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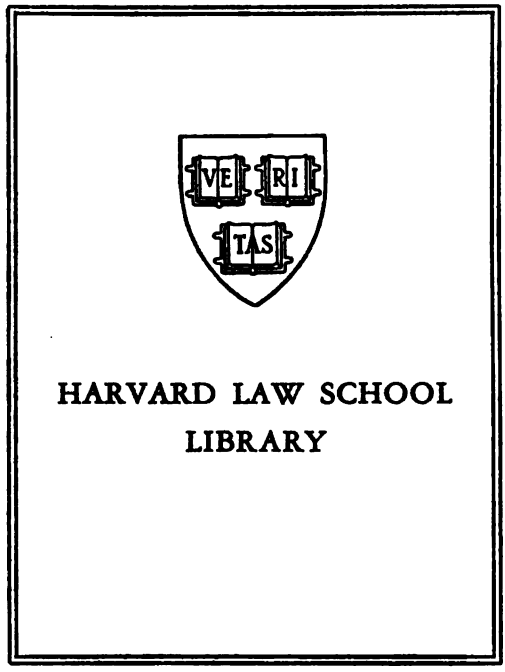

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# SOUTHEASTERN REPORTER,

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OF THE

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THE

# SOUTHEASTERN REPORTER.

## VOLUME 59.

(2 Ga. App. 696)

### FULLER v. STATE. (No. 700.)

(Court of Appeals of Georgia. Oct. 22, 1907.)

1. MASTER AND SERVANT—EMPLOYMENT CONTRACT—VIOLATION—OFFENSES—ELEMENTS.

To authorize a conviction for a violation of the labor contract act of 1903. (Acts 1903, p. 90), the evidence must show an intent to defraud on the part of the accused and loss on the part of the person alleged to have been cheated and swindled.

2. CRIMINAL LAW—EVIDENCE—CONCLUSION.

Testimony on the part of a witness that a certain payment was an advance is not competent evidence of that fact. It is the province of the jury to determine from the facts in connection with the payment the state of the employé's account with his employer, and whether the payment made was an advance or part payment of an indebtedness for labor due by the employer to his servant.

(Syllabus by the Court.)

3. WORDS AND PHRASES—"ADVANCE."

The word "advance," as used in the contract labor law (Laws 1903, p. 90), means a payment of money to a contract laborer which has not been earned.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 214–218; vol. 8, pp. 7566–7567.]

Powell, J., dissenting.

Error from City Court of Americus; Chas. R. Crisp, Judge.

Ambrose Fuller was convicted of violating the labor act, and he brings error. Reversed.

H. B. Simmons, for plaintiff in error. Zach Childers, Sol., for the State.

RUSSELL, J. The defendant may be guilty, but his guilt was not legally established. The burden of establishing his guilt devolves upon the state, and, if he be guilty, the fact can be shown, as it must be, by sufficient evidence. The evidence, as it appears in the record, not being sufficient to authorize a conviction of the violation of the labor act of 1903, we feel it to be our duty to grant a new trial.

The learned trial judge erred in overruling the defendant's motion for a new trial, for the reason that the verdict, so far as the evidence is concerned, is contrary to law. The only facts shown by the state, as disclosed by the record, were that the witness Jones paid $108 for Ambrose Fuller, and at the same time made a contract with said Fuller in behalf of his (Jones') employer, Johnson, by the terms of which contract Fuller was to work 12 months for Johnson. The contract appears in the record and is as follows:

"Georgia, Sumter County.

"I, Ambrose Fuller, do solemnly swear that I am not under a written contract as employé, tenant, or cropper with any person for the period or any part thereof covered by the contract I am about to make with Mr. R. W. Johnson.

"Signature of the affidavit:

his
"Ambrose X Fuller.
mark.

"Sworn to and subscribed before me this 12th day of December, 1906.

"Signature of attesting officer: G. E. Buchanan, N. P. S. Co.

"Georgia, Sumter County.

"This contract, made and entered into between R. W. Johnson, of said county and state, of the first part, and Ambrose Fuller, of the county of Sumter, said state, of the second part, witnesseth: Said second party has this day hired as a waged hand to said first party for twelve months from the 12th day of Dec., 1906, to the 12th day of Dec., 1907, at $10.00 per month, payable each month, which said first party agrees to pay.

"In witness whereof, both parties have hereunto set their hands in the presence of an officer authorized to administer oaths.

"Signature of first party: R. W. Johnson.

"Signature of second party (or parties):

his
Ambrose X Fuller.
mark.

"Signed in my presence this 12th day of December, 1906.

"Signature of attesting officer: G. E. Buchanan, N. P. S. Co., Ga."

On cross-examination the state's witness Jones testified that he was on a bond for the defendant and that he had taken other security for the money advanced, and to protect himself as bondsman on the bond the security taken was a mortgage on the defendant's mother's house and lot in the city of Ameri-

cus. The defendant procured $2 in money from his employer on Saturday night, and on the Monday following, April 9, 1907, left his employment and went to work with one Worsham in the settlement where he had formerly lived, in Sumter county. The mortgage was not put in evidence, and we know nothing, therefore, of its terms and contents, except what appears from the parol evidence. The defendant's excuse for breaking the contract was that he could not get along with the negro foreman under whom he was put to work.

The labor contract act of 1903 (Acts 1903, p. 90) has several times been construed by this court. To establish a violation of this penal statute, and to show one's guilt of cheating and swindling, it must appear that there was an existing intent to defraud at the time the advance was procured. Patterson v. State, 58 S. E. 284. It must appear that there was actual loss suffered by the party alleged to have been cheated, and the intent to defraud, even if loss be shown, must be proximately connected with the alleged offense. Mulkey v. State, 1 Ga. App. 521, 57 S. E. 1022. Whether the employer does or does not take other security to insure the payment of the advance made, as we have held in Harwell (alias Isaacs) v. State, 58 S. E. 1111, is entirely immaterial, though the furnishing of security may prevent loss, and thereby destroy one of the essential ingredients of the offense. As has uniformly been held, both by this court and the Supreme Court, it is not a part of the purpose of the statute to aid in the collection of debts. We will measure the facts in this case, of which we have stated a correct summary, by the principles enumerated in all of the adjudicated cases. It devolves, then, upon the state to show that the defendant had made a contract to labor in some specified way for a definite period of time, and that, being under such contract, he procured the advance. It must be made plainly to appear that at the time of obtaining the advance the defendant intended to defraud his employer; that is, that he not only intended to quit his employment, but that he would be charged in law by the facts of the case with reasonable knowledge that, when he quit his employment, the result would be loss to his employer. It is probable that there are other elements which the state should prove to the satisfaction of the jury; but it is not necessary to advert to any of them in this case, because the evidence appears not to establish even these vital essentials of the offense.

In the first place, under the undisputed evidence in the case, the payment of the defendant's indebtedness to his former employer and the taking of the mortgage on defendant's mother's house and lot in Americus as security for that amount, as well as to indemnify the witness, who was security on the defendant's bond in a criminal case, must be left entirely out of consideration. The defendant could have objected to the proof offered relative to the mortgage; but, even taking the evidence in the record upon that subject, there is nothing to inform this court as to the contents of the mortgage, except the amount to be secured and the property pledged as security. The contract which the prosecutor made with the defendant stipulated that the defendant is to receive as compensation for his labor $10 per month, "payable each month, which said first party agrees to pay."

It is insisted that, as the defendant owed the debt secured by the mortgage, evidence of this fact would authorize the prosecutor to apply the earnings of the defendant on the indebtedness, and that the prosecutor would even be required to do this for the protection of the mortgagor. We cannot agree with this contention, in the absence of proof that such was the agreement of the parties. If, for instance, the note to secure which the mortgage was given was not due until January 1, 1908, the employer would have no right whatsoever to apply the wages of the defendant to the payment of the mortgage indebtedness. As the mortgagor was the mother of the defendant, and as by the very nature of the case, if defendant's wages were to be applied to the payment of the $108 mortgage and interest thereon, the result of defendant's contract would be that he would get nothing himself for his labor during the entire year. As the court can take judicial knowledge of the fact that food and clothing are necessary and ordinarily must be bought by those who use them, the contract, if thus construed, in the absence of any proof of the contents of the mortgage, would evidence a system of peonage which this court is now asked to uphold.

Taking the case as we find it, the evidence shows that the defendant had worked nearly four months for the prosecutor upon the contract, and the only payment shown by the state and called "an advance" is the sum of $2. To make a case which would authorize the jury to infer fraudulent intent, the state should have shown that the $10 a month for the time which had elapsed had been paid to the defendant, and that when he obtained the $2 he became thereby indebted just that amount, or some other amount, which he had not repaid, either by working on his contract or by returning the money, and that thereby his employer had sustained a loss, either of the $2 or some portion of it. There is no legal evidence showing that the defendant ever received anything from his employer except the $2, and all of the evidence is clear that he worked in pursuance of his contract from December 12, 1906, to April 9, 1907. It is true that the prosecutor testified that this $2 was an advance.

It is insisted that the word "advance" necessarily means a payment of money which had not been earned, and for that reason that the use of that word by the witness establishes the fact that all pre-existing indebted-

ness for labor had been paid by the prosecutor to the defendant. We hold that such is a reasonable construction of the word "advance," and yet the use of that word by the witness established nothing for the jury. The jury, instead of being given the facts upon which the witness based his conclusion, and from which facts they might have drawn an entirely different conclusion, were compelled to adopt a mere opinion of the witness, which may or may not have been well founded. In our judgment, this opinion, volunteered by the witness, had no evidential value. If it hereafter appears upon the trial, which we now order, that the prosecutor had complied with his agreement and had paid the defendant $10 per month, for the nearly four months during which he had been employed prior to the payment of the $2, and that, therefore, at the time the $2 was paid, he owed the defendant nothing, and it further appears that the $2 was not repaid, and the defendant quit the service of his employer without sufficient cause, the conviction of the defendant would be authorized. But, if it should appear that the defendant quit the service of his employer with a balance still in his favor for work done, there could be no conviction. And this would be true, regardless of the intent of the defendant; for the prosecutor would not have sustained any loss by reason of the advance. The payment of the wages to which we have alluded might be shown, either by proof of payment directly to the defendant, or if it can be established that there was an agreement embodied in the mortgage or otherwise evidenced in writing as part of the contract that the wages of the defendant were to be applied to the payment of the indebtedness secured by the mortgage for the benefit and protection of the mortgagor, and that his wages were thus paid to him by having been so applied, and that for that reason no part of the wages which had been earned by the defendant had been paid at the time the $2 was advanced, and that thereby the prosecutor sustained loss, a conviction can be sustained; but this record does not disclose any of these essential facts. The fact that the employer had taken other security does not in any way illustrate the intention of the accused by the time he procured the advance. This was our ruling in State v. Isaacs, and for this reason the learned trial judge well says in his opinion, filed in the record, that "a verdict of guilty on the original of $108, at the time the contract was made, cannot be upheld," and for the further reason that in the Mulkey Case the evidence showed that the defendant entered upon a contract and worked more than three months for the prosecutor after that advance was made.

It is clear to our minds, under the evidence, that the $108 in this case was not, strictly speaking, an advance upon the contract, because there is no evidence that the defendant requested the prosecutor to pay his indebtedness, and it is testified that one purpose of making the advancement and securing the defendant's mother's mortgage was to indemnify the witness against loss on a criminal bond, which, so far as appears from the evidence, was in no way connected with this case. In the absence of evidence to the contrary it is to be presumed that the mortgagee had security ample for the dual purpose. In the absence of express direction to apply the defendant's wages as a credit upon the $108 debt, the defendant would have the right each month before the maturity of the mortgage to demand payment of his wages, and it is only in case that there was such express direction that the prosecutor would have the right to refuse to pay the defendant his wages and to apply them upon the debt evidenced by the mortgage. It not being made clearly to appear that the defendant had received any advance at the time that he quit the service of his employer, nor that the employer was defrauded or sustained any loss, a new trial is ordered.

Judgment reversed.

POWELL, J. (dissenting). There is not the slightest disagreement among the members of this court as to the proposition that the act of 1903 is designed purely for the punishment of frauds, and that it is not to be perverted into an instrumentality of oppression or a harsh remedy for the collection of debts. Yet the act legally construed and fairly applied has a beneficial and useful purpose to subserve.

As to the $108 advanced by the prosecutor before the labor began, it is plain that no legal conviction can be based on it under the circumstances of the present case. The defendant's desertion of his contract of labor is too remote in point of time and circumstance to be evidentiary of any fraudulent intent at the time that payment was made by the prosecutor; and in his opinion filed in the record the trial judge recognizes this to be true. See Mulkey v. State, 1 Ga. App. 521, 57 S. E. 1022. My Brethren of this bench agree with me in the proposition that, if the $2 paid to the defendant on the Saturday night before he left the prosecutor was in fact an advance under the contract, the defendant leaving without good excuse and without repaying the $2 might be evidentiary of an intent to cheat the prosecutor out of that sum, upon which theory the conviction could be sustained. But my colleagues say that there is no proof that this $2 was in fact an advance; and here comes the point of our disagreement and my dissent. In the first place, the prosecutor testified in direct terms that the $2 was "advanced" to the defendant. My fellows say that this has no sufficient probative value because it merely states a legal conclusion, without giving the facts on which it is based. To my mind, not so. Simply because a witness uses a word which ex vi termini connotes a number of individ

ual facts which in their sum total go to make up the meaning of the word (as in the present case the word "advance" contains in itself the idea of a sum of money paid not for services rendered in the past, but to be rendered in the future) does not render the statement of the witness opinionative, any more than it would be opinionative of him to express the same idea by the circumlocution of many words. When the witness says, "I advanced to him $2," it means no more and no less than if he had said, "I gave him $2 not for work already performed, but for work to be performed by him in the future." However, I may waive this point; for I think the record otherwise discloses that this $2 was an advance in the true sense of the word.

On December 12, 1906, when the contract was made, the prosecutor paid for the defendant the $108. This payment by the direct, undisputed testimony was paid "on the contract." This was sufficient to pay all the monthly payments due by the promisee under the contract for a period extending far beyond the time when the defendant left his employment; so that whatever sum was paid to the defendant at the time he left and before this $108 had been worked out was necessarily an advance. My colleagues, to avoid the effect of this, say that this $108 was secured by a mortgage given by the defendant's mother on her house and lot; and this fact does appear in the record. They say that the date of the maturity of this mortgage does not appear. So; but, if necessary, as to this date a presumption should be indulged which would uphold the verdict, not one which would defeat it. This, however, is unnecessary, for the maturity of this mortgage is wholly immaterial. Take the supposititious case proposed by my colleagues, that the mortgage given by the mother to secure the performance of the son's contract to repay the $108 by his labor does not become due until January 1, 1908, would this alter the case? The mother's mortgage is only a collateral undertaking, and, while the prosecutor could not proceed against her until the mortgage actually matures, this fact in no wise impairs the terms of the contract between him and the defendant. Indeed, if that mortgage had been made due one day after date, still under the law, it having been given merely as security for the defendant's contract, it could not be foreclosed until the defendant had broken the main contract. An elemental principle of the law of suretyship compelled the prosecutor to credit the defendant's labor to the extinguishment of the debt for which the mother through the mortgage stood security. Every dollar the prosecutor paid to the defendant on his wages, the $108 not being first repaid, pro tanto released the surety and the mortgage. Underwood v. Bass, 1 Ga. App. 623, 57 S. E. 953, and cases cited. In the majority opinion it is said: "If it can be established that there was an agreement embodied in the mortgage, or otherwise evidenced in writing as part of the contract, that the wages of the defendant were to be applied to the payment of the indebtedness secured by the mortgage, or otherwise evidenced in writing, as a part of the contract, that the wages of the defendant were to be applied to the indebtedness secured by the mortgage, for the benefit and protection of the mortgagor, and that his wages were thus paid to him by having been so applied, and that for that reason no part of the wages which had been earned by the defendant had been paid at the time the $2 was advanced, and that thereby the prosecutor sustained a loss, a conviction can be sustained; but this record does not disclose any of these essential facts." The obvious reply is that the law itself embodies into the transaction this duty of applying the defendant's wages to the reduction of the sum already paid him, and secured by his surety's mortgage, and all courts are required to notice judicially the legal effects growing out of transactions. That which is judicially recognized need not be proved.

Having paid the defendant $108 at the inception of the contract, the prosecutor owed the defendant nothing else thereunder until the 10 months and 24 days expired, for the wages were at the rate of $10 per month. Anything else paid him in the meantime was an advance. The question then stands out: "How is the laborer to support himself in the meantime?" "Aye, there's the rub." If the defendant had left the prosecutor because the contract he had made was so hard that he could not live up to it in reasonableness, and the prosecutor had refused to ameliorate the hardship by making advances or otherwise, the excuse for quitting would have been a good one, and the defendant would have been exempt from criminality. But he presents no such excuse. In fact, the prosecutor swears that pending the employment he had made advances. Taking advantage of this liberality of his employer in advancing him money beyond what the letter of the contract required, the defendant obtained the $2 on Saturday night, on Monday morning was absent from his post of duty, and thereafter came no more—to employ the colloquial phrase, he had "skipped out."

I think the verdict of guilty should stand.

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(2 Ga. App. 689)

## COHEN v. STATE. (No. 619.)

(Court of Appeals of Georgia. Oct. 14, 1907. Rehearing Denied Oct. 23, 1907.)

1. CRIMINAL LAW—LIMITATIONS—EXCEPTIONS—INDICTMENT—PROOF.

The particular facts which constitute exceptions to the bar of the statute of limitations need not be minutely alleged in the bill of indictment. It is sufficient if any of the exceptions stated in section 30, Pen. Code 1895, be stated in the language therein employed. As

to such exceptions, the state is only required to show a prima facie case, as this is not matter essential to the actual guilt or innocence of the accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3015; vol. 27, Indictment and Information, § 189.]

2. SAME — KNOWLEDGE OF OFFENSE — EVIDENCE.

Where an offense is alleged to have been unknown, the state need only show that it was unknown to the prosecutor in order to make prima facie proof of that allegation. Being a matter of defense, the defendant may rebut such proof by proving that the transaction alleged in the indictment as a violation of the law was known, and the general notoriety may be sufficient proof to establish the fact that it was not unknown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1270, 2001; vol. 15, Criminal Law, § 3154.]

3. FALSE PRETENSES—EVIDENCE—VERDICT.

The verdict of the jury was amply supported by the evidence, and no reason appears why a new trial should be granted.

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

S. M. Cohen was convicted of cheating and swindling, and, from an order of the superior court dismissing his writ of certiorari to review such conviction, he brings error. Affirmed.

Haygood & Cutts and Hines & Jordan, for plaintiff in error. W. F. George, Sol. Gen., A. J. McDonald, Sol., E. W. Ryman, and E. D. Graham, Sol. Gen., for the State.

RUSSELL, J. The defendant, Cohen, was convicted of the offense of cheating and swindling in the city court of Fitzgerald, and carried his case by certiorari to the superior court, where his certiorari was overruled. In the bill of exceptions there is not only the general assignment of error that the court erred in overruling the certiorari, but it is insisted that the court erred in not granting a new trial on each and every one of the more than 50 grounds set out in the original petition. Regardless of the burden imposed upon us by the bulky record in the case, we cannot but admire the painstaking zeal and laborious diligence of counsel; but, after a most careful examination of the record and an investigation and consideration of every point in the case, we are not able to find a reason which would require a reversal of the judgment of the judge of the superior court. To apply our own language to a well-known principle—he who claims error must show error, and hence, even were we in doubt, the plaintiff in error has not so shown it as to remove the presumption which arises in favor of the verdict. Especially where, as in this case (the defendant being guilty under his own statement) the verdict is demanded by the evidence.

The demurrer to the accusation was properly overruled. The accusation was as follows:

"Whereas, Isidore Gelders did on the 17th day of April, in the year 1905, make D. W. Paulk, J. P., an affidavit charging S. M. Cohen with the offense hereinafter mentioned: Now, I, L. Kennedy, county solicitor, in the name of the state of Georgia, do charge and accuse, basing this accusation upon the affidavit aforesaid, the said S. M. Cohen with the offense of cheating and swindling, for that the said Cohen on the 13th day of March, in the year 1902, in the county aforesaid, with force and arms, with intent to cheat and defraud said Isidore Gelders, did falsely and fraudulently represent to said Gelders that he, the said Cohen, was then and there the owner of a certain lot of land in the city of Fitzgerald, in said county, namely, city lot No. 26, in square No. 13, in block No. 7, in said city of Fitzgerald, according to the plat of said city made by the American Tribune Soldiers Colony Company, and did then and there by said false and fraudulent representation induce said Isidore Gelders to purchase said city lot of land from the said Cohen, and to pay him, the said Cohen, for the same, the sum of $775 in money; the said representation being wholly false, and having been made falsely and fraudulently and with intent to deceive, and did deceive the said Isidore Gelders as aforesaid, and the said Gelders having relied upon the said false and fraudulent representations as being true, and upon the faith of said false and fraudulent representations purchased said city lot of land from said Cohen and paid him, the said Cohen, the sum of $775 in money, and was thereby defrauded of said sum of $775 in money of the value of $775; and the said offense herein alleged against the said S. M. Cohen was unknown until the 7th day of February, A. D. 1905, contrary to the laws of said state, the peace, good order and dignity thereof.

"Count 2. I, the said L. Kennedy, county solicitor, as aforesaid, in the name and behalf of the state of Georgia, do further charge and accuse, basing the accusation upon the affidavit aforesaid, the said S. M. Cohen with the offense of a misdemeanor, for that the said Cohen on March 13, 1902, in the county and state aforesaid, did unlawfully cheat and defraud the said Isidore Gelders by then and there fraudulently and unlawfully with intent to cheat and defraud said Gelders, making unto said Gelders a second deed of conveyance to certain land in the city of Fitzgerald, in said county, namely, city lot of land No. 26, in square No. 13, in block No. 7, according to the original townsite plat of said city, thereby obtaining from said Gelders the sum of $775, the purchase price of said land, the said Cohen having previously made a deed of conveyance of the said land to one Glory Cohen, but the said Gelders without any knowledge of the first deed and upon the faith of the second deed and the representations of the said Cohen, then and there made to the said Gelders that

he, the said Cohen, was the owner of said land, paid the said Cohen the said sum of $775 in money, whereby the said Gelders was cheated and defrauded by the said S. M. Cohen of the sum of $775 in money of the value of $775; and the said offense herein alleged against the said Cohen was unknown until the 7th day of February, A. D. 1905. Contrary to the laws of said state and the good order, peace and dignity thereof.

"This 12th day of June, 1905.

"L. Kennedy, Solicitor General."

The demurrer was based on four grounds. The first is general, and depends upon the three which follow it; and the second ground, which objects to the joinder of the two counts, is not now insisted upon. The third and fourth grounds of the demurrer attack the accusation specially; the third insisting that the offense, as appears upon the face of each count, is barred by the statute of limitations, and the fourth objects to exception that the offense was unknown, as alleged in the indictment, as being insufficiently full, and for failure to show any fact or reason why the accusation is not barred. By the terms of section 30 of the Penal Code of 1895, indictments may be found and filed in all misdemeanors within two years after the commission of the offense, and at no time thereafter. This is with the proviso, however, that no limitation shall run so long as the offender or offense is unknown. It was ruled in McLane v. State, 4 Ga. 335, and reaffirmed in Hansford v. State, 54 Ga. 58, that as a matter of substantive right to the defendant, where an exception was relied upon to defeat the bar of the statute of limitations, it must be alleged and proved. As it is alleged in the accusation before us that the offense was unknown until the 7th day of February, 1905, it would seem that the exception is fully set out, unless it be held that the state should be required to allege to whom the offense or the offender is unknown, or why the offense in this case (or the offender in other probable cases) was unknown. Is it, then, necessary to set out more in the indictment than that the offense was unknown up to or until the date when it was discovered? We think not.

The decision in the McLane Case was made upon a ruling on a motion in arrest of judgment where it appeared upon the face of the indictment itself that the offense was barred, and the motion was sustained upon the express ground that the exception which it relied upon to relieve the bar of the statute of limitations must be alleged so as to enable the defendant to prepare his defense. We hold that it is only necessary for the indictment to state which exception is relied upon in the language used in section 30, Pen. Code 1895. Whether the defendant had absconded from the state or concealed himself to prevent arrest, or whether the offense was unknown or the offender was undiscoverable, until a certain named day, would be amply sufficient. In the McLane Case, supra, page 340, the court says: "The public law of the state declares that the defendant shall not be indicted for the offense of arson, after the expiration of four years from the commission of the offense, unless the offender shall abscond, or conceal himself, that he cannot be arrested, or the offender was unknown. Here is an indictment, charging the defendant of the offense of arson, on the face of which it appears the offense was committed more than four years before the indictment was filed and found in the proper court. No reason stated why it was not found before. No allegation that the defendant was within either of the exceptions mentioned. How could a judgment of conviction by the court be supported, on this indictment, under the law? The argument is that the court is bound to presume it was proved on the trial the defendant was within one of the exceptions mentioned in the statute. Admit such a presumption could be indulged, in a criminal prosecution, within which one of the exceptions was the defendant, or was he within all of them? Besides, the defendant, when put upon his trial, on the indictment barred by the statute, is entitled to know on what ground the state seeks to avoid its operation, as it may constitute a material part of his defense. If the state relies upon the exception that the defendant absconded from the state, he may desire to show he did not abscond. If on the exception that he concealed himself so that he could not be arrested, he might be able to show that it was notorious in the neighborhood who committed the offense. The particular exception relied on should be alleged in the indictment so as to notify the defendant, that he may be prepared to meet all the allegations on the part of the state, at the trial."

In the opinion of the writer one reason why the same particularity is not required in the statement of the exception is that the exception which brings the defendant to trial is not a part of the state's case. It does not involve the question of guilt or innocence. It is not a plea to the merits. It can exist with admitted guilt. That the offense is barred by the statute of limitations is matter of defense. This is in accord with the reasoning in United States v. Cook, 84 U. S. 168, 179, 21 L. Ed. 538. In that case the Supreme Court of the United States ruled as follows: "Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is admitted, an indictment founded upon the statement must allege enough to show that the accused is not within the exception. But if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without

any reference to the exception, the indictment may omit any such reference. The matter contained in the exception is matter of defense, and to be shown by the accused."

Our ruling that it is not necessary for the exception to be more particularly set out in the indictment by using the words of the Code (section 30) is not in conflict with any authority in this state, and to require more than this of the state would be to require the prosecution to prove facts peculiarly within the knowledge of the defendant and of times solely within his knowledge. It is true that in the McLane Case, 4 Ga., on page 342, Judge Warner, who delivered the opinion of the court, intimates that it is only just that the state should prove the exception. But this portion of the decision is clearly obiter, because the only question before the court was the sufficiency of the motion in arrest of judgment. In the Hansford Case, the record shows that the facts creating the exception were, as a matter of fact, fully set out as to Hansford's confederates, but as to Hansford himself the fact that he was unknown as one of the offenders is nowhere alleged in the indictment, so that the case was decided on the authority of the McLane Case, 4 Ga. 335. In Watkins v. State, 68 Ga. 832, in the second headnote, it was held that, as the indictment alleged that the defendant concealed himself and avoided arrest, the indictment was sufficient to bring the case within the exception. Upon an examination of the Watkins indictment in the original record, we find that the only particularization used in the indictment—the language employed—is: "Did so conceal himself that he could not be again arrested for about five years, until the 7th day of July, 1881." In the Watkins Case, the trial court overruled the motion to quash the indictment on the ground that the offense was barred by the statute of limitations, and, the Supreme Court having thereupon held that the exception as to concealment was sufficiently alleged, we think settles it that it is only necessary for the state to affirm the particular exception relied upon by it to relieve the bar of the statute of limitations. It is not necessary to allege with particularity the facts, or set out the manner in which the exception arose. The statement of the special exception will enable the defendant to prepare to contradict it, and that is sufficient.

Where it is stated that the indictment was not brought within the period of time allowed by section 30, Pen. Code 1895, because the offense or the offender was unknown, the state makes a prima facie case and shifts the burden of proof on the defendant, when it is shown that the prosecutor or the party most interested did not know the offense, or the offender, as the case may be. Upon such proof that the offense was unknown to the person aggrieved, the defendant may either show that it was known to him, or he may show by evidence of common notoriety that the bar of the statute of limitations has attached. The same would be true as to his having absconded from the state or concealed himself. The statute of limitations being a matter of defense independent entirely of the merits of the main case, and of which the defendant may avail himself, though he have neither defense, excuse, or justification for the actual criminal act, the state having by stating the exception enabled him to meet it, it is only required to prove this portion of the indictment pro forma, unless it is challenged in the proof by the evidence of the defendant. And in those cases where the offense is against society in general, and there is no prosecutor, the return by the grand jury of a presentment containing the exception will presumptively establish that the offense or offender was unknown until the statement is denied by evidence on the part of the defendant. There is in this ruling no conflict with the established rule that the state must prove every material fact essential to show the guilt of him who is accused of crime, for, as we have stated, this is no part of the crime, but merely an exception to a rule in his favor.

As to the exceptions contained in the petition for certiorari, it is useless to discuss any of them. No errors are apparent. But if any errors were committed, they were contained in the charge to the jury, and where the evidence requires the verdict, errors in the charge of the court will not necessitate a new trial. Hagar v. State, 71 Ga. 164, and citations. The requests to charge, so far as they were pertinent and legal, were covered by the general charge.

Judgment affirmed.

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(2 Ga. App. 757)

## WINN v. INGRAM. (No. 528.)

(Court of Appeals of Georgia. Oct. 31, 1907.)

1. ERROR, WRIT OF—EVIDENCE.
The verdict was not without evidence to support it.

2. TRIAL—INSTRUCTIONS.
There was some evidence on which to base the charge complained of as not being pertinent.

3. NEW TRIAL—COERCION OF VERDICT.
After the jury had been deliberating about two hours, the court called them in and inquired if they had agreed or were likely to agree. The foreman replied in the negative. The court inquired as to how they were divided in number, asking them not to indicate in whose favor the majority might be. The foreman answered that they stood nine to three. The court instructed them to return to their room, to deliberate further, and to see if they could not agree. After the lapse of another hour, and when the noon recess was about to be taken, the court again inquired of the jury as to what progress had been made toward an agreement. The foreman replied that they then stood ten to two. The court stated that, as they were making progress, he would let them continue their deliberations, and would have dinner provided for them, but that he could not send them to the hotel as usual, there being good reason for not letting them go there. Again, at 4 o'clock in the afternoon, the

court called them in and asked if they had yet agreed. The foreman said that they had not. The court sent them back to their room. Later a verdict was rendered. *Held*, that the verdict was not the result of improper coercion on the part of the court, and that the action of the court is not sufficient reason to require the grant of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 747.]

(Syllabus by the Court.)

Error from City Court of Dawson; M. C. Edwards, Judge.

Action between C. W. Winn and J. P. Ingram. From the judgment, Winn brings error. Affirmed.

Raines & Gurr, for plaintiff in error. Marlin & Hoyl, for defendant in error.

PER CURIAM. Judgment affirmed.

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(2 Ga. App. 754)

HARRELL et al. v. NUSBAUM et al. (No. 571.)

(Court of Appeals of Georgia. Oct. 30, 1907.)

COURTS—APPELLATE COURT—JURISDICTION.

This court has no jurisdiction of a writ of error sued out, complaining of the judgment of a superior court in a civil action originally instituted therein, irrespective of the amount involved.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Action between Annie Harrell and others and L. Nusbaum and others. From the judgment, Harrell and others bring error. Dismissed.

M. E. O'Neal and A. E. Thornton, for plaintiffs in error. Russell & Hawes, for defendants in error.

POWELL, J. Writ of error dismissed.

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(2 Ga. App. 718)

BETTS-EVANS TRADING CO. v. BASS.

BASS v. BETTS-EVANS TRADING CO. (Nos. 535, 561.)

(Court of Appeals of Georgia. Oct. 29, 1907.)

1. ERROR, WRIT OF—DISMISSAL—CROSS-BILL OF EXCEPTIONS.

Where the controlling question in a case is presented by a cross-bill of exceptions, and the judgment of the lower court thereon is reversed, the writ of error issued upon the main bill of exceptions will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3122.]

2. ACKNOWLEDGMENTS — VALIDITY — INTERESTED PARTIES—DOCUMENTARY EVIDENCE.

Officers, who are authorized by law to attest the execution of deeds, mortgages, bills of sale, and other papers, are disqualified to attest such writings when the same are executed, whether as conveyances or as security, to a partnership in which such officer is a partner or to a corporation in which he is a stockholder. The record of a written instrument, whether the same purports to create a lien on property, or to convey or to reserve title thereto, which is attested by a stockholder in a corporation in whose interest such writing is executed, is unauthorized and invalid, and effects no notice of the existence or contents of such instrument.

a. It was error not to exclude the instrument in question in this case, upon proper and timely objection to its attestation and record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 104–111.]

(Syllabus by the Court.)

Error from City Court of Ashburn; J. A. Comer, Judge pro hac.

Action by the Betts-Evans Trading Company against J. L. Bass. From a judgment of nonsuit, plaintiff brings error, and defendant assigns cross-error. Judgment in the cross-bill of exceptions reversed, and writ of error on main bill dismissed.

R. L. Tipton and J. H. Tipton, for plaintiff in error. A. J. Davis, Jas. H. Pate, and Z. Bass, for defendant in error.

RUSSELL, J. The Betts-Evans Trading Company complain by a bill of exceptions of the judgment of the city court of Ashburn awarding a nonsuit, and Bass, the defendant in the court below, filed his cross-bill of exceptions. The Betts-Evans Trading Company filed in the city court of Ashburn an action of trover to recover a sorrel horse to which it claimed title. There was also filed an affidavit for bail. The defendant, in his plea, denied all the allegations of the plaintiff's petition, except the jurisdiction of the court. On the trial the plaintiff offered in evidence a note evidencing a conditional sale and reservation of title by the Betts-Evans Trading Company, attested by J. B. Bozeman, notary public of Worth county, Ga., and duly recorded. On the instrument in question appeared a credit of $90. In the testimony of the first witness in behalf of the plaintiff it appeared that J. B. Bozeman was a stockholder in the plaintiff corporation at the time he attested the note and paper in question. Upon this ground the defendant's counsel moved to rule the note out of evidence, upon the ground that it was not properly attested; that the testimony showed that at the time of the attestation Bozeman was a stockholder in the Betts-Evans Trading Company, and the note, not being properly attested, was not admissible as against the interest of the defendant. This motion the court overruled. The plaintiff proceeded to introduce testimony to show that the horse was at the commencement of the action in possession of the defendant, and also proved that the corporation, at the time of the sale of the horse to one Johnson by Smith, the maker of the note, did not agree to release or cancel its reservation of title. At the conclusion of the plaintiff's evidence the defendant moved for a nonsuit. The court overruled this motion. The motion to grant a nonsuit was made upon the ground that the defendant Bass was manager for the Turner County Stock Company, and the evidence shows that the possession of Turner was as manager for the Turner County Stock Company, and for that reason was

its possession, and that the evidence did not show that Bass individually was in possession of the horse. The court allowed the plaintiff to reopen the case and introduce further testimony, for the purpose of showing Bass' possession of the horse at the time of the demand. At the conclusion of the additional testimony for the plaintiff the court awarded the nonsuit upon the ground, as it appears from his oral statement in the record, that the possession of the horse was shown to be in the Turner County Stock Company, and not in Bass as an individual.

Plaintiff in error in the main bill of exceptions insists that the court erred in granting a nonsuit, because the title to the property in question was clearly shown to be in the plaintiff in error, and the possession of the property proved to be in the defendant, J. L. Bass, and conversion of the property by him was shown. In the cross-bill of exceptions, exception is taken to the judgment of the court in overruling defendant's special demurrer to the fourth paragraph of the petition, and to the ruling of the court admitting in evidence the conditional sale note, and to the refusal of the court to withdraw this note from evidence for want of proper attestation. We think the court should have sustained the special demurrer, and should have required the plaintiff to state in his petition the date from which it claimed that the defendant was liable for hire. We are further of the opinion that, if the plaintiff had proved title in itself and constructive notice of that title to the defendant, and that the horse was in the possession of the defendant, even though such possession was in his capacity as manager of the Turner County Stock Company, it would have been error to have awarded a nonsuit. The first thing that the plaintiff had to prove was that the Betts-Evans Trading Company had title to the horse in question. The plaintiff attempted to show this title by the conditional sale note and its record. This title was not established in any other manner. The defendant, Bass, moved to rule the note out of evidence, and, had the court so ruled, the plaintiff would not have been entitled to be awarded the possession of the horse.

The controlling question, therefore, is presented by the cross-bill of exceptions. We think the paper containing the reservation of title in question should have been excluded from the evidence. It was uncontradicted that it was attested only by J. B. Bozeman as notary public of Worth county, and that Bozeman was, at the time of its attestation, one of the stockholders of the Betts-Evans Trading Company. He was clearly disqualified by interest for the performance of a legal duty of such importance as would entitle to record a paper in which he himself had a direct pecuniary interest. We can see a marked difference between allowing one to be a witness in his own behalf on the trial of a case, where his testimony may be discounted or its weight diminished in consideration of his interest, and allowing such interested party to confer upon his own paper a special privilege lien or priority, which may be antagonistic to the rights of others. The witness testifies in the bright sunlight of judicial investigation, under the scrutiny of the court and jury, and is subject to cross-examination; but to allow an officer in private or public to discharge a function in his own interest, by which special rights accrue to him, is obnoxious to public policy and liable to be productive of fraud. We do not see that a clerk, who has no interest conditional upon the profits, might not as notary public attest deeds, mortgages, or conditional bills of sale in behalf of his employer, or that a cashier or other officer of a bank, who owned no stock therein, might not do the same thing, though this would be of doubtful propriety.

The exact point now presented to us, so far as we are able to find, has not been decided in this state; but upon every ground of public policy and good morals we are compelled to hold that a partner, who may be an officer authorized to attest papers officially, is disqualified to attest instruments taken in behalf of the partnership, or in which the partnership has a pecuniary interest, and that a stockholder in a corporation, though he may by law be authorized to attest papers for others, is disqualified to attest officially, so as to entitle them to record, any papers in which the corporation or in which he as a stockholder has a pecuniary interest. Certainly one authorized by law to attest writings so as to entitle them to record would be disqualified from attesting an instrument drawn in his own interest, either to secure a debt or to convey title to himself. We apprehend that this would not be disputed, and though, in case of a partnership or of a stockholder in a corporation, the degree of pecuniary interest would be less, the principle would be unchanged. A party at interest is competent to testify as a witness to the fact of the execution of a writing; but there is a difference of great import to the rights of third persons between testifying to the execution of a paper and the official attestation of such papers as are required by law to be formally attested so as to admit them to record. Official attestation is not strictly judicial; but it is of judicial nature, and requires judicial fidelity. The probative force of the attestation by an officer authorized to attest a deed, mortgage, or other like paper is such that, if the paper to be recorded has not been thus attested, it requires the oath of a witness to admit such paper to record, and after record this probative force of the official attestation is again recognized by the courts. Not only because of this probative effect so accorded to the act of attestation by an officer authorized to act, but also on account of the usually important consequences of the writing itself,

public policy forbids that the act of witnessing, and by his signature certifying, the signature of the maker, shall be exercised by an officer who is financially interested in the conveyance.

After such an instrument has been recorded, the execution of the writing by the maker is presumptively established by the attestation, subject to impeachment only by proof to the contrary, or by evidence of fraud or imposition in the procurement. Certainly a person financially interested should not be permitted to impart such characteristices and intrinsic elements to a paper to his own benefit and to the detriment of others. Our view is sustained by the following authorities: Ogden Bldg., etc., Ass'n, v. Mensch, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330; Hayes v. Southern Home, etc., Ass'n, 124 Ala. 663, 26 South. 527, 82 Am. St. Rep. 216; Devlin on Deeds, § 476; Smith v. Clark, 100 Iowa, 605, 69 N. W. 1011; Miles v. Kelley, 16 Tex. Civ. App. 147, 40 S. W. 599; Amick v. Woodworth, 58 Ohio, 86, 50 N. E. 437; Watts v. El Reno First National Bank, 8 Okl. 645, 58 Pac. 782; 6 Cyc. p. 1006 (2); Siebold v. Rogers, 110 Ala. 438, 18 South. 312; Donovan v. St. Anthony, etc., Elevator Co., 8 N. D. 585, 80 N. W. 772, 46 L. R. A. 721, 73 Am. St. Rep. 779. We think, therefore, the court should have excluded the instrument containing the reservation of title to the Betts-Evans Trading Company in this case, upon the objection made by defendant's counsel. This being true, the plaintiff failed to sustain its case, and there was no error in awarding a nonsuit.

As our judgment in the cross-bill of exceptions necessarily effects a final disposition of the case adverse to the plaintiff in error in the main bill of exceptions, it is needless for us to deal with the questions therein.

Judgment in the cross-bill of exceptions reversed, and writ of error on main bill of exceptions dismissed.

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(2 Ga. App. 746)

## DUBLIN & S. W. RY. CO. v. AKERMAN & AKERMAN. (No. 505.)

(Court of Appeals of Georgia. Oct. 30, 1907.)

1. PARTNERSHIP—ACTION—PLEADING.
The name "Akerman & Akerman" connotes a partnership. An amendment alleging that it is a partnership is permissible, though not necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 404–408.]

2. ATTORNEY AND CLIENT—SERVICES.
An attorney may render services for a person or corporation in a suit to which the latter is not a formal party.

3. CORPORATIONS—AUTHORITY OF OFFICERS—EMPLOYMENT OF COUNSEL.
"The managing officers and agents of corporations have power to employ attorneys to prosecute and defend suits for the corporation, or otherwise to assist in legal proceedings in which it is interested, without any express delegation of power to do so, or any formal resolution of the board of directors to that effect."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1615–1619.]

4. ATTORNEY AND CLIENT—ACTION FOR SERVICES.
The evidence in this case demanded the verdict rendered.

(Syllabus by the Court.)

Error from City Court of Eastman; J. H. Thomas, Judge.

Action by Akerman & Akerman against the Dublin & Southwestern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Akerman & Akerman brought suit against the Dublin & Southwestern Railway Company on an account as follows: "To service in the case of Southern Railway Company v. Mayor and Council of Eastman et al., in the Circuit Court of the United States for the Southern District of Georgia, $100.00." The defendant demurred on the grounds: (1) Because no party plaintiff is named, it not appearing that Akerman & Akerman is either a partnership or a corporation; (2) because it appears from the account that defendant is being sued for services in a case to which it does not appear to have been a party. The plaintiff amended, alleging that Akerman & Akerman is a partnership. The demurrer was overruled. Upon the trial the following testimony was introduced by the plaintiff:

Judge Clements testified that in June, 1905, the Southern Railway Company filed a petition in the United States court against the mayor and council of Eastman, and he was representing that defendant. The suit involved the right to a certain strip of land on which the Southern Railway Company were about to lay the side track, and which the city, it seems, was about to give to the Dublin & Southwestern Railway Company for terminal or similar purposes. (The exact nature of this suit is immaterial to this case, except to the extent that the city and the Dublin & Southwestern Railway Company had a mutuality of interest.) The answers of the city had been prepared and filed. This witness further testified: "I met Judge Roberts, who had been to Dublin, and he came to me and told me that Col. J. M. Stubbs, who was general counsel for the Dublin & Southwestern, had told him and requested him to see me and get the Akermans in the case. Judge Roberts and myself were local counsel for the Dublin & Southwestern. I went to Macon in three or four days afterwards, and when I got up there I spoke to Mr. Alex Akerman, the older member of the firm, and told him of the message I had received from Col. Stubbs, through Judge Roberts. We discussed the case, and he told me what he would charge to go into the case. * * * Mr. Akerman told me he would charge $100 to go into the case. Before the case was called Col. Stubbs and Mr. Rents

both appeared in the Federal Building in Macon, and Mr. Rentz again spoke to me about the employment of Mr. Akerman, or, rather, he and Col. Stubbs discussed it with me. They were both in the courtroom after the case had been started and during a portion of the trial. I told Mr. Rentz what Mr. Akerman said about the fee, and he directed me to employ him for the railroad company, and that the company would pay Mr. Akerman. I immediately did that, and Mr. Akerman went into the case, and Mr. Rentz was in there while the case was being tried and saw Mr. Akerman participating in the case. Before the suit of the mayor and council of Eastman had been disposed of, an amendment was offered by the Southern, asking that the Dublin & Southwestern be made a party also."

Judge Roberts testified that Col. Stubbs, the general counsel for the railway company, asked him to tell Judge Clements to employ Akerman & Akerman to represent the railway company's interests in the matter, on account of the special skillfulness of that firm in matters of procedure in the federal courts. As to Mr. Rentz, who was referred to in the testimony, Judge Roberts testified: "I think Mr. Rentz was president of the Dublin & Southwestern as it then existed. He was supervisor and superintendent of the extension of the road to this place. * * * I think Mr. Rentz was the only president the road ever had up until the time it was sold out."

Judge James Bishop, who represented the Southern Railway in the suit, testified to the successful fight made by Akerman & Akerman to prevent the Dublin & Southwestern Railway Company from being joined by amendment as party defendant to the suit pending against the city of Eastman. It further appeared from the testimony of directors of the railway company and others that Mr. Rentz had referred to this fee at meetings of directors, and had said that he would see to its being paid, but that he wanted to hold Akerman & Akerman off and see if he could not get them down on the price. Messrs. Akerman presented their bill to the city of Eastman and after they declined, on the ground that the railway company alone was liable, this suit was brought.

The defendant introduced no testimony.

J. P. Highsmith, for plaintiff in error. Chas. W. Griffin and Tye, Peeples, Bryant & Jordan, for defendants in error.

POWELL, J. (after stating the facts as above). 1. The statement of the first headnote is too plain to justify elaboration. Buffington v. State, 124 Ga. 24, 52 S. E. 19; Smith & Co. v. Columbia Jewelry Co., 114 Ga. 698, 40 S. E. 735; Western & Atlantic R. Co. v. Marble Works, 122 Ga. 776, 50 S. E. 978.

2. The statement of the second headnote seems likewise obvious. Very frequently the most valuable service an attorney can perform for his client is to keep him out of a suit.

3. The third headnote is copied bodily from 10 Cyc. 928 (8b). We are inclined to think that the general counsel or head of the legal department, in a corporation such as this, would have the implied power to employ such special or local attorneys as might be necessary. Certainly the employment of an attorney by the joint authority of the general counsel and the president, who also exercised the duties of superintendent, is to be regarded as the act of the corporation. It is said in the argument that there is no evidence of Mr. Rentz's official capacity; that Judge Roberts' testimony to that effect was prefaced by the words "I think." There is no rational distinction between the expression "I think" and "according to my recollection," as applied to the testimony of a witness as to the existence of a fact which came within his personal knowledge. Mimbs v. State (Ga. App.) 58 S. E. 499 (2); Voisin v. Insurance Co., 70 N. Y. Supp. 147, 154, 60 App. Div. 139; Humphries v. Parker, 52 Me. 502, 504; Galveston Ry. Co. v. Parrish (Tex. Civ. App.) 43 S. W. 536. See the second definition of the verb "think" in the Century Dictionary.

4. The testimony is clear and unequivocal that this debt is due and owing by the defendant to the plaintiff. It is true that there are some exceptions taken in the record based upon objections to testimony; but, should we concede all these objections to be well founded (though, indeed, they are not), still they relate to immaterial matters not in any wise changing the only material fact, which is overwhelmingly established, and not denied, that this debt is due the plaintiffs; and therefore these exceptions are utterly immaterial. By not a word of testimony does the defendant dispute the debt. The only reason, so far as the record shows, why it has not been paid, is indicated by the statement, made by the president at the directors' meeting, "that he was holding them off to see if he could not get them down some." After a careful consideration of the record, we have become satisfied that the bringing of the case to this court is but a part of the defendant's plan to "hold off" the plaintiffs; that it was for delay only. Protection to the state, as well as the defendants in error, demands the awarding of damages in such cases.

Judgment affirmed, and 10 per cent. damages awarded.

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(2 Ga. App. 761)

## JACKSON v. BROTHERS AND SISTERS OF PROMISE. (No. 579.)

(Court of Appeals of Georgia. Oct. 31, 1907.)

JUSTICES OF THE PEACE—SUMMONS—PLEADING—AMENDMENT—INSURANCE—RIGHT OF ACTION.

The court erred in refusing to allow the amendment offered by the plaintiff and in dismissing the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 253, 264, 265.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Susie Jackson against the Brothers and Sisters of Promise. From a judgment of the superior court, dismissing the case on appeal by defendant from a justice, plaintiff brings error. Reversed.

H. F. Strohecker and Chas. Akerman, for plaintiff in error. Glawson & Fowler, for defendant in error.

POWELL, J. The action was instituted in the justice court. In the exhibit to the original summons the cause of complaint is stated as follows: "The Brothers and Sisters of Promise (Incorporated), of Bibb county, Georgia, Oct. 12, 1906, to Susie Jackson, sole heir at law of Hamp Jackson, to amount of benefit due on death of Hamp Jackson, $60.00." The defendant appeared and pleaded in the justice court. By original plea the defendant admitted an indebtedness to the plaintiff of $54 on account of the death benefit of Hamp Jackson, and offered to pay that sum into court. Judgment was rendered against the defendant, who appealed to the superior court. In that court the defendant amended its plea and denied any liability at all, stating that while Hamp Jackson, when he died, was a member of the defendant benefit association, and while, under the by-laws, "on the death of a member of the Brothers and Sisters of Promise, each member of the society shall be assessed in the sum of 25 cents, to go to the family of the deceased, or to whom it may have been willed," and under this by-law $52 had been paid in and was owing to the family of Hamp Jackson, yet Hamp Jackson having left no will, the sum was due his family, but that plaintiff was not a member of his family. It further set up that, if any indebtedness was due at all, it was to the administratrix on Hamp Jackson's estate, and not to the plaintiff. In the superior court the defendant moved to dismiss the action on the following grounds: (1) That no cause of action is set out; (2) that the original summons fails to show on its face that the plaintiff has the right to sue as "heir at law"; (3) that the cause of action, if any, is in administratrix of Hamp Jackson. The plaintiff tendered the following amendment to the summons: (1) By inserting "before the words 'sole heir' the words 'child and only member of the family'; and (2) by adding after the words 'death of Hamp Jackson' the following: 'Arising from contract contained in the laws of said society in the 13th section of the constitution as follows: Sec. 13. On the death of a member of the Brothers and Sisters of Promise, each member shall be assessed in the sum of twenty-five cents, to go to the family of the deceased, or to whom it may have been willed. This assessment must be paid within thirty days.'" The judge refused to allow the amendment and dismissed the action.

We hold:

1. That, even in the absence of amendment, the cause of action was set forth in the exhibit to the original summons with adequate definiteness for the purpose of justice court procedure (especially in the absence of timely special demurrer) and that on appeal to the superior court the sufficiency of the summons is governed there also by the same rule as pertains in the court below. "Some degree of certainty," not full legal definiteness, is the test in such cases. Powell v. Alford, 113 Ga. 979, 39 S. E. 449; Thomas v. Forsyth Chair Co., 119 Ga. 693, 46 S. E. 869; Georgia Southern & Florida Railway Co. v. Barfield, 1 Ga. App. 203 (1), 58 S. E. 236, and citations; Southern Express Co. v. Briggs, 1 Ga. App. 294 (2), 57 S. E. 1066; Southern Ry. Co. v. Oliver, 1 Ga. App. 734, 58 S. E. 244.

2. That the amendment offered merely tended to amplify the original allegations, and should have been allowed.

3. For a death benefit payable to the family of the deceased, those persons whose relationship to the deceased are legally connoted in the word "family" are entitled to sue, and not his personal representative. Starnes v. Atlanta Police Relief Ass'n, 2 Ga. App. ——, 58 S. E. 481.

Judgment reversed.

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(2 Ga. App. 723)

## TAYLOR v. STATE. (No. 644.)

(Court of Appeals of Georgia. Oct. 29, 1907.)

1. INDICTMENT—VARIANCE.

There is no material variance between the allegata and the probata, and the allegations of the indictment were sufficiently proved as laid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 562, 569–572.]

2. LARCENY—INSTRUCTIONS.

The court fully, fairly, and clearly submitted to the jury the issues and the law applicable thereto. The exceptions to portions of the charge are without merit.

3. CRIMINAL LAW—NEW TRIAL—CONDUCT OF JUDGE.

A new trial is granted solely because the trial court violated the spirit of section 4334 of the Civil Code of 1895 in the particulars pointed out in the opinion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1520.]

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

C. L. Taylor was convicted of larceny after trust, and brings error. Reversed.

Perry & Williamson, Pope & Bennet, and J. J. Forehand, for plaintiff in error. W. E. Wooten, Sol. Gen., and J. H. Tipton, for the State.

HILL, C. J. Taylor was convicted in the superior court of Worth county on an indictment charging him with the offense of larceny after trust under section 195 of the Penal Code of 1895. The character and purpose of the trust and the fraudulent breach thereof are described in the indictment in

the following language: "For that the said Charles L. Taylor did on the 1st day of October, 1906, in the county aforesaid, being intrusted by the Virginia-Carolina Chemical Company with the following described promissory notes, to wit: [Here follows a list of the notes, giving the names of the makers, dates, and amounts]—all of said notes being due on October 1, 1906, payable to Charles L. Taylor, or order, and by the said Taylor transferred and assigned to said Virginia-Carolina Chemical Company, said notes being intrusted to said defendant, as aforesaid, for the purpose of said defendant collecting the money due on said notes, and each of them, and paying the proceeds and moneys collected on said notes, and each of them, over to the said Virginia-Carolina Chemical Company, he, the said defendant, being intrusted as aforesaid, did collect the moneys and proceeds on and from said notes and each of them in the amounts hereinbefore respectively stated, and did then and there wrongfully, fraudulently, and feloniously convert said moneys and proceeds to his, said defendant's, own use."

In proof of the allegations in the indictment the state introduced the following evidence, here substantially stated: (1) Agreement between the chemical company and the defendant, dated January 16, 1906, stipulating that the company was to furnish from its factories for sale by Taylor 100 tons of fertilizers, with guaranteed analysis and price per ton, to be delivered in car load lots at the depot at Huggins, Ga., Taylor agreeing to receive all of said fertilizers for sale, and take same and pay therefor the prices mentioned in the agreement; that, until sold or settled for by Taylor, the fertilizers under the agreement to remain the property of the company, "and, when sold, all the proceeds of sale of such fertilizers, including cash, notes, open accounts, and collections thereupon, shall be kept separate and held by Taylor as a trust fund, and turned over to said company as collateral security and pledge until the entire indebtedness of Taylor to the company arising under this agreement has been paid"; that shipments of fertilizers were to be made by the company before May 1, 1906, and payments of all shipments guaranteed in full to the company at prices stated, and settlements to be made on or before May 1, 1906, by cash or negotiable notes (on the company's regular form) of Taylor, maturing November 1, 1906, November 15, 1906, and December 1, 1906, each of said notes being payable at the Bank of Tifton, Ga.; that Taylor will pay over to the company all the cash proceeds of sales made for cash when sold, and on or before May 1, 1906, will send to the company a complete list of his time sales, and indorse, if necessary, and surrender to the company all notes received by him from the purchasers of said fertilizers, which notes are to be taken on forms of the company, and these notes to be returned by the company to Taylor "for the purpose only of collection and remittance to the company, until his debt to it has been fully paid as aforesaid, and, when said notes are so returned to Taylor by the company, they are to be receipted for in trust to the company by Taylor." (2) Taylor's three notes provided for in the agreement, payable to the company at the Bank of Tifton, Ga., due November 1, November 15, and December 1, 1906, and indorsed in blank by the company. (3) Trust receipt, signed by Taylor, dated August 17, 1906, as follows: "Received of Virginia-Carolina Chemical Company, in trust for collection, for its account, as per terms and conditions of contracts made by * * * with said company, the following described notes and accounts: * * *—it being agreed that all money or cotton or other proceeds collected on them will always be held subject to order of Virginia-Carolina Chemical Company, until notes to them are paid in full." This receipt contains a list of the notes set forth in the indictment, giving names of the makers of each note, dates, and amounts.

The state also introduced some of the notes so described in the indictment and the receipt signed by Taylor, marked "Paid," and proved by the makers that the proceeds thereof had been paid to the defendant, and also showed by oral evidence that many of the notes as described in the indictment and receipt had been paid by the makers to Taylor. In these cases the paid notes themselves were not introduced in evidence. The state introduced a letter from Taylor to the company, dated December 27, 1906, notifying it that he had been robbed Monday night of $1,373 of money that he had in his possession belonging to the company. An admission of the defendant, made to the agent of the company who demanded the money collected on the notes, that he had collected it, was proved.

The defendant, in his statement to the jury, qualified his admissions by stating that he had collected about $900 due on the notes, and, explaining why he had not sent this amount to the company according to his contract, said that he was waiting to collect the full amount, so as to pay in full his three notes held by the company for the fertilizers; that he added to the amount collected belonging to the company enough of his own money to make the amount $1,373, and this sum was in his satchel in his store; and that the store was broken open, and the satchel entered, and the whole amount stolen. He introduced some 15 of the notes which he claimed had not been collected. These notes were among those set out in the indictment, and were all made payable to the defendant, and were indorsed by him in blank. On the merits of the case it will therefore be seen that the defendant admitted on the trial the trust delegated to him by the company, and that he had collected the larger part of the notes intrusted to him, but set up as a

defense for his breach of the trust the burglary of his storehouse and the larceny of the money.

1. The first assignment of error is that the court erred in admitting in evidence the trust receipt signed by the defendant, because said receipt showed a different trust from the one alleged in the indictment. The indictment charged that the notes therein described and set out in the trust receipt were intrusted to the defendant for the purpose of being collected by him and paying the proceeds so collected to the company, and the trust receipt stipulated that the notes were intrusted to the defendant for the purpose of collection, but that "all money or cotton or other proceeds collected on them will be always held subject to the order of the Virginia-Carolina Chemical Company." In other words, it was contended that there was a material variance in the allegation that the proceeds of the notes were to be collected and paid over to the company by the defendant, and the recitals in the trust receipt that the proceeds of the note were to be collected and always held subject to the order of the company. This trust receipt must be construed in connection with the terms of the original agreement between the defendant and the company, which was in evidence. This agreement provided "that Taylor will pay over to the company all the cash proceeds of sales made for cash when sold, and on or before May 1, 1906, will send to the company a complete list of his time sales, and indorse, if necessary, and surrender to the company all notes received by him from the purchasers of said fertilizers, * * * to be returned by the company to Taylor * * * for the purpose only of collection and remittance to the company, * * * and, when said notes are so returned to Taylor by the company, they are to be receipted for in trust to the company by Taylor." There is no evidence of any cash sales; but it is not disputed that Taylor did sell to various parties the fertilizers belonging to the company, did receive therefor their notes, did send these notes to the company according to the agreement, and that these notes were returned by the company to Taylor for the sole purpose of having him collect the same and pay over the proceeds to the company. This agreement, supplemented by the oral evidence, fully proved the trust alleged in the indictment and its breach by Taylor. The trust receipt was merely cumulative as to the nature of the trust created. We do not think, however, the statement in the trust receipt that the money, the proceeds of the notes, was to be held by the defendant at all times subject to the order of the company, described a different trust from that alleged in the indictment. It is clear from the evidence and the admission of the defendant that he was in no doubt as to the character of the trust delegated to him by the company.

2. It was insisted in the next place that the state failed to prove the allegation of the indictment that the notes in question were "transferred and assigned by Taylor to the Virginia-Carolina Chemical Company," and that this allegation was descriptive of the notes and should have been proved as laid. The writer is inclined to the opinion that this allegation is simply surplusage. It is alleged that the notes described in the indictment were the property of the company, and intrusted to the defendant for the purpose of collecting them and paying over the proceeds to the company. In connection with the evidence that the notes were payable to Taylor, were sent by him to the company, and were intrusted by the company to Taylor as its property, for the purpose of having him to collect the proceeds and pay over the same to the company, the only rational conclusion from these facts was that the notes had been transferred and assigned by Taylor to the company, and the express allegation of that fact was simply the legal conclusion of the pleader. But, whether this position be sound or not, any deficiency on this point in the proof offered by the state was fully supplied by the evidence of the defendant. The 15 notes introduced by him were each made payable to the order of the defendant, and each was indorsed in blank by him, and sent to the company, and by the company intrusted to the defendant for the purpose alleged in the indictment. These notes were all described in the indictment, among the others which the evidence showed had been collected by the defendant. It is a fair and reasonable inference that the notes collected by Taylor had also been indorsed by him. On three of the notes, shown to have been indorsed by the defendant and sent to the company, there appeared credits amounting to $30 or $40; and, as the defendant admitted that he had not paid to the company any part of the proceeds of any of the notes, the allegation that the notes were "transferred and assigned" to the company by the defendant was fully, and even technically, proved.

3. The court allowed several of the makers of the notes to testify that they had paid to the defendant these notes and he had delivered them into his possession. This testimony was objected to on the ground that the notes and entries of payment thereon were the best evidence of the fact of payment. Testimony by the maker of a note that he had paid it in full and that it had been delivered up to him by the holder was competent and admissible, without the production of the note itself.

4. Error is assigned to certain portions of the charge. A careful examination of the entire charge leads us to the conclusion that there is no merit in any of these assignments. The charge fully, fairly, and clearly submitted the issues and the law applicable thereto.

5. During the progress of the trial the

court propounded many questions to the witnesses on both sides. A large number of these questions are specifically objected to because they were not only "leading and suggestive, but clearly indicated to the jury an opinion of the court as to the guilt of the defendant." A great part of this examination of the witnesses was as to the collection of the notes intrusted to the defendant. There was no controversy over this fact. It was not denied that the notes were all intrusted by the company to the defendant, to be collected and the proceeds paid over by him to the company. The defendant admitted in his statement to the jury that he had collected about $900 on the notes and had not paid any of it to the company. So this part of the examination of the witnesses by the judge, even conceding that it was justly amenable to the criticism made, could not have been in manner material or harmful to the defendant. As before stated, the defendant did not deny, but fully admitted, the nature and purpose of the trust. He admitted that he had collected a large portion of the money represented by the notes intrusted to him, and had not remitted any part of it to the owner. In short, he admitted every material allegation of the indictment, except the charge of fraudulent conversion. He set up, as an excuse for the breach of the trust reposed in him, the burglary of the storehouse where he had the money in his grip, and the stealing of the same therefrom. This defense was a good one, if true; but it presented three weak points, which were vigorously assailed by the state: The absence of physical marks on the window or door of the storehouse indicating a burglary; the conduct of the defendant before, and immediately after, the alleged burglary; and the unreasonableness of the statement that so large a sum of money should have been carelessly left in a small satchel in the store. There were other facts and circumstances which the state contended proved the untruthfulness of this defense, and indicated that it was a sham or pretense to hide guilt. It is in some cases difficult to determine when the judge violates the spirit of the positive limitations of his juridical right, as prescribed in section 4334 of the Civil Code of 1895. Talleyrand said: "Language is given to man to conceal his thoughts." But the most adroit and careful use of words is necessary to hide from an alert juror intimation of the opinion really entertained by the trial judge. We know of no better test to apply to the language of a judge claimed to contain and to intimate an opinion to the jury than the impression made upon our own minds in reading and considering the words of the court objected to. After a most careful consideration of the questions asked by the court for the purpose of elucidating the issues on the points of the defense above mentioned, we are convinced that the learned judge clearly, although unconsciously, gave expression to his incredulity as to the honesty and truth of the defense. On reading the evidence, we fully share in such incredulity. But the very weakness of a defense makes it all the more necessary that it should go to the jury without the ponderous handicap of judicial disparagement and discredit. The purpose of the legal inhibition against the expression or intimation of opinion by the judge is to protect a defendant in his weakness, as well as in his strength, and to preserve inviolable the priceless right of trial by jury. The province of the jury as the exclusive arbiters of facts is holy ground, not to be approached by the judge, even with bare feet and uncovered head. The judge should sit on the bench the calm and impartial incarnation of law, as silent as the Sphinx on contested questions of facts.

We do not deem it necessary to specifically point out the questions in the record which we think justly obnoxious to the foregoing criticism. Comprehensively stated, it is that part of the court's examination of the witnesses which emphasized by suggestive questions the weakness of the defense in the particulars mentioned. We repeat what was said by this court in the Sharpton Case, 1 Ga. App. 548, 57 S. E. 932: "It is almost an intellectual impossibility for a judge to engage in an examination of a witness on vital questions of the case on trial, without in some manner and to some extent indicating his own opinion. Every practitioner knows how eagerly alert jurors are to every utterance from the bench, and how sensitive is the mind of the juror to the slightest judicial expression. Therefore, while the trial judge has the right to ask questions of the witnesses when necessary to bring out the full truth of the case, we are not prepared to say that it is his duty to do so; and in exercising the right he should be careful not to intimate any opinion upon the facts, or use any expression calculated to prejudice the rights of either party." Even in a clear case of guilt, this court has no other alternative, and it desires no other, than to grant a new trial when it comes to the conclusion that the right of the defendant to have the fact of his guilt or innocence determined exclusively by the jury has been in the slightest degree infringed by judicial intimation or expression of opinion.

Judgment reversed.

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(2 Ga. App. 750)

## NATIONAL LUMBER CO. v. TURNER et al.

(No. 531.)

(Court of Appeals of Georgia. Oct. 30, 1907.)

1. ADMINISTRATORS — DEATH OF WARD — RIGHTS OF GUARDIAN.

The guardian of a ward who dies pending his minority, intestate, becomes, upon the death

of such minor ward, the administrator of his estate. Section 2569, Civ. Code 1895.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 48.]

2. GARNISHMENT—PERSONS SUBJECT—ADMINISTRATORS.

An administrator cannot be garnished in the absence of a statute conveying express authority for that purpose, for the reason that without such statute the court of ordinary alone has jurisdiction. Under sections 4734 and 4735 of the Civil Code of 1895 an administrator is, in certain cases therein provided for, subject to garnishment, but, the provisions of these sections being in derogation of the jurisdiction of the court of ordinary, the garnishment proceedings must be in strict compliance with the terms of the exceptions therein provided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, § 119.]

3. SAME—AFFIDAVIT—SUFFICIENCY.

Process of garnishment sued out to reach the distributive share of a person in the hands of the administrator, or to impound a debt owed by the estate to a debtor of the garnishing creditor, is void unless "the creditor will swear—in addition to the oath required in ordinary cases—that his debtor resides without the state or is insolvent." Without such an affidavit, the court of ordinary still has jurisdiction of the person and subject-matter, and no other court acquires jurisdiction.

4. SAME—VOID JUDGMENT.

The affidavit upon which the garnishment was based, containing no statement that the heir, distributee or creditor of the estate was insolvent, the city court of Baxley was without jurisdiction to issue process of garnishment, and consequently all subsequent proceedings, including the judgment against the garnishee, were void. Consequently, in a suit brought against such administrator and the surety on his bond, founded upon such void judgment against the garnishee, it was not error to render a judgment in favor of the defendants.

(Syllabus by the Court.)

Error from City Court of Baxley; J. H. Thomas, Judge.

Action by the National Lumber Company against E. W. Turner and H. M. Herndon. Judgment for defendants, and plaintiff brings error. Affirmed.

W. W. Bennett, for plaintiff in error. V. E. Padgett, for defendants in error.

RUSSELL, J. In 1905 the National Lumber Company obtained a judgment against E. W. Turner in the city court of Baxley for $308.52. Subsequently, on the 6th of March, 1906, the lumber company sued out process of garnishment before the judge of the city court of Baxley, and had summons of garnishment served upon E. W. Turner as guardian of Francis Virginia Turner, deceased, calling upon him to answer what amount he owed the defendant E. W. Turner as an individual. The garnishment was made returnable to the April term, 1906, of the city court of Baxley, and service was perfected on E. W. Turner, guardian, the garnishee, on March 6, 1906. The affidavit upon which the process of garnishment issued was as follows:

"Georgia, Appling County.

"In person before the undersigned officer, authorized to issue process of garnishment, came W. W. Bennett, the attorney at law of the National Lumber Company, a corporation under the laws of Georgia, who on his oath says, to the best of my knowledge and belief, that E. W. Turner is indebted to the National Lumber Company in the sum of two-hundred and seventy-five dollars, for which amount judgment has already been obtained in the city court of Baxley, Ga., and that he has reason to apprehend the loss of said sum, or some part thereof, unless process of garnishment do issue.

"W. W. Bennett,
"Attorney for the National Lumber Co.

"Sworn and subscribed to before me this 6th day of March, 1905.

"J. H. Thomas,
"Judge C. C. of Baxley, Ga."

The National Lumber Company gave a garnishment bond in conformity with the affidavit. The garnishee filed no answer to the summons of garnishment either at the April or June terms, and on the 9th day of August, 1906, judgment was entered against the garnishee, E. W. Turner, guardian of Francis Virginia Turner, deceased, for $275 and costs. On December 14, 1906, the execution was issued on this judgment, and placed in the hands of the sheriff, after being entered on the general execution docket, who made a return thereon of nulla bona. Thereupon the plaintiff in fi. fa., the National Lumber Company, brought the present action against E. W. Turner, guardian, as principal, and H. M. Herndon, as security, on the guardian's bond. The petition, after setting forth the foregoing facts and alleging that E. W. Turner was one of the heirs at law of his deceased daughter and ward, Francis Virginia Turner, and had received from the sale of land belonging to his deceased ward the sum of $1,025, asked judgment against the principal and security on the guardian's bond for the amount of $275, being the amount of the judgment he had obtained against the guardian as garnishee. The defendants Turner, guardian, and Herndon, as security, defended solely upon the ground that the judgment against the garnishee and the proceedings upon which said judgment was based are null and void. The issue was tried before the judge of the city court of Baxley, who on April 13, 1907, held that the garnishment proceeding was invalid and the judgment rendered thereupon was null and void, and rendered a judgment in favor of the defendants, which is now excepted to.

We think the judgment of the judge of the city court of Baxley was right. The plaintiff in error insists that the garnishment proceedings and the judgment based thereon and fi. fa. issued upon the judgment, all admitted in evidence, show a valid, legal, binding judgment against the defendant E. W. Turner, guardian. If this were true, and the guardian having received $1,025, belonging to the estate of his ward, and being one of her heirs, his

interest therein as such heir could be reached by his judgment creditors by the process of garnishment. The learned counsel for the plaintiff in error insists that the case is controlled by sections 4705, 4706, 4708, and 4709 of the Civil Code of 1895. These are the sections applicable to proceedings in garnishment generally, and the affidavit which we have quoted above was made in conformity with section 4708.

We think, however, that this guardian could only be garnisheed under the terms of section 4735 of the Civil Code of 1895, and that while the judge of the city court of Baxley is clothed by the provision of section 10, Act No. 153, p. 423, of the Acts of 1897, with ample power to take the affidavit and issue the process of garnishment, he could only do this in conformity with the terms of section 4735 of the Civil Code of 1895. It appears from the record that the ward, Francis Virginia Turner, died in 1901, a minor 18 years of age, leaving her estate in the hands of her guardian, because it was not sold until March 6, 1906. Under these circumstances, the guardianship terminated, and E. W. Turner became the administrator of his deceased ward's estate. Section 2569 of the Civil Code of 1895 provides that, "when a ward shall die intestate pending his minority, the guardian shall proceed to distribute his estate in the same manner as if he had been appointed administrator upon such estate, and the surety on his bond shall be responsible for the faithful administration and distribution of such estate." This Code section is not in the same verbiage as the original act from which it is taken. Acts 1858, p. 57. The original act provided that "whenever any ward or wards shall depart this life leaving assets of any kind the guardian or guardians of said ward or wards are hereby vested with all the powers of administrators of the estate, and shall be controlled by the laws in force in this state in relation to administrators." In Jefferson v. Bowers, 33 Ga. 452, the Supreme Court held that this act applied to guardians of lunatics, and so construed it. There is one material difference between the Code section as now embodied in the Code of 1895 and the original act. The Code section makes the guardian an administrator only when the ward dies intestate, whereas the original act vested the guardian with all the powers and duties of administrator whenever his ward died "leaving assets of any kind." The original act made the guardian the administrator without regard to the contingency that the ward might have executed a will. The Code section perhaps is intended to provide for that contingency. It is clear, therefore, that, in the absence of either allegation or proof that Francis Virginia Turner left a will, her guardian, E. W. Turner, upon her death, became, by the terms of section 2569, the administrator of her estate, and was only subject to garnishment under the provision of section 4735 of the Civil Code of 1895, which furnishes an exception to the usual rule as to garnishments. Under the provision of section 4735, an executor or administrator may be garnished for a legacy or distributive share or for any debt owed by the estate to any other person, but the creditor must swear, in addition to the oath required in ordinary cases of garnishment, that his debtor either resides without the state or that such debtor is insolvent. As will be noted from the affidavit in this case, the affiant did not swear that E. W. Turner either resided out of the state or that he was insolvent. Not having placed his case within the exception, the affidavit was fatally defective, and gave the city court of Baxley no jurisdiction. All of the subsequent proceedings, including the judgment, for want of jurisdiction, were void.

The garnishee fails to answer a garnishment at his peril, but he is not required to answer a void process of garnishment, and therefore in this case the fact that the garnishee failed to make answer was of no importance, and adds nothing to the authority of the court or its power to enter judgment against the garnishee. Unless the affidavit, made to obtain process of garnishment, conferred jurisdiction upon the court rendering the judgment, the judgment was void and could be attacked whenever it was material to the interest of the parties to consider it. The judgment against the garnishee was a nullity. Section 5369, Civ. Code 1895. Section 4735 fully authorizes the issuance of summons of garnishment against an administrator for the distributive share of the distributee, but only when the creditor complies with its terms. The administrator is primarily responsible to the ordinary, and the court of ordinary has jurisdiction. The mandatory requirements of section 4735 must be complied with in order to give any other court than the court of ordinary jurisdiction of an administrator in a special proceeding like a garnishment. Harris v. Kittle, 119 Ga. 30 (3), 45 S. E. 729; Brown v. Wiley, 107 Ga. 85, 32 S. E. 905. "Without the aid of a statute, an administrator or an executor cannot be garnished for funds which he holds as such administrator or executor. The reason is that he is an officer of the court, and as such must account for all funds in his hands, and it would be improper and against public policy for another court to interfere with the administration." Brown v. Wiley, supra. This is a general rule. Our state has varied it to the extent of the provisions of sections 4734 and 4735 of the Civil Code of 1895; but these sections, furnishing exceptions to the general rule, must be strictly complied with. Had the affidavit, made to obtain the garnishment, contained the statement that the debtor, E. W. Turner, was insolvent, the judgment against the garnishee and the return of nulla bona on the fi. fa., issued in pursuance of such judgment, if sup-

ported by proof of the other allegations, would have authorized a judgment against the guardian and the surety on his bond. In the absence of a sworn averment in the original affidavit that the defendant was insolvent, or that he resided without the state, the jurisdiction of the court of ordinary was exclusive, and the jurisdiction conferred by section 10, Act No. 153, p. 423, of the Acts of 1897 (creating the city court of Baxley), to issue the garnishment, was inoperative. This being true, all subsequent proceedings against the garnishee were, for want of jurisdiction, void, and properly so considered by the judge in the trial of the pending case against the guardian and the surety.

Judgment affirmed.

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(2 Ga. App. 755)

## PATTERSON v. SAMS. (No. 527.)

(Court of Appeals of Georgia. Oct. 31, 1907.)

1. MASTER AND SERVANT — NEGLIGENCE OF SERVANT—PLEADING.

Niceties of pleading are not required in the justices' courts; but an allegation in a petition attached to the summons that the servant of the defendants fired a brush heap near the line of plaintiff's land, and went away and left the fire burning near the property of the plaintiff, which was destroyed by fire, is ample allegation of negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1268.]

2. SAME—"SERVANT"—DEFINITION.

The word "servant," in section 3817, Civ. Code 1895, refers only to domestic servants.

3. WRIT OF ERROR—GRANT OF NONSUIT.

One cannot complain of a ruling which he himself has invoked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3591.]

4. MASTER AND SERVANT—TORTS OF SERVANT—EVIDENCE.

The verdict was authorized by the evidence, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Action by Mrs. W. J. Sams against George T. Patterson and another. Judgment for plaintiff against the named defendant and he brings error. Affirmed.

J. W. Wise, for plaintiff in error. W. B. Hollingsworth and J. W. Culpepper, for defendant in error.

RUSSELL, J. Mrs. Sams brought suit against Will and George T. Patterson in a justice's court for $100 damages, alleging that the defendants caused 93 cords of her wood to be burned and destroyed. It appears that the justice rendered a judgment with which the plaintiff was dissatisfied, and she appealed it to a jury in the justice's court. After the verdict of the jury in the justice's court, the case was carried by certiorari to the superior court, and the judgment of the justice's court was reversed, and the case was remanded for another trial in the justice's court. Before this trial the case was by consent of both parties appealed to a trial by jury in the superior court. On the trial in the superior court, upon motion of defendant's counsel, a nonsuit was granted as to Will Patterson, and a verdict was rendered against G. T. Patterson for $65. Before proceeding to trial in the superior court, the defendants demurred generally and specially to plaintiff's petition attached to the summons in the justice's court. The defendants demurred specially, because the petition did not set out the kind of servant the defendants employed, nor what his duties were, and because the petition failed to set out with sufficient certainty in what manner the defendants were negligent, or in what way their servant was negligent. The court overruled the demurrers, and exceptions were filed pendente lite. Error is assigned on the judgment overruling the demurrer, and the order granting the nonsuit, and the refusal of the motion for new trial.

1. There was no error in overruling the demurrer. The petition alleged "that defendants, by their servant, one Carl Scott, fired a brush heap on their land and negligently went away and left said fire burning," etc. Under the ruling in Lockett v. Pittman, 72 Ga. 817, the word "servant" can have no other meaning than a domestic servant, and no other duties than those which appertain to such servants; and even if, in an action brought in the superior court, it were necessary to allege special facts showing the servant to be a domestic servant, and to set forth the duties of such servant with particularity, this is not necessary or required in a justice's court. Nor was there any merit in defendant's second ground of special demurrer. The allegation that the defendants' servant, Carl Scott, allowed fire to spread from the brush heap, near the line of plaintiff's premises, which had been fired by him, and to spread to petitioner's land, where it burned her wood, because he went away and left the fire burning, well knowing that said fire was near the property of plaintiff and likely to spread to her property if left unwatched, is, we are clear, a sufficiently certain statement of the manner in which the defendants and their servant were negligent to withstand a special demurrer in any court, and far more ample than was required in a justice's court.

It must be born in mind that the case, being in the superior court by appeal from the justice's court must be tried as if it were still in the justice's court. And, as was expressly held in Ga. S. & F. R. R. Co. v. Barfield, 1 Ga. App. 203 (1), 58 S. E. 236, "the terms of Civ. Code 1895, § 4116, requiring a copy of the cause of action sued on to be attached to the summons in a justice's court, do not necessitate a specific allegation of negligence, or a detailed relation of the acts from which negligence may be inferred, or by which it is to be proved, or that the plaintiff set out a statement of the facts which constitute the alleged negligence." The re-

quirement as to summons and copy in a justice's court is an exception to the general rules of pleading, and the case is not changed by reason of an appeal to the superior court. As held by this court in S. R. R. Co. v. Oliver & Morrow, 1 Ga. App. 734, 58 S. E. 244, "it is neither possible, practicable, nor requisite to indulge in the niceties of pleading in a justice's court." There was, therefore, no error in overruling both the special and general demurrers. The suit was predicated upon section 3817 of the Civil Code of 1895: "Every person shall be liable for the torts committed by his wife or child or servant by his command, or in the prosecution and within the scope of his business, whether the same be negligent or voluntary." "A petition alleging negligence on the part of an employé in and about a matter falling within the regular discharge of his business, within the scope of his employé's business, and consequent injury to the plaintiff, set forth a cause of action against said employé's master." Thompson v. Wright, 109 Ga. 466, 34 S. E. 560.

2. The plaintiff in error is estopped from complaint of the grant of the nonsuit as to Will Patterson, because it appears from the record that a nonsuit was granted upon motion of counsel for plaintiff in error. Civ. Code 1895, § 5150.

3. There was no error in overruling the motion for a new trial, as the evidence in behalf of the plaintiff fully authorized the verdict rendered in her favor. It is true that the testimony of the defendant George T. Patterson would have authorized a verdict in his favor. He testified that he told his servant to work at a different place that day, and not to set out fire until he himself could be present, and that he was at home sick that day. But the plaintiff's witness W. J. Sams testified that Carl Scott (who had previously testified in the justice's court and since died) swore in the justice's court that the defendant directed him to set fire to the grass which caused the burning of the wood in question, and the comparative credibility of this testimony was a question for the jury. Upon the case, see Brown Store Co. v. Chattahoochee Co., 121 Ga. 809, 49 S. E. 839.

Judgment affirmed.

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(2 Ga. App. 718)

## EADY v. ATLANTIC COAST LINE R. CO. (No. 144.)

(Court of Appeals of Georgia. Oct. 29, 1907.)

ERROR, WRIT OF — CERTIFIED QUESTION — AFFIRMANCE.

The only question insisted on in this case having been certified by this court to the Supreme Court, and a decision having been rendered by the latter court adversely to the contention of the plaintiff in error, the judgment is affirmed.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action by S. A. Eady against the Atlantic Coast Line Railroad Company. Verdict for plaintiff. Questions certified to the Supreme Court were answered, 58 S. E. 895. Affirmed.

Jos. H. Hall, Warren Roberts, and Polhill & Williamson, for plaintiff in error. W. E. Kay, Bennet & Conyers, T. R. Perry, and J. H. Tipton, for defendant in error.

HILL, C. J. Judgment affirmed.

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(2 Ga. App. 759)

## KELLY v. FUDGE. (No. 575.)

(Court of Appeals of Georgia. Oct. 31, 1907.)

PROCESS—AMENDMENT.

To a suit filed in and addressed to a city court, with prayer for process to that court, there was attached process tested in the name of the judge of that court, and requiring the defendant to be and appear "at the next superior court," to be held on the date named by law for the next regular term of the city court.

*Held*, that the process was not void, and was amendable by allowing the clerk to strike the words "superior court" where they appeared therein, and insert the words "city court" in lieu thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 224–238.]

(Syllabus by the Court.)

Error from City Court of Miller County; C. C. Bush, Judge.

Action by John Kelly against Judge Fudge. Judgment for defendant, and plaintiff brings error. Reversed.

P. D. Rich, for plaintiff in error. W. L. Geer, for defendant in error.

POWELL, J. This was a trover suit, brought by Kelly against Fudge. The suit was brought to and filed in the city court of Miller county, to which court process was prayed. Process was annexed requiring the defendant "to be and appear at the next superior court to be held in and for said county on the second Monday in June next. * * * Witness the Hon. C. C. Bush, judge said court." At the time required in the process the defendant appeared in the city court, and there filed his written demurrer and motion to dismiss the case, "because petition is addressed to the city court, and the process is to superior court." The judge held that said motion was good, but before the petition was dismissed the plaintiff asked leave to allow the clerk, who was then present, to amend the process by inserting the words "city court" wherever the words "superior court" appeared. This amendment the court refused to allow, and dismissed the suit "because there is no process attached to same."

1. The process was not void. Civ. Code 1895, § 4994. The defendant had notice of the pendency of the suit. He was notified by the summons to be and appear at court on the second Monday in June. The law informed him that Hon. C. C. Bush was judge of the city court of Miller county, and not of the superior court of said county. He

was also thus notified that no regular term of the superior court convened in that county on the date above stated; also that the city court did. At the appointed time he was present to make his defense. See Richmond & Danville R. Co. v. Benson & Co., 86 Ga. 208, 12 S. E. 357, 22 Am. St. Rep. 446, in which many cases are cited in support of the proposition herein announced.

2. As the process was not void, the amendment should have been allowed. Civ. Code 1895, § 4047; Richmond & Danville R. Co. v. Benson & Co., supra. This case is distinguishable from that of Lowrey v. Richmond & Danville R. Co., 83 Ga. 504, 10 S. E. 123, for the reason that in the Lowrey Case the process not only required the defendant to appear at the superior court, but bore test in the name of the judge of that court, in direct violation of section 4974 of the Civil Code of 1895; while in this case the process bears test in the name of the proper judge.

The defendant, in his brief in this court, attempts to attack the process for a reason additional to that herein determined. The record, however, showing clearly that this question was not presented to or passed on by the lower court, it is not properly here for adjudication.

Judgment reversed.

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(2 Ga. App. 730)

## COOPER v. STATE. (No. 682.)

(Court of Appeals of Georgia. Oct. 29, 1907.)

1. CRIMINAL LAW — INSTRUCTIONS — ASSUMPTION OF FACT IN ISSUE.

A plea of not guilty by one accused of crime is an express contention on his part antagonistic to every fact necessary to be proved by the state in order to establish his guilt; and, unless the accused admits one or more of the facts which it devolves upon the state to prove, such fact must be established by evidence. To assume that an important fact in the case on trial has been admitted, and to so instruct the jury, when no such admission has been made is reversible error. Southern Express Co. v. State, 1 Ga. App. 700, 58 S. E. 67.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 720, 721, 1754–1764.]

2. SAME—PROOF OF VENUE.

Venue is a jurisdictional fact, which must be established to the satisfaction of the jury beyond a reasonable doubt. If there be uncertainty in the evidence which the jury cannot make certain, an acquittal must result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1277, 1278.]

3. SAME — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.

Where the intention of the accused can only be derived from circumstances, the jury should be instructed, substantially in the terms of section 984 of the Penal Code of 1895, that, if the circumstances from which a guilty intent could be inferred are equally consistent with an innocent intention or an intention different from that charged against the accused, he should be acquitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1883–1888.]

(Syllabus by the Court.)

Error from Superior Court, Dougherty County; W. N. Spence, Judge.

Dan Cooper was convicted of assault with intent to commit crime, and brings error. Reversed.

R. J. Bacon and L. W. Nelson, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

RUSSELL, J. The plaintiff in error was convicted of assault with intent to rape. He excepts to the overruling of his motion for a new trial. The 15 grounds of the motion, so far as are necessary to be considered, can well be grouped into three exceptions or complaints.

1. Plaintiff in error excepts to the following instruction of the court contained in the charge to the jury: "In this case, gentlemen, it is insisted by the state that, so far as the element of force is concerned, the element of consent, that the female named in the bill of indictment is of such unsound mind, such a mental condition, as to be incapable of giving consent. However, that issue, that question, is not an issue in this case, I believe. It is not contended by the defense that the female was of sufficient mind to give consent to have carnal knowledge." We have carefully examined the record, and do not find that the defendant anywhere or in any manner admitted that the female was of unsound mind, or of such mental condition as to be incapable of giving consent, and for that reason, under the mandatory terms of section 4334 of the Civil Code of 1895, the statement of the judge contained in this portion of the charge demands a reversal of the judgment. As has heretofore been pointed out by this court in the case of Southern Express Company v. State, 1 Ga. App. 700, 58 S. E. 67, the filing of a plea of not guilty by the accused is an explicit contention on his part antagonistic to every fact necessary to be proved by the state to establish his guilt. Unless he admits unequivocally one or more of the facts which it devolves upon the state to prove, such facts must be proven. Especially would this be true in a case such as the present, where the presumption of sanity must necessarily be rebutted by proof of unsoundness of mind, and where proof of this fact is a burden to be borne by the state.

We cannot agree with the contention of the plaintiff in error that the capacity or incapacity of the female to give consent is immaterial, or that there is any difference as to the capacity to give consent in assault with intent to rape and rape. The intent to have sexual intercourse with a female forcibly and against her will, as defined in the statute, is a quality applicable to the accused, and not to the person assaulted; and the intent is the same, whether the attempt be successful or be defeated. If sexual intercourse with a female of unsound mind be rape, the attempt to have sexual intercourse with the same female would be assault with intent to rape, provided the

attempt to accomplish the intercourse included the intent to do the act forcibly and against the will of the female assaulted. We recognize, however, that there is a distinction between sexual intercourse against the will of the female and without the consent of the female. While it has frequently been held that the two are practically synonymous, yet, when this rule is applied to cases where the female is of unsound mind, a difference may be admitted to exist. In cases where assault with intent to rape is alleged to have been committed, and the female assaulted is of unsound mind, the rule must be that if the female has a clear and definite understanding of the act sought to be committed, and is capable of exercising a desire in the premises, and under these circumstances consents, the offense would not be complete. Whether she was or was not clothed with a full apprehension of the nature of the act, and consented thereto, could be determined by the circumstances of the case. The intent, however, of the male, and not of the female, would be determinative of his guilt or innocence. If the female be of unsound mind on all subjects, necessarily any sexual intercourse with her, or any attempt directed to that end, evidenced by an overt act, would either be rape or assault with intent to rape. If, however, the female, although of unsound mind as to many matters other than that of sexual intercourse, yet has a full understanding of the nature of the act to be committed and desires to consent to the act of sexual intercourse, and this is apparent to the defendant (the desire not being superinduced by her insanity), it cannot safely be said that the offense would be more than fornication, adultery, or adultery and fornication.

2. The court charged the jury that "if the state establishes that it was in Dougherty county, inside of the Dougherty county line, beyond a reasonable doubt, or that it was so near the dividing line between the county of Baker and the county of Dougherty, as to make it impossible to determine definitely as to whether it was on one side of the line or the other, then, under this section of the Code, the state will have complied with the law if it shows that state of facts." This charge was error. The venue is a jurisdictional fact, which must be established to the satisfaction of the jury beyond a reasonable doubt. The learned trial judge was evidently of the opinion that sections 23 and 24 of the Penal Code of 1895 were applicable in this case. Section 23 is as follows: "Whenever a stream of water is the boundary of a county, the jurisdiction of the county shall extend to the center of the main channel of such stream; and if an offense is committed on such stream, and the evidence on the trial does not definitely disclose in which county it was committed, the courts of either county may maintain jurisdiction for the trial and punishment of the offender." And section 24 provides that, where the evidence does not definitely disclose on which side of the line of two counties, at the place where such county line touches a river forming a boundary between this and any other state, an offense is committed, the courts of either county may maintain jurisdiction. The instruction was wholly unsuited to the facts of this case. There was a conflict in the testimony as to which side of the line between Baker and Dougherty counties the alleged offense was committed. A large number of the witnesses swore that the road, which presumably, from the evidence, was constructed on the line between these two counties, curved or deflected around the lime sink where the offense is alleged to have been committed. The evidence showed that the county line was a straight line, and this court judicially knows that fact, and the further fact (also disclosed by the evidence) that the boundary line of Dougherty and Baker counties is not a stream of water. A large number of the witnesses swore that the lime sink was in Baker county, and quite a number that it was in Dougherty county. The jury would have been authorized to have believed from the testimony that the transaction occurred in either county. But the only correct charge with reference to a boundary line that could have been made would have been (had there been evidence from any witness that the offense was committed on the boundary line) that, if the jury believed that the offense was committed on the boundary line, then either county would have jurisdiction to try the offender. This means on the line, and not that the place was so near the line as to leave the matter in doubt.

3. We think that the complaint contained in the thirteenth ground of the motion is well taken, and that the jury should have been instructed that the intent must be proved beyond a reasonable doubt; and, inasmuch as the intent of the defendant could have been ascertained only from the circumstances, we think, further, that the jury should have been instructed that, if these circumstances were equally consistent with the defendant's innocence, he should be acquitted. While we may think that the assault, if made, could have been for no other purpose than that of sexual intercourse, still failure to call the attention of the jury to section 984 of the Penal Code of 1895 would have the effect of precluding the defendant's defense that he had a different intention in making the assault, if the jury believed he made the assault.

Judgment reversed.

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(2 Ga. App. 758)

SUTTON v. McCOY. (No. 546.)

(Court of Appeals of Georgia. Oct. 31, 1907.)

TROVER—WHEN LIES—EVIDENCE.

One who has sold property to another on credit on open account cannot maintain trover for the property, although the latter may not

have paid for the property. Therefore it is not reversible error for the court to exclude testimony which would merely tend to corroborate the plaintiff's statement in such a case that the defendant had not paid him in full for the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 103–116.]

(Syllabus by the Court.)

Error from City Court of Miller County; C. C. Bush, Judge.

Action by A. D. Sutton against Heck McCoy. Judgment for defendant, and plaintiff brings error. Affirmed.

W. I. Geer, for plaintiff in error. Bush & Stapleton, for defendant in error.

POWELL, J. The plaintiff, Sutton, brought trover against the defendant, McCoy, for a mule. The plaintiff testified that he had never sold the mule to the defendant. The defendant testified that he had. The defendant further testified that he had not only bought the mule on credit, but afterwards had paid for it, in full. On this last proposition the plaintiff also took issue with him. The defendant testified that he turned over his crop of nine bales of cotton to the plaintiff in payment of his indebtedness for rent, supplies, and the mule, and that the plaintiff told him that this was sufficient to pay for all these things. The plaintiff responded that he had received only eight bales of cotton, and then tendered an account for rent and supplies which he swore was true and correct, and which, instead of showing the mule to be paid for in full, shows only a credit of $31 after extinguishing the amount of rent and supplies claimed by him.

For certain irregularities in the form in which the account was stated the court excluded it; but his reasons are immaterial, in light of what we are holding in the case. If the defendant bought the mule, it would be immaterial whether he had paid only $31 on it, or had paid for it in full; for trover will not lie to enforce the payment of the purchase money for property sold on credit on open account. Usually rulings on collateral and immaterial matters, whether correct or not, afford no reason for overruling the action of the trial court in refusing to grant a new trial, when there is ample evidence to support the verdict and the trial judge approves it.

Judgment affirmed.

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(2 Ga. App. 740)

FINCHER, Marshal, v. COLLUM. (No. 789.)

(Court of Appeals of Georgia. Oct. 29, 1907.)

1. MUNICIPAL CORPORATIONS—GENERAL WELFARE—LICENSING DOGS.

Under a general welfare charter clause in usual form, a city council may pass an ordinance requiring owners of dogs to register them, secure tags, and pay fees therefor, and authorizing the killing of all untagged dogs; also making the owners of untagged dogs subject to punishment. The fact that the tag fees on female dogs are higher than those on male dogs does not render such an ordinance invalid. Such ordinances are sanitary and not fiscal in their nature, are an exercise of the police power, and not of the taxing power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1335–1337.]

2. SAME—CHARTER.

The charter of the city of Dalton approved February 24, 1874 (Acts 1874, p. 181), and the subsequent acts amendatory thereof, represent the entire charter powers of the city; and provisions contained in prior charters, but omitted from this act, are no longer in force.

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Application by S. C. Collum for a writ of habeas corpus to J. C. Fincher, marshal. From a judgment granting the writ, the marshal brings error. Reversed.

Collum was convicted in the police court of Dalton for keeping a dog in violation of the "dog ordinance" of that city. He took habeas corpus against the marshal of the city, and was released on the ground that the ordinance is void; and the city brings error. The ordinance (omitting immaterial parts) is as follows: "It shall be unlawful to keep, maintain, or allow kept on one's premises within the city of Dalton, any dog not tagged as hereinafter set out. The clerk is hereby directed to prepare suitable metal tags for sale for those desirous of keeping dogs within the city of Dalton. Tags to be placed on male dogs shall be sold at one dollar each and tags to be placed on female dogs shall be sold at five dollars each. * * * Such tags, when attached to the neck of said animal, shall protect said animal from being killed during the year within which same is sold, except as hereinafter provided. The police force is hereby required to kill all dogs, male or female, found within the limits of the city of Dalton, after the 1st day of June, 1907, which are not protected by a proper tag, as hereinbefore set out, and they are further required to kill all dangerous, vicious and mad dogs found within the limits of said city, whether they shall be tagged or not, and nothing herein contained shall be construed to prevent the killing of such vicious, dangerous and mad dogs. The owner of any dog found within the limits of Dalton, after the 1st day of June, 1907, and not bearing the tag herein provided for shall be guilty of a violation of this ordinance; and the word 'owner,' as herein used, shall be construed to mean any person having such dogs in charge, or allowing the same kept on any premises owned or occupied by him." Violations are to be punished in accordance with the penal ordinance of the city.

It is alleged in the petition for habeas corpus that the ordinance is void because it is a tax ordinance, and by the city charter (sections 44 and 78) license fees and taxes can be enforced only by execution; also that it is void "because it imposes a license fee or tax of $1 on male dogs and a license fee or tax

of $5 each on female dogs, and therefore violates the constitutional provision that 'all taxation shall be uniform on the same class of subjects,'" especially in light of section 4 of the Political Code of 1895, which says that "the masculine gender shall include the feminine and neuter"; also that it is void because of lack of authority in the charter of Dalton to regulate any dogs, except such as are "straying at large within the corporate limits," while the ordinance attempts to make illegal the keeping of the dogs on the citizen's own premises. In this connection the ordinance is alleged to be "an oppressive and tyrannical usurpation of power and an illegal invasion of the rights of a citizen and resident of said city." It is further alleged that, "if said ordinance is claimed to be a police regulation to promote the peace, health, or good order of the city," it is wholly impotent, void, and illegal, as such being inconsistent with the laws of Georgia, and, instead of being a police protection, is just the opposite, its effect being to turn loose upon the streets of said city, under the protection of a license, every vicious dog in the city whose owner buys a tag for said dog and puts the same on, said tags having on them "Licensed Dog," and is no protection to the children or women or others on the public street against mad or vicious dogs, as a muzzle would be. For these reasons it is averred that the restraint under the conviction under the ordinance is "wholly illegal, void, senseless, tyrannical, oppressive, and malicious."

Julian McCamy, for plaintiff in error. C. D. & F. K. McCutchen, for defendant in error.

POWELL, J. (after stating the facts as above). If the ordinance were adjudged to be a tax ordinance, the question arising from the discrimination in the amount imposed on female dogs and that imposed upon the males might be serious, though we are inclined to think the subtle influence which she dogs possess of attracting all the he dogs in the neighborhood to their immediate vicinity at stated periods, thereby making themselves attractive nuisances, as it were, might furnish a legitimate basis for putting bitches in a special taxing class. Still just here the present complaining party would be met with the obstacle that he owns a dog, and not a bitch; and favored classes are not allowed to complain of discriminations in their favor. Mayor v. Simmons, 96 Ga. 480, 23 S. E. 508 (3); Reid v. Mayor, 80 Ga. 757-8, 6 S. E. 602. However, the ordinance is not a tax ordinance, but a police regulation. "The power to regulate the keeping of dogs and to enforce such regulations by fines, forfeitures, and penalties, is recognized as one within the police power." This power of regulation may lawfully be exercised through a requirement that all persons keeping dogs on their premises shall register the same, procure a badge for each dog, and pay a fee. Griggs v. Macon, 103 Ga. 602, 30 S. E. 561, 68 Am. St. Rep. 134; 1 Dillon, Munic. Corp. (4th Ed.) 212, note 2; Cole v. Hall, 103 Ill. 30; Commonwealth v. Markham, 70 Ky. 486; Van Horn v. People, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159; Carthage v. Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352; Gibson v. Harrison, 69 Ark. 385, 63 S. W. 999, 54 L. R. A. 268; Sentell v. N. O. R. Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169. That bitches are taxed more than males works no invalidity. Hendrie v. Kalthoff, 48 Mich. 306, 12 N. W. 191. Such measures are sanitary, not fiscal. Commonwealth v. Markham, supra.

The nature and habits of dogs make them the special subjects of the police power. Despite the fact that the virtues of the dog have commanded the favorable attention of Senator Vest and others, who have paid him many glowing tributes, still he has not a universal good name. There are good dogs and bad dogs. Holy Writ has but few good words for dogs. Note the unfavorable categories in which they are placed: "For without are dogs, and sorcerers, and whoremongers, and murderers, and idolaters, and whosoever loveth and maketh a lie." Rev. xxii: 15. "Thou shalt not bring the hire of a whore or the price of a dog into the house of the Lord thy God for any vow; for even both of these are abominations unto the Lord thy God." Deut. xxiii: 18. "Beware of dogs, beware of evil workers, beware of the concision." Phil. iii: 2. We have no disposition to take issue with the unbroken current of authority, which says that dogs are under the special watch and ward of the police power. Take our canine citizenship out from under the dominion of the police power, and every municipality which finds itself in the throes of a mad-dog scare will be exposed to the chagrin of seeing its ordinances, hastily drawn to meet the emergency, resisted by defenses and assailed by injunctions predicated upon the thirteenth, fourteenth and fifteenth amendments to the federal Constitution. Shall pointers and setters or yellow curs be the sufficient cause for clash between state authorities and federal courts? Shall a day come when a "grandfather clause" will be the necessary adjunct to every town dog law? In the light of such possibilities public policy forbids the courts to interfere, or to do anything which will tend to diminish the hold of the police power upon the subject, although to leave the subject as it is may occasionally result in the "senseless, tyrannical, oppressive, and malicious" restraint of some good citizen.

However, it is not every city government that possesses, untrammelled by limitations, this subtle something which we call the police power. Let us examine the charter of Dalton, to see how far this city is authorized to go on this dog question. Under an unlimited "general welfare clause" the ordinance would be valid. Crum v. Bray, 121

Ga. 709, 49 S. E. 686. Has Dalton such power? We will review briefly its charters. On December 29, 1847 (Acts 1847, p. 47), an act was passed converting the village of Cross Plains into the city of Dalton. By section 16 (page 49) of that act "the mayor and council shall have power to pass such ordinances as they may deem advisable for the management of all hogs, dogs, horses, mules, and other stock, straying at large within the corporate limits." On January 18, 1852, an act was passed repealing the act of December 15, 1847. On December 28, 1853 (Acts 1853–54, p. 235), another act was passed to incorporate the city of Dalton in lieu of the town of Dalton. In section 24 (page 241) of this last-mentioned act it was recited that the act of January 15, 1852, repealing the act of December 29, 1847, incorporating the city of Dalton, had not been acted under; and the actions of the mayor and city council during the years 1852 and 1853 were ratified and declared legal and valid. In this charter no reference is especially made to the regulation of dogs and stock, but an unlimited "general welfare" clause appears. On February 24, 1874, there was passed (to quote the title) "An act to consolidate, amend and codify the various acts incorporating the city of Dalton in the county of Whitfield and the various acts amendatory thereof and to define the duty of the mayor and council and other officers of said city." Acts 1874, p. 181. This act does not deal specifically with the question of dogs or stock, but contains a "general welfare" clause in usual form. Under this charter the Supreme Court, in the case of King v. Ford, 70 Ga. 628, upheld an ordinance by which the city marshal of Dalton justified his conduct in suppressing the pranks of a "sportive filly," which, as appears from the record in this case, gave considerable annoyance, by her divers sundry pranks and gambols, to the quiet-loving citizenship of that most excellent city. It may be interesting to note that the fathers of the young gentlemen, who have so fervently and ably argued the present case in this court for the respective sides of the issue, were in that case likewise opposed one to the other. "As the mantle of the elder Pitt fell upon the younger Pitt," etc.

But to proceed with the decision of the case: If the sixteenth section of the act of 1847 is to be considered as still in force, as is contended by defendant in error, the express authority to regulate dogs and stock "running at large" might, under the principle of "expressio unius, exclusio alterius," be considered a restriction upon the right to regulate dogs kept upon the premises of the owner. See Waycross v. Walker, 116 Ga. 221, 42 S. E. 375. We think, however, that this section is no longer a part of the charter of Dalton. The repealing act of 1852, as well as the omission of the provisions of this section from the new charters of 1854 and 1874, seem to have eliminated it, and to have left the general welfare clause untrammeled by its provisions. Indeed, we think that the act of 1874 and the subsequent acts amendatory thereof constitute the only existing charter powers of the city of Dalton. The language in which the title to the act of 1874 is couched indicates a clear intention to cover the entire subject-matter and to repeal such portions of former charters as were not therein included. McVicker v. Conkle, 96 Ga. 594, 24 S. E. 23; Central Railroad v. State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518. "The general rule, that when a statute not merely cumulative of the common law or of previous statutes, and not made to cure the deficiencies thereof, is designed to create a new and independent system, and to dispose of the whole subject of legislation, it is the only law on that subject, and without an express repealing clause displaces the old statutes, has been almost universally applied to Codes and revisions." 26 Amer. & Eng. Encyc. of Law (2d Ed.) 738.

We conclude, therefore, that the city council of Dalton had the charter power to pass the ordinance; that it is a reasonable exercise of the police power; that, being an exercise of the police power, and not a revenue or tax ordinance, provisions which relate to taxes and ordinary license fees are not applicable; in fine, that there is no reason for declaring the ordinance void. If, in the discussion, we have been led away from wonted judicial serenity and seriousness, our apology is that the strenuousness with which the collection of this fine of $1 and costs has been resisted and with which the resistance has been resisted, the vehemence of language in the pleadings, the volume of matter in the briefs, the earnestness with which all these questions have been presented—and we must confess that the young men have argued the matter with consummate skill and ability—when brought into contrast with the actual subject-matter of the controversy, presents a phase of humor that has tempted us aside.

Judgment reversed.

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(3 Ga. App. 734)

## COLE v. STATE. (No. 706.)

(Court of Appeals of Georgia. Oct. 29, 1907.)

ASSAULT—JUSTIFICATION—EVIDENCE.

In a prosecution for assault and battery, it is not competent for the defendant to show as justification that prior to the assault, and not contemporaneous therewith, the prosecutor or person assaulted had committed an injury upon the person, family, or property of the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 94.]

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Edna Cole was convicted of an assault, and brings error. Affirmed, with directions.

Mrs. Cole was tried and convicted of the offense of battery in the city court of Fitz-

gerald. She presented a petition for certiorari to the judge of the superior court, who refused sanction; and she brings error. The testimony was that Mrs. Cole came up to the prosecutor, J. F. Greek, in the cotton factory at Fitzgerald, said to him, "You have got to quit whipping my boy," thrust her hand up toward his face, and, according to the statement of the prosecutor, actually touched his face, though it did not hurt him. Several witnesses testified that she did not touch him, and merely pointed her hand up toward his face; but the verdict of the jury necessarily concluded the issue in favor of the theory that there was a slight touching. The defendant's statement was as follows: "Joe Greek had been whipping my boy. He is all the time picking at him, and on one occasion made him drunk. He had just been beating him, and made him cry, and as soon as I saw him I walked up to where he was talking and told him he must not whip my boy again, and shook my hand in his face. I did not hit him at all." The defendant also attempted to prove by witnesses that the prosecutor had slapped and hit her son, a small child, just before the rencounter occurred; that, while the assault on the child did not occur in her immediate presence, the boy ran away crying to her; and that she quickly came and assaulted the prosecutor in the manner specified above. The court repelled the evidence, and error is assigned to this ruling. The two following requests to charge, which were refused by the court, thereby furnishing the basis of another assignment of error, present the theory of the law asserted by counsel for plaintiff in error, to wit: "A parent may not only commit a reasonable battery to protect his or her child, but any treatment of the child by another which, if meted out to the parent, would justify the parent to commit a battery, would, if meted out to the child, justify the parent in committing the same kind of battery upon the one from whom the treatment flows," and "It is not the law that a parent may commit a battery only in defense of a child. He or she may be provoked by a battery on his or her child; and, if the jury believe the battery committed by him or her in consequence of the provocation is reasonable and justified, he or she may be acquitted by the jury; and it is for the jury to decide whether he or she is justified." A chaingang sentence of four months, with alternative of $40 fine, was imposed.

O. H. Elkins, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

POWELL, J. (after stating the facts as above). Judges have to declare the law as they find it to be, and not as they personally wish it to be. Every man who is acquainted with the God-given instincts of motherhood, which impel every true mother to fly, not only to the protection of her child, but also to vindicate wrongs done it, realizes what a strong excuse this natural impulse furnishes for her conduct under circumstances such as this case discloses, and also respects her the more because she so loves and so acts. We would, if in duty we could, strain the tethers of the law, which binds us, in order that we might give this mother a new trial. But what is the law? A mother may justify the commission of an assault and battery by proof of any act done to her child, which if done to herself personally would furnish like justification. This is elemental and undisputed. However, it may be asserted, equally irrefragably, that in misdemeanors, based on assaults or batteries, no provocation which does not occur in the defendant's presence, or at the immediate time of the difficulty, can be pleaded by the defendant in justification. To quote from Bishop's New Criminal Law (8th Ed.) vol. 2, § 41: "The person beset is permitted to act only in self-defense. He cannot take the law into his own hands to inflict punishment for the injury. Therefore, if he strikes when all danger is past, he is guilty." Wharton's Criminal Law (8th Ed.) § —, on the same subject, says: "He can defend, but not punish."

The broadest statement of the rule in behalf of the defendant, so far as has come within our observation is given in Blackstone's Commentaries (book 3, p. 3), where, in discussing the different methods by which private wrongs may be redressed, the venerable writer says: "Of the first sort, or that which arises from the sole act of the injured party, is the defense of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of the peace, which happens, is chargeable upon him only who began the affray. For the law, in this case, respects the passions of the human mind, and (when external violence is offered to a man himself, or those to whom he bears a near connection) makes it lawful in him to do himself that immediate justice to which he is prompted by nature, and which no prudential motives are strong enough to restrain. It considers that the future process of law is by no means an adequate remedy for injuries accompanied with force, since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man to immediately oppose one violence with another. Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be, in fact, taken away by the law of society. In the English law particularly it is held an excuse for breaches of the peace, nay even for homicide itself; but care must be taken that the resistance does not exceed the bounds of

mere defense and prevention, for then the defender would himself become an aggressor."

An exception from the common law and general rule is found in our statute allowing provocation by opprobrious words as a defense in such prosecutions. Even under this statute the opprobrious words must have been used in the presence of the defendant, at the time of the assault, and not previously. Berry v. State, 105 Ga. 683, 31 S. E. 592. Evidence of insulting words used by the prosecutor to the daughter of the accused, while he was absent, is not admissible on a trial of one charged with assault and battery. Walker v. State, 117 Ga. 323, 43 S. E. 737. Hard law, but law. The law will justify an assault for less necessity than it would a homicide. One may strike another who has just hit him, not merely to prevent another immediate blow, but to prevent future similar outrages. This much we deduce from the statement of Blackstone above. This much the law allows to the individual by way of redressing his own wrong and preventing future wrong; but after the initial attack is ended, and the immediate affray is over, the law withdraws its permission for a further breach of the peace, and compels the injured party to resort to the courts for his redress.

It is argued to us that in this case, if the accused had killed the prosecutor, the law would have given such effect to the previous wrongful conduct of the latter and the passion aroused thereby that the homicide might be reduced from murder to manslaughter; and this we concede to be true. It is further insisted that a provocation to which the law gives such effect as to make it mitigation for a homicide ought to have at least enough efficacy to justify a mild battery. The distinction is this: Murder is an unlawful killing with malice. Manslaughter is an unlawful killing in anger without malice. Proof of prior provocation may exclude the idea of malice in the homicide, but does not exclude the idea of unlawfulness. It merely substitutes the element of anger without malice for the element of malice, thus distinguishing the offenses. Battery is the unlawful beating of another, whether it be done with malice or without malice, but in anger. Provocation, which merely substitutes into the offense the element of anger for that of malice, does not alter the nature of the crime. The element of unlawfulness, which in battery is the only necessary element, remains.

This court has no jurisdiction to review a sentence imposed in a criminal case, on the ground that it is excessive, if it be within the limits set by the statute. The lower court is in so much better position to exercise a sound discretion in these matters that we feel a delicacy in making any expression that would seem to show any dissatisfaction with the action of the trial court in this respect. However, in this case, if this record states the whole truth, the sentence is so disproportionate to the offense proved that we feel justified in breaking our wonted silence in such matters. Indeed, the defendant's transgression is so slight, and her alleged provocation so great, that to our minds as men a fine of $1 would be ample, if not excessive. We are not mentioning this fact, however, for the mere purpose of criticism or comment, but as a basis for the direction we have decided to give in connection with our judgment of affirmance in the case. We strongly suspect that the judge of the superior court, to whom the petition for certiorari was presented, overlooked the fact that, in criminal certiorari from the city court of Fitzgerald, the law of certiorari from county courts applies, and that in such cases the judge of the superior court has the power to review the sentence and "to pass such judgment or sentence as, in review of the whole case, is consistent with justice and law." Pen. Code 1895, § 767. In passing upon this question he exercises an original discretion.

We therefore affirm the judgment, with the direction that, within 30 days after the remittitur from this court is filed in the court below, the judge of the superior court may in his discretion sanction the petition for certiorari and cause answer to be made, as prescribed in section 766 of the Penal Code, to the end that he may pass upon the justness of the sentence and change it if he sees fit to do so. Of course, if he is satisfied with the sentence as it is, even upon the ex parte statement of the matter contained in the petition for certiorari, he should decline to exercise the discretion which this direction confers upon him. He is in so much better position to do full justice to the interests of society, as well as of the accused, in this matter, that we would not have anything herein expressed so construed as to operate in any wise to the constraint of a full and free exercise of his untrammeled discretion.

Judgment affirmed, with direction.

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(2 Ga. App. 739)

## HALL v. STATE. (No. 708.)

(Court of Appeals of Georgia. Oct. 29, 1907.)

1. CHATTEL MORTGAGES—CROP TO BE GROWN.

A valid mortgage cannot be made of a crop which has no actual or potential existence at the date of the mortgage. Therefore, where a mortgage was given on a crop planted at the date of the mortgage, but which crop was subsequently destroyed by natural causes, and a new crop planted, the lien of said mortgage did not attach to any portion of the new crop.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 59, 60.]

2. SAME—SALE OF MORTGAGED CROP—PROSECUTION.

A conviction under section 671 of the Penal Code of 1895 could not be predicated on the sale of any part of the crop planted subsequent to the date of the mortgage; but such conviction, to be lawful, must be based on the fraudulent sale of the crop planted before the date of the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 59, 60, 491.]

3. SAME—INSTRUCTIONS.
Written requests embodying the foregoing principles of law should have been given in charge, and the refusal to give them was error.
(Syllabus by the Court.)

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

J. H. Hall was convicted of selling mortgaged property, and brings error. Reversed.

Raines & Gurr and H. A. Wilkinson, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and J. B. Ridley, for the State.

HILL, C. J. The indictment in this case is for a violation of section 671 of the Penal Code of 1895. The evidence for the state showed that the defendant executed a mortgage to the prosecutor covering his crop for 1906; that said mortgage was dated April 16, 1906; that the defendant, without the consent of the prosecutor, sold his crop when gathered, and appropriated the proceeds to the payment of other indebtedness, leaving the mortgage unpaid, and thereby the mortgagee had sustained loss. The defendant contended that the crop covered by said mortgage was first planted in March, 1906; but, while said crop was growing, it was nearly all destroyed by a hailstorm which occurred May 1, 1906. Subsequently to this storm and the destruction of the crop, a new crop was planted, and harvested and sold by the defendant. The evidence does not clearly show how much of the old crop which was covered by the mortgage escaped destruction and came to maturity, and was gathered and sold by the defendant; but there was evidence which tended to prove the contention of the defendant that the amount realized from the old crop was not sufficient to pay liens prior in dignity to the mortgage. The jury solved the facts against the defendant, and we are asked to grant a new trial on the general grounds and because the court erred in refusing to give in charge the following written requests: "(1) The mortgage given to J. W. F. Lowry to secure his debt due him by J. H. Hall is not a good and valid mortgage, unless the crops were planted at the time said mortgage was made and executed. (2) You would not be authorized to convict the defendant, unless the mortgage given by him to J. W. F. Lowry was a valid mortgage. (3) The burden is on the state to show that the mortgage is valid."

Under the evidence in the case, the foregoing requests were pertinent and legal, and should have been given by the court. It is well settled that there can be no valid sale or mortgage of a crop until it is planted. The crop must have an actual or potential existence at the date of the mortgage. Redd & Co. v. Burrus, 58 Ga. 575; Crine v. Tifts, 65 Ga. 644; Forsythe Mfg. Co. v. Castlen, 112 Ga. 201, 37 S. E. 485, 81 Am. St. Rep. 28. If the crop which was planted before the mortgage was executed was in fact largely destroyed by the hailstorm which took place, then the mortgage lien only remained as to the portion of that crop which had escaped destruction. Its lien did not attach to the crop that was planted subsequent to its date; and, if this part of the crop was not sufficient to pay those liens which were prior in dignity to the mortgage lien, then the defendant could not be legally convicted under section 671 of the Penal Code of 1895. Certainly the crop planted subsequent to the date of the mortgage was not subject to it, and the mortgagor could not have incurred any criminal liability to the mortgagee for its sale. There being some evidence in the record which would have sustained the foregoing contentions of the defendant, he was entitled to have the law embodied in his request, applicable thereto, submitted to the jury by the court, and the refusal to do so was error.

Judgment reversed.

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(78 S. C. 398)

## MORRISON v. MUTUAL BENEV. ASS'N OF CHESTERFIELD COUNTY.

(Supreme Court of South Carolina. Oct. 23, 1907.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE—FORFEITURE.
The by-laws of a mutual benefit association requiring the payment of dues provide that, if a member has not belonged to the association for 12 months, he is only required to pay pro rata, and that any member failing to pay the annual dues within the given time shall be dropped from membership. *Held*, that the provision for forfeiture applies as well to members joining during the year as to those belonging at the beginning of the year.

2. TRIAL—INSTRUCTIONS—NECESSITY FOR REQUESTS—RULES OF COURT.
While Const. 1895 requires judges in charging juries "to declare the law," they are not bound to charge in the absence of a request submitted in accordance with a rule of court requiring requests to be submitted before argument, and providing that such additional requests as may be suggested by the argument may be submitted at the conclusion thereof.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 642.]

3. INSURANCE—MUTUAL BENEFIT INSURANCE—FORFEITURE — WAIVER — QUESTION FOR JURY.
Whether a mutual benefit association waived its right to forfeit a policy for nonpayment of dues *held*, under the evidence, to be a question for the jury.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 2009.]

4. SAME—CONTROL AND REGULATION.
Mutual benefit associations are generally governed by the same rules of law as old-line insurance companies.

Appeal from Common Pleas Circuit Court of Chesterfield County; J. C. Klugh, Judge.

Action by C. F. Morrison against the Mutual Benevolent Association of Chesterfield County. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Stevenson & Matheson, for appellant. W. P. Pollock, for respondent.

JONES, J. Plaintiff brought this action to recover $1,000 on a policy of life insur-

ance issued by defendant October 15, 1904, on the life of plaintiff's wife, Elizzie E. Morrison, who died July 22, 1905. The defense set up was that the policy was forfeited for failure on the part of plaintiff to pay a note for entrance fee for himself and wife, and because the annual dues for the period from October 15, 1904, to December 1, 1904, being one-eighth of $1.25, had not been paid on December 1, 1904, which defeated the policy. From judgment for defendant, plaintiff appeals.

The first exception alleges error, in the charge to the jury that section 12 of by-laws of the association which formed a part of the policy entailed a forfeiture of membership, if the dues of about 15 cents were not paid by December 1, 1904. The section in question is as follows: "The annual dues of $1.25 shall be due and payable to the secretary and treasurer of the home office on or before the first day of December of each year. If a member has not belonged to the association for twelve months, he is only required to pay pro rata. Any member failing to pay the annual dues of $1.25 within the given time shall be dropped from the association." The court, in construing this section, instructed the jury: "Now, the question is: What is the proper construction of that section of the by-laws where a member has been in the association for less than a year from the time the annual dues fall due, and therefore is only chargeable for a pro rata of the $1.25 in proportion to the length of time he has been in the association? I charge you that by the terms of the contract it is as much the duty of the member to pay the pro rata which is due as it is the duty of another member to pay the full amount of $1.25; and the same consequences must fall upon the failure to pay one as upon the failure to pay the other. The mention of the annual dues of $1.25 is not intended, and cannot be construed, to mean that it must be a failure to pay $1.25 annual dues to work a forfeiture of the policy; but the failure to pay the annual dues, whatever it may be, is what works the forfeiture. I charge you if you find from the evidence that the assured failed to pay the annual dues, whatever she was due as annual dues on the 1st day of December, 1904, then this policy became forfeited, and was liable to be dropped, and, if the association did drop her from its membership, that that amounted to a cancellation of that policy and the plaintiff cannot recover. That is a question of fact for you to determine as to whether the annual dues were due or not at that time." It is contended by appellant that this charge added to and changed the forfeiture clause in section 12 of the written contract so as to read: "Any member failing to pay the annual dues of $1.25 or such pro rata as may be due under this by-law shall be dropped," etc., and that this construction was violative of the rule that forfeitures should be strictly construed. We think the charge of the court was correct in so far as it construed article 12. It seems clear that this provision as to forfeiture was intended to apply as well to members joining the association any time during the year as to those joining or belonging at the beginning of the year, as the duty to pay annual dues is as important and imperative in the one case as in the other. The words "annual dues of $1.25" fairly include pro rata annual dues at that rate.

The second and third exceptions charge error in failing or refusing to charge plaintiff's request on the subject of waiver of the forfeiture presented to the court after the charge was concluded. The record does not show that the court either charged or refused to charge the request, or made any reference to it whatever. Rule 11 of the circuit court requires that requests to charge be submitted before argument, and provides that such additional requests as may be suggested by the argument may be submitted at the conclusion thereof. The respondent invokes this rule as a justification of the failure of the court to charge as requested. Although the Constitution of 1895 requires judges in charging juries "to declare the law," yet the rule enforced in numerous cases is that an exception for mere failure to charge a particular proposition of law will not be considered, unless a charge to so charge was made. This rests upon the theory that the appellant by not preferring such request, and calling the court's attention to the particular instruction he wishes to be given, is deemed to have acquiesced in the omission, and to have waived the right to such instruction. State v. Adams, 68 S. C. 428, 47 S. E. 676. In this case the request was made, but not in accordance with the rule of court. The rule of court, however, is not in violation of law, and directs the duty of counsel in making requests. It must therefore follow that a circuit judge has a right to ignore a request to charge not presented as required by rule 11, and, if the record shows that the court did not respond to the request, it is fair to presume that he disregarded it for noncompliance with the rule.

Fortunately, however, for appellant, the exceptions taken as a whole and by a liberal construction are broad enough to enable this court to consider whether there was error in not submitting to the jury the question of waiver. The jury were instructed that if the assured failed to pay the pro rata annual dues on December 1, 1904, the policy became forfeited, and she was liable to be dropped, and, if the association did drop her from its membership, that amounted to a cancellation of the policy, and the plaintiff cannot recover. It was erroneous to charge that plaintiff could not recover because of a forfeiture and ignore the doctrine of waiver, if there was evidence to go to the jury under

the issues that the forfeiture had been waived. That there was some evidence of waiver seems clear. The testimony shows that plaintiff's wife was not dropped from the association for nonpayment of annual dues, but for nonpayment of the note accepted in lieu of her membership fee. It was admitted by the defendant on the trial that this was not a ground of forfeiture. While there was testimony that plaintiff's wife was dropped from the membership in January, 1905, for nonpayment of said note, it was also in evidence that Mr. S. J. Sellers, an agent of the association, on August 10, 1905, mailed a letter to plaintiff, calling for the payment of the note for membership fee of himself and wife, stating that the company "is compelled to have the money or drop you from the association," implying that they had not been previously dropped. We should have stated that plaintiff and his wife each took out a policy on same day, and gave their joint note for $10 payable November 1, 1904, in lieu of the membership fees. When this letter by Mr. Sellers was written, it appears the association was not aware of the death of plaintiff's wife. On August 26, 1905, plaintiff replied, inclosing check for $10. The plaintiff has never paid the pro rata annual dues due by him December 1, 1904, and the evidence is that on the payment of the note for membership he was regarded as reinstated, and is now in good standing.

The foregoing constitutes some evidence that the association as to these policies did not regard the nonpayment of the 15 cents dues payable December 1, 1904, as ground of forfeiture. This would certainly be regarded as some evidence of waiver as applied to old-line insurance companies, and in McBryde v. S. C. Mutual Ins. Co., 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769, and Sparkman v. Supreme Council, 57 S. C. 16, 35 S. E. 39, it was declared that mutual insurance companies and fraternal benefit societies are generally governed by the same rules of law as old-line insurance companies.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

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(78 S. C. 408)

## FAUST v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Oct. 26, 1907.)

APPEAL—VERDICT—REVIEW.

The decision of a question of fact by the circuit court is final on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3955.]

Appeal from Common Pleas Circuit Court of Richland County; R. Withers Memminger, Judge.

Action by J. A. Faust against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 54 S. E. 566.

John T. Sloan, for appellant. James S. Verner, for respondent.

WOODS, J. The plaintiff recovered judgment in the court of Magistrate Moorman for the value of a car load of wood alleged to have been lost by the defendant railway company. The appeal is from a decree of the circuit court affirming the judgment of the magistrate.

The plaintiff testified he loaded the car at 114 milepost and placed on it a tag on which was written his own name as consignor and the name of the South Carolina Cotton Oil Company as consignee; and that it was the custom of the defendant railway company to receive cars with shipping instructions so tagged on them from places where there was no agent. The plaintiff admitted that, two or three days after the car had been taken away by the railway company, he accepted a bill of lading from defendant's agent at Cayce, in which D. J. Trotter, instead of the South Carolina Cotton Oil Company, was designated as consignee. Both Trotter and the South Carolina Cotton Oil Company denied receiving the wood. The defendant offered evidence that it had delivered the wood to Trotter. From this statement it is clear that the whole case turned on questions of fact, and in the decision of those questions the judgment of the circuit court is final.

The judgment of this court is that the judgment of the circuit court be affirmed.

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(78 S. C. 404)

## GRAHAM v. BURGISS.

(Supreme Court of South Carolina. Oct. 26, 1907.)

1. CORPORATIONS—OWNERSHIP OF STOCK—ESTOPPEL.

Where a corporation through its stockholders and directors allowed plaintiff to part with his stock with the understanding that he was to have certain stock in another corporation then standing in the name of the first, and acquiesced in its president's transfer of such stock to plaintiff, the corporation could not thereafter question plaintiff's ownership.

2. SAME—TRANSFER.

Where plaintiff was the equitable owner of certain stock standing in the name of a corporation when the corporation's president transferred it to him, the court will give full effect to such transfer.

3. SALES—CORPORATE STOCK—EXECUTION OF CONTRACT—ACTION FOR PRICE.

Where a buyer of corporate stock wrote plaintiff, "I take your 40 shares of F. M. stock at 85, first payment to be made one year from October 15, the other in equal amounts, one and two years each, interest payable semiannually," such contract was a contract to purchase a particular 40 shares of stock, which became executed on the seller's tender of the stock, at which time, on the tender being refused, a right of action accrued for the entire purchase money.

4. INTEREST—OBLIGATION TO PAY.

Where a contract to purchase stock provided for deferred payments with interest payable semiannually, interest ran from the date of the contract.

Appeal from Common Pleas Circuit Court of Greenville County; R. C. Watts, Judge.

Action by C. E. Graham against W. W. Burgiss. From a judgment for plaintiff, defendant appeals. Affirmed.

Cothran, Dean & Cothran, for appellant. J. A. McCullough, for respondent.

WOODS, J. This action was brought by the plaintiff to recover the purchase money of certain shares of stock in the Franklin Cotton Mill. The contract of purchase was made by defendant with Huguenot Mills, and the defense mainly relied on was that Huguenot Mills had never transferred its interest to the plaintiff, and that therefore the defendant was not liable to him for the purchase money. The circuit judge directed a verdict for the plaintiff. The defendant offered no testimony and made no question of the credibility of the testimony on the part of the plaintiff. The issue involved in this appeal therefore is whether the circuit court's legal conclusion from the undisputed facts is sound.

The defendant on the 9th of July, 1902, contracted in writing with the Huguenot Mills to buy from it 40 shares of the capital stock of the Franklin Mill, each of the par value of $100, at $85 per share. When the contract was made, the plaintiff was president of the Huguenot Mills, and owned five-sixths of its stock, and R. L. Graham and Abertheny owned the other sixth. Afterwards, a reorganization of the Huguenot Mills was effected. The agreement for reorganization contemplated an increase of capital stock and the sale of all the capital stock owned by the plaintiff in the Huguenot Mills, and his ownership of the stock of the Franklin Mill subject to the contract of purchase by the defendant, Burgiss. Indeed, it seems, from the following evidence of the plaintiff, he was recognized as the real owner of the stock in the Franklin Mill before the reorganization, though the certificate was held in the name of the Huguenot Mills: "There has never been a new corporation. That stock was issued to the Huguenot Mills. * * * It was issued to the Huguenot Mills which I have stated before, and I owned five-sixths of the Huguenot Mills, and my brother and a partner of his owned the other one-sixth; and in selling out the Huguenot Mills to the new organization they didn't want to buy all of the assets, and I had over $100,000 worth of assets, and this stock standing in the name of the Huguenot Mills, and this stock was never sold to the new organization, and, my brother being president of the new organization, he had to transfer it to me." In pursuance of the understanding, R. L. Graham, the new president of the Huguenot Mills, assigned the certificate of stock in the Franklin Mill to the plaintiff. No resolution was ever passed by the directors of the Huguenot Mills authorizing the transfer; but the corporation through its stockholders and directors have acted under the reorganization agreement and acquiesced in the transfer of the stock to the plaintiff from 1904 to the present time. The corporation through its stockholders and directors having thus allowed the plaintiff to part with his stock in the Huguenot Mills, with full understanding that he was to have the stock in the Franklin Mill, and having acquiesced in the president's transfer to the plaintiff, it is now too late for the corporation ever to question his ownership. Lancaster Co. v. Railroad Co., 28 S. C. 142, 5 S. E. 338.

The plaintiff's title was good for another reason. There can be no doubt, under the facts stated, before the transfer by the president the plaintiff was the equitable owner, and entitled to a legal transfer of the property. Having such right, it was a duty of the corporation imposed by the law to make the transfer, and the president as its executive officer was the proper person to perform that duty for it. The court will therefore give full recognition and effect to this transfer made by the president in the name of the corporation.

In addition to all this, the defendant fully recognized plaintiff's right to the stock, and often promised to pay him the purchase money.

The position that the recovery could not be for the full contract price, but for the difference between the contract price and the market value at the time of trial, is not tenable. The language used by the defendant in his letter closing the bargain is: "The writer confirms the trade with you as follows: I take your forty shares of Franklin Mill stock at 85, first payment to be made one year from the 15th of next October, the other to be paid in equal amounts, one and two years each, interest payable semiannually." This was not a promise to purchase, but the actual purchase of a particular 40 shares of stock, then held by the Huguenot Mills. The contract was therefore fully executed, the shares of stock thereby became the property of the defendant in the hands of the former owner, and, when the seller's obligation was fully performed by tender to the defendant, the right of action accrued for the entire purchase money. Woods v. Cramer, 34 S. C. 516, 13 S. E. 660; 1 Benjamin on Sales, p. 333; 24 A. & E. Enc. 1046, 1120.

Defendant's position that he is liable for interest only from maturity of the installments is also untenable. The rule is universally recognized that a contrat to pay a certain sum with interest means interest is to run from the date of the contract.

The judgment of this court is that the judgment of the circuit court be affirmed.

(78 S. C. 408)

## BANK OF SPARTANBURG v. MAHON.

(Supreme Court of South Carolina. Oct. 26, 1907.)

1. CONTRACTS—CONSIDERATION—MORAL OBLIGATION.

A perfect moral obligation is a sufficient consideration for a contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 257–381.]

2. BILLS AND NOTES—ACCOMMODATION INDORSER—COLLATERAL—MISAPPLICATION—ACCOUNTING.

An accommodation indorser or surety on a note may require the creditor to account for the value of any collateral held for his protection and released or misapplied to the indorser's prejudice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 604–605.]

3. CONTRACTS—CONSIDERATION.

A firm, being indebted to a bank on notes indorsed by M. and for an unsecured overdraft, and also indebted to M. personally, agreed to sell its stock of goods and use the proceeds to pay all the notes on which M. was indorser, and prorate the surplus between the overdraft and the personal debt of the firm to M. Neither the bank nor M. had any lien on the goods, nor was there any extension of time given, nor any change of possession, either by the bank or M., by virtue of such agreement. *Held*, that the agreement was unenforceable against the firm for want of consideration, and that, at least before the time the proceeds of the goods were deposited in the bank, the bank and M. were free from all responsibility to each other for the application of such proceeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 240.]

4. BANKS AND BANKING—APPLICATION OF DEPOSITS.

Where an agreement of a firm to sell its assets and apply the proceeds to certain notes held by a bank, indorsed by M., and to prorate the surplus between an unsecured overdraft and a personal debt to M., was without consideration, the proceeds, on being deposited in the bank to the credit of the firm's general account, were subject to check and were not assets under the control of the bank, which it could apply without the firm's consent in accordance with the agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 353, 354.]

5. SAME—UNMATURED NOTES.

A bank cannot apply a depositor's account, subject to check, to his unmatured notes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 353–354.]

Appeal from Common Pleas Circuit Court of Greenville County; R. C. Watts, Judge.

Action by the Bank of Spartanburg, as indorsee, against G. H. Mahon. From a judgment for plaintiff, defendant appeals. Affirmed.

Jos. A. McCullough, for appellant. Simpson & Bomar and M. F. Ansel, for respondent.

WOODS, J. The Bank of Spartanburg, as indorsee and holder, brought this action against G. H. Mahon as indorser on three promissory notes. On the first trial of the cause the circuit court granted a nonsuit holding that Mahon was never liable on the notes. This court held otherwise and reversed the judgment. 75 S. C. 255, 55 S. E. 529. On the second trial the sole issue was whether the plaintiff bank had come into possession or control of funds of the principal debtors, James & Stewart, which it should have applied to the payment of the notes. The circuit judge held there was no evidence to support defendant's contention, and instructed the jury to find a verdict in favor of the plaintiff for the amount claimed. The exceptions charge error in this instruction. In stating the material facts, the defendant's version of those in dispute must be taken; for, if there was any evidence from which the jury could have found the bank had control of the funds which it ought to have applied to the payment of the notes in suit, then it was error to direct a verdict for the plaintiff.

In the spring of 1904 James & Stewart, a firm doing business in the city of Spartanburg, owed the Bank of Spartanburg notes aggregating $10,200, indorsed by defendant, Mahon, who lived in Greenville, and also an unsecured overdraft of about $4,000. At the same time the firm owed Mahon an unsecured debt of $10,000. In April Mahon had a conference with James, one of the partners, and Boyd, the cashier of the Bank of Spartanburg, at which it was agreed, as Mahon testified, the stock of goods of James & Stewart should be sold and the proceeds of the sale be first applied to the payment of the notes indorsed by Mahon, and the surplus pro rata to the overdraft due the bank and the debt due Mahon. These are the words in which Mahon states the agreement: "It was in Mr. James' store, and Mr. Boyd was there; and it was agreed that we would sell the stock of goods, and several parties' names were mentioned that would probably buy the stock of goods, and these notes which I was indorser on were to be paid off, and then the surplus was to be prorated to the overdraft and to my individual notes, to share and share alike." Early in May, 1904, James & Stewart sold the stock of goods for $10,366.53, and James deposited the whole sum to the credit of the firm in the Bank of Spartanburg. The overdraft at this time was $3,338.83, so that, after the deposit, there was a balance to the credit of James & Stewart of $7,027.71. This balance James & Stewart immediately checked out; one of the checks being in favor of the bank for $4,955, to be applied to the notes on which Mahon was liable as indorser. After payment in full of several of the notes indorsed by Mahon, $971.35, the remainder of the check, was applied as a payment on one of the notes in suit. The contention of the defendant is that under his alleged agreement with the bank and James & Stewart, when James deposited the proceeds of the stock of goods, the bank was in control of the deposit, and was bound to apply the whole sum to the payment of the indorsed notes.

There is no doubt of the soundness of de-

fendant's position that a perfect moral obligation is in this state a sufficient consideration to support a contract. McMorris v. Herndon, 2 Bailey, 56, 21 Am. Dec. 515; Ferguson v. Harris, 39 S. C. 323, 17 S. E. 782, 39 Am. St. Rep. 731. It is no less true that a surety or accommodation indorser has the right to require the creditor to account for the value of any collateral held for his protection and released or misapplied to his prejudice. The issue is whether these principles are available to the defendant under the evidence. It is to be observed neither the bank nor Mahon had any interest in the goods, or any lien on them, or any control over them. If there was an agreement for the sale of the goods, it must, therefore, be treated as the undertaking of James & Stewart alone; for, being the absolute owners in exclusive possession, they alone could sell. So, also, after the sale, the purchase money was in the absolute control of James & Stewart. Hence it is manifest that, up to the time the proceeds were deposited, the bank and Mahon were free from all responsibility to each other for the sale of the goods or the application of the proceeds. If we assume the bank had control of the fund after it was deposited, then there was a sufficient consideration to support its promise to apply it according to the agreement. The evidence of Mahon presents this condition of affairs: A mercantile firm in failing circumstances; two creditors, anxious about their debts, and seeking payment from assets inadequate for the payment of both; a meeting of these creditors with the debtor, and the consideration of the disposition of the stock of goods —usually the most important source of payment; an agreement for the conversion of this asset into money, to be paid to one creditor, who agrees to apply it to the debts in certain proportions. Is it not evident there is a sufficient valuable consideration for the contract of the creditors with each other, in that each creditor has changed his position, and altered his chances of obtaining payment from the visible assets of the debtor, on the faith of the promise of the other? Is it not more evident that it would be a fraud on the part of the creditor, authorized to receive and apply the proceeds of sale, to apply the whole amount realized to his own debt, to the exclusion of the debt of the other, in violation of his agreement? In this case, it is true, the arrangement which Mahon says was made seems a foolish one on the part of the bank, inasmuch as the fund to be realized from the sale of the goods was to be applied first to a debt already secured by Mahon's indorsement. That fact might tend to support the statement of Boyd, the cashier, that no such agreement was made; but, if the agreement was made, its validity could not be impaired by the fact that the bank made a bad bargain. We think, if the agreement was made, and the fund derived from the sale came under the control of the bank, it could not escape its promise to apply the money first to the notes indorsed by Mahon, for lack of consideration for its promise.

But under the law of this state the fund never came under the control of the bank. As to James & Stewart, it seems clear there was no consideration, either legal or moral, upon which the agreement could rest. There was no contract for extension, nor any stipulation which could possibly be a benefit to them; nor was there any surrender by the other parties of any right or claim against James & Stewart. True, they were under a moral obligation to apply their assets to the payment of their debts; but that obligation was not for a preferential, but an equal, distribution. Hence, when the fund was deposited to their credit, there was not in existence a contract binding on them by virtue of which the bank could, without their consent, apply the deposit to the indorsed notes. In this the case differs from Livingstain v. Columbian B. & T. Co., 77 S. C. 305, 57 S. E. 182. The deposit made by James & Stewart was, therefore, subject to their exclusive control, and the bank was bound to pay their checks on it until the account no longer showed anything to their credit. This the bank did, and the defendant has no valid claim to credit for funds which the bank could not control.

The only note indorsed by Mahon which had matured was paid by James & Stewart out of the deposit. While there has been difference of judicial opinion in this state as to the right of a bank to apply the balance of a deposit account to matured notes of a depositor held by the bank, it has never been doubted a depositor's consent is necessary before a bank can apply funds deposited, subject to check, to a depositor's unmatured notes. Fogarties v. Stillman, 12 Rich. Law, 518, 78 Am. Dec. 468; Callaham v. Bank, 69 S. C. 374, 48 S. E. 293.

The judgment of this court is that the judgment of the circuit court be affirmed.

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(78 S. C. 413)

## PAGAN v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Oct. 26, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT — FELLOW SERVANTS — ASSUMPTION OF RISKS.

When one takes employment under another, he assumes in general the natural and ordinary risk of such employment, which includes the negligence of a fellow servant whom the employer has selected with due care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 567–573.]

2. SAME—TEST.

Whether a person by whose negligence a servant is injured is a vice principal or a fellow servant does not depend on a difference of grade, rank, or authority, but on the character of the act performed by the offending servant, as to whether it is the performance of a duty which

the master owed to the injured servant and intrusted to the offending servant to perform.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 375, 422–448.]

3. SAME—DUTIES OF MASTER.

The duties imposed by law on a master are to furnish safe and suitable appliances, to see that they are kept in proper repair, to provide a safe place to work, to employ a sufficient number of servants to perform the labors of their employment, and to select competent servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 135, 171, 178, 179, 327, 334, 336.]

4. SAME—RAILROADS.

Prior to the adoption of Const. 1895 the fellow servant rule was applicable to railroads.

5. SAME—ENGINEER AND BRAKEMAN.

A railroad's rules provided that the conductor should have charge of the train, that enginemen were jointly responsible with conductors for the movement and protection of their trains, and that they should see that brakemen riding on their engines promptly returned to their positions whenever necessary, and required brakemen, when their trains were running, to ride on top of them and to respond to the engineer's call for brakes, and to set brakes without call from the engineer when necessary, and report to and receive instructions from the trainmaster, and obey orders from the conductor. *Held*, that a brakeman on a freight train was not under the direct control of the engineer, within Const. 1895, art. 9, § 15, authorizing a railroad employé to recover for injuries resulting from the negligence of a superior having the right to control or direct his services, but that the engineer and the brakeman were fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 503, 505, 508, 509.]

6. SAME—ENGINEER AND FIREMAN.

An engineer is a vice principal and not a fellow servant of his fireman, within Const. 1895, art. 9, § 15, giving to railroad employés the right to recover for injuries sustained by the negligence of a superior having the right to control or direct the services of the party injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 503, 505, 508, 509.]

Appeal from Common Pleas Circuit Court of Richland County; Geo. W. Gage, Judge.

Action by Norman P. Pagan against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Logan & Edmunds and Nelson & Nelson, for appellant. E. M. Thomson, for respondent.

WOODS, J. This appeal from an order of nonsuit depends on whether a railroad company is liable to the plaintiff, who was a brakeman, for an injury received from being thrown from a freight train by the negligence of the engineer in suddenly and without warning checking the speed of the train. The general rule in this state as to the negligence of fellow servants is thus stated in Brabham v. Telegraph Co., 71 S. C. 56, 50 S. E. 717: "When one takes employment under another, he assumes the natural and ordinary risk of such employment, which includes the negligence of a fellow servant whom the employer has selected with due care. In determining who are fellow servants, the test or rule in this state is not whether the servants are of different grade, rank, or authority, one of them having the authority to control and direct the services of another; but the test is in the character of the act being performed by the offending servant, whether it was the performance of some duty the master owed to the injured servant, the performance of which duty the master had intrusted to the offending servant." The duties imposed by law on the master are: "(1) To furnish safe and suitable appliances, and to see that they are kept in proper repair; (2) to provide a safe place to work; (3) to employ a sufficient number of servants to perform the labors of their employment; (4) to select competent servants." Until the adoption of the Constitution of 1895 these general rules in their full force applied to railroads, and exempted them from all liability to an employé for the negligence of a fellow servant; and under these rules an engineer and a brakeman were held to be fellow servants. Boatwright v. Railroad Co., 25 S. C. 128; Evans v. Chamberlain, 40 S. C. 104;[1] Lyon v. C. & W. C. Ry. Co., 77 S. C. 336, 58 S. E. 12. By article 9, § 15, of the Constitution of 1895, employés of railroads are given the same right of recovery as a person not an employé (1) where the injury results from the negligence of a superior officer or agent; (2) where it results from the negligence of a superior having the right to control or direct the services of the party injured.

The conductor is the officer and representative of the railroad company in charge of the train; and the entire train crew, including the engineer, is subject to his orders. The railroad rules introduced provide that the conductor shall have charge of the train to which he is assigned, and the direction and control of all persons employed thereon. The plaintiff relies mainly on the following rules to show that the engineer is the superior of the brakeman, and that the brakeman is under his control or direction:

"Rule 502. As to Enginemen. They are jointly responsible with the conductor for the movement and protection of their train in accordance with the rules; and while they must obey all proper orders by the conductor or others, as provided by the rules, they are individually responsible for the observance of the rules relative to their duties, and must decline to obey any order by the conductor or any other person which involves the violation of such rules, or peril to persons or property."

"Rule 516. * * * They must maintain, as far as practicable, regular and uniform speed, and must avoid sudden increase or checking of speed, except when necessary to prevent accident. They must avoid excessive speed on downgrades, and run with due caution where the track is under repair, and

[1] 18 S. E. 213.

at all points where there is reason to apprehend danger."

"Rule 545. * * * They must see that brakemen who are riding on their engines promptly return to their positions on the train whenever it is necessary."

The engineer is in charge of the engine, and, though subject to the orders of the conductor, it is essential that he should exercise a degree of discretion in the management of his engine. He has no authority over the brakemen, except to require them to leave the engines and return to their positions on top of the train; and it is to be observed, under the rules, the brakeman is never on the engine in the discharge of a duty, but only in taking temporary refuge in extremely cold or stormy weather. On the other hand, the brakemen are in charge of the brakes on freight trains, and, though subject to the orders of the conductor, they also are required to exercise a degree of discretion in the discharge of the duty imposed on them, as appears by the following rules and others introduced in evidence. The portions of these rules we have italicized shows this discretion in some circumstances extends to complete control of the train:

"Rule 663. As to Brakemen. When their trains are running they must ride on top of them, and *in such positions as to be able to control* them most effectually and to pass signals the whole length of the train."

"Rule 666. * * * When the control of the train is dependent wholly or in part upon the manual application of the brakes, they must promptly perform this duty at all points where its necessity is apparent, without waiting for a signal from the engineman or directions from the conductor, and under all circumstances they must respond instantly to the engineman's call for manual application of the brakes. They must apply the brakes in such succession as to take up the slack of the train gradually and avoid breaking it in two, must not slide the wheels, and on long grades must release each brake at such intervals as may be necessary to avoid excessive heating of the wheels."

"Rule 659. * * * Freight brakemen will report to and receive instructions from the trainmaster. When on duty they must obey the orders of the conductor."

As the engineer is in charge of the engine, so is the brakeman in charge of the brakes—both exercising a degree of control over the management of the train, both subject to the orders of the conductor, but not of each other. The fact that the management of the engine requires greater intelligence and more discretion than the management of the brakes does not constitute the engineer an officer or agent superior to the brakeman. To make the superiority of the officer or agent, within the meaning of the Constitution, depend on the shades of intelligence or discretion required in carrying out the rules of railroad companies, would be to sweep away the whole fellow servant doctrine as applied to railroads, in opposition to the clear meaning of the Constitution. Nor does the requirement that the brakeman shall respond to the signals of the engineer determine the relation. The engineer, and even conductor, must respond to the signals of flagmen and switchmen; but responding to a signal in obedience to a rule requiring response obviously does not signify that the employe that gives the signal is a superior officer or agent, or that he has a right to control or direct the services of him who acts on it.

The relation of a fireman to an engineer is entirely different from that of the brakeman. The fireman works on the engine as the immediate subordinate of the engineer who directs his service. As to him we do not see how it could be doubted the engineer would be, under the Constitution, a person for whose negligence the railroad company would be liable. The force of the reasoning and the weight of the authority of the cases so holding are fully recognized. So. Ry. Co. v. Cheaves, 36 South. 691, 84 Miss. 565; Ragsdale v. Railroad Co. (C. C.) 42 Fed. 383. But these cases do not discuss and have no application to the relation of engineer and brakeman.

In Evans v. L., N. O. & T. Ry. Co., 12 South. 581, 70 Miss. 527, the Supreme Court of Mississippi decided the precise question here under consideration; the constitutional provision of that state being the same as ours. In discussing the relation of engineer and brakeman, the court thus clearly states the meaning of the Constitution: "As to these the relation of superior and subordinate does not exist, but they are coequal, co-ordinate co-operators, each with a part to perform, like different members of the human body—each with appropriate functions, some with greater or less honor, it may be, but all necessary coefficients in the complete whole. Neither can say to the other, 'I have no need of thee,' or claim superiority or right to control or direct the service of the other in obeying the rule prescribed for and obligatory on all alike. Their relation is correlative. They have reciprocal duties in enforcing the rules of a common superior for the successful operation of the train, and superiority or right to control, in the sense of the Constitution, cannot be affirmed of them. The constitutional provision has reference to a superior agent or officer of the sort well known as such, and any other person in the company's service, by whatever name, who may be invested with the right to control or direct the services of others, according to his discretion and judgment, one to whom is committed the discretion or control of others for the accomplishment of some end dependent upon his independent orders born of the occasion, springing from him as director, and not consisting of the mere execution of routine duties in pursuance of fixed rules by various employés, each charged with certain

parts in the general performance." In construing a statute similar in terms to our constitutional provision, the Supreme Court of Ohio also held the engineer and brakeman not to sustain the relation of superior and subordinate. Cleveland, etc., Ry. Co. v. Shanower, 71 N. E. 279, 70 Ohio St. 166.

We are of the opinion that an engineer of a freight train is a fellow servant of the brakeman, and is not a superior officer or agent, nor a person having a right to direct or control the services of the brakeman. The railroad company, therefore, is not liable for an injury to a brakeman caused by the negligence of the engineer on the same train.

The judgment of this court is that the judgment of the circuit court be affirmed.

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## STATE ex rel. PEOPLE'S BANK OF GREENVILLE v. GOODWIN, County Sup'r, et al.*

(Supreme Court of South Carolina. Oct. 26, 1907.)

1. MANDAMUS — GROUNDS — ISSUE OF WARRANTS BY PUBLIC OFFICERS — STATUTORY PROVISIONS.

Under Civ. Code 1902, § 607, prohibiting public officers from applying funds from current taxes to payment of past indebtedness, and section 809, forbidding the county supervisor from drawing checks unless the county treasurer has reported funds in the treasury to pay them, there is no ground for mandamus to compel the county supervisor to draw a warrant for the payment of unpaid claims when the return shows that there are no funds in the hands of the county treasurer applicable to their payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 217–222.]

2. SAME — EXISTENCE OF RIGHT TO BE ENFORCED—LEVY OF TAXES.

Under Const. art. 5, § 10, authorizing the General Assembly to vest in municipal authorities of a county power to levy taxes for corporate purposes, the Supreme Court cannot issue a mandamus to compel the county board of commissioners to levy a special tax to pay ordinary claims against the county, where the General Assembly has not conferred such power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 37.]

3. TAXATION—EXTENT OF POWER—STATUTORY PROVISIONS.

Civ. Code 1902, § 799, requiring the county board of commissioners to prepare an estimate of the amount necessary to pay expenses incurred by the board and for ordinary county expenses, and to report the same to the Comptroller General for submission to the General Assembly in order to provide necessary taxation for county purposes, was intended to embrace claims for past indebtedness legally approved by the board.

4. COUNTIES—ALLOWANCE OF CLAIMS—CONCLUSIVENESS.

The action of the county board in allowing a claim presented in such a form as to give the board jurisdiction is an adjudication in the merits of the claim, not subject to collateral attack, and hence not affected by the conclusions of an investigating committee that the claim is invalid, though it might be set aside for fraud in a direct proceeding instituted for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, §§ 322–325.]

5. SAME—WANT OF JURISDICTION—COLLATERAL ATTACK.

Under Civ. Code 1902, § 806, providing that no claim shall be audited and paid by the county board unless it is itemized and accompanied by an affidavit that the items are correct, etc., the board has no jurisdiction to audit and allow a claim not so itemized nor verified, and its allowance of such claim is void and subject to collateral attack.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, §§ 322–325.]

6. SAME—RECORD—SHOWING JURISDICTIONAL FACTS.

Facts necessary to give the county board jurisdiction in the auditing and allowing of claims must appear on the record, since it is an inferior tribunal, and, if such facts do not appear, its judgment may be treated as a nullity wherever encountered.

7. TAXATION—LEVY—ITEMS—CLAIMS NOT LEGALLY ALLOWED.

In making the estimate required by Civ. Code 1902, § 799, of the amount necessary to pay expenses incurred by the county board of commissioners and for ordinary county expenses, for the purpose of enabling the General Assembly to make the proper levy, the board is under no duty to include other than valid claims. Hence, claims not itemized or verified by affidavit need not be included, even though they have been audited and allowed.

Mandamus by the people, on the relation of the People's Bank of Greenville, against J. P. Goodwin, county supervisor, and others. Petition dismissed.

J. A. McCullough, for petitioner. H. J. Haynsworth, for respondents.

WOODS, J. In this petition for mandamus, the People's Bank of Greenville alleges it purchased for valuable consideration and without notice of any defects, if any exist, a number of claims listed in the petition, against the county of Greenville, which had been audited and approved by the county board of commissioners. The petition further alleges: "That although the county had and now has funds applicable to the payment of the said claims, J. W. Walker, county supervisor, and being the predecessor of the present incumbent, and the old board of county commissioners, refused to take any steps toward paying the said claims, but denied the validity thereof, and the present respondents, after demand made upon them, refuse to take any steps towards the payment of the said claims, and J. P. Goodwin, county supervisor, refuses, after demand made upon him, to draw his order or warrant upon the county treasurer upon the funds in his possession applicable to the said claims or any of them, and the respondents, after demand upon them, have failed and refused to do the acts required of them by law, looking towards the payment of the said claims or any of them, and they deny the validity of the said claims, or that the county is liable on account thereof, and the county commissioners of Greenville county refuse to levy a tax to pay the said claims or any part thereof, as they are required by law to do, and they further refuse to le-

* For opinion on petition to rehear, see 59 S. E. 361.

clude the said claims, or any part of them, in the budget of expenses incurred for ordinary county expenses and report the same to the Comptroller General of the state, by him to be submitted to the General Assembly, in order to provide the necessary taxation for county purposes, and they have attempted to repudiate the said claim and have refused, and still refuse, to take any action whatsoever, looking towards the recognition and payment thereof." The prayer is: "That J. P. Goodwin, county supervisor, be required to draw his order or warrant upon the county treasurer for such funds as may be in his hands applicable to the said claims or any of them. (2) That the board of county commissioners of the said county be required to levy a tax in payment of the said claims. (3) That the said board of county commissioners be required to include in the budget, or estimate of the amount of money necessary to pay the expenses incurred by the said board and for ordinary county expenses, the claims aforesaid and report the same to the Comptroller General of the state, to be by him submitted to the General Assembly in order that their payment may be provided for. (4) That the respondents and each of them be required to do any and all acts required of them by law looking towards the recognition and payment of the said claims. (5) For such other and further relief as petitioner may be entitled to. * * *"

The return shows there are no funds in the hands of the county treasurer applicable to the claims set out in the petition, which are for past indebtedness; and section 607 of the Civil Code of 1902 prohibits the respondents, as public officers, from applying the funds arising from the taxes for the current year to the payment of indebtedness contracted in any previous fiscal year. Section 809 of Civil Code of 1902 forbids the supervisor to draw checks unless the county treasurer "has reported funds in the treasury to pay the same," and it forbids the county treasurer to pay checks drawn in violation of its provisions. There is therefore no ground to ask for mandamus to require the issuing and payment of a check for the amount of petitioner's claims.

By section 10, art. 5, of the Constitution, the General Assembly was authorized to vest in the municipal authorities of a county the power to lay taxes for corporate purposes, but the General Assembly has not seen fit to confer the power on the county board of commissioners, except a limited power to lay a special tax of one mill for roads. 23 St. at Large, p. 1012. Therefore, this court cannot issue a mandamus to require the board to do an act not within its official duty or power. In Supervisors v. U. S., 18 Wall. (U. S.) 77, 21 L. Ed. 771, the court says: "It is very plain that a mandamus will not be awarded to compel county officers of a state to do any act which they re not authorized to do by the laws of the state from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred on them by the author of their being, and it may be observed that the office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing. A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked. Is it then the duty of the board of supervisors of a county in the state of Iowa to levy a special tax, in addition to a county tax of four mills upon the dollar, to satisfy a judgment recovered against the county for its ordinary indebtedness? The question can be answered only by reference to the statutes of the state." U. S. v. Clark County, 96 U. S. 211, 24 L. Ed. 629; U. S. v. Macon County Court, 99 U. S. 582, 25 L. Ed. 331. It is true the principle thus stated in Ralls County Court v. U. S., 105 U. S. 733, 26 L. Ed. 1220, has been generally recognized and followed: "It must be considered as settled in this court that, when authority is granted by the legislative branch of the government to a municipality or a subdivision of a state to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet, at maturity, the obligations to be incurred, is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention. The power to tax is necessarily an ingredient of such a power to contract, as, ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation." U. S. v. Clark Co., supra; Quincy v. Jackson, 113 U. S. 337, 5 Sup. Ct. 544, 28 L. Ed. 1003; Scotland Co. v. Hill, 140 U. S. 44, 11 Sup. Ct. 697, 35 L. Ed. 353. But this principle has no application here, because the claims involved are not extraordinary debts, but ordinary county claims for current expenses of the class which the General Assembly undertakes to provide for by a direct legislative levy. City of Cleveland v. U. S., 111 Fed. 341, 49 C. C. A. 383. Besides, it will be found, in all the cases above cited in which the power and duty to levy a tax to pay a debt has been implied from the authority to make the debt, the officers to whom such power and duty have been attributed were authorized by law to levy taxes for the general purposes of the municipality. For the courts to undertake to create the machinery of taxation would be to usurp a legislative function. This court therefore has no power to issue a mandamus to require the levy of a special tax to pay the petitioner's claims.

But the petition alleges, the claims now in controversy against the county having been approved by the county board of commissioners, the court should issue its writ of

mandamus requiring the board to include the claims in its estimate to be submitted under section 799 of the Civil Code of 1902, which reads as follows: "The county board of commissioners shall prepare an estimate of the amount of money necessary to pay the expenses incurred by said boards and for ordinary county expenses, and report the same to the Comptroller General of the state, on or before the 5th day of January of each year, to be by him submitted to the General Assembly, in order to provide the necessary taxation for county purposes." This section was clearly intended to embrace past indebtedness. The purpose of the estimate is to enable the General Assembly "to provide the necessary taxation for county purposes," and taxation is as essential for the payment of past indebtedness as for payment of current expenses. But it is not necessary to resort to the spirit of the act. By its express language the section requires: "An estimate of the money necessary to pay the expenses incurred by said boards and for ordinary county expenses." The expenses already incurred by the board clearly embrace all claims legally approved by the board up to the date of the estimate. Ordinary county expenses are those to be incurred for the current fiscal year.

The respondents, however, allege these claims should not be included in the estimate required by the statute: (1) Because they were approved by preceding county boards of commissioners without being itemized and verified; and (2) because a number of the claims were fraudulent, and the rest, for other reasons affecting the merits, were not valid claims against the county. As to the merits of the claims, it is well settled by a number of decisions of this court that the action of the county board of commissioners in approving or disallowing a claim against the county, presented in such form as to give the board jurisdiction, is an adjudication. Richland County v. Miller, 16 S. C. 236; State v. Kirby, 17 S. C. 565; Jennings v. Abbeville, 24 S. C. 543; State v. Appleby, 25 S. C. 103; Kendall v. County Commissioners, 28 S. C. 258, 5 S. E. 622; Tinsley v. Union County, 40 S. C. 281, 18 S. E. 794; Lockwood v. Adams, 63 S. C. 191, 41 S. E. 82. No doubt, such a judgment may be set aside for fraud by a direct proceeding instituted for that purpose. Farrow v. Dial, 1 McMul. 292, 36 Am. Dec. 267; Brown v. Buttz, 15 S. C. 488; Lockwood v. Adams and Richland County v. Miller, supra. But it is not affected by the conclusions of an investigating committee that the claim upon which it rests is invalid for fraud or any other reason. Wheeler v. County, 18 S. C. 135; State v. Appleby, supra. The finding of the investigating committee appointed under the act of 1905 (24 St. at Large, p. 1109) as to the merits of the claims can have no effect. Indeed, the act confers on the committee no power except to investigate. No proceeding has been instituted to set aside the approval or audit of the claims for fraud, and mandamus could not be refused for lack of merit in the claims.

But the fact alleged in the return, which is not traversed, that the claims were not verified or itemized as required by statute, is fatal. Section 806 of the Civil Code of 1902 provides: "No accounts shall be audited and ordered to be paid by the board of county commissioners for any labor performed, fees, services, disbursements, or any other matter, unless it shall be made out in items and accompanied with an affidavit attached thereto, and made by the person or officer presenting or claiming the same, that the said items are correct, and that the labor, fees, disbursements, services or other matters charged therein have been in fact done, made, rendered, or are due, and that no part of the same has been paid or satisfied." Until a claim is presented in the form required by this statute, a county board of commissioners has no jurisdiction to audit it. The county board of commissioners being an inferior tribunal, the facts necessary to give it jurisdiction must appear on the record; and, if they do not appear, its judgment may be treated as a nullity wherever encountered. Devall v. Taylor, Cheves, 5; McCall v. Cohen, 18 S. C. 198. For this reason, the county board of commissioners are under no duty to treat the claims as valid and include them in the estimate of the expenses incurred.

The petition for mandamus is dismissed.

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(145 N. C. 279)

## TOMLINSON v. BENNETT.

(Supreme Court of North Carolina. Oct. 23, 1907.)

1. MONEY RECEIVED—EXECUTORY CONTRACT—IMPLIED PROMISE TO REPAY.

If one in part performance of an executory contract pays money and delivers personalty, and for any reason, for which he is not responsible, the contract is not executed, he can recover the money on an implied promise to repay it and the value of the personalty as for a conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Received, §§ 9–10.]

2. LIMITATION OF ACTIONS—PAYMENT UNDER EXECUTORY CONTRACT—ACCRUAL OF RIGHT TO SUE.

Limitations run against an action to recover money paid under an executory contract not executed from the time the contract is broken, and not from the time the money is received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 266.]

3. SAME—ESTOPPEL TO PLEAD LIMITATION.

Though one may not plead limitations where his inequitable conduct has prevented another from suing during the statutory period, defendant could plead limitations against an action to recover money paid and personalty delivered on an executory contract not executed, though he sued plaintiff about the time the contract was broken, and failed to file his complaint for several years, and then took a nonsuit, since plaintiff at any time could have compelled defendant as plaintiff in the former

action to file his complaint or dismiss, or could have sued earlier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 56.]

4. EVIDENCE—PAROL—ADMISSIBILITY.

Where plaintiff pleads that he was prevented from setting up his claim as a counterclaim in an action by defendant through defendant's dismissal of his suit without filing any complaint, leaving in the record only the summons and order of dismissal, parol testimony is inadmissible to show what would have been alleged in such complaint.

Appeal from Superior Court, Anson County; Councill, Judge.

Action by T. R. Tomlinson against D. N. Bennett. From a judgment for defendant, plaintiff appeals. Affirmed.

Action to recover money paid, and the value of a horse delivered by plaintiff to defendant. The uncontroverted facts, as they appear upon the pleadings, are: On December 1, 1887, plaintiff and defendant entered into a contract, whereby defendant agreed to convey to plaintiff a good and indefeasible title to a tract of land represented to be of the value of $1,825. Plaintiff, in consideration of the conveyance of said land, agreed to convey to defendant title to a lot in the town of Wadesboro of the value of $1,500, to pay $175 in money, and deliver to him one horse valued at $150. Plaintiff paid the money, and delivered the horse at the time the contract was made. For reasons not necessary to be set out, the contract in regard to the conveyance of the real estate was never executed. At the ——— term, 1888, of the superior court of Anson county, defendant instituted an action against plaintiff, in which summons was duly issued and served. The case remained on the docket of said court, no complaint having been filed, until March term, 1906, when the plaintiff in said action took a nonsuit. Plaintiff in this action objected thereto. Plaintiff herein at April term, 1906, of said court, instituted this action, alleging that he was induced to enter into said contract by representations in regard to the value, condition, etc., of said land, which were untrue—that the title was defective. He also alleged the payment of the money and delivery of the horse and value thereof, demanding judgment therefor. Defendant answered at length, admitting that the contract had not been executed, stating reasons therefor, and pleading the several statutes of limitation. Plaintiff alleged that he was prevented from setting up the matters constituting his present cause of action by way of counterclaim in said action, by reason of defendant's failure to file a complaint, and taking a nonsuit therein. The complaint does not state the cause of action upon which the first suit was brought. The answer states that it was to compel the present plaintiff, defendant therein, to carry out his contract. He admits that the nonsuit was taken, alleging that, after the institution of the action, a building on the lot, contracted to be conveyed, was destroyed by fire, rendering it impracticable for plaintiff to comply with his contract, etc. Defendant herein moved for judgment upon the facts alleged and admitted in the pleadings, for that (1) the complaint did not set out facts sufficient to constitute a cause of action; and (2) that the alleged cause of action was barred by the statute of limitations. His honor granted the motion. Plaintiff excepted and appealed.

H. H. McLendon and J. W. Gulledge, for appellant. Robinson & Caudle, for appellee.

CONNOR, J. (after stating the facts as above). The only cause of action stated in the complaint is for money had and received to plaintiff's use. If the plaintiff, in part performance of an executory contract, paid the money and delivered the horse, and for any reason, for which he was not responsible, the contract was not executed, he would be entitled to recover the money upon an implied promise to repay it and the value of the horse as for a conversion. The law will imply a promise to repay money received, when there is a total failure of the consideration upon which it was paid. It would be against good conscience and equity to retain it. This is the principle upon which the action is based. As plaintiff does not allege that the horse was sold and the money actually received, the action in that respect must be for the value of the horse. This, however, is not the point in the case. Treating the action as for money had and received, it is barred at the end of three years from the time the action accrued—that is, the contract was broken—and not from the receipt of the money. This was in 1888. Plaintiff, however, says that he was prevented from suing by reason of defendant's conduct in bringing an action in 1888, permitting it to remain on the docket until 1906, and disposing of it by a nonsuit. It is settled that if plaintiff was prevented from bringing his action, during the statutory period, by such conduct on the part of the defendant as makes it inequitable for him to plead the statute, or by reason of any agreement not to do so, he will not be permitted to defeat plaintiff's action by interposing the plea. Daniel v. Com'rs, 74 N. C. 494; Haymore v. Com'rs, 85 N. C. 268; Whitehurst v. Dey, 90 N. C. 542. These and other cases sustain this proposition.

We are unable to see in the mere failure of the defendant to file his complaint in the former action, in the absence of any agreement calculated to cause the plaintiff to sleep upon his rights, any fraud or wrong on his part. Assuming, for the purpose of the argument, that plaintiff in that action would, in his complaint, have set out a cause of action to which the defendant's present cause of action could have been pleaded as a counterclaim, he was not compelled to plead it. He may at any time have brought an in-

dependent action. Woody v. Jordan, 69 N. C. 189. Plaintiff encounters another difficulty—how is the court to know what the defendant, the plaintiff in that action, would have alleged therein as his cause of action? We do not think parol evidence would be competent to show what a plaintiff would have alleged in a complaint which was never filed. The language of Ashe, J., in Bryan v. Malloy, 90 N. C. 508, discussing a different question, but involving the same principle, is pertinent. "The only record is a summons, no complaint, no answer, no issue and no verdict, only a judgment of nonsuit, which in that case means a nolle prosequi." Concluding the discussion and referring to the class of cases in which parol evidence is admissible to make more specific the issues decided in a former action, he says: "It is only admissible in aid of the record; that is, whenever the record of the first trial fails to disclose the precise point on which it was decided, it is competent for the party pleading it as an estoppel to aver the identity of the point or question on which the decision was had and to support it by proof. But there must be a record to be aided. When there is no record, as in this case, there is no foundation for the proof." The learned justice used the word "record" as synonymous with "pleading." The plaintiff could, at any term of the court between 1888 and 1906, have compelled the defendant, plaintiff in the first action, to file his complaint or dismiss his action, or he could have brought his action for the recovery of the money paid and the value of the horse. There was nothing in the record to prevent him from doing so. By permitting the action to remain on the docket during the intervening years and failing to sue, he is barred. There must be an end to litigation. Private right and public interest demand it, and vindicate the wisdom of statutes of limitation.

The judgment must be affirmed.

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(145 N. C. 288)

## McINTYRE et al. v. PROCTOR et al.

(Supreme Court of North Carolina. Oct. 23, 1907.)

EXECUTORS—RESIGNATION.

After an executor has accepted the office and qualified, he cannot be permitted to resign, if he is a competent and proper person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 213.]

Appeal from Superior Court, Robeson County; E. B. Jones, Judge.

Special proceedings by Stephen McIntyre and another against Lizzie G. Proctor and others to be allowed to resign as executors of a will of Edward Knox Proctor, Jr., deceased. From an order of the superior court reversing a judgment of the clerk of the superior court, the guardian ad litem for minor defendants appeals. Reversed.

The petitioners, having qualified as executors of the last will and testament of E. K. Proctor, deceased, proceeded to collect the assets and pay the debts of their testator, and, having in their possession quite an amount of property, real and personal, to be managed and applied under the provisions of the will, filed their petition before the clerk of the court that they be allowed to resign their office in favor of a son of the testator now grown, who is ready and willing to act as their successor and is capable of discharging the duties of the office. The widow and children and heirs at law of the testator were made parties defendant, and a guardian ad litem for the infants duly appointed. On the hearing the clerk, having found the allegations of the petition to be true, held as follows: "Upon the foregoing facts, the court is of opinion that as a matter of law it has no power to permit the petitioners to resign as executors and trustees of the estate of E. K. Proctor, Jr., and that the court has no power to appoint James D. Proctor as administrator de bonis non," etc. And thereupon adjudged that the prayer of the petitioners be refused. On appeal the judge reversed the ruling of the clerk, and directed that the clerk proceed in accordance with such ruling, and defendants excepted and appealed.

McIntyre & Laurence, for plaintiffs.

HOKE, J. (after stating the facts as above). The allegations of the petition relevant to the inquiry admitted by the answer and found to be true on the hearing are as follows: "(3) That your petitioners have collected all the assets belonging to said estate, and have paid all debts due by the said estate, and have in all respects complied with the terms and provisions of the said last will and testament, and have made all investments as therein provided, and have satisfied all legacies to be satisfied, all of which will more fully appear from the annual accounts filed by your petitioners as executors in the office of the clerk of the superior court of Robeson county, to which said reports reference is hereby made. (4) That your petitioners have so far administered the said trust that nothing now remains to be done except to collect the rents and profits from the real estate owned, and the dividends from the moneys invested, and to expend such portions thereof as may be necessary for the support, maintenance, and education of the family of said E. K. Proctor, Jr., as by the said will provided. (5) That your petitioners are informed and believe that, under the terms and provisions of the said will, the said trust cannot be finally closed and settled until the youngest child of the said E. K. Proctor, Jr., attains his majority, and, inasmuch as said youngest child, Robert W. Proctor, is now of the age of about 8 years, it will be some 13 years before said trust can be finally closed and settled. (6) That the administration of the said period of 13 years will be very expensive to the said estate, and a heavy charge upon the said chil

dren and devisees of the said E. K. Proctor, Jr., the same to be the more considered on account of the fact that the utmost economy must be used in order that there may be property sufficient to provide a support, maintenance, and education for all of the said children until they attain their majority. (7) That the widow and all the children of the said E. K. Proctor, Jr., reside in the town of Lumberton, N. C., and no general or testamentary guardian has been appointed for the minor children. That all of the said children, except James D. Proctor, are infants and reside with their mother. (8) That James D. Proctor, eldest son of E. K. Proctor, Jr., has attained his majority, and is now engaged in the practice of law in the town of Lumberton, N. C., and the widow and children of said E. K. Proctor, Jr., reside with him, under his care and protection. (9) That your petitioners believe, and so allege, that it would be to the best interests of the widow and children of the said E. K. Proctor, Jr., if the management of the said estate and the care and control thereof could be turned over to James D. Proctor, for the reason that the said James D. Proctor, residing as he does with the others of the family, is in a better position to know their actual necessities and to exercise greater economy in their support and maintenance than can the present executors, and for the further reason that no commissions would be charged by him for his services in closing up the said trust and estate. (10) That your petitioners have consulted Mrs. Lizzie G. Proctor, widow of E. K. Proctor, Jr., and the children who are capable of understanding, and they agree with your petitioners, and are desirous, that your petitioners be allowed to resign as executors and trustees of the estate of E. K. Proctor, Jr., and that the said James D. Proctor be appointed in their place and stead. (11) That your petitioners have consulted the said James D. Proctor, and he is willing to assume the duties which would be imposed upon him in case of his appointment as substituted trustee of the said estate, and he is prepared to give such bond as the court may require of him as a condition precedent to this appointment. (12) That your petitioners are desirous of filing their last annual account, and of resigning their executorship and trusteeship in favor of the said James D. Proctor, and there are many reasons, business and sentimental, incapable of being set forth here, why it will be to the benefit of the widow and heirs at law of the said E. K. Proctor, Jr., that such change be made." And on these facts we think the clerk correctly ruled that he had no power to accept the proposed resignation and appoint a successor.

At common law, using the term in its broadest sense, an administrator and executor who had duly qualified and entered on the performance of his duties had no right at his own desire and for his own convenience to resign his office, and so put aside responsibility for the further performance of his duties. This has been directly held with us in the case of Washington, Ex'r, v. Blunt, 43 N. C. 253; and without statutory authority a clerk for a like purpose has no right to permit such resignation. Our statutes in various sections (Revisal 1905, §§ 31–34–35–37–38) confer on the clerks the power to revoke the letters of administrations for certain reasons therein specified; section 38, containing the more general provisions on the subject, being as follows: "If it is made to appear that the person to whom the letters have been issued is legally incompetent, or has been guilty of default or misconduct in the execution of his office, or that the letters have been obtained by false and fraudulent misrepresentations." And no doubt for causes specified in the statute or equivalent causes as indicated by way of suggestion only, in Tulburt v. Hollar, 102 N. C. 406, 9 S. E. 430, the clerk could permit the officer to resign and revoke the letters on such resignation. But the power exists for the good of the estate and its proper administration, and should only be exercised by reason of some unfitness or unfaithfulness on the part of the trustee, and never simply for his convenience or because the parties interested may desire it. While the principle is well established, both as to administrators and executors, it is more especially appropriate to the case of executors who are selected by the testator himself, usually because of his knowledge of their business capacity and his confidence in their integrity or both; and, though they have in the first instance a right to decline the office, after they have accepted and are qualified, they are not afterwards permitted to resign, and voluntarily put aside its responsibilities. This case presents a good illustration of the doctrine and its proper application. A perusal of the will and the facts submitted in connection with the administration indicates that there is a good amount of property to be invested and managed, and that the duties incident to the trust will continue for some length of time. The testator has selected two of his friends to administer his estate, and carry out his wishes, on account of their capacity and approved faithfulness, and they will no doubt continue to justify his confidence. There is no reason alleged or shown why they should be displaced, and the judgment of the clerk should have been affirmed. Let this be certified and order entered accordingly.

Reversed.

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(145 N. C. 440)

## STATE v. WOLF.

(Supreme Court of North Carolina. Oct. 16, 1907.)

1. INDIANS—SCHOOLS—COMPULSORY ATTENDANCE—STATUTES—VALIDITY.

Const. art. 9, § 15, authorizing laws to require the attendance of children at school, em-

braces Indians as well as whites and blacks, and hence Laws 1905, p. 227, c. 213, requiring certain Indian children to attend school, is not invalid as exceeding the Legislature's power.

2. CONSTITUTIONAL LAW—CLASS LEGISLATION — INDIANS — COMPELLING ATTENDANCE AT SCHOOL.

Laws 1905, p. 227, c. 213, requiring certain Indian children to attend school, is not unconstitutional as class legislation.

3. STATUTES — SPECIAL LAWS — INDIANS — SCHOOLS—COMPELLING ATTENDANCE.

Laws 1905, p. 227, c. 213, creating a special school district, and requiring Indian children residing therein to attend school, is not invalid because applying to one locality or district only, and not to the state at large.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 107.]

4. INDIANS—SCHOOLS — COMPULSORY ATTENDANCE.

Laws 1905, p. 227, c. 213, creating a special school district and requiring certain Indian children to attend school, does not compel their attendance at the school maintained within the district by the federal government, but specifically provides that such children may be sent to any other school.

Connor and Walker, JJ., dissenting.

Appeal from Superior Court, Swain County; O. H. Allen, Judge.

Jacob Wolf was acquitted of unlawfully withholding his child from school in violation of Pub. Laws 1905, c. 213, and the state appeals. Reversed.

The Attorney General and Hayden Wolf, Asst. Atty. Gen., for the State. W. T. Crawford, for defendant.

CLARK, C. J. Chapter 213, p. 227, Laws 1905, reads as follows:

"Section 1. That all within the boundary known as the 'Qualla boundary' of the Cherokee Indian lands in Jackson and Swain counties, in which is located the government Indian school at Cherokee, N. C., be and the same is hereby constituted a special school district.

"Sec. 2. That all children within said boundary are hereby compelled to attend school at least nine months in each calendar year between the ages of seven and seventeen years: provided, the government of the United States shall furnish such school with all proper facilities, together with board, clothing, books, medicine, medical attendance and other necessary expenses: provided, further, that nothing in this act shall compel any sick or otherwise disabled child, or any child who is sole person or necessary for the care or waiting on of any sick parent, or for legal or lawful excuse, to attend said school: provided further, that nothing in this act shall prevent the proper school authorities from excusing any child from the provisions of this act, when in their judgment they deem it necessary: provided, further, that this act shall not apply to children in said boundary attending some other school for a like time and period.

"Sec. 3. That it shall be unlawful for any parent or guardian to withhold any child from school, and upon conviction shall be fined or imprisoned at the discretion of the court.

"Sec. 4. That the proper authorities of said school shall have authority to take charge of any of said children of said district, wherever found, and place and keep them in said schools for the period above expressed: provided, that nothing in this act shall allow any person to mistreat or abuse said child or children or use any more force than is necessary to carry this act into force and effect.

"Sec. 5. That nothing in this act shall apply to any child, parent or guardian with less than one-eighth Indian blood."

The defendant was indicted for violation of this act, and the jury returned the following special verdict: "We find that at the commencement of this action, and for a year prior thereto, there was a school maintained by the government of the United States within the Qualla boundary, furnished with all the proper facilities, together with board, clothing, books, medicine, medical attendance, and other necessary expenses; that the defendant was the father of a child between the ages of 7 and 17; that he did not send said child to the said school for nine months during the last school year; that said child is more than one-eighth Indian blood; that said child was not sick, disabled, or necessary for the care or waiting upon of any sick parent; that said child was not in attendance on any other school for a period of nine months during said school year, nor was said child excused from attendance by the proper school authorities; that said defendant resided within the Qualla boundary; that the said school is under the entire control of the United States, and the said school is in no way under the control or management of the board of education, or school committee, or taught by any teacher under employment of the state. If, upon this special verdict the court be of the opinion that the defendant is guilty, then we, the jury, find him guilty; but, if the court be of the opinion that he be not guilty, then we find him not guilty." The defense seems to rest its case upon three propositions: (1) The defendant is not a citizen of the state, and hence the act is beyond the power of the state Legislature. (2) That the act applies only to Indians, and hence is class legislation, and unconstitutional. (3) It is unconstitutional to select out one school district or locality and make education compulsory therein, without applying the same regulation to the rest of the state.

Const. art. 9, § 15, provides: "The General Assembly is hereby empowered to enact that every child of sufficient mental and physical ability, shall attend the public schools during the period between the ages of six and eighteen years, for a term of not less than sixteen months, unless educated by other means." The authority is as to "every child" between the ages of 6 and 18, and embraces Indians, as well as white and blacks. We have long had legislation for separate schools

for the Croatans in Robeson. In State v. Ta-cha-na-tah, 64 N. C. 614, it was held that the Cherokee Indians resident in this state are subject to our criminal laws; the court saying: "Prima facie, all persons within the state are subject to its criminal law and within the jurisdiction of this court. If any exception exists, it must be shown. Upon examination of the treaty of New Echotah, Ga., on December 29, 1835, between the United States and the Cherokee Indians, we find that by article 12 it was provided that individuals and families who were averse to moving west of the Mississippi river might remain and become citizens of the states where they resided. * * * Unless expressly excepted, our laws apply equally to all persons, irrespective of race." In Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. Ed. 25, and Worcester v. Georgia, 6 Pet. (U. S.) 515, 8 L. Ed. 483, it is held: "It is the universal doctrine of the public law that the Indians are the domestic subjects of the particular European or American state in which they may happen to be." There are bands of Indians still surviving in New York, Georgia, Wisconsin, and in many other states, and the decisions on this point are summed up and reviewed in State v. Doxtater, 47 Wis. 278, 2 N. W. 439. These decisions show that Indians are subject to the general laws of the state, unless specially excepted, and that they are usually excepted in laws as to taxation and game laws, but not in this state. In this case the General Assembly did not exempt Indians, but specially provided for the application of this law to them in this district. In Re Cherokee Trust Funds, 117 U. S. 309 (bottom of page) 6 Sup. Ct. 728 (29 L. Ed. 880), it is said of the Cherokees in North Carolina, "They are citizens of that state, and bound by its laws."

The second objection, that this is class legislation and unconstitutional, is equally untenable, as is also the third objection, that it applies to only one locality or district. The Constitution does provide (article 9, § 2): "The children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of, or to the prejudice of either." The white and colored races compose the bulk of the people of this state, and the object of this provision is plain, but it is clear that this special act in regard to the Indians of the Qualla school district is "no discrimination in favor of, or to the prejudice of, either" the white or colored race. And it is also well settled that the Legislature can meet the needs of one county, district, or locality without making the same act apply to the whole state. This was held as to the sale of intoxicating liquor (State v. Joyner, 81 N. C. 534; State v. Stovall, 103 N. C. 416, 8 S. E. 900; State v. Barringer, 110 N. C. 525, 14 S. E. 781; State v. Snow, 117 N. C. 774, 23 S. E. 322), restricting sale of seed cotton in certain localities (State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696), as to no fence laws (Broadfoot v. Fayetteville, 121 N. C. 418, 28 S. E. 515, 39 L. R. A. 245, 61 Am. St. Rep. 668), as to mode of working public roads (Tate v. Commissioners, 122 N. C. 812, 30 S. E. 352), and there are other instances (Intendant v. Sorrell, 46 N. C. 49), and many cases cited (State v. Sharp, 125 N. C. 632, 633, 34 S. E. 264, 74 Am. St. Rep. 663). That the Legislature may provide special regulations for a particular school district, as where for instance the district furnishes, by its own action, funds in addition to the public school funds, is held in McCormac v. Commissioners, 90 N. C. 441. And the same must be true if the funds come from private donation or the general government, if the state accept such maintenance for "a public school district." The act is not discriminative because it applies alike to all Indians in that school district. It could not apply to other races which go to their own race schools. It is not objected (indeed, could not be by this defendant) that other races are unduly taxed for the benefit of one race, as in Lowery v. School Trustees, 140 N. C. 33, 52 S. E. 267, for the school is supported not by taxation, but by donations from the general government. It has been suggested that, the school being supported and maintained by the federal government, the state could not compel the defendant to send his child there. The point does not arise for the act while creating the district a "special school district"—as is also the case with graded schools supported in whole or in part by other than state and county funds—and requiring the Indians within that district to send their children between 7 and 17 to school, provided the United States government furnishes "all proper facilities, together with board, clothing, books, medicine, medical attendance and other necessary expenses," does not require them specifically to send the children to the government school, but specifically says that they may send their children to any "other school for a like time and period." There are exemptions of sick and disabled children, or those waiting on sick parents or having other lawful excuse, or whom the school authorities may see fit to excuse. The law compels attendance on some school, but not on this school, leaving the defendant full choice. The purview of the act is clear, reasonable, and within the scope of the lawmaking power of the state. The federal government has established a school for the Indians in the "Qualla boundary," and defrays all expenses, including not only education, but books, board, clothing, medicine, medical attendance, and other necessary expenses. The United States government cannot compel the attendance of the children. The state Legislature makes the "Qualla boundary" a special school district, and, reciting the above facilities afforded by a school established therein, requires (section 2) the Indian children in that boundary

"to attend school at least nine months" in each year, without designating this school, and to avoid such conclusion provides that the children may comply with the act "by attending some other school." The defendant did not send his child to any school.

Upon the special verdict, the judge should have held the defendant guilty. The judgment is reversed. The case is remanded for proper judgment to be entered on the verdict, and that the sentence of the court may be imposed. Reversed.

HOKE, J., concurs in result.

CONNOR, J. (dissenting). I do not question that pursuant to the provisions of article 9, § 15, of the Constitution, the General Assembly is authorized to enact statutes "requiring every child of sufficient age, mental and physical ability, to attend the public schools" established and maintained as a part of the public school system of the state. I do not question the power of the General Assembly to extend this legislation to the children of Cherokee Indians residing in the state. I dissent from the conclusion that the General Assembly has the power to compel such attendance upon a school for nine months in each year "under the entire control of the government of the United States, and no way under the control or management of the board of education, or school committee, or taught by any teacher under employment of the state." While this statute is confined to a small number of Indian children living in the mountains of Swain county, and doubtless, in its operation, would do but little wrong, the principle involved is, to my mind, very important to the preservation of our system of public education. The Constitution (article 9, § 3) commands the General Assembly to provide for the division of each county into a convenient number of districts, in which one or more public schools shall be maintained at least four months in every year. We have decided, at the present term, that this constitutional requirement is paramount, and that any other provision apparently conflicting with it must give way. We have sustained every act of the General Assembly enacted for the purpose of making the public school system elastic and adjustable to local conditions and needs. We have, however, kept always in view the constitutional provision for a system of public schools, uniform in essential respects, holding that every public school established and maintained by public taxation constitutes a part of the system and subject to the control, either of committees appointed by the county boards of education or in such manner as the special statutes provide. It has never, I am sure, been supposed that by simply declaring that certain territory shall constitute a school district, a school entirely controlled by other than state or local officers could be ingrafted into the state's system. In Lowery v. Com'rs, 140 N. C. 33, 46, 52 S. E. 267, 272, we said: "There can be no possible room for doubt or controversy in respect to the two principles underlying and always controlling the establishment and maintenance of the public school system of this state. The system includes all public schools, or schools receiving for their support public taxes either general or local." The question was discussed, and the authorities reviewed by Mr. Justice Hoke, in Smith v. School Trustees, 141 N. C. 143, 53 S. E. 524. The education of the children in the public schools is peculiarly, and, in a large measure, exclusively, a function of the state —a trust which she cannot delegate to any other agency. The absolute separation of the races, the exclusion of any political or sectarian influence or control, is essential to the fundamental and fixed policy of the state. These can only be secured with absolute assurance by holding strictly to the constitutional provision commanding the Legislature to provide for a uniform system of public schools. This uniformity, in essentials, must be preserved. Such variety, in matters of administration, not affecting the cardinal points, regarding race, sectarian issue, etc., is preserved by keeping the public school under the direct control of the people through their representatives and other officers elected by them for that purpose. Any departure from this principle will eventually destroy uniformity in the system, introduce novel, disturbing, and dangerous expedients, with disaster to the cause of public education, so essential to the welfare of the state. If this act, with its loose, uncertain provisions, conferring upon the "authorities" of this government school almost arbitrary powers can be sustained, it is difficult to see where a limit would be fixed beyond which legislative discretion may not go. I disclaim any right, as a judge, to declare an act of the Legislature violative of the Constitution because I may not deem it wise; but there is no more dangerous fallacy than that which teaches that for some real or supposed temporary advantage either department of the government may disregard the supreme law of the state, the people's will formulated and crystallized into the organic law. The people of this state command, in unmistakable terms, their Legislature to provide a system of public schools, and empowers it to require compulsory attendance, but certainly they never conferred power to compel attendance upon schools wherein their appointed officers and teachers could not, as a matter of right and duty, enter, supervise, and, in all proper manner as prescribed by law, control. In the public schools, nurseries of the state's citizenship, she cannot safely delegate to any other authority the duty of selecting the teachers, prescribing the books, excluding all teaching and training not in harmony with her ideas and ideals. Doubtless the introduction and passage of this law was prompted by good motives, and for the pur-

pose of promoting education among the children of the Cherokee Indians, but the best and permanent good to the state is preserved only by keeping all legislation within the limitations fixed by the supreme law. Any experimental expedients, not within these limitations, are subversive of liberty regulated by law.

We have avoided many of the disturbing questions encountered by other communities. Our population has been divided by well-defined racial distinctions, for which provision is made. Political, sectarian, and other lines of separation have been excluded from our public school system. We may avoid them by adhering strictly to the constitutional requirement that, in these essential matters, we maintain a uniform system of public schools under the control of the people of the state, in accordance with local needs and conditions. I think that the judgment of his honor should be affirmed.

WALKER, J., concurs in dissenting opinion.

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(145 N. C. 170)

## COLLIE v. COMMISSIONERS OF FRANKLIN COUNTY.

(Supreme Court of North Carolina. Oct. 10, 1907.)

1. COURTS—STARE DECISIS.

The doctrine of stare decisis, in regard to one constitutional provision, where it does not involve the rights of the citizen, should not be allowed to obstruct the carrying out of other provisions of the Constitution intended to promote the progress, prosperity, and welfare of the people.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 311, 317.]

2. SCHOOLS — PUBLIC SCHOOLS—TAXES—CONSTITUTIONAL PROVISIONS—AMOUNT OF TAX.

Const. art. 9, § 1, declares that schools and the means of education shall be forever encouraged, and commands in section 3 that one or more public schools shall be maintained for four months in every year in each school district in each county of the state, and that the school commissioners shall be liable to indictment for failure to comply with this requirement. Const. art. 5, § 1, directs the levying of a capitation tax by the General Assembly, which shall be equal on each to the tax on property valued at $300, and the state and county capitation tax combined shall never exceed $2 on the head. Section 6 provides that the taxes levied by the commissioners for county purposes shall never exceed the double of the state tax, except for a special purpose and with the special approval of the General Assembly. Revisal 1905, § 4112, authorizes the board of county commissioners, if the tax levied by the state for the support of the public schools is insufficient to maintain one school in each school district for four months in each year, to levy a special tax to supply the deficiency. *Held*, that the county commissioners may, where the tax levied by the state for the support of the public schools is insufficient, levy a special tax observing the equation between property and the poll fixed in the Constitution sufficient to maintain a public school in each school district for four months in each year, though it exceeds the limitations fixed in Const. art. 5.

Appeal from Superior Court, Franklin County; Cooke, Judge.

Action by J. R. Collie, on behalf of himself and other taxpayers, against the commissioners of Franklin county, to restrain the collection of a school tax. From a judgment dissolving the temporary restraining order granted, plaintiff appeals. Affirmed.

Civil action brought to August term, 1907, of Franklin superior court, by the plaintiff and in behalf of other taxpayers of Franklin county against the board of commissioners of said county to restrain said board from collection of a tax levied at the meeting of June, 1907, of 1 cent on the $100 worth of property, and 3 cents on each taxable poll for the support and maintenance of the public schools of the county, in addition to and beyond the limit of 66⅔ cents on the $100 worth of property and $2 on each taxable poll, levied for general state and county purposes in said county in said year. Plaintiff obtained from Hon. C. M. Cooke, J., resident of the Fourth judicial district, a temporary restraining order returnable before himself. Upon the hearing, his honor dissolved the restraining order, and plaintiff appealed.

Wm. H. Ruffin, for appellant. F. S. Spruill, Chas. B. Aycock, and R. B. White, for appellee.

BROWN, J. It is admitted that the questions presented by this appeal have been passed upon adversely to the contention of the defendant in two cases. Barksdale v. Commissioners, 93 N. C. 473, and Board of Education v. Commissioners of Bladen, 111 N. C. 578, 16 S. E. 621, 18 L. R. A. 850. We are now asked to review those cases, and disregard them as precedents in the decision of this case. As those cases involve a construction of certain sections of the Constitution relating to a question of taxation, and involve no right affecting the life, liberty, or property of the citizen, we can see no reason why they should continue to guide us if time and reflection have convinced us that they are not correct interpretations of the letter and spirit of our organic law. We are not lacking in respect for the opinion of the eminent judges who decided those cases, because we happen to differ from them in our efforts to gather from that instrument the true intent and purpose of its framers. The doctrine of stare decisis is worthy of all respect, and should be accorded due weight in the consideration of all cases, but the doctrine, where it does not involve the rights of the citizen, should not be carried to that extreme where it becomes an obstruction to the carrying out of other provisions of the Constitution intended to promote the progress, prosperity, and welfare of the people. Again, it must be remembered that the cases cited are somewhat weakened as authoritative precedents by dissenting opinions in each, of acknowledged power and force of reason. Section 1,

art. 5, of the Constitution, directs the levying of a capitation tax by the General Assembly, "which shall be equal on each to the tax on property valued at three hundred dollars in cash * * * and the state and county capitation tax combined shall never exceed two dollars on the head." Section 6 of the same article enacts that "the taxes levied by the commissioners of the several counties for county purposes, shall be levied in the like manner with state taxes, and shall never exceed the double of the state tax, except for a special purpose, and with the special approval of the General Assembly." Article 9, § 1, of the Constitution, after declaring that "religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education should be forever encouraged," commands, in section 3 thereof, that one or more public schools shall be maintained at least four months in every year in each school district in each county of the state, and further provides that, "if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment." At every session the General Assembly has endeavored to give effect to this section of the Constitution by providing that, if the tax levied by the state for the support of the public schools is insufficient to enable the commissioners of each county to comply with that section, they shall levy annually a special tax to supply the deficiency, to the end that the public schools may be kept open for four months as enjoined by the Constitution. Revisal 1905, § 4112. It is admitted that in the Barksdale Case this court held that the sections quoted from article 5 are a limitation upon the taxing power of the Legislature, and control article 9, so that, if the taxes levied in accordance with that limitation and equation are insufficient to support the public schools for four months, the commissioners cannot be compelled to levy more, and that the act of the General Assembly requiring it is void. The Barksdale Case was approved and followed in the Bladen Case, and the matter so exhaustively discussed in the opinions of the court and of the dissenting judges in both cases that it is difficult to add anything new to the controversy, and it is unnecessary to repeat the arguments set forth in their opinions. We agree with the court in those cases that article 5 is a limitation generally upon the taxing power of the General Assembly; nor are we called upon to hold that the tax to supplement the school fund in each county directed by the statute to be levied in case of need may be upheld as a "necessary county expense" or as a "special tax" for a special purpose. It is unnecessary, in the construction we give to the Constitution, to place our decision upon any such grounds. We hold with Mr. Justice Merrimon, in the Barksdale Case, that, while this limitation upon the taxing power of the General Assembly prevails generally, it does not always prevail, and that it should not be allowed to prevent the giving effect to another article of the same instrument equally peremptory and important. We must not interpret the Constitution literally, but rather construe it as a whole, for it was adopted as a whole; and we should, if possible, give effect to each part of it. The whole is to be examined with a view to ascertaining the true intention of each part, and to giving effect to the whole instrument and to the intention of the people who adopted it. Coke, Lit. 381a; Cooley, Const. Lim. (7th Ed.) p. 91.

Of the two constructions which have been given it in the cases cited, we prefer to adopt that which, while properly limiting the power of taxation as to matters not embraced in the Constitution, leaves it within the power of the Legislature to give effect to one of its most important and peremptory commands. While the General Assembly must regard such limitation upon its power to tax, as defined in many decisions of this court, when providing for the carrying out of objects of its own creation, and the ordinary and current expenses of the state government, yet, when it comes to providing for those expenses especially directed by the Constitution itself, we do not think the limitation was intended to apply. Although the Legislature must observe the ratio of taxation between property and the poll provided in article 5, § 1, it is not required to obey the limitation upon the poll and the property tax, if thereby they are prevented from giving effect to the provisions of article 9. It is better we think to hold that such limitation applies to legislative creations, rather than let it hinder constitutional commands. The purpose of our people to establish by taxation a general and uniform system of public schools wherein tuition shall be free of charge to all the children of the state, and that such schools should be open every year for at least four months, is so plainly manifest in article 9 of the Constitution that we cannot think it possible they ever intended to thwart their clearly expressed purpose by so limiting taxation as to make it impossible to give effect to their directions. The reasons which induced the people to adopt article 9 are set forth in its first section; and they are so exalted and forcible in their nature that we must assume that there is no article in our organic law which the people regarded as more important to their welfare and prosperity. This conviction is greatly strengthened when we find that the only criminal offense defined and made indictable by the instrument is one created especially to enforce obedience to its specific commands in respect to the establishment of four-month schools. In commenting upon this, Mr. Justice Avery well says: "It is difficult to understand why this wide departure from the usual course was made, unless we interpret it as emphasizing the intent of the framers

of the Constitution that the officers held subject to this unusual liability should have power coextensive with their accountability." Board v. Commissioners, 111 N. C. 585, 16 S. E. 623, 18 L. R. A. 850.

"Schools and the means of education shall forever be encouraged," says the Constitution. Why? Because they foster religion and morality, which, with knowledge, are necessary to good government. The people expressed their willingness to incur such expense because of the great good resulting therefrom. It is hardly probable they intended by a previous enactment in the same instrument to render it impossible to carry out purposes expressed in such earnest and unmistakable language. Our people regarded the subject of education as of the highest and most essential importance, and there is no provision in our Constitution which is clearer, more direct, or commanding in its terms than article 9. As said by Judge Merrimon: "Its framers, whatever else may be said of their work, seem to have been especially anxious to establish and secure beyond peradventure a system of free popular education." Barksdale's Case, 93 N. C. 483. This sentiment has grown greatly in the hearts and minds of our people since that section of the Constitution was adopted. So great has been its growth that they have in recent years adopted an educational qualification as a prerequisite to exercising the electoral franchise. Const. art. 6, § 4. This places an additional obligation upon us to provide full educational facilities for the youth of the state who otherwise may grow up in ignorance and be disqualified to take their just part in the administration of our government. The construction placed upon the Constitution by the Barksdale decision has been found to be an especial handicap upon the country schools. In the cities and towns generally special taxes are levied by a vote of the people, graded schools established, and the requirements of the Constitution more than complied with. Very many country schools cannot continue open for four months unless the tax prescribed by the act is levied. The country school is the nursery of the larger part of the bone and sinew of this land. It carries a greater responsibility than the city schools in proportion to its advantages; for, as is well said by a recent writer: "It is charged not only with its own country problems, but with the training of many persons who swell the population of cities. The country school is within the sphere of a very definite series of life occupations."

Thus it is seen that article 5 vitally affects all the leading purposes of the Constitution. It therefore becomes more imperative than ever that, if it reasonably can be done, we should give the instrument that construction which will effectuate and carry out its wise and beneficent provisions. We think we do this when we hold that the limitation contained in article 5 was not intended to restrain and trammel the General Assembly in providing the means whereby the boards of commissioners of the different counties are enabled to perform the duties enjoined by the Constitution and give to the people public schools for at least four months in each year. Instead of prescribing the rate of tax to be levied for the purpose of a four-months school, the General Assembly properly and wisely left the amount to be levied to be determined by the county authorities of each county. In some counties it may not be necessary to levy any tax, while in others some tax differing in amount will have to be levied and collected in order to carry out the directions of the law. In levying the tax, the boards of commissioners must observe the equation between property and poll fixed in the Constitution. In estimating the tax necessary beyond the limit of 66⅔ cents on property and $2 on the poll, to give a four-month term, no longer period may be considered. When the four-month requirement is fulfilled, the limit of taxation fixed in article 5 necessarily takes effect and anything beyond that would be void. The taxes levied and collected in pursuance of the act constitute a special fund supplemental to the general school fund, and must be devoted exclusively to procuring four-month terms of the public schools in those counties or districts only where for lack of funds they are kept open for a shorter period.

After careful consideration of the matter, we are of opinion that the judgment of the superior court dissolving the restraining order should be affirmed.

WALKER, J. (concurring). The provisions of the Constitution having any special bearing upon the question presented in this case are as follows: "The General Assembly shall levy a capitation tax on every male inhabitant of the state over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at three hundred dollars in cash." Article 5, § 1. "The proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent thereof be appropriated to the latter purpose." Article 5, § 2. "The taxes levied by the commissioners of the several counties for county purposes shall be levied in like manner with the state taxes, and shall never exceed the double of the state tax, except for a special purpose, and with the special approval of the General Assembly." Article 5, § 6. "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools, and the means of education, shall forever be encouraged." Article 9, § 1. "The General Assembly, at its first session under this Constitution, shall provide by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all

the children of the state between the ages of six and twenty-one years." Article 9, § 2. "Each county of the state shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least four months in every year; and if the commissioners of any county shall fail to comply with the aforesaid requirements of this section, they shall be liable to indictment." Article 9, § 8. "All moneys, stocks, bonds, and other property belonging to a county school fund; also, the net proceeds from the sale of estrays; also, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the state; and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this state: provided, that the amount collected in each county shall be annually reported to the superintendent of public instruction." Article 9, § 5. "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." Article 7, § 7.

It is a well-recognized rule in the interpretation of Constitutions, and the same principle extends to statutes and contracts, that, in case of any ambiguity, the whole instrument must be examined and considered, in order to determine the meaning and legal effect of any part of it, and the construction should be such as to give effect to the entire instrument, and not to raise any conflict between its several provisions, if this can possibly be avoided. Black's Const. Law, p. 67, § 41. There is one case in our Reports which has been cited frequently as establishing the doctrine that the provisions of the Constitution are all mandatory. State v. Patterson, 98 N. C. 660, 4 S. E. 350. I have never been able to give the full assent of my mind unreservedly to this proposition, broadly stated as it is in that case and as it has been construed by this court to be. 'A large part of our present Constitution was not the voluntary expression of the will of our people, for many of the most intelligent of them were at the time it was adopted under the ban of proscription, and were not permitted to take any part in framing it; but, notwithstanding this deplorable fact, it contains many commendable features, and among them those which I have already quoted, and which in my opinion are of such an important and essential nature as to be mandatory upon us. When the people have clearly ordained what shall be done, we, as judges, have nothing to do but to obey and to execute their will. Whether the particular provisions in question are wise or unwise is not for us to determine. We must give proper effect to each part, and to the whole, so as to fully execute the general purpose, if possible, with harmonious precision. After a most careful reading again of the entire Constitution of our state and a study of its general scope, and the specific purpose of its framers as shown in its several provisions concerning public schools and taxation, I am constrained to believe that the duty of educating the people, as enjoined by the Constitution, is one of its leading and controlling ideas, and was so intended to be, and the plan devised for providing the necessary means for discharging this duty were considered in the general scheme of taxation to be of paramount importance. In article 9 the very first declaration is that religion, morality, and knowledge lie at the very foundation of all good government; and who can doubt the correctness of this proposition? They are its essential prerequisites, if I may so speak. Without intelligence, properly cultivated and directed, good government would be almost impossible, especially where the particular form of state policy depends so largely upon the will of the people as it does in a representative democracy. I may go further, and assert that this principle is applicable generally to all forms of society, and lies at the foundation of all human institutions. Good government begins at the fireside, is nourished in the schoolhouse, and gradually developed in the council chamber and legislative halls, on the hustings and in the forum, and refined, purified, and ennobled by the holy precepts of religion and morality as taught and inculcated in the sanctuaries of the people. What the state needs to make her great and prosperous is good minds and good men. She is apt always to have the beneficent influence of good women in her homes. Education, religion, and morality must be the cornerstones of all successful government. I have made these general observations for the purpose of showing that the provision of the Constitution as to the education of the masses being of supreme importance, it must of necessity be held to be something apart from others not relating to that subject, and to be highly mandatory. It cannot be subject to any limitation of taxation, for the very terms by which the duty to educate the people is enjoined are altogether independent of the provision establishing a limitation of the taxing power and are just as imperative.

It was necessary to support the government, and therefore to provide it with the means of defraying its expenses by taxation, the only method by which this could be done. It was well to prescribe an equation or ratio of taxation, and consequently a limit beyond which the taxing power should not be permitted to impose burdens upon the people, as is done in the Constitution, but it is a grave mistake, I think, to suppose, for a moment, that this limitation, which, of course, is fi-

nally determined by the proportion of taxation and the maximum of the poll tax, was intended to have any necessary connection with the other provisions in regard to the duty to educate the people. The two articles are, and were manifestly intended to be, separate and distinct. The public schools must be kept open for the required time, and, at the same time, the government, both state and local, must likewise be maintained. One is just as mandatory as the other. The prohibition of the Constitution against doubling the state tax for county expenses, except for a special purpose, and then only with the special approval of the General Assembly (article 5, § 6), has no essential relation to the educational article of the Constitution, as by the express language of article 5, § 6, it is restricted to taxation for county purposes, strictly speaking—that is, those which arise in the ordinary administration of county affairs—nor can it be successfully asserted that the education of the people is a "special purpose" within the meaning of that section. It is emphatically a general one and of the first importance, and is so clearly defined to be in article 9. It may well be conceded that the just and equitable principle involved in the equation of taxation may be beneficially applied to all forms of taxation and for all purposes, as this court held should be done in the case of taxation by cities and other public or municipal corporations, under article 7, § 9—which by examination will be found to bear a close resemblance to the provision of article 5, § 3, requiring uniformity in the taxation of property, at its true value, or, as it is sometimes expressed, ad valorem—(Redmond v. Com'rs, 106 N. C. 122, 10 S. E. 845, 7 L. R. A. 539; Young v. Henderson, 76 N. C. 420; French v. Wilmington, 75 N. C. 477); although, by the same authorities, it was adjudged that the rule in regard to the limitation of taxation did not apply to such corporations.

In passing, I may remark that I do not take the view of article 5, § 6, which seems to be indicated in several opinions of this court, namely, that the doubling of the state tax for county purposes has any necessary connection with either the equation or limitation of taxation. This prohibition against counties exceeding the double of the state tax may, in practice, well come into play before the limit of taxation—that is, 66⅔ cents on the $100 worth of property—is ever reached. For illustration: The state tax may be as low as 10 cents on the $100 of property at its true value, in which case the county might double or levy a tax of 20 cents, making a total of state and county taxation equal to 30 cents on the $100 in value of property. The rate would be still short of the limit by 33⅓ cents. The extreme limit of taxation prescribed to the counties and the largest levy that could be made by them under this provision (article 5, § 6) would be reached only where the state should levy a property tax of 22²/₉ cents on the $100 of value, when the counties could levy 44⁴/₉ cents, without the special approval of the General Assembly or for a special purpose. The limit prescribed to the counties would, of course, be decreased in the proportion that the rate should be increased for state purposes. Even where the general limit of taxation is not reached by the counties in doubling the state tax, they would have no power under article 5, § 6, to increase their rate, except for the purpose therein specified, and with the special approval of the General Assembly. If the rate for state purposes is 20 cents, that of the counties must not be over 40, unless an increased rate is constitutionally authorized by the General Assembly.

The general limit of taxation is fixed, of course, at 66⅔ cents on the $100 in value of property, as I have already indicated, by the provision in regard to the equation, and the maximum of the poll tax, which is $2 on the $300 of property at its true value in cash. Const. art. 5, § 1. All the above provisions were evidently intended to apply to taxes laid for general state and county purposes, and could not by any admissible rule of interpretation apply to the taxes required for the support of the schools. It was regarded of such momentous importance to educate the people that a separate and distinct provision was made for that purpose, and an entire article of the Constitution devoted to the subject; the only restriction imposed upon the power to tax for the education of the people being the provision which requires that one or more public schools shall be kept open at least four months in every year in each school district. Article 9, § 3 (2 Revisal 1905, p. 618). This requirement was considered as so vital to the welfare of the state that it was made indictable, if the officers who were charged with this supreme duty failed to comply with this plain mandate of the Constitution. When a duty is prescribed or when a power is conferred by the Constitution, or even by statute, every means and every other power necessary to execute the primary purpose is also considered as granted. It is distinctly enjoined by the Constitution that the people shall be educated, and, for this purpose, it is ordained that there shall be a "general and uniform system of public schools" with free tuition to all children between the ages of 6 and 21 years, and it is further commanded that the General Assembly shall, even at its first session, provide by taxation and otherwise for the execution of that provision. Can we escape the conclusion that the framers of the Constitution of 1868, as amended in 1875, intended that commissioners of the counties should do a certain thing, with a heavy penalty imposed in case of their default, and yet be deprived of the power of performing their duty. What an imperfect syllogism, and what an impotent conclusion! When we concede the duty as a correct premise, the opposite result is in-

evitable, if we reason logically. The chief purpose of the framers of the organic law was that the people should be educated, without regard to the raising of the necessary expenses of government for other purposes; but according to the only true principle of democracy (using that word as describing a particular form of government and not in any partisan sense), that no more of the people's earnings should be exacted of them than is necessary for the support of their government economically administered, which should really be the true principle of taxation in all government, whatever may be its form. It is true the people have agreed to support their government in all its branches, by the method of taxation, consisting in reasonable impositions laid upon persons and property, by a standard which they deemed fair and just to all, but their leading desire was that their children should receive the advantages of education, so that not only should the government proceed in the exercise of its ordinary functions for their benefit and advantage, but that the people of the state should be elevated in the scale of intelligence and prepared to enjoy the true blessings of liberty and prosperity for which the compact of government was formed, and, moreover, to further advance their welfare and happiness. This was of the first consideration.

I am now brought to my second proposition: Whether the education of the people is so far required by the organic law as to have become a necessary expense of the government, within the meaning of article 7, § 7, of the Constitution. It is not for me to say, in construing that instrument, whether its provisions make for the best interest of the people. I must ascertain the will of the people from what they have said, and not from what I think they should have said—not meaning at all to imply that they have not spoken wisely and truly expressed their intention. If there is a deliberately conceived and carefully stated principle in their Constitution, and one which it is perfectly evident they desired to be clearly understood and rigidly enforced, it is that embraced in sections 1, 2, and 3 of article 9, in regard to the schooling of the children of the state. They intended that the state should no longer be debased, or retarded in its progress, by the ignorance of its people. It is plain that those who wrote these sections knew, as any intelligent citizen knows, that the surest way to obtain good government and to enjoy it is to know how to appreciate its blessings, and to be able to perpetuate it by a proper and intelligent use of it. When it was, therefore, declared that the people must be educated, it was just as binding an injunction that the means to that end must be supplied by taxation as it was that the counties, or even the state government, should be supported. Why not? It became, therefore, by the very terms of the command a public necessity, because the people in their Constitution have so declared, and logically, therefore, a necessary expense.

Why is one essential mandate of the Constitution any more binding or obedience to it any more obligatory than another? What the framers of the Constitution meant was this: That the state and county governments should be maintained by taxation (with certain qualifications), which should be laid upon a principle of equation, or due proportion between property and taxes, and within a certain limit, but that in addition to this sovereign power, and corresponding duty, so necessary to the vigorous life of the government, there should be another, which is equally vital to its continuance under just and wise laws, and that is the separate and independent right to educate the people, by taxation also, to the extent that it might be necessary to keep open, to all the children between certain ages, the public schools of the state for "at least four months in every year." Const. art. 9, § 3. To my mind, at least, it is perfectly clear that this power of taxation, in order to educate and enlighten the people, is not in any way subject to the provision as to the limit of taxation fixed by other articles and sections of the Constitution, but what is known as the equation may be just and not necessarily inconsistent with article 9, and perhaps should be observed. It is not required now that I should express any binding opinion as to this matter. When the Constitution prescribes only one limit to taxation for school purposes, as I have shown has been done by the clearest implication, we, as a court, have no right to substitute another. It is provided by article 5, § 2, that a specified part of the proceeds of the state and county capitation tax shall be applied to the purposes of education, and by article 9, §§ 4, 5, that certain property therein enumerated shall also be applied to the same purpose, but, if this is not sufficient to keep the schools open as required to be done by article 9, § 3, then it is the paramount duty of the Legislature to provide by taxation for a strict compliance with the latter section, without regard to any restriction on taxation, except in the respect herein already indicated.

It may be a question worthy of serious reflection whether by the recent amendments to the Constitution, which relate to suffrage and which were adopted for the purpose of securing an intelligent electorate and prescribing an educational test for the voter, it has not become the duty of the state to educate her people, and, by reason thereof, such education has become a necessary expense to be met by appropriate taxation, imposed as in like cases, as I have already substantially argued. Those amendments to our organic law were, in my opinion, at least as now advised, lawfully passed and ratified, and were a rightful and sagacious exercise of the power of the people of this state, un-

der the federal Constitution, to protect themselves at the ballot box against the untold consequences of ignorance, illiteracy, and vice. What is more essential to good government, and the peace and good order of society, than that the voter should be able to intelligently decide for himself upon all public questions which concern the general welfare and to select honest and capable men to represent him in the offices and councils of the state, and wherein is there any departure from constitutional principles, if each man is given a fair chance by the law to qualify himself to exercise this important right and principle, when the people rule and declare what this law shall be? That is all these amendments seek to secure, and, if there is anything to be found in the Constitutions of the state or of the United States that will prevent a consummation so devoutly to be wished, it would be strange indeed, and every canon of construction should exclude such a meaning of its provisions, unless it has been most plainly and clearly expressed. There must be no loose implication in favor of it. But these amendments have imposed the duty upon the state to prepare its people to enjoy the rights and advantages that will accrue from self-government, by qualifying them to exercise the elective franchise, and, in order to do this, it perhaps became a public necessity that the schools be kept open, as required by the Constitution, so that the benefits of education can be accessible to all.

CLARK, C. J. (concurring). The requirement of the Constitution (article 9, § 3) that the "public schools shall be maintained at least four months in every year" (besides making the county commissioners in any county failing to do this indictable), and the prohibition in the Constitution (article 5, § 1) that the state and county taxation shall not exceed 66⅔ cents upon the $100, are both imperative. There should have been at no time any difficulty in enforcing both. The trouble has been to find between the amount levied for state taxes, when added to that required for four-month schools, and the 66⅔ cents limitation, a margin of taxation large enough to defray the necessary expenses of the county. In 38 counties such margin is large enough to provide for necessary county expenses, but in 59 counties it is not. The error has been in assuming that in such case the necessary expenses of the county came first. Such is not the mandate of the Constitution. The maintenance of schools for four months in each county is imperatively commanded. If the margin left is not sufficient to raise enough money to defray the necessary expenses of the county, taxes for that purpose can be levied, without a vote of the people, by approval of the General Assembly. Const. art. 5, § 6; article 7, § 7; Vaughn v. Commissioners, 117 N. C. 429, 23 S. E. 354. That permission has been practically, though perhaps not very explicitly, given, by the statutes authorizing and requiring county commissioners to provide for the county purposes named in the laws concerning them.

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(145 N. C. 293)

## UNIVERSAL METAL CO. v. DURHAM & C. R. CO.

(Supreme Court of North Carolina. Oct. 23, 1907.)

1. APPEAL — REVIEW — REASONS FOR DECISION.

The reason of the judge for setting aside a verdict, if insufficient, is immaterial where there appears a valid reason in the record for sustaining his ruling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3408.]

2. PRINCIPAL AND AGENT—POWERS OF AGENT —LIMITED AUTHORITY.

An agent of restricted authority cannot exceed the limit of his power; the restriction being known to the party with whom he is dealing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 556, 557, 559.]

3. FRAUD—QUESTION FOR JURY.

Whether evidence is sufficient to establish fraud is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 67–71.]

4. TRIAL — INSTRUCTIONS—WEIGHT OF EVIDENCE.

Under the express provisions of Revisal 1905, § 535, the judge must express no opinion as to the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 439.]

5. SAME—QUESTION OF LAW.

Whether there is any evidence upon which the jury could determine as to the truth of a matter in issue is a question of law for the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 338, 339.]

6. SAME—TIME FOR ASKING INSTRUCTIONS.

After the evidence was closed and the jury dismissed for the noon recess, counsel, at the request of the judge, argued a certain point in the case as preliminary to the argument after the recess. *Held*, that it was not too late to request a written charge after court had reconvened and before the argument to the jury had commenced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 642–645.]

7. COSTS—ON APPEAL—NEW TRIAL.

Under the express provisions of Revisal 1905, § 1279, where a new trial is granted, on appeal, the awarding of costs is discretionary.

Appeal from Superior Court, Moore County; Peebles, Judge.

Action by the Universal Metal Company against the Durham & Charlotte Railroad Company. From an order setting aside a verdict for plaintiffs and awarding a new trial, both parties appeal. New trial ordered in both appeals.

This action was brought by the plaintiffs to recover of the defendant $898.95 upon an alleged contract by which the plaintiffs agree to sell to the defendant a certain quantity of steel in bars at the aforesaid price. The defendant denied the contract, and specially alleged that it did agree to purchase from

the plaintiff, a firm of Mulhouse, France, to be shipped and delivered to it at Gulf, in this state, a certain quantity of metal or steel, which was at the time falsely and fraudulently represented to the defendant to be "Metalose," a new discovery which was much lighter than and more preferable to the steel in ordinary commercial use; that the said false representation was made to induce the defendant to buy a much larger quantity than, as the plaintiff well knew, the defendant intended or desired to buy; that when the "Metalose" arrived it was discovered not to be as represented by the plaintiffs, and the defendant refused to receive the same. The court submitted issues to the jury, which, with the answers thereto, are as follows: "(1) Did the defendant contract with the plaintiff as alleged in the complaint? Ans. Yes. (2) Was the defendant induced by fraud and misrepresentation to enter into the alleged contract with the plaintiff? Ans. No. (3) Is the defendant indebted to the plaintiff on account of the alleged contract? If so, in what amount? Ans. $898.95. (4) Were Paul Bloch and Octave Bloch, at the time mentioned in the complaint, trading and doing business under the firm name of Universal Metal Company? Ans. Yes." There was evidence tending to show that Frank D. Jones, superintendent of the defendant company, who represented it in the negotiations, told Alfred Jacob, the agent of the plaintiffs, at the time the alleged contract was made, and with whom, as such agent, it was made, that he had received orders not to buy more than $100 worth of supplies at any one time without the approval of the president of the company, and that such order had in fact been given. Jacob replied to Jones that the order would not exceed in amount $100. There was further evidence that the shops of the defendant company were not large, and only a small quantity of steel was needed, and Jacob was, at the time the alleged contract was made, notified of this fact, and that the order was given only to test the new metal. There was evidence introduced tending, as we think, to show the alleged fraud practiced upon the defendant. Requests for instructions were submitted by the defendant upon the questions of fraud and the authority of Jones to make the contract, and refused by the court. When the evidence was closed, and the court had discharged the jurors until after the noon recess and directed them to leave the courtroom, the judge asked the defendant's counsel what evidence there was upon the question of fraud, and the matter was argued by the respective counsel for a short time, whereupon the judge remarked that the court would take a recess and give counsel an opportunity to examine and present any authorities they could find upon the question, when the court convened after the noon recess. When the court reconvened, and, before anything else had been done, the defendant's counsel requested the court to give a written charge. This was refused upon the ground, as stated at the time by the judge, that the request was made too late. He then charged the jury orally and instructed them upon the second issue that there was no evidence of fraud, and that they should answer the issue "No." A verdict was rendered for the plaintiffs, as above indicated, whereupon the presiding judge set it aside and directed the following order to be entered: "The court being of opinion that the order for goods upon which this action is based was not binding upon defendant, and for that reason he erred in his charge to the jury on the first issue, not as a matter of discretion, but as a matter of right on the part of the defendant, the court sets aside the verdict and awards a new trial." The plaintiff excepted and appealed.

Geo. H. Humber, for plaintiff. Guthrie & Guthrie, for defendant.

WALKER, J. (after stating the facts as above). It was stated, on the argument, that the court thought the order for the goods was not binding upon the defendant because signed simply "Frank D. Jones, Superintendent," without indicating for what company he was superintendent. The reason of the judge for setting aside the verdict, if insufficient, is immaterial, so that there appears a good and valid reason in the record for sustaining his ruling, and we are all of the opinion that such a reason does exist. There was evidence that Jones was an agent of limited authority, and there was also evidence, we think, that a fraud was practiced upon the defendant by plaintiff's agent in his dealings with Jones, and yet the court instructed the jury that, if they found Jones made the order for the metal on September 19, 1905, they should answer the first issue "Yes," and that the evidence in the case was not sufficient to sustain an affirmative finding upon the second issue, and they should answer it "No." The defendant's counsel had asked instructions as to both of these issues. Their third prayer, as to the authority of Jones, was not very explicit, it is true, as it referred more to the fact that Jones had informed Jacob of his restricted authority, as agent of the defendant, than it did to the nature or extent of the authority itself; but, if a liberal construction is given to it, we find it sufficient to embrace that feature of the case. It should have more definitely required the jury to find: First, what was the nature of Jones' authority, whether limited or unlimited; and, if they found that it was limited, whether, in the second place, the plaintiffs, through Jacob, were notified of the fact. If Jones had only the restricted authority, as testified by him, he could not, of course, exceed the limit of his power when he made the contract. Brittian v. Westhall, 135 N. C. 492, 47 S. E. 616; Id., 137 N. C. 30, 49 S. E. 54; Bank v. Hay, 143 N. C. 326, 55 S. E. 811.

Whether the evidence introduced to establish the fraud was sufficient for that purpose was a question for the jury, and the judge could express no opinion as to its weight. Revisal 1905, § 535; Withers v. Lane, 144 N. C. 184, 56 S. E. 855; State v. Simmons, 143 N. C. 613, 56 S. E. 701. Whether there is any evidence upon which the jury could decide as to the truth of the matter submitted to them for inquiry and decision we have often said is a question of law to be decided by the judge (Byrd v. Express Co., 139 N. C. 273, 51 S. E. 851; Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201; Lewis v. Steamship Co., 132 N. C. 904, 44 S. E. 666); but, there being some evidence, which is more than conjectural or speculative, to establish the fact in issue, and which the law adjudges to be fit for the consideration of a jury, whether it sufficiently proves the fact or not is a question for the jury. The cases already cited also establish this proposition, which is but the counterpart of the other. The able and learned judge who presided at the trial may have intended, by the expression which he used, to say that there was no evidence of the fraud; but, even if this was his purpose, there was error, as, in the view we take of the evidence, without setting it out at length, we think there was at least some which the jury should have been permitted to pass upon.

We also are of the opinion that the judge erred in not reducing his charge to writing, as he was asked to do by the defendant's counsel. The request was made in apt time. It is impossible to distinguish this case from Craddock v. Barnes, 142 N. C. 89, 54 S. E. 1003. The principle established in that case is clearly applicable to this one. The mere intervention of an argument by counsel, at the judge's invitation, upon the question as to whether there was any evidence of a particular fact, when the jury had retired from the courtroom for the recess, and as preliminary to the discussion before them after the recess, should not have the effect to except this case from the principle of that one. The argument to the jury had not commenced when the request to the court was made. We do not see anything in the record to indicate that the judge did not have adequate time to write out his charge after he was asked to do so. Sawyer v. Lumber Co., 142 N. C. 162, 55 S. E. 84, would also seem to be direct authority against the ruling of the court that the request had come too late. In that case, the present Chief Justice said: "The defendant, at the close of the evidence, and before the argument began, requested the court to put its charge in writing." This means, of course, "at the close of the evidence and before the argument (to the jury) began." We then held that the judge committed an error when he failed to comply with the request.

There must be a new trial, for the errors indicated in the plaintiff's appeal.

New trial.

Defendant's Appeal in Same Case.

These two appeals have been so prepared for this court that it has been found impossible to reach the true merits of the questions intended to be presented without considering them together and as if they had been consolidated into one. We doubt if it was necessary for the defendant to have formally taken an appeal, as the exceptions noted in its case might well have been considered in the plaintiff's appeal. It is stated by the judge in the plaintiff's appeal, the case having been settled and signed by him, that all the evidence was sent up at the request of the appellants; whereas, it appears by reference to the defendant's appeal that all the evidence, by some accidental omission, of course, was not in fact stated in the plaintiff's appeal, for there is much evidence to be found in the case, as stated in the defendant's appeal, which is not in the case, as stated in the plaintiff's appeal. It was intended, no doubt, and we think the cases clearly show that to be so, that all the evidence should have been set out in the plaintiff's appeal. We have for this reason, and for others of equal or greater weight, found it absolutely necessary, for the purpose of doing justice by intelligently considering this case, to unite the two cases, as it were, into one appeal, and in this way we have been enabled to reach what we consider to be the right conclusion upon the whole matter. In view of the confusion in the record, as above indicated, we think the costs of this court, except the costs of printing the records and briefs, should be divided between the parties. The plaintiff is adjudged to pay one half thereof, and the defendant the other half. The plaintiffs will pay the costs of printing the record and briefs in their appeal, and the defendant the cost of printing the record and briefs in its appeal. Where a new trial is granted the awarding of costs is discretionary. Revisal 1905, § 1279; Williams v. Hughes, 139 N. C., at page 18, 51 S. E. 790.

Regular practice and procedure would require us, under ordinary circumstances, to dismiss the defendant's appeal, as it was taken only to save its rights, in case our opinion should have been adverse to it in the plaintiff's appeal, and, as we have decided the other way, a consideration of the defendant's appeal separately becomes unnecessary. We conclude, though, that an apparent departure from the strict practice in such cases is justified, under the peculiar circumstances, and the real intention of the parties will be effectuated by considering the two cases as we have done, and dividing the costs. If this course were not taken, and the plaintiffs' position is the correct one.

we would, perhaps, have to affirm in their appeal and award a new trial in the defendant's appeal, and thereby produce confusion and incongruity in the result. It would be vain and useless to issue a certiorari or any other process to perfect the case, when all the facts are before us in the two cases.

Sometimes it may be proper and legitimate practice for a party, in whose favor a case has been decided, to note his exceptions and preserve them by an appeal in case the ruling of the court is reversed here; but the instances where this practice can be justified are exceedingly rare, and it is not to be encouraged. We do not decide that the defendant's appeal was improvidently taken in this case, though we are inclined to think the defendant's exceptions could have been presented in the plaintiff's appeal. Let the two cases be considered as one, and the costs be divided and paid as herein directed.

New trial, as ordered in plaintiff's appeal.

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(145 N. C. 207)

## DAVIS & HOOKS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 16, 1907.)

1. CARRIERS — TRANSPORTATION OF GOODS — DELAY—REASONABLE TIME—COMPUTATION.

Under Revisal 1905, § 887, providing that the time within which an act is to be done shall be computed by excluding the first day and including the last, unless the last day shall be Sunday, when it shall also be excluded, what constitutes a reasonable time for the transportation of freight, as required by section 2632, must be determined by including the last day, unless it is Sunday.

2. SAME—"INTERMEDIATE" POINTS.

A station on defendant's railroad which was the terminus of two other railroads was not an intermediate point with reference to freight not transferred to the other lines, but shipped through on defendant's line to points beyond, under Revisal 1905, § 2632, providing what shall be a reasonable time for the transportation of freight, and authorizing a delay of 48 hours at one intermediate point for each 100 miles.

3. SAME—EXCLUSION OF SUNDAYS.

Revisal 1905, § 2632, requires transportation of freight within a reasonable time, and declares that in reckoning what is a reasonable time a delay of 2 days at the initial point and 48 hours at one intermediate point for each 100 miles of transportation shall not be charged against the carrier as unreasonable. *Held*, that, in determining whether a shipment was unreasonably delayed, the court was not authorized to exclude intervening Sundays, because section 3844 prohibited the running of freight trains on Sundays between sunrise and sunset.

4. SAME—DELAYS AT INITIAL POINT.

Where one of the two days next after the delivery of freight to a carrier for transportation was Sunday, such day was properly deducted in ascertaining whether the freight was transported within a reasonable time, as required by Revisal 1905, § 2632, not as Sunday, but as one of the two initial days of nonaction which the carrier was entitled to before it was required to begin the transportation.

Appeal from Superior Court, Wayne County; E. B. Jones, Judge.

Action by Davis & Hooks against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Aycock & Daniels, for appellant. M. T. Dickinson, for appellee.

CLARK, C. J. This is an action for penalty under Revisal 1905, § 2632, begun before a justice of the peace. On appeal to the superior court, by consent the court found the facts, from which it appears: That on May 5, 1906, a firm of merchants in Wilmington, N. C., shipped over defendant's road to plaintiff at Fremont, N. C., a quantity of corn, less than a car load; that Fremont is a station 96 miles from Wilmington on defendant's line from Wilmington to Rocky Mount; that Goldsboro between Wilmington and Fremont is the terminus of two other railroads; that in the car in which this corn was shipped was other merchandise which was unloaded at Goldsboro to be transferred to said other railroads at that point; that this car arrived at Fremont May 16th; that the shipment was in possession of the defendant for 12 days, including the day of its receipt and the day of its arrival at Fremont; that two of the intermediate days (i. e., May 6th and 13th) were Sundays; and that the schedule or ordinary time for the movement of freight by local train between Wilmington and Fremont is one day. The court below allowed the defendant to deduct five days, i. e., the day of receipt of the goods for shipment, the next day (Sunday 6th), then two more days, Monday and Tuesday, to get ready to start, and one day as the actual "ordinary schedule time" for transporting freight between Wilmington and Fremont, and gave judgment for seven days' delay, i. e., one day at $12.50, and six at $2.50 each; total $27.50.

The defendant excepted because the court did not further deduct Sunday, May 13th, also two days (48 hours) at Goldsboro as an intermediate point, also the day of arrival at Fremont. These four days, if allowed, added to the five already allowed, would make a total of nine days for transportation of freight from Wilmington to Fremont, 96 miles, whose ordinary schedule is one day, as found by the court. Ninety-six miles in nine days is more than twice the time it would take an ox cart to make the same trip. Indeed, as railroad trains, unlike ox carts, ordinarily travel by night as well as by day, 96 miles in nine days is less than one-half mile per hour. At 20 miles an hour, the ordinary speed of a freight train, it would have taken less than five hours, instead of the 12 days actually taken, to transport this freight from Wilmington to Fremont, which was at the actual average speed of one mile for each three hours, or eight miles for each 24 hours. In Hinkle v. Railroad, 126 N. C. 939, 36 S. E. 351, 78 Am. St. Rep. 685, it was held that "transportation of live stock at an average rate of less than five miles an

hour cannot be considered reasonable diligence, in the total absence of explanation." The statute was passed in response to a wide public demand and a grave recognized necessity of compelling railroads to deliver freight in a reasonable time. A construction of the act that would hold that this modern, splendidly equipped, up-to-date railroad, with its line between Wilmington and Fremont almost without curves and level as a plank floor, is not chargeable with unreasonable delay if it shall take in transportation between those points more than twice as long as it would take an ox cart to make the transit challenges attention. If the remedial statute accomplishes no more than requiring of a railroad less than half the speed of an ox cart, why was it passed? What does it remedy?

The statute (Revisal 1905, § 2632) is as follows: "It shall be unlawful for any railroad company, steamboat company, express company or other transportation companies doing business in this state to omit or neglect to transport within a reasonable time any goods, merchandise or articles of value received by it for shipment and billed to or from any place in the state of North Carolina, unless otherwise agreed upon between the company and the shipper or unless same be burned, stolen or otherwise destroyed, or unless otherwise provided by the North Carolina Corporation Commission. Each and every company violating any of the provisions of this section shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day, and five dollars for each succeeding day of such unlawful detention or neglect where such shipment is made in carload lots, and in less quantities there shall be a forfeiture in like manner of twelve and fifty one-hundredth dollars for the first day, and two and fifty one-hundredth dollars for each succeeding day: Provided, the forfeiture shall not be collected for a period exceeding thirty days. In reckoning what is reasonable time for such transportation it shall be considered that such transportation company has transported freight within a reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations; and a delay of two days at the initial point and forty-eight hours at one intermediate point for each hundred miles of distance or fractions thereof over which said freight is to be transported shall not be charged against such transportation company as unreasonable and shall be held to be prima facie reasonable, and a failure to transport within such time shall be held prima facie unreasonable." The statute for computing time (Revisal 1905, § 887) is as follows: "The time in which an act is to be done, as provided by law, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded." The Legislature makes the law. The function of the court is to apply it. An examination of these two statutes will show: (1) That the last day, the arrival at Fremont, is not to be deducted, unless it had been Sunday. (2) We are of opinion that Goldsboro is not an intermediate point on the line between Goldsboro and Fremont, on the same railroad. It would be an "intermediate" point only as to freight transferred to another railroad at that place. Merely taking goods out of the car en route at Goldsboro could not justify a delay of 48 hours there, for, this being a "local freight" train, goods are taken out or put in the car at any station, requiring for that purpose only a few moments and not delaying the train, nor the transportation of this particular freight, as may be the case as to freight transferred to another line of road to be forwarded in another car. (3) The Legislature has not written the words "Sundays excluded" into the statute, and the court has no authority to do so. Revisal 1905, § 887, by providing that in computing time, if the last day be Sunday, it shall be excluded, shows that except when Sunday is the last day it shall be counted in the time "provided by law."

The defendant contends that, inasmuch as railroads are prohibited (Revisal 1905, § 3844) from running freight trains on Sundays between sunrise and sunset, the court ought to interpolate the words "Sundays excepted" in section 2632. The Legislature might have written those words in the statute, but it did not do so. The courts have no power to do so. The Legislature evidently thought it had made full allowance for freight trains not running between sunrise and sunset on Sunday by the liberal allowance it has made to the railroads, over and above "the ordinary time required for transporting such articles of freight between the receiving and shipping stations," which in this case is found to be one day. The exact point has already been twice passed upon by this court. In Keeter v. Railroad, 86 N. C. 346, Ashe, J., says that the defendant set up the defense that Sunday should not be counted because the statute (chapters 97 and 203, pp. 182, 359, Laws 1879) forbade freight trains to run on that day, and holds that Sunday is to be counted, not excluded, in making up the time which the railroad is allowed for transportation. Said chapters 97 and 203, pp. 182, 359, Laws 1879, referred to by Judge Ashe, are now Revisal 1905, § 3844, again brought forward as a defense by defendant. The same ruling that Sunday (unless the last day) is to be counted was made in Branch v. Railroad, 77 N. C. 347. In Drake v. Fletcher, 50 N. C. 411, in construing the statute which allowed 20 days in which a ca. sa. must be executed, the court held that Sundays must be counted, though the statute forbade service of such process on Sunday; the court saying that when Sundays are to be excluded "the Legislature so declares in express terms." In Barcroft v. Roberts, 92 N.

C. 249, the court held, as to the 20 days allowed in which a petition to rehear could be filed, that the first day is to be excluded from the count, and the last day is to be counted, unless Sunday, and counted all other Sundays in the 20 days.

We have numerous statutes fixing the time within which certain acts are to be done, and though process and notices are forbidden to be served on Sunday (Revisal 1905, § 2837), no court has ever written into the statute specifying the time in which process shall be served (under a penalty to the officer for failure to serve in the prescribed time) the words "Sundays not to be counted." We also have statutes prescribing that if roads or bridges shall remain out of repair 10 days the overseer is liable to a fine and an action for damages (Revisal 1905, § 2724), but this has not been construed as "exclusive of Sundays," though the overseer is forbidden to do any work on Sunday (Revisal 1905, § 2836), and would not have 10 working days exclusive of Sundays. There are similar penalties in Revisal 1905, §§ 2722, 2723. Appeals must be taken in 10 days, cases on appeal served in 10 days, counter cases in five days under penalty of loss; yet the court has not extended the time by writing in the statute "Sundays not counted," though lawyers are no more to be expected to work on Sundays than freight trains. There is a severe penalty on any officer not serving process if delivered to him 20 days before court, or 10 days before return day of a justice of the peace warrant (Revisal 1905, § 2817); but, though he cannot serve such process on Sundays, they have never been excluded from the count. If a register fails to record a license in 10 days, he incurs a penalty. Revisal 1905, § 2092. But though he cannot legally record it on Sundays (Revisal 1905, § 2836) any more than a freight train can legally run between sunrise and sunset on that day, Sundays are not excluded. There is a penalty on clerks for not issuing executions in six weeks. Revisal 1905, § 618. They cannot legally issue executions on Sunday, but it has never been held that another week was to be added to the six weeks because of the six Sundays included. Many other instances might be given; but, as this court has said, if the Legislature intends that Sundays shall not be counted, it always "so declares in express terms." Drake v. Fletcher, 50 N. C. 411. This is a remedial statute in response to a public demand that quasi public corporations shall transport freight in a reasonable time. There is no indication that Sundays shall be excluded from the reasonable time prescribed in which railroads shall transport freight, since Sundays are counted in the time in which clerks, sheriffs, lawyers, road overseers, and all others are respectively required to perform certain acts under a penalty if they fail to do so within the time prescribed. In the cognate matter of demurrage, as Judge Ruffin notes in Branch v. Railroad, 77 N. C. 354, Sundays are counted in the time prescribed. To same effect: Car Co. v. Railroad, 121 Fed. 609, 57 C. C. A. 635; The Oluf (C. C.) 19 Fed. 459; Baldwin v. Sullivan Timber Co., 142 N. Y. 279, 36 N. E. 1060.

It follows, not only that none of the defendant's exceptions can be sustained, but that the judge erred in allowing the defendant four days at the initial point, for the statute expressly allows only "a delay of two days at the initial point," Sunday, May 6th, was properly deducted, not as Sunday, but as one of the two initial days of nonaction. There was no authority to deduct two more days. This last error follows our ruling that Sundays are not excluded by the statute, but we cannot correct this error, as the plaintiff does not appeal. For the same reason, we cannot pass upon the contention earnestly and ably made by the plaintiff that, under the terms of the statute, "if there is a delay of two days at the initial point," or of "48 hours at an intermediate point," it shall be held "prima facie reasonable"; but that this does not mean that, if there is not in fact such delays at those points, that length of time shall be deducted out of unreasonable delays elsewhere. The question is an interesting one, but we are not called on to decide a point not raised by any exception; the plaintiff not appealing. In Meredith v. Railroad, 137 N. C. 481, 50 S. E. 1, this court held that the "48 hours at intermediate point" was, as the statute says, only "prima facie reasonable delay," and not to be allowed unless it was a necessary delay. The statute allows the carrier "the ordinary time for transporting such articles of freight between the receipting and shipping stations," and, in addition to that, "a delay of two days at the initial point" (instead of the day of receipt, under Revisal 1905, § 887), and "48 hours at one intermediate point for each 100 miles of distance or fractions thereof * * * shall be held prima facie reasonable." This is the plain language of the body authorized to make laws, and this court has no desire or power to read or construe it except as it is written. If the time allowed is too liberal, or too restricted, it is for the Legislature to change it.

Affirmed.

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(145 N. C. 236)

## WATSON v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 16, 1907.

1. CARRIERS—TRANSPORTATION OF FREIGHT—DUTY OF CARRIER.

The only duty assumed by a carrier of freight under a bill of lading is to transport the articles to destination within a reasonable time if on its own line, and, if not, to transport and deliver to the next connecting carrier on the route to final destination, in the absence of evidence of a joint obligation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 272-279.]

2. SAME — DELAY — DAMAGES — BURDEN OF PROOF.
Where a consignee seeks to charge a carrier with liability by way of damages or statutory penalty for delay, the burden is on the consignee to show that the goods were not transported according to the contract within a reasonable time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 439.]

3. SAME—DELIVERY TO A CONNECTING CARRIER.
Where an initial carrier delivers freight to the connecting carrier within a reasonable time, such initial carrier is not liable for a delay subsequently occurring.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 766–774.]

4. SAME—BURDEN OF PROOF.
Where a delay in the transportation of freight was due to the negligence of a connecting carrier, the burden was on the initial carrier, in a suit against it for a statutory penalty for such delay, to prove such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 835–838.]

5. SAME—PRESUMPTIONS.
Where an initial carrier, in an action for penalty for delay, did not prove that the delay or a portion thereof occurred on the line of a connecting carrier, it would be presumed that the entire delay occurred on the initial carrier's line.

[Ed. Note.—For cases in point, see Cent. Dig vol. 9, Carriers, §§ 835–838.]

6. SAME—STATUTES—COMPUTATION OF TIME.
Revisal 1905, § 2632, requiring carriers to transport goods within a reasonable time, and imposing a penalty for delay, provides that in reckoning reasonable time a delay of 2 days at the initial point and 48 hours at one intermediate point for each 100 miles of distance or fraction thereof over which freight is to be transported shall not be charged against the carrier. *Held*, that a carrier was not entitled to a deduction of intervening Sundays, because section 2613 prohibits the running of freight trains on Sunday between sunrise and sunset.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 835–838, 841, 842.]

7. SAME—PURPOSE OF STATUTE.
The 48 hours' allowance to a carrier for delay at intermediate points by Revisal 1905, § 2632, is for change of cars if necessary, and for unloading and reloading.

Appeal from Superior Court, Bertie County; Lyon, Judge.

Action by T. W. Watson against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action for the recovery of penalty, before a justice of the peace, and heard on appeal to the superior court before Lyon, Judge, and a jury. The following evidence was submitted: Bill of lading duly signed by defendant company for car load of lumber to be shipped by plaintiff, T. W. Watson, at Cedar Landing, Bertie county, N. C. (1) That on the 1st day of October, 1906, the Rocky Mount Sash & Blind Company, at Rocky Mount, delivered to the Atlantic Coast Line Railroad Company for T. W. Watson, at Cedar Landing, N. C., the owner and party in interest, a car load of lumber and window frames, to be shipped and delivered at Cedar Landing to said Watson. (2) That the distance from Rocky Mount to Cedar Landing is 58 miles, and there is in that distance one intermediate point, to wit, Williamston, N. C., where the defendant connects with the Norfolk & Southern Railroad Company by boat for Cedar Landing. (3) That said shipment was delivered to the plaintiff at Cedar Landing on the 21st day of October, 1906. (4) That the entire route of the shipment and both terminal points are in North Carolina. (5) The defendant delivered to the plaintiff the bill of lading named above referred to. The court instructed the jury if they believed the evidence to answer the first issue "Yes," and the second issue "$100." To this charge defendant excepted. Thereupon the court rendered judgment. Defendant excepted to the judgment and appealed.

J. H. Pou, G. B. Elliott, and Pruden & Pruden, for appellant. Winston & Matthews for appellee.

HOKE, J. (after stating the facts as above). In support of its exception to the charge of his honor, on the first issue, the defendant insists that the only obligation assumed by the contract of carriage, evidenced by the bill of lading, was to transport, within a reasonable time, the articles to the point of destination, if on its line, and, if not, to transport and deliver to the next connecting carrier on the route to the final destination. In the absence of any evidence of a joint obligation, this is unquestionably true. It is further true that if the consignee seeks to fix the carrier with liability, either by way of damages, or for statutory penalty, the burden of proof is upon him to show that the goods were not transported, according to the contract, within a reasonable time. Walker v. Railroad, 137 N. C. 163, 49 S. E. 84. In this case it is conceded that the articles were received by defendant at Rocky Mount October 1, 1906, to be transported and delivered to plaintiff at Cedar Landing, both points being in this state, and the distance separating them 58 miles; that they were delivered to plaintiff October 22, 1906; that there was but one intermediate point between the place of shipment and destination. When the facts are admitted, and but one reasonable inference can be drawn from them, the court should instruct the jury as a matter of law. This is elementary. In the absence of explanation, it would not seem open to debate that the time between the receipt and delivery of the articles was unreasonable. We do not understand counsel to controvert this proposition. Defendant insists that, conceding this to be true, it also appears that Williamston is, for the purpose of this shipment, the terminus of defendant's line, and that, at that point, the articles were delivered to and transported by the Norfolk & Southern Railroad Company to their final destination. It is clear that if within a reasonable time the defendant delivered the articles to the Norfolk & Southern Company, and the delay

occurred upon that line, the defendant was exonerated, and the liability was transferred to that company. The question therefore is: Where does the burden of proof rest as to such transportation and delivery?

We had occasion to discuss this question in the case of Meredith v. Railroad, 137 N. C. 478, 50 S. E. 1, in an action for damages for a failure to transport goods in a reasonable time and deliver them in good condition. After a careful consideration of the authorities, we held that the means of proof, being within the control of the contracting company, upon the well-settled exception to the general rule, the burden was upon it to account for the damaged condition of the goods. In Harper v. Express Co., 144 N. C. ——, 57 S. E. 458, we held that the same principle would apply where the action was for wrongful delay, and that presumption of responsibility would arise against any one of the connecting carriers shown to have possession and control of goods after the delay occurred. We can perceive no good reason why the same principle should not control in an action for the statutory penalty for delay in transporting goods. As we said in Stone's Case, 144 N. C. 220, 56 S. E. 932, the only purpose and effect of the statute is to enforce the common-law duty and penalize its breach. The defendant keeps a record of all shipments over its line, by means of waybills, showing the date of receipt, date of arrival at the destination, together with all other data enabling is agents to keep trace of the shipment. It also takes a receipt from the connecting carrier to which shipments are delivered for transportation to the point of destination. This record is always made by and under the control of, defendant's agents. The shipper, or consignee, only knows, from his bill of lading, when the goods are shipped and when delivered. It is manifest upon every principle of fair dealing that, when he shows an unreasonable delay in the transportation, all matters in exoneration or defense should come from the defendant. To hold otherwise would be to render the legislation enacted for the enforcement of the duty of the carrier and protection of the "party aggrieved" of no effect—to keep the promise to the ear and break it to the sense. If, as in this case, the carrier may permit articles (lumber and window frames) doubtless shipped to meet an immediate necessity, to be delayed from October 1st to October 21st, a distance of 58 miles, and, without any explanation or information as to the cause or place of such delay, call upon the plaintiff to summon its agents with its own records to show when, where, and how the delay occurred, the statute would be of little value as a remedy for the wrong done him. His honor was therefore clearly correct in his instructions to the jury upon the first issue.

The defendant excepts to the instruction upon the second issue. His honor assumed that the entire delay occurred on the defendant's road. In the absence of any explanation, we are unable to perceive how any other rule can be applied. For the same reasons which fixed the burden of proof regarding the place or cause of the delay, we are constrained to hold that the defendant must be held liable for the entire delay. If, having the evidence in its possession to show the contrary, the defendant withholds it from the court, it has no just cause of complaint. In the absence, therefore, of any evidence showing when the article was delivered to the connecting carrier, the initial or contracting carrier will be charged with the entire time during which the unreasonable delay occurred. If it has discharged its full duty, or has positively done so, the evidence thereof is within its possession and not known to plaintiff.

His honor directed the jury to answer the second issue "$100." This is upon the theory that there was a delay of 21 days, 2 days being allowed at the shipping point, and 2 days at the intermediate point, leaving 17 days. The judgment of $100 is based upon a charge of $25 for the first day and $5 per day for 15 days. It is stated in the brief that October 21st was Sunday. We presume that his honor deducted that day. The defendant's counsel insists that the day of receipt and the day of delivery should be deducted, and from the time thus fixed the four days should be deducted. We do not think this a reasonable construction of the statute. The two days at the initial point are allowed for the purpose of giving a reasonable time to begin the transportation. The 48 hours at each intermediate point are allowed for change of cars, if necessary, unloading and reloading. The defendants insist that, in view of the statute (Revisal 1905, § 2613) prohibiting freight trains to run on Sundays, between sunrise and sunset, the Sundays intervening between the day of shipment and delivery should not be counted. This suggestion might be made effective on appeal to the Legislature, but the court is not at liberty to adopt it when the statute which imposes the penalty (Revisal 1905, § 2632) contains no such provision. We should not read into the statute an exception which the Legislature has not seen proper to make. Davis et al. v. Railroad (at present term) 59 S. E. 53. It will be noticed that the carrier is only prohibited from running its train for a part of Sunday, between sunrise and sunset, and certainly in the present case there has been no hardship imposed in the matter of time. In a shipment where the entire distance was not over 58 miles, there has been an allowance of 5 days as free time, and this was as favorable as the defendant could reasonably ask.

There has been no error of which the defendant can complain, and the judgment below is affirmed.

Affirmed.

(145 N. C. 261)

## WIERSE v. THOMAS et al.

(Supreme Court of North Carolina. Oct. 23, 1907.)

1. EXEMPTIONS — INJUNCTION — PROCEEDINGS IN COURTS OF ANOTHER STATE—EVASION OF EXEMPTION LAWS.

A resident of this state may be enjoined from prosecuting an action in another state for the purpose of evading the exemption laws and subjecting property to the payment of his debt protected by the Constitution and general exemption laws of the state, and also by Code, § 493 (Revisal 1905, § 678), exempting wages due for personal services rendered within 60 days prior to the levy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Exemptions, § 168.]

2. SAME—CONSTITUTIONAL LAW—FULL FAITH AND CREDIT.

An injunction so issued is not in violation of Const. U. S. art. 4, § 1, requiring full faith and credit to be given in each state to the judicial proceedings of every other state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Exemptions, § 168.]

3. CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES OF CITIZENS.

An injunction so issued is not in violation of Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

4. EXEMPTONS—PERSONS ENTITLED—REMOVAL FROM STATE.

Where a debtor ceased to be a resident of the state before property belonging to him became applicable to a creditor's claim, the general exemption laws of the state do not operate in his favor.

Appeal from Superior Court, New Hanover County; E. B. Jones, Judge.

Action by Paul Wierse against Bettie S. Thomas, trading as Thomas & Co., and the Atlantic Coast Line Railroad Company, to restrain attachment proceedings in another state to subject an indebtedness to plaintiff from the Atlantic Coast Line Railroad Company to the payment of an indebtedness due defendant Thomas & Co. From a judgment continuing the restraining order to the hearing, Thomas & Co. appeal. Affirmed.

The court found the facts to be as follows: "That the plaintiff, at the date of the institution of these proceedings, was a resident of North Carolina, the defendant Thomas & Co. resident of North Carolina, and the defendant corporation, having its principal place of business at Wilmington, N. C., operating a railroad in Virginia, North Carolina, South Carolina, and Georgia. Plaintiff and the other defendant reside in Wilmington, N. C. That at said date plaintiff was a resident having a family residing in Wilmington, where plaintiff worked as an employé of defendant company. That on the ——— day of May, 1906, defendant Thomas & Co. sent an account against plaintiff for collection to Atlanta, Ga., where an attachment was issued against plaintiff in a justice's court, levying upon the indebtedness of Atlantic Coast Line Railroad Company to plaintiff; such action not being prosecuted further by reason of the restraining order issued in this cause. That the amount of indebtedness due by the defendant company to plaintiff was $70, being for his personal services rendered within 60 days prior to said levy, and said sum is necessary for support of said debtor and his family, supported by him. That the debt claimed by Thomas & Co. against plaintiff is just and correct and was then due"—and thereupon adjudged that the restraining order be continued to the hearing, and defendant Thomas & Co. excepted and appealed.

R. G. Grady, for appellant. J. D. Bellamy, for appellee.

HOKE, J. (after stating the facts as above). At the time this action was commenced, and the Georgia attachment was levied, the property attached was protected both by the personal property exemption provided for by the Constitution and the general exemption laws of the state and also by section 493 of the Code. Section 678 of the present Revisal, prohibiting wages due for personal services of the debtor rendered within 60 days prior to the levy, and necessary for the use of the family, which was supported by his labor, from being subjected and applied to the laborer's indebtedness; and, this being true, on the facts established the judge correctly ruled that the restraining order be continued to the hearing. As stated in 12 Amer. & Eng. Encyclopedia, p. 256: "It may be regarded as settled that a court of equity has jurisdiction to enjoin a resident creditor from instituting or prosecuting an action or proceeding in another state for the purpose of evading the exemption laws of his state and of collecting his claim by subjecting to its satisfaction property or credits which the debtor could claim as exempt if the action or proceeding were brought within the state; and in such a case an injunction should generally be granted." And the doctrine so stated is grounded in right reason and fully sustained by authority. Dehon et al. v. Foster, 86 Mass. 545; Teager v. Landsley et al., 69 Iowa, 725, 27 N. W. 739; Engle v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448; Snook v. Snetzer, 25 Ohio St. 516; Waples on Homestead Exemptions, pp. 888, 889.

It is objected chiefly that an injunction on the facts before us is in violation of article 4, § 1, of the federal Constitution, providing that in each state full faith and credit shall be given to the judicial proceedings of every other state, etc., and section 2 of the same article, providing that citizens of each state shall be entitled to all the privileges and immunities of the several states. This view is fully discussed in the authorities cited, and rejected as unsound, and the correct doctrine is held to be that the courts of the resident creditor have power in proper cases to issue an injunction, not in restraint of the action of the court of another

state, but operating in personam on the creditor, and compelling him to obey the laws of his own commonwealth. Thus, in Dehon's Case, supra, Chief Justice Bigelow, speaking to this question, says: "The authority of this court as a court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the courts of this state or of other states or foreign countries, is clear and indisputable. In the exercise of this power, courts of equity proceed, not upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly presented for their determination. But the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction and amenable to process to restrain them from doing acts which will work wrong and injury to others, and are therefore contrary to equity and good conscience. As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign state or country. If the case stated in the bill is such as to render it the duty of the court to restrain a party from instituting or carrying on proceedings in a court in this state, it is bound in like manner to enjoin him from prosecuting a suit in a foreign court. 2 Story on Eq. pp. 889–900; Mackintosh v. Ogilvie, 3 Swanst. 365, note, 4 T. R. 193, note; Carron Iron Co. v. Maclaren, 5 H. L. Cas. 416, 445; Maclaren v. Stainton, 16 Beav. 286." And in Snook v. Snetzer, 25 Ohio St. 519, Rex, J., delivering the opinion, says: "In exercising this authority, courts proceed, not upon any claim of right to control or stay proceedings in the courts of another state or country, but upon the ground that the person on whom the restraining order is made resides within the jurisdiction and in the power of the court issuing it. The order operates upon the person of the party, and directs him to proceed no further in the action, and not upon the court of the foreign state or country in which the action is pending. On this subject, Mr. Justice Story, in his Commentaries on Equity Jurisprudence (section 899), says: 'Although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act in personam upon those parties, and direct them, by injunction, to proceed no further in such suit.' In such a case, these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court; but, without regard to the situation or the subject-matter in dispute, they consider the equities between the parties and decree in personam according to those equities, and enforce obedience to their decrees in personam." And in the case of Keyser v. Rice, 47 Md. 208, 28 Am. Rep. 448, Bowie, J., for the court, said: "The power of the state to compel its citizens to respect and obey its laws, even beyond its own territorial limits, is supported, we think, by the great preponderance of precedent and authority." And again: "All these instances imply that the citizen going from one state to another shall be entitled to the privileges and immunities of a citizen of the state to which he goes, but they do not absolve him from the duties and obligations of a citizen to the state to which he belongs and from which he went. As long as a citizen belongs to a state, he owes it obedience; and, as between states, that state in which he is domiciled has jurisdiction over his person and his personal relations to other citizens of the state." And the question was directly presented to the Supreme Court of the United States, the final arbiter on such matters, in Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538, in which Chief Justice Fuller, in a learned and elaborate opinion, established the proposition that the Constitution of the United States in proper case permits equity courts of one state to control persons within their jurisdiction from prosecuting suits in another state, and applied the principle to a case not unlike the one now before us. The same opinion, too, cites with approval several cases where the same principle is applied on facts almost identical with those existent here, and making the case an apt authority in support of our present decision.

True, it is not found as a fact in express terms that the purpose of the creditor in resorting to the Georgia courts was to evade the exemption laws of his own state; but as both plaintiff and his creditor were then resident and domiciled in the same city, where the railroad company had its office and principal place of business, and where the local courts were open and accessible, no other reason could be well conceived or suggested, and the existence of such a purpose is an inference well-nigh conclusive from the facts which are declared. As said in the Keyser Case, supra: "We think the intention to evade is necessarily presumed. Rational creatures must be presumed to intend the necessary and inevitable consequences of their deliberate acts." There is nothing in our present decision which is intended to militate against the position, undoubtedly correct, that our exemption laws have no extraterritorial vigor; nor do we question in any way the doctrine, declared by the United States Supreme Court in several recent decisions, that for the purpose of attach-

ment and jurisdiction, to the extent that it may be so acquired, the situs of the debt is at the debtor's residence, or wherever he may be personally served with process. Railroad Co. v. Deer, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. Ed. 426; Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023; Railroad v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144. While the debt may have a situs in the state of Georgia, it has its situs, too, in the state of North Carolina, where the railroad also has its residence and principal place of business, and where the debt due to plaintiff, its employé, is subject to our general exemption laws and the statute passed for the especial protection of a laborer's wages; and though the Georgia court has jurisdiction for the purpose and to the extent indicated, and if it should proceed, its judgment applying the property on the claim would be allowed full force and effect, so as to protect the railroad company from a second payment, this does not impair the right of the court of the creditor's residence, acting in personam, to compel obedience to its own laws, to the extent permitted by the proper application of the constitutional principle; and if such creditor, in defiance of an injunction duly served in an action properly constituted, should proceed in the Georgia courts, he would be subject, perhaps, to punishment for disobeying the restraining order, and could certainly be made here to restore the amount, wrongfully collected from the debtor. Teager v. Landsley, supra. In Sturm's Case, supra, which was strongly urged upon our attention in behalf of defendant, it does not appear, in any report of the case to which we have access, that the attaching creditor was a resident of the state whose exemption laws were alleged to have been violated, and the right of the courts of the resident creditor to compel obedience to its own laws does not seem to have been presented. It was certainly not considered or passed upon. The court only applied the recognized principle that, the court where the attachment issued having acquired jurisdiction, its judgment condemning the debt would protect the garnishee from a second payment. The same doctrine was applied here in a recent case of Wright v. Railroad, 141 N. C. 164, 53 S. E. 831, and neither decision is in conflict with our present opinion, nor the principle upon which it is made to rest.

We note an affidavit sent up with the record to the effect that, since this suit was instituted, the plaintiff has removed from the state and become a resident of South Carolina. This is not adverted to by the court in its findings of fact, and, while the findings are not conclusive upon this court in a case of this kind (Mayo v. Commissioners, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163), as the evidence on the matter may not all have been sent up, we make no comment, except to say that, if it should be made to appear that plaintiff has ceased to be a resident and citizen of this state at any time before the property is applicable to the creditor's claim, the general exemption laws of our state would not operate in his favor. The authorities, however, seem to have decided that the statute passed to protect a laborer's wages (Revisal of 1905, § 678) would, in any event, be effective for his protection. Goodwin v. Claytor, 137 N. C. 224-236, 49 S. E. 173, 67 L. R. A. 209, 107 Am. St. Rep. 479.

There is no error, and the judgment of the lower court is affirmed.

Affirmed.

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(145 N. C. 272)

## BEASLEY v. ABERDEEN & ROCKFISH R. CO.

(Supreme Court of North Carolina. Oct. 23, 1907.)

1. EASEMENTS—DEEDS—CONSTRUCTION.

A deed conveying to one a perpetual right of entry, right of way, and easements to locate, build a road, etc., over a strip of land, conveys an easement only in the strip, and the title, subject to the easement, remains in the owner.

2. CORPORATIONS—POWERS—STATUTES.

A corporation organized under Code 1883, § 677, authorizing the formation of corporations for the transaction of business except railroad business, and empowered by its charter to build and operate "tramways or other roads, not meaning railways," has no power to build or operate a railroad, and has no capacity to take and use an easement for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1519, 1520.]

3. SAME—CONVEYANCES—VALIDITY.

A right to avoid a deed to a corporation in excess of its capacity to take and use the property conveyed is confined to the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1550.]

4. SAME—DEEDS—CONSTRUCTION—EASEMENTS.

A deed to a corporation organized under Code 1883, art. 677, providing for the creation of corporations except for railroad purposes, which recites that the corporation contemplates "building a tram or railroad," and which grants to it a right of way on which to locate its "road * * * depots, station houses, bridges, etc., necessary * * * for * * * operating * * * said road," conveys only a right of way for a tramway, the word "railroad" meaning such a road as the corporation was authorized to construct, though it in general use signifies a road constructed of cross-ties on which iron rails are placed, dedicated to public use under the general law regulating public highways.

5. CONTRACTS—CONSTRUCTION.

Parties to a contract are presumed to have used language effectuating a lawful purpose, rather than an unlawful one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 734.]

6. EMINENT DOMAIN—RAILROADS—RIGHT OF WAY—ACQUISITION.

Where a railroad enters on the land of another and builds its road, and pays the compensation fixed for an injury to the land in an action by the owner thereof, the railroad acquires an easement to use the land to the same

extent as if it had acquired it by condemnation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 825.]

Appeal from Superior Court, Cumberland County; Webb, Judge.

Action by Festus Beasley against the Aberdeen & Rockfish Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial granted.

On May 29, 1890, the Enterprise Land & Improvement Company was incorporated pursuant to the general law of the state. The business proposed to be conducted by the company is stated in the articles of incorporation "to transport and carry for tolls timber, lumber, and produce of all kinds, naval stores, and all kinds of produce and merchandise of every nature and description, and for this purpose may build and operate, if necessary, tramways or other roads, not meaning to include railways, and may generally do all such kinds of work and business," etc. On the 9th day of June, 1890, Malcom McInnis, under whom plaintiff claims title to the land described in the complaint, executed a deed to the said corporation in consideration of $1 and "benefits to be derived," etc., "a free and perpetual right of entry, right of way and easements at any and all times for the purpose of surveying, locating, building etc. the said road, its depots, station houses and bridges in, through and over a strip of land one-hundred and thirty feet wide; that is to say, measuring sixty-five feet on each side of said road." Thereafter the said corporation executed a mortgage on all of its property, right of way, etc., to the Lima Machine Works. The mortgage was foreclosed, and the same property conveyed to Henry M. Sherrin and two others. Such title as they acquired passed to the defendant Aberdeen and Rockfish Railroad Company. Malcom McInnis, on September 14, 1897, conveyed to John Beasley the tract of land over which the right of way was granted, who on January 25, 1898, conveyed to the plaintiff. The evidence, on the part of defendant, tended to show that the Enterprise & Improvement Company built a tramroad of wooden rails across the land. No cuts or fills were made. The testimony on part of plaintiff tended to show that the tramroad was operated two years; that it was discontinued five or six years; that the timber rotted and burned. In 1897-98 it was rebuilt and operated about two years. This was by Sherrin and Campbell. It was not operated when plaintiff bought the land. After the Enterprise & Improvement Company quit operating, it was destroyed by every one who owned the land on it. Other persons had conveyed rights of way. In two or three years after Sherrin and Campbell ceased operating, defendant entered and built a railway, standard gauge, on the right of way and are now operating it, hauling freight and passengers. Defendant has been operating a railroad for about three years. This action is brought to recover damages for the entry upon, and appropriation of, the roadbed by defendant. His honor, being of the opinion that plaintiff was not entitled to recover, so instructed the jury. Plaintiff excepted. Judgment for defendant. Appeal by plaintiff.

Sinclair & Dye and J. S. Newton, for appellant. Robinson & Shaw, for defendant.

CONNOR, J. (after stating the facts as above). It is conceded that the deed from Malcom McInnis to John Beasley, under which plaintiff claims, covers the tract of land described in the complaint, over which defendant has constructed its track and is now operating the business of a common carrier. The right of the plaintiff, therefore, to maintain this action, depends upon the answer to the second issue: "Is the plaintiff the owner of the strip of land mentioned and referred to in the complaint?" His honor instructed the jury to answer the issue "No." In any aspect of the case this was error—doubtless inadvertent on the part of the court and counsel. The utmost which defendant could claim under the deed from McInnis to the improvement company, through which it deraigns its title, is an easement to use so much of the strip of 130 feet as is necessary to construct and operate its road. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263, and cases cited. No land is conveyed but a "right of way" and easement. The title to the land, subject to such easement, remained in McInnis and passed to plaintiff. The real questions, however, presented in the record and argued before us, are (1) the extent and character of the easement, and (2) whether it has been lost by abandonment.

Plaintiff seeks, in this action, to recover damages, or, speaking more accurately, compensation, for the entry upon his land and subjecting it to the burden of defendant's railroad track. He concedes that the land may be subjected to the burden by defendant, in the exercise of the right of eminent domain, by proper proceeding. He alleges, however, that its entry was a trespass. Defendant, on the other hand, insists that, by the deed from McInnis to the improvement company, a perpetual easement passed, entitling the grantee and its successors to build, maintain, and operate a railroad, of standard gauge, and used for the purpose of carrying freight and passengers. The solution of this question depends upon the construction of the deed. It will be observed that the charter of the improvement company was obtained under the provisions of the general law then in force (Code 1883, § 677), and not under statute providing for incorporating railroad companies. Chapter 16, § 677, expressly excepts from the corporate powers granted building railroads. The charter empowers the company "to build and operate, if necessary, tram ways or other roads, not meaning rail-

ways." The deed from McInnis contains the following recital: "Whereas the party of the second part contemplates building a tram or railroad," etc. The words of the grant are: "A free right of entry, right of way, etc., for the purpose of locating said road, its depots, station houses, bridges, etc., necessary and convenient for the use, operating and business of said road." Pursuant to this grant made in 1890, the improvement company constructed a wooden tramway over the land. After using it some time, having mortgaged its property and easements, they passed into the hands of natural persons, who used it for about two years, and "quit operating it about 1900." Thereafter the defendant corporation, conceded to have power to build and operate a railroad, as a common carrier, acquired such right as passed to the improvement company, and proceeded to build and operate a railroad over the land owned by plaintiff. Before defendant acquired the easement, the wooden tramway had practically disappeared—been burned or had rotted. It is manifest that the improvement company had no power to build or operate a railroad, and therefore no capacity to take and use an easement for that purpose. If it had attempted to do so, its acts would have been ultra vires, and, at the suit of the state, its charter forfeited. The deed, if construed to grant such power, would have been, in such suit, declared void, and, as the consideration was contemplated "benefits" from the road, the easement been at an end. It is settled by the decisions of this court, although held otherwise by the Supreme Court of the United States and other state courts, that the right to avoid the deed is confined to the state. Womack, Private Corporations, § 132 et seq., where the authorities are collected and commented upon. We are of the opinion, however, that by a proper construction of the deed no easement passed other than the company was authorized to take and use. The words "tram or railroads" should not be so construed as to invalidate the grant. It may well be that they were used as synonymous. The word "railroad," while in general use understood to signify a road constructed of cross-ties, upon which iron rails are placed and dedicated to public use under the general law regulating public highways, may well be construed, as used in the deed, as a private road, such as the improvement company was authorized to construct, with iron rails. So understood, it would be but a tramway, built of iron, instead of wooden, rails. This construction conforms to the charter and the evident intention of the parties as manifested by their conduct. It is an elementary rule of construction that parties will be presumed to have used language effectuating a lawful purpose rather than one which is unlawful. We must assume that the owners of the Enterprise & Improvement Company intended to preserve the powers conferred by their charter, than to expose their corporation to a suit by the state for acting ultra vires. We have construed such grants of easements to railroads as conveying no more than may be reasonably within the contemplation of the parties. Hodges v. Telegraph Co., 133 N. C. 225, 45 S. E. 572.

Illustrating the principle, Redfield, C. J., in Hill v. Railroad, 32 Vt. 68, says: "A contract to convey land for a particular use or to a party having capacity to acquire a certain estate in land for a particular use must of necessity carry the implication of such limitation upon the estate to be conveyed." The grant of such easement as is necessary or convenient for the operation of "said road" should be confined to such "tram or railroad" as the charter authorized the grantee to construct and operate. As said by Battle, J., in Railroad v. Garrison, 74 Ark. 136, 85 S. W. 81: "The right of way for a tramway does not imply the right to construct and operate a railroad. The owner of the land might be willing to waive compensation for the first when he would not for the latter." It is a matter of common observation that tramways, or, as sometimes called, railroads constructed by lumber companies for a temporary purpose, destroying but little timber, requiring no cuts or fills, are of little damage to lands. Many persons, either for some benefit accruing or to aid and encourage improvement, give such right of way who would be surprised to find that they had thereby imposed a permanent burden upon their lands, with much larger powers and much greater injury incident to the building and operation of a railroad than they contemplated. In this case it is in evidence that at the time plaintiff purchased the land the tramway had disappeared. There was nothing more than a "waggon-road" where the tramway had been. We think that it would be doing violence to the language of the charter of the improvement company, the language of the deed, and the intention of the parties to hold that a permanent easement for the construction and operation of a railroad was granted. By construing the language of the deed as granting a right of way for a tramway, we avoid these difficulties and relieve the land of a burden which the company had no right to impose, and we do not think the grantor intended to create.

This view of the case renders it unnecessary to discuss a number of interesting questions raised upon the record. The plaintiff is entitled to recover of defendant a fair compensation for the injury done his land by entering upon it and constructing the railroad. When this is fixed and paid, the defendant will acquire the easement to use the land in the same manner, for the same purpose, and to the same extent as if it had acquired the easement by condemnation. Brown v. Power Co., 140 N. C. 333, 52 S. E. 954, 3 L. R. A. (N. S.) 912.

We think that there was evidence proper to be submitted to the jury upon the question of

abandonment of the easement, but, as the view which we take of the record entitles the plaintiff to recover, it is unnecessary to discuss that question. There must be a new trial.

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(145 N. C. 269)

## SMITH v. MOORE.

(Supreme Court of North Carolina. Oct. 23, 1907.)

1. TRIAL—VERDICT—CONFLICT.

In an action to set aside a deed, it was alleged that defendant's testator, aided by counsel for plaintiff and her mother, had caused them to execute a deed conveying certain property to testator absolutely, instead of a will which they intended to make, which would have left the property to testator after their death. A verdict found the issue as to intentional fraud in the affirmative, but added that the jury distinctly exonerated testator of any intentional fraud; it being agreed that the finding was necessary under the charge of the court as to the law, and that the guilt was legal, and not moral, and the evidence showing that it was the purpose of plaintiff and her mother that the property in question should go to testator and his heirs after the death of both plaintiff and her mother. *Held*, that the verdict was conflicting and insufficient to sustain a judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857–860.]

2. SAME—INSTRUCTIONS.

Plaintiff and her mother executed a deed to testator which plaintiff alleged both believed to be a will leaving the property to testator after the death of both plaintiff and her mother. After execution of the deed, testator executed a life lease to plaintiff and her mother reserving a peppercorn rent. On an issue as to the validity of such deed, one of the jurors asked the court if the lease was found to be valid, whether plaintiff and her mother would be entitled to the rents of the property for life. *Held*, that the court should have answered such question in the affirmative, instead of giving a nonresponsive charge, which might lead the jury to think that the court was of the contrary opinion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 569.]

Appeal from Superior Court, New Hanover County; W. R. Allen, Judge.

Action by Louise B. Smith against Susan E. Moore as executrix of the estate of Roger Moore, deceased. From a judgment for plaintiff, defendant appeals. Reversed.

Bellamy & Bellamy, H. McClammy, and Rountree & Carr, for appellant. E. K. Bryan and J. D. Bellamy & Son, for appellee.

CLARK, C. J. This case was before us (142 N. C. 277, 55 S. E. 275, 7 L. R. A. [N. S.] 684), when a new trial was granted. It is not necessary again to set out the facts in full.

The cause of action alleged in the complaint is that on or about March, 1885, Roger Moore, the testator of the defendant, Susan E. Moore, and ancestor of the other defendants, being the confidential friend and adviser of the plaintiff and her mother, Mary E. Smith, induced and persuaded the said Mary E. Smith and this plaintiff to execute and deliver to him a certain deed conveying to him a lot of land and premises in fee simple, in the city of Wilmington, and at the time he procured the execution of the said deed he procured the same by falsely and fraudulently representing to this plaintiff and her mother, the said Mary E. Smith, that the said deed was a will whereby they would leave the said property to him after their death, and thereupon the plaintiff and her mother, relying upon the said representation, and verily believing the said instrument to be a will, executed the same; that the plaintiff did not discover or know that the said instrument was not a will but a deed until some time after the death of Roger Moore, when the defendants demanded possession of the said premises from the plaintiff, telling her that she had conveyed the same to the said Roger Moore, and threatening to have this plaintiff ejected from the same if she did not surrender the possession thereof. These allegations were denied by the defendants. On the new trial from which this appeal is taken, the following issue was submitted to the jury: "Was the deed of March 3, 1885, by Mary E. Smith and Louise B. Smith to Roger Moore, procured by fraud?" To which the jury replied, "Yes." At the time the issue above was answered as above set out, the jury attached to the same a separate piece of paper, and asked the court to consider the same in connection with their verdict thus rendered, whereon was written the following words: "In answering the issue in this case 'Yes,' we distinctly exonerate Col. Roger Moore of any intentional fraud; it being agreed that the finding is made necessary under the charge of the court as to the law, and that the guilt is legal and not moral. We think the evidence shows conclusively that it was the wish and purpose of both Mrs. M. E. Smith and Louise B. Smith that the property in question should go to Roger Moore and his heirs after the death of both of them"—which entry was made on the records by order of the judge.

The only fraud alleged in the procurement of the deed of March 3, 1885, was that the deed was substituted for the will by the fraudulent practices of Col. Moore, aided by Mr. Cutlar, the counsel for plaintiff and her mother. This appears throughout plaintiff's evidence and in the argument of plaintiff's counsel to the jury as stated by the court in the charge when arraying the contentions of the parties. This is a charge of the plainest and grossest moral fraud. It was not a case of legal, as distinguished from moral, fraud. The verdict of the jury, in effect, says that yielding to the instructions of the court as to the law they are compelled to find that the deed was procured by fraud, but that they are compelled upon the evidence to find that there was no intentional or moral fraud on the part of Col. Moore, and that it was the wish and purpose of

both Mrs. M. E. Smith and Louise B. Smith that the property in question should go to Roger Moore and his heirs after the death of both of them—a purpose which is effectuated by the deed and lease called in question by this action. The issue was tried as one of moral, intentional fraud. The verdict answers "Yes," and then contradicts this finding by recording, as a part of the verdict, that Col. Moore was not guilty of intentional fraud. The finding is palpably contradictory, and no judgment can be based upon it. It is impossible that a lawyer could have "unintentionally" drawn a deed for a will, especially when he conveyed a life estate back to the grantors by executing a lease reserving a peppercorn rent.

One of the jurors, before the jury withdrew, asked the court the following question: "If the lease written March 15, 1895, is found by the jury to be valid, would the life tenants under that lease be entitled to the rents of this property?" The court erred in not answering the question "Yes," instead of the charge given, which was not only not responsive, but probably had the effect, we think, to lead the jury to think the court was of the contrary opinion.

There were other exceptions, but as a new trial is necessary, and they may not arise again, it is unnecessary to discuss them.

Error.

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(145 N. C. 450)

## STATE v. HOLT et al.

(Supreme Court of North Carolina. Oct. 23, 1907.)

1. BAIL — CONTINUANCE — DISCHARGE OF SURETY—RENEWAL OF BOND.

The continuance of a criminal case in which bail is given does not discharge the surety, unless the bond is renewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, § 313.]

2. SAME—JUDGMENT NISI.

Where the principal in a bail bond was called, and, failing to appear, judgment nisi was rendered against him and his surety, such judgment offering an opportunity to show cause why it should not be made absolute did not discharge the surety.

3. SAME—DEFENSES.

Where bond was given for the appearance of H. to answer a criminal charge, it was no defense to the surety that H. failed to appear, because at the time he was called he was incarcerated for drunkenness in the town lockup; H. not having been produced during the term after his release from the lockup, and his bond not having been renewed.

Appeal from Superior Court, Scotland County; Councill, Judge.

Action by the state against B. F. Holt and others on an appearance bond. From a judgment for plaintiff, defendants appeal. Affirmed.

H. H. McLendon, for appellants. Hayden Clement, Asst. Atty. Gen., for the State.

CLARK, C. J. Sci. fa. against Holt, principal, and Ballard, surety, on appearance bond. The defendant was called on Wednesday of April term, and judgment nisi and capias ordered. It was issued July 10th, and served on surety, the principal not found, having become a fugitive from justice on another charge. On motion for judgment absolute the surety, Ballard, answered that Holt did not appear in court on Wednesday when called, because he could not, being under arrest in the town lockup, and that, as soon as released, he came to the courthouse, but found that his case had been continued. The solicitor replied that Holt had not renewed his bond after being called out; that he had not attended court after the sci. fa. issued, and was now a fugitive from the state; that when called out said Holt was in town custody on a charge of being drunk and disorderly.

It is very true, as Sir Boyle Roche said in the Irish Parliament, that "no man can be in two places at the same time, barring he is a bird," and that Holt could not be down and drunk in the town guardhouse and at the same instant soberly and seriously conducting his defense in the superior court. But he had no business to be drunk. His being in town custody was neither "the act of God nor the public enemy." He could not plead his own wrong. The surety, Ballard, says he was not surety that Holt should keep sober and out of custody of the law on some other charge; hence he is not responsible for Holt not appearing on Wednesday when called. If that be conceded, the surety, Ballard, was nevertheless not discharged from liability on the bond until Holt renewed his bond or appeared and stood his trial. The continuance of the case, unless the bond is renewed, does not discharge the surety. State v. Morgan, 136 N. C. 602, 48 S. E. 670. The judgment nisi did not discharge the surety, for that was a conditional judgment against both the principal and surety, with opportunity to show cause why it should not be made absolute. If sufficient excuse has been shown for the failure to answer on Wednesday, none has been shown why Holt did not give bond during the term after his release or later. The liability of the surety is a continuing one until discharged by renewing the bond or production of the prisoner and surrendering him into custody. Certainly a defendant cannot relieve himself and surety by getting drunk and in arrest, and then avoid all consequences by taking flight when released from that arrest. The town authorities may not have known of Holt being bound over to court. If they did, it was not their duty, but his surety's, who had so contracted, to deliver him to the court when called for.

The judgment absolute is affirmed.

(78 S. C. 424)

## BOWIE v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Oct. 31, 1907.)

1. TELEGRAPHS — LIMITATION OF LIABILITY — WAIVER — ACCEPTANCE OF MESSAGES OVER TELEPHONE.

While a reasonable stipulation on a telegraph company's message blank, limiting its liability for messages to those presented and accepted at its transmitting offices is binding upon the sender with notice thereof, yet, where a message is received at the office over a telephone and is transmitted by the company to the sendee, the company will be held to have waived the regulation by inviting the delivery of messages in another way, where it does not appear that the sender assented to any stipulation limiting the company's liability for messages so received, nor knew that a stipulation was contained on its message blank, nor intended the message to be written on the blank.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 39, 45.]

2. SAME — MISTAKE IN MESSAGE — ACTION — MEASURE OF DAMAGES.

Where a person bought flour on the faith of an erroneous telegram in which it was offered at $4.30 per barrel, instead of $4.60 as intended by the sender, and afterwards had to pay the higher price for the same flour, the measure of damages for which the telegraph company is liable is the difference between the market value and the price stated in the message.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 72.]

3. EVIDENCE—MARKET VALUE—QUOTATIONS.

Where a mill company's quotation for flour delivered at a place was the only evidence of market value there, and its good faith and correctness were not questioned, it was proper to take it as the true market value in computing damages for a mistake in sending a telegram quoting prices.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 259.]

Appeal from Common Pleas Circuit Court of Abbeville County; James Aldrich, Judge.

Action by J. S. Bowie against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Fearrons, Frank B. Gary, and Evans & Finlay, for appellants. J. F. Lyon and M. P. De Bruhl, for respondents.

WOODS, J. The defendant telegraph company on August 3, 1904, delivered to the plaintiff, a wholesale grocer and commission merchant at Abbeville, S. C., a telegram offering flour for sale, in these words: "El Reno, O. T., Aug. 3, 1904. To J. S. Bowie, Abbeville S. C. Will book at four thirty in sacks delivered. Our lowest limit. Market advancing rapidly. El Reno Mill E. Company." The plaintiff immediately telegraphed acceptance in these words: "August 3, 1904. To El Reno Mill & Elevator Co., El Reno, Okla. T. Accept three hundred barrels Wigwarm as quoted. Writing. J. S. Bowie." The plaintiff on the faith of his trade immediately resold the flour on the Abbeville market at $4.40, being a profit of 10 cents per barrel on the price stated in the telegram delivered. When the flour arrived, the plaintiff found the El Reno Mill & Elevator Company had drawn a draft with the bill of lading attached for the price computed at $4.60 a barrel, instead of $4.30 as stated in the telegram received. The plaintiff paid the draft, and delivered the flour on his contracts of sale. He then brought this action, alleging the telegram as delivered to the defendant company was an offer to sell flour at $4.60 per barrel, and that he had been misled and damaged $90 by reason of the defendant's negligence in changing the offer in transmission to $4.30 per barrel. The verdict was for $90, the whole amount claimed.

The message having been sent to the defendant company and accepted by its agent at El Reno by telephone, the defendant relied on this stipulation in its message blank to exempt it from liability for any mistake in the transmission: "No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender." On this point the circuit judge, at the request of the plaintiff, gave this instruction: "If a message is received at the office of a telegraph company over the telephone and is transmitted by the telegraph company to the sendee, it is presumed to be properly delivered to and accepted by the telegraph company for transmission." There was no evidence that the sender assented to the stipulation or knew it was written on the company's blank, or that he intended or expected the message to be written on the blank. In the absence of such evidence, we can see no ground whatever for the company to say a delivery and acceptance over a telephone kept in its office was not a proper delivery. Certainly the defendant has no right to complain when the circuit judge, assuming that there might be some evidence bringing the stipulation home to the sender, in response to the defendant's request, charged if the regulation on the message blank was reasonable, and brought to the knowledge of the sender he would be bound by it and the company would incur no liability in reference to the telegram until it had been presented and accepted at one of its transmitting offices, unless the company had seen fit to waive the regulation by inviting or encouraging the sender or the public to deliver to it messages in some other way. The court instructed the jury, if the defendant did not make the mistake in the telegram, then it was not liable at all. The verdict for any amount is therefore a finding that the mistake was made by the defendant.

The other question in the cause is whether the following instruction, as to the measure of damages, was correct under the facts of this case: "If the jury find the plaintiff bought flour on faith of a telegram

in which it was offered at four dollars and thirty cents per barrel, and afterwards had to pay $4.60 for the same flour, the telegraph company will have to pay plaintiff the difference between the price actually paid and the price stated in the message if the defendant made a mistake in sending the price in the message at $4.30 when it should have been $4.60." To lay down any formula by which damages may be measured in all cases for failure to deliver telegrams or mistakes in their transmission is impossible. The direct damages to be anticipated, as well as those which are actually produced by such failures and mistakes, are as various as the business affairs which are transacted by telegraph. There are, however, some principles of general application, though it would not be safe to say all of them apply to every case. The doctrine thus stated in Roper v. Johnson, L. R. 8 C. P. 180, 23 English Ruling Cases, 545, as to the measure of damages for breach of contract, is generally accepted: "The general rule as to damages for breach of a contract is, that the plaintiff is to be compensated for the difference of his position from what it would have been if the contract had been performed. In the ordinary case of a contract to deliver marketable goods on a given day, the measure of damages would be the difference between the contract price and the market price on that day." Manufacturing Co. v. Iron Works, 75 S. C. 349, 55 S. E. 768; Wallingford v. Telegraph Co., 53 S. C. 410, 31 S. E. 275; Brooke v. Laurens Milling Co. (recently filed) 58 S. E. 806. The primary end to be kept in view is compensation to the party against whom the breach has been committed for the difference in his position from what it would have been if the contract had been performed. Market values are only factors used in arriving at this difference. The reason for the use of market values is that goods are worth what they will bring in the market, not what the buyer or seller may think they ought to bring. Hence he who breaches a contract must pay as damages what the other party could and would have realized in view of existing market conditions, if the contract had been performed. This test of the measure of damages is not affected by the fact that part of the difference between the contract price and the market price would be profit. The parties are entitled to all legitimate benefits of the contract including profits. This general rule is applicable to damages for mistakes in communicating contracts by telegraph, and it was the basis of the decision in Hays v. Telegraph Co., 70 S. C. 16, 48 S. E. 608, 106 Am. St. Rep. 731, 67 L. R. A. 481. There the evidence was that by the mistake in the telegram the plaintiffs had been misled into buying mules, which, though actually superior in quality, were worth no more on the Greenwood market than other mules which in the telegram as written were quoted $10 cheaper, and which plaintiffs would have bought if the telegram had been properly transmitted. The court there said: "Therefore, whether we regard the effect on the plaintiffs as a loss of profit, or the fruitless expenditure of money on the faith of the telegram, the result is the same. The difference in the price paid and the price stated in the telegram as delivered was, under the facts of this case, the true measure of damages." So, also, we think that under the facts of this case the difference between the price as stated in the telegram and the price plaintiff was obliged to pay is the true measure of damages. When the telegraph company by its negligence deprived the plaintiff of the benefit of his bargain, it must compensate him for the loss of it by the same measure as would have been applied to the seller if the breach had been on the part of the seller. Misled by defendant's error, the plaintiff had resold the goods, and there was no evidence that he could have obtained for delivery on his contracts flour of the same quality on the Abbeville market at less than the sum called for by the draft which he was obliged to pay in order to obtain this lot. The only evidence as to the market value of the flour was the real quotation of flour in the telegram as delivered at El Reno to the defendant's agent. The price at which the plaintiff sold was not evidence, because that was clearly based on the incorrect quotation contained in the telegram as delivered to him. As the mill's quotation for flour delivered in Abbeville was the only evidence of market value at that place, and the good faith and correctness of that quotation was not drawn in question by defendant, we think it was not error for the circuit judge to charge the jury on the assumption that it was the true market volume.

We cite only a few of the many authorities supporting the conclusion we have reached: Pepper v. Telegraph Co., 87 Tenn. 554, 11 S. W. 783, 4 L. R. A. 600, 10 Am. St. Rep. 710; W. U. Tel. Co., v. Flint River L. Co., 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; W. U. Tel. Co. v. Nye & S. G. Co., 70 Neb. 251, 97 N. W. 305, 63 L. R. A. 803; Joyce on Electric Law, 964 and 974; Reed v. Telegraph Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; Jones Telegraph Companies, 544; W. U. Tel. Co. v. Stevenson, 128 Pa. 442, 18 Atl. 441, 5 L. R. A. 515; 15 Am. St. Rep. 687; W. U. Tel. Co. v. Du Bois, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109; Pearsall v. W. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534, 21 Am. St. Rep. 662.

The judgment of this court is that the judgment of the circuit court be affirmed.

(78 S. C. 419)

## BALDWIN v. POSTAL TELEGRAPH CABLE CO.

(Supreme Court of South Carolina. Oct. 31, 1907.)

1. TORTS—ACTIONS—PLEADING.
In declaring in tort if the act which caused the injury is alleged to be negligent and willful, two causes of action are stated, and, upon the failure to prove willfulness, the plaintiff may be nonsuited as to that cause of action and denied punitive damages, and still recover actual damages on proof supporting the charge of negligent injury.

2. SAME—DAMAGES.
If an act is one for which there can be no recovery unless it was done either negligently or willfully, and plaintiff only charges that it was done willfully, on proof of willfulness he may recover both actual and punitive damages, but, on failure of such proof, he can recover neither.

3. TRESPASS—INJURIES TO REAL PROPERTY—PLEADING—ISSUES AND PROOF.
To make an injury done in the prosecution of work on land carried on by the permission of the owner a tort, it must be inflicted negligently or willfully, and, if alleged to have been done willfully, proof that it was done not willfully, but negligently, is insufficient to sustain the cause of action alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 107.]

4. SAME—DAMAGES.
Neither willfulness nor negligence is necessary to make a trespass on real estate a tort, and, where the owner brings action therefor, alleging only that it was done willfully and oppressively, and the proof fails to sustain this allegation, he is still entitled, on proof of the unintentional trespass, to recover actual damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 134.]

5. EMINENT DOMAIN — TELEGRAPHS — STATUTORY PROVISIONS—REMEDIES OF PROPERTY OWNERS.
In trespass against a foreign telegraph company for entering on plaintiff's land, the company cannot claim that plaintiff was confined to the remedy offered by the condemnation statute because he gave it a written permit to construct its line over his land, since under Civ. Code 1902, § 2211, a foreign telegraph company not domesticated in compliance with the statute cannot avail itself of the condemnation statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 694.]

6. CONTRACTS — VALIDITY OF ASSENT — IGNORANCE OF FACTS—FRAUD.
The failure of an illiterate person to have a contract read to him before signing it will ordinarily estop him from avoiding the contract; but, if he was induced to sign by false representations as to its contents, he is not bound thereby to the party who made the representations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 423.]

7. SAME—QUESTION FOR JURY.
In trespass against a telegraph company for erecting its line on plaintiff's land, where the company claimed the right to do so under a contract executed by plaintiff, and plaintiff contended that the contract was secured by fraud, *held*, under the evidence, that it was a question for the jury whether the plaintiff was negligent in signing the contract without ascertaining its contents, or was induced to sign by fraudulent statements of the defendant's agent as to its purport.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 454.]

Appeal from Common Pleas Circuit Court of Oconee County; R. C. Watts, Judge.

Action by Stephen Baldwin against the Postal Telegraph Cable Company for trespass to real estate. From a judgment for plaintiff, defendant appeals. Affirmed.

J. P. Carey and J. W. Shelor, for appellant. J. R. Earle and B. F. Martin, for respondent.

WOODS, J. The plaintiff recovered judgment for damages against defendant under this allegation: "That on the ——— days of ———, in the years 1902 and 1903, the defendant oppressively, without right or authority, with a high hand, and in reckless and wanton disregard of the rights of the plaintiff, went upon his said tract of land and did trespass thereon by digging holes, erecting poles, stringing wires across said premises, cutting down and destroying trees, making roads through his cultivated and uncultivated lands and growing crops, dragging and hauling poles and other material across and upon his cultivated and uncultivated land against plaintiff's will and over his protests and entreaties, to his damage in the sum of $600." The circuit court, being of the opinion that there was no evidence that the trespass alleged was committed oppressively with high hand or recklessly and wantonly, ordered a nonsuit as to punitive damages.

The defendant first contends the action is solely for punitive damages, and therefore the finding that there was no evidence to support punitive damages was necessarily a finding there was no case, and the circuit judge erred in not ordering a nonsuit generally. The law is well settled that in declaring in tort, when the plaintiff alleges the act which caused the injury to be negligent and willful, he in reality states two causes of action—in one cause of action alleging the act to be a tort because inflicting injury by negligence, and in the other alleging the act to be a tort because inflicting injury willfully. Under a complaint so drawn, upon failure to prove willfulness, the plaintiff may be nonsuited as to that cause of action and denied punitive damages, but may recover actual damages on proof supporting the charge of negligent injury. Machen v. Telegraph Co., 72 S. C. 261, 51 S. E. 697. But, if the act be one for which there can be no recovery, no matter how great the injury, unless it was done either negligently, or willfully, recklessly, or wantonly, and the plaintiff omitting to charge negligence, alleges it was done willfully, wantonly, or recklessly, he cannot recover either actual or punitive damages unless he proves willfulness, wantonness, or recklessness. Procter v. Railway Co., 61 S. C. 186, 39 S. E. 351; Id., 64 S. C. 491, 42 S. E. 427;

Chiles v. Railway Co., 69 S. C. 327, 48 S. E. 252; Machen v. Telegraph Co., supra. But, under such allegations upon proof of willfulness, wantonness, or recklessness, he may recover both actual and punitive damages. Chiles v. Railway Co., supra; Duke v. Telegraph Co., 71 S. C. 104, 50 S. E. 675. In the application of these established rules, an important distinction is to be observed between cases where the act complained of is in itself a tort, as, for example, a trespass on real property, and those where the act only becomes a tort because done negligently, or willfully, wantonly, or recklessly. A complaint which merely alleges injury done in the prosecution of work on land carried on by permission of the owner states no cause of action. To make such injury a tort, it is necessary to allege it was inflicted negligently, or willfully, wantonly, or recklessly. Hence in such case, if the allegation be that the injury was inflicted willfully, and the proof be it was inflicted not willfully, but negligently, under the authorities above cited, a nonsuit is proper for failure to prove the cause of action alleged. There being no allegation of negligence, and the allegation of willfulness having fallen for lack of proof, there remains nothing to support the case. But neither willfulness nor negligence is necessary to make trespass on real estate a tort. Hence, this case, when by the nonsuit the circuit court struck from the case every charge of willfulness and oppression, there remained the charge of an unintentional trespass which when proved carried a right to actual damages.

The defendant introduced a written permit from the plaintiff granting the right to construct the telegraph line over his land. In view of this permission to enter, the defendant contends the plaintiff had no right of action for injury, but was confined to the remedy offered by the condemnation statute. An admission appears in the record that the defendant is a foreign corporation, and it does not appear it has become a domestic corporation under the laws of this state. It cannot therefore avail itself of the condemnation statute. Civ. Code 1902, § 2211; Duke v. Telegraph Co., 71 S. C. 99, 50 S. E. 675.

It remains to be considered whether a nonsuit should have been ordered for an entire lack of evidence of fraud in obtaining the permit to construct the telegraph lines over plaintiff's land. The permit pretended to give defendant "the right to construct and maintain its lines of telegraph, including the necessary poles over the property which I own, or in which I have any interest, in the ——— of ——— county of Oconee, and state of South Carolina, and along the roads, streets, and highways adjoining the said property." There was evidence of plaintiff's inability to read or write, and there was no evidence of the permit being read to him. The rule is a person who is unable to read is bound to have the paper read to him before signing, just as a person who can read is bound to read it before signing; and failure by such illiterate person to take this precaution will ordinarily be regarded such gross negligence as will estop him from avoiding the contract. Montgomery v. Scott, 9 S. C. 20, 30 Am. Rep. 1; 9 Cyc. 90. But another rule coexistent with this is, if one of the parties induces the other to sign a paper in reliance upon his representation as to its contents, and the representation turns out to be untrue and fraudulently made, the party who relied on it is not bound to him who deceived him into signing the paper. Here there was evidence that plaintiff relied on the representation of defendant's agent that the contract provided for the line to be run within a foot of the railroad's right of way. On this point the plaintiff testified that: "Q. If he had not agreed to run the line where you said he could run it, would you have let him gone on your place at all? A. No, sir. The contract what he claimed was a contract was to have gone in a foot of the railroad right of way on the south side." Support is given to this statement by the fact that, if the line had been run within a foot of the railroad right of way, the disadvantage to the plaintiff, if any, would have been so insignificant that it might readily be allowed for so small a consideration as $1, mentioned in the permit, whereas it is quite improbable the plaintiff, for such a consideration, would have agreed to put it in the power of the defendant to run the line anywhere on his land, and thereby cause serious damage. It was a question for the jury to determine, in view of all the circumstances, whether the plaintiff's unequal contract was due to his own negligence, or to his reliance on a false statement of its purport, made to him by defendant's agent. Montgomery v. Scott, 10 S. C. 449; Mason v. Telegraph Co., 71 S. C. 150, 50 S. E. 781; Burnett v. Telegraph Co., 71 S. C. 146, 50 S. E. 780. The case of Mason v. Telegraph Co., 74 S. C. 557, 54 S. E. 763, was quite different. In that case the evidence of the expression by the agent of the telegraph company of even an intention as to the location of the line was contradictory and extremely vague, and there was no evidence of reliance by the plaintiff on his statement of the purport of the contract.

The judgment of this court is that the judgment of the circuit court be affirmed.

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(78 S. C. 430)

## VOYLES v. POSTAL TELEGRAPH CABLE CO.

(Supreme Court of South Carolina. Oct. 31, 1907.)

1. TRESPASS—EVIDENCE—NONSUIT—FRAUD.

In an action against a telegraph company for trespass on plaintiff's land, it was proper to refuse a nonsuit where the evidence of plaintiff was that the permit under which defendant

claimed to have entered was fraudulently obtained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 150.]

2. SAME—PLEADING—ADMISSIBILITY OF EVIDENCE.

In trespass against a telegraph company for entering upon plaintiff's land, where the company claimed a right to do so under a permit from plaintiff, he may attack the permit for fraud, though he did not allege that he gave it, or that it was obtained by fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, §§ 102, 103.]

3. APPEAL—REVIEW.

In trespass against a telegraph company for willfully entering on plaintiff's land, where a nonsuit was granted as to punitive damages, it eliminated all evidence as to the entry being made with insult, and objections to the competency of such evidence need not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3331.]

4. ABATEMENT AND REVIVAL — DEATH OF PLAINTIFF—SURVIVAL OF ACTION.

Under Code Civ. Proc. 1902, §§ 165, 169, providing that an objection for defect of parties must be made by answer or demurrer, defendants, in an action for trespass to real estate, where the plaintiff died and his executrix was substituted as plaintiff, cannot on motion for nonsuit raise the objection that the action did not survive to the executrix.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 355–357.]

Appeal from Common Pleas Circuit Court of Oconee County; R. C. Watts, Judge.

Action by J. A. Voyles against the Postal Telegraph Cable Company for trespass to real estate. From a judgment for plaintiff, defendant appeals. Affirmed.

J. P. Casey and J. W. Shelor, for appellant. J. R. Earle and B. F. Martin, for respondent.

WOODS, J. This case and the case of Stephen Baldwin against Postal Telegraph Cable Company were tried together in the circuit court, and on appeal in this court. 59 S. E. 67. The allegations of trespass on which the plaintiffs recovered judgment are identical. The questions common to both cases are considered and decided in the Baldwin Case, but the exceptions in this case raise other questions which it is more convenient to consider separately.

The original plaintiff, J. A. Voyles, the owner of the land, died after the commencement of the action, and it was continued in the name of his executrix. In the deposition of J. A. Voyles, taken in his lifetime, he testified on the point of fraudulent representation in obtaining from him a permit which was precisely the same in terms as that set out in the Baldwin Case: "I was on the bed when Eastman drove up out there. My wife called to me, and said there was somebody out there that wanted to see me. I got up to go out there. He introduced himself as Eastman to me. He said that he wanted to build a telegraph line in competition to the Western Union, and make it better for everybody. He said he just wanted one foot from the Southern right of way. I marked off with my toe just one foot from the Southern right of way, and asked him if that would be room enough, and he said, 'Yes.' My wife heard the conversation. Then I told him that the shade trees should not be cut down, and then told him that there should not be a pole in 100 feet from my house. He said they could put in long poles, and work that very easily. I told him those trees must be cut and trimmed under my direction, and he agreed to it, and said he would be right along here when they were cutting them. Well, then he had his little paper and said that all he wanted was just a permit to go through. He said as quick as they went through I should have every cent of damages, and I said what was they paying other people, and he said from $1 to $5 a post. I then signed what I understood to be just a permit for him to go through, and he got right up and put it in his pocket, gave me nothing, jumped in his buggy, and went off." This evidence brought the case within the principle of Burnett v. Telegraph Co., 71 S. C. 146, 50 S. E. 780, and Mason v. Telegraph Co., 71 S. C. 150, 50 S. E. 781, and a motion for nonsuit for lack of evidence that the permit was obtained by fraud was properly refused. As in the Baldwin Case it was for the jury to say whether the plaintiff entered into an unequal contract through his own negligence, or was induced to do so by the false representation of the defendant's agent. It is true the complaint does not admit the giving of the permit and allege it to have been obtained by false representation, but it was expressly decided in Mason v. Telegraph Co., supra, the plaintiff could, without these allegations, attack such a permit for fraud when introduced by the defendant in justification of the entry. The objections to the competency of the evidence introduced for the purpose of showing the entry was made with insult need not be considered, because the nonsuit as to punitive damages eliminated all such evidence as completely as if it had been stricken out.

The order of the circuit court continuing the cause in the name of the executrix after the death of J. A. Voyles was made on the authority of the act of 1905 (24 St. at Large, p. 945). "Causes of action for and in respect to any and all injuries and trespasses to and upon real estate, and any and all injuries to the person and to personal property, shall survive both to and against the personal or real representative (as the case may be) of deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary, notwithstanding." Defendant's counsel by motion for nonsuit made the point that the action being for trespass on real estate survived to the devisee or the grantee to whom Voyles had conveyed the land before his death, and not to the executrix. It is fatal to this objection for defect of parties that it was not made by answer or demurrer as re-

quired by sections 165 and 169 of the Code of Civil Procedure of 1902. Anderson v. Baughman, 69 S. C. 38, 48 S. E. 38; Shull v. Caughman, 54 S. C. 203, 32 S. E. 201; Delleney v. Granite Co., 72 S. C. 39, 51 S. E. 531. We refrain from expressing an opinion as to whether the objection would have been sound if made by answer or demurrer.

The judgment of this court is that the judgment of the circuit court be affirmed.

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(78 S. C. 457)

## GUNTER v. FALLAW et al.

(Supreme Court of South Carolina. Nov. 8, 1907.)

1. APPEAL — REVIEW — QUESTION OF FACT — JURISDICTION.

An action to recover possession of a tract of land being an action at law, and the issue of title having been submitted to the court without a jury, questions of fact must be accepted as finally settled, since the Supreme Court has no jurisdiction to review issues of fact in a law case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3979–3982.]

2. SAME.

In equity cases, when the legal issue of title paramount is raised, the conclusion of the circuit court on matters of fact involved is final.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970–3978.]

3. SAME—SUFFICIENCY OF EVIDENCE IN SUPPORT OF VERDICT.

A verdict and judgment, which is absolutely without any evidence to support it, is erroneous as matter of law, and the Supreme Court upon proper exceptions may grant a new trial for such error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928–3934.]

4. EJECTMENT—SUFFICIENCY OF EVIDENCE.

In an action to recover possession of real estate, evidence examined, and *held* to warrant the conclusion that the tract claimed by plaintiff was not included in the tract deeded to defendants by the person alleged to be the common source.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 279.]

5. PARTITION—SALE — EFFECT — PERSON PRECLUDED.

Where the wife of an intestate was not made a party defendant to proceedings to partition his land, and, claiming title, publicly forbade sale under the judgment rendered, she has not lost her one-third interest in the land conveyed.

6. EJECTMENT—RIGHT OF ACTION—OUSTER.

Intestate's wife was not made a party defendant to proceedings to partition his land, and, claiming title, forbade the sale, and is now in possession of the tract purchased by plaintiff. *Held*, that plaintiff, being entitled to recover two-thirds of the tract, could recover the same in an action at law, since the wife is in the exclusive possession, claiming the whole, and ousting the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 65–73.]

Appeal from Common Pleas Circuit Court of Lexington County; R. W. Memminger, Judge.

Action by Lula Gunter against Martha Fallaw and Burt Fallaw to recover possession of real estate. From a judgment for plaintiff, defendants appeal. Reversed, and new trial granted conditionally.

W. H. Sharpe and E. L. Asbill, for appellants. G. T. Graham and A. D. Martin, for respondent.

JONES, J. The plaintiff brought this action to recover possession of a tract of land in Lexington county. A jury trial was waived, and by consent all issues were submitted to Judge Memminger, who gave judgment in favor of plaintiff for the possession of the whole tract in dispute and $10 damages.

This being an action at law, the issue of title having been submitted to the court without a jury, questions of fact must be accepted as finally settled, since we have no jurisdiction to review issues of fact in a law case. Peeples v. Warren, 51 S. C. 560, 29 S. E. 659. Even in equity cases, when the legal issues of title paramount is raised, the conclusion of the circuit court on matters of fact involved is final. Johnson v. Jones, 72 S. C. 287, 51 S. E. 805. A verdict and judgment, however, which is absolutely without any evidence to support it, is erroneous as matter of law; and this court, upon proper exceptions, may grant a new trial for such error. State v. Shaw, 64 S. C. 569, 43 S. E. 14, 60 L. R. A. 801, 92 Am. St. Rep. 817; Colvin v. Oil Co., 66 S. C. 77, 44 S. E. 380. Usually this last question should be presented to the trial court in the first instance, and appeal taken from refusal to set aside or correct the verdict; but that method was impracticable in this case, as the testimony was taken by referee under a consent order and reported to the court, the case was heard thereon in November, 1906, and the judgment was filed December 29, 1906, after the adjournment of the court. We will therefore, under the principles above stated, look into the testimony only with a view to ascertain whether there was any testimony to support the conclusions on the facts.

There was certainly evidence tending to show that plaintiff and defendants claimed from a common source, and the ruling of the court to that effect cannot be disturbed. The plaintiff claimed under a deed by Samuel B. George, as clerk of the court, dated May 25, 1904, conveying the land in question to plaintiff as purchaser at sale under judgment in proceedings to partition the lands of Levi Rish, Sr., deceased; and defendants claimed under a deed by Levi Rish, Sr., to defendant Martha Fallaw and the heirs of her body, executed January 13, 1872. The real question, then, was whether plaintiff had a better title than defendant from the common source. This question largely depended upon a question of fact—location of the respective deeds. The deed from Levi Rish, Sr., to Martha Fallaw conveyed lands described as "my home place, including half the mill thereon, containing 500 acres, more or less, in said county, near North Edisto river, adjoining

lands of Lury Ann Fallaw, Lorance Ralls, Loduska Lowman, estate of Wayne Able, and Caswell Gantt, with full mill privileges," etc. The deed under which plaintiff claimed described the land as one other tract "on Hood's Branch, containing two hundred and ten (210) acres, more or less, bounded by Levi Rish, William Merrit, Ulysses Gantt, and Alfred Gunter." The issue was whether the land claimed by plaintiff was covered by the deed of Levi Rish to defendant. Upon this issue the circuit court, after hearing the evidence of the surveyors and other witnesses, found in favor of plaintiff; and it cannot be said that there was no evidence to support the conclusion. There was evidence tending to show that Levi Rish, Sr., purchased the land claimed by plaintiff from Caswell Gantt "about 1871"; that it contained about 210 acres; that its northern boundary was the old Charleston road, and its southern boundary was the old Rish home place. The deed by Levi Rish to defendant in January, 1872, did not call for the old Charleston road as a boundary, as would be natural if the Caswell Gantt tract was intended to be included in the description of the home place, but, on the contrary, called for "Caswell Gantt" as a boundary. There was also evidence tending to show that, if the old home place was so located as to include the Caswell Gantt tract, it would include about 700 acres, whereas the deed described the home place as containing 500 acres, more or less.

But, regarding the conclusion of the court on the question of location as final, it does not follow that plaintiff was entitled to recover the whole of the land in dispute. The evidence shows that Levi Rish, Sr., died intestate in 1875, leaving surviving as his only heirs at law his widow, the defendant Martha, who afterwards married defendant Burt Fallaw, and his children, the plaintiff, Loduska Lowman, Lizzie Able, Lorannah Rawls, Levi Rish, Jr., and Delia Hughes, Adella Fallaw, and A. D. Fallaw, children of a predeceased daughter. These children and grandchildren were all made parties to the partition proceedings under which plaintiff claims as purchaser; but the defendant Martha Fallaw was not made a party. The defendant was in possession of the land at the time of the sale in partition, and publicly forbade the sale, claiming title. It is manifest, therefore, that plaintiff was not entitled to recover as against the widow of Levi Rish more than two-thirds of the land; but this interest she could recover in this action at law, since the defendant was in exclusive possession, claiming the whole, and ousting the plaintiff.

It is contended by respondent that defendant on the trial claimed under the deed of Levi Rish, and did not claim as his heir at law, and that such point should not be now raised for the first time in the exceptions. Under the general denial in the answer it was incumbent on plaintiff to establish the title to the premises, and this she has failed to do, except to the extent of a two-thirds interest therein. It would be manifestly unjust to deprive the defendant in possession of her interest in the property as shown by the undisputed evidence.

The foregoing conclusions render it necessary to set aside the judgment and grant a new trial, unless the plaintiff shall remit therefrom to the extent of one-third interest in the premises. The amount assessed as damages is little more than merely nominal, and, as there was evidence of ouster and damages committed by defendants, we will not disturb the conclusion of the circuit court thereon, except as it may be involved in the judgment nisi to be rendered herein.

The judgment of this court is that the judgment of the circuit court be set aside and a new trial granted, unless the plaintiff shall within 30 days after the filing of the remittitur herein enter in writing upon the record a remittance of the judgment to the extent of one-third of the land embraced therein, so that the judgment shall be for the plaintiff for the recovery of an undivided two-thirds interest in the premises and for $10 damages.

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(145 N. C. 316)

## CITIZENS' NAT. BANK OF DURHAM v. BURCH et al.

(Supreme Court of North Carolina. Oct. 30, 1907.)

1. BILLS AND NOTES—PARTIES.
One who signs in form and appearance as a principal and maker of a note is bound as such to all persons who subsequently deal with the paper without knowledge of his true relation to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 255.]

2. PRINCIPAL AND SURETY — LIMITATION OF LIABILITY.
It is competent for one to become surety for other sureties, or to limit the extent of his liability with respect to other sureties.

[Ed. Note.—For cases in point, see Cent. Dig. vol 40, Principal and Surety, § 113.]

3. BILLS AND NOTES—BONA FIDE PURCHASER.
A person dealing with a negotiable instrument has a right to act on it as it appears on the face of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 790.]

4. PRINCIPAL AND SURETY—CO-SURETIES.
To constitute a surety on a note a co-surety with another signing the note, there must be a mutual understanding between the parties to that effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 108.]

5. SAME.
Where one signed as surety a note signed by two persons, without knowledge of the fact that one of the signers was a surety, he could not be held a co-surety with such signer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 108.]

Appeal from Superior Court, Durham County; Justice, Judge.

Action by the Citizens' National Bank of Durham against Mollie F. Burch, administratrix, and J. W. Smith. From the judg-

ment, said Smith appeals. Judgment modified.

On July 16, 1906, Joab Burch and L. R. Burch executed a note, of which the following is a copy: "$1,000.00 Durham, N. C., July 16, 1906. One hundred and twenty days after date we promise to pay to the order of the Citizens' National Bank of Durham, at Durham, N. C., one thousand and $^{00}/_{100}$ dollars, negotiable and payable at the Citizens' National Bank of Durham, at Durham, N. C., for value received. * * * [Signed] Joab Burch. L. R. Burch." Across the back of this note is written the words: "J. W. Smith, Surety." The court submitted these issues: "(1) Are the defendants, Mollie F. Burch, administratrix of Joab Burch, L. R. Burch, and J. W. Smith, indebted to the plaintiff in the sum of $1,000 and interest as alleged in the complaint? Answer. Yes. (2) Is the estate of Joab Burch insolvent? Answer. Yes. (3) Is L. R. Burch a surety on the note sued upon? Answer. Yes. (4) Did defendant J. W. Smith know at the time he indorsed the note that L. R. Burch was surety? Answer. No." From the judgment rendered declaring him a co-surety with L. R. Burch the defendant Smith appealed.

Giles & Sykes, for appellant J. W. Smith. Winston & Bryant, for appellee L. R. Burch.

BROWN, J. (after stating the facts as above). According to the facts as found by the jury at the time the note was presented to appellant for indorsement as surety, it contained the names of Joab Burch and L. R. Burch as principals, and Smith indorsed the same on its back as surety for them as principals, having no knowledge that Joab Burch and L. R. Burch were otherwise than principals, or that the defendant L. R. Burch bore any relation to the note other than as a co-principal with Joab Burch. The form of the note justified Smith in supposing that the two Burchs were borrowing the money jointly, and were jointly liable for it as co-principals, and that he was contracting as surety for the two, and not for the one. One who signs in form and appearance as a principal and maker of a note is bound as such to all persons who subsequently deal with the paper without knowledge of his true relationship to it. It is entirely competent for one person to become surety for other sureties, or to limit the extent of his liability with respect to other sureties. The test of liability is the intent of the parties as indicated by their agreement. There is no finding as to any agreement here which warranted the court in holding Smith other than as he is bound by the face of the instrument he signed, and according to that he is bound as surety for the two apparent principals.

A person dealing with a negotiable instrument has a right to act upon it as it appears upon the face of it. Daniels on Negotiable Instruments, p. 311. This is also the doctrine laid down in Cragin v. Lovell, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. Ed. 903. In order to constitute the appellant Smith a co-surety with the defendant L. R. Burch, there must have been a mutual understanding between the parties to that effect. Smith v. Smith, 16 N. C. 173; Cowan v. Baird, 77 N. C. 201; Bulkeley v. House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; Thompson v. Sanders, 20 N. C. 541; Dawson v. Pettway, 20 N. C. 531; Sayles v. Sims, 73 N. Y. 552; Sherman v. Black, 49 Vt. 198; 1 Brandt on Suretyship (2d Ed.) § 260. According to these authorities, it is plain that his honor erred in holding the appellant as a co-surety with L. R. Burch.

The cause is remanded, with directions to modify the judgment rendered in accordance with this opinion. The costs of this court will be taxed against L. R. Burch, the appellee.

Modified.

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(145 N. C. 319)

## SINGER MFG. CO. v. CITY NAT. BANK et al.

(Supreme Court of North Carolina. Oct. 30, 1907.)

CONTRACTS — LEGALITY OF CONSIDERATION — PERVERTING ADMINISTRATION OF JUSTICE — SUFFICIENCY OF EVIDENCE.

Where one received $150 from another to make a trip through Georgia and secure witnesses for the latter in his pending divorce suit against his wife, it does not follow, in the absence of other evidence, that the recipient of the money was to secure false or suborned testimony, or do any other act that was corrupt or against public policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 616–632.]

Appeal from Superior Court, Guilford County; Ward, Judge.

Action by the Singer Manufacturing Company against the City National Bank and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action brought by the plaintiff to recover a sum of money belonging to plaintiff and deposited by its agent, Summers, to his individual credit in defendant bank. Summers procured a cashier's check, drawn by the cashier of defendant bank in Summers' favor, and indorsed it to the defendant Fuller. Plaintiff enjoined the payment of the check to Fuller. Upon the pleadings his honor, Judge Ward, presiding, submitted the following issue to the jury: "Was the defendant Fuller a purchaser of the check in good faith, for valuable consideration, and without notice of any infirmity in the instrument or defect in the title of Summers? Answer. Yes."

King & Kimball and Thos. S. Beall, for appellant. John A. Barringer, W. P. Bynum, Jr., and T. H. Calvert, for appellees.

PER CURIAM. A careful examination of the record in this case has led us to conclude

that no formal opinion is necessary. The issue involved purely a question of fact, and that has been decided against the plaintiff under a clear charge free from error. The contention, so earnestly pressed, that the testimony of the defendant Fuller shows that a small part of the consideration for the assignment to him of the cashier's check was an immoral and illegal consideration, is not supported by the record. The fact that Fuller admitted that he received $150 from Summers for the purpose of making a trip to Georgia and securing witnesses for Summers in his pending divorce suit against his wife does not justify the conclusion, in the absence of other evidence, that Fuller was to secure false and suborned testimony, or to do any other act for Summers that was corrupt and against the policy of the law.

The judgment of the superior court is affirmed.

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(145 N. C. 285)

DREWRY-HUGHES CO. v. McDOUGALL et al.

(Supreme Court of North Carolina. Oct. 23, 1907.)

1. PARTNERSHIP — LIABILITY OF RETIRING PARTNER.

Where, in an action against a firm for goods sold to it by one who had not before the sale dealt with the firm, it appeared that the seller acted on information acquired eight months before by a mercantile agency from a person informing the agency that he was a partner in the firm, proof that such person, three months before the sale, informed an agent of the agency that he was not a partner, and would not be responsible for the firm debts, was competent to relieve him from liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 506.]

2. SAME.

One who has dealt with a firm is entitled to rely on the status remaining unchanged until notified of the withdrawal of a partner.

Appeal from Superior Court, Scotland County; Council, Judge.

Action by the Drewry-Hughes Company against B. & S. McDougall and others, copartners. From a judgment for plaintiff, defendant L. A. Monroe appeals. Reversed.

M. L. John, for appellant. McLean, McLean & McCormick, for appellee.

CLARK, C. J. The defendant, Monroe, wrote on October 8, 1902, a letter to the mercantile agency of R. G. Dun & Co., in response to their inquiry, in which he stated that he, with others named, was a member of the firm of B. & S. McDougall. The defendant Monroe offered to prove that in January, 1903, some three months prior to the time when the plaintiffs sold this bill of goods to B. & S. McDougall, that he, the said Monroe, saw the duly authorized agent of R. G. Dun & Co. at his town, and had a conversation with him, in which Monroe informed such agent that the letter to said R. G. Dun & Co. on October 8th was an error, that neither he nor the others named in that letter had become members of said McDougall firm, and that none of them would be responsible for the debts of that firm, and at the same time gave the agent an oral statement of the financial condition of said firm, which the agent wrote down. It was error to exclude this testimony. Information of the letter of October 8, 1902, was conveyed to plaintiffs by said R. G. Dun & Co., and the testimony is that the plaintiff sold the goods on such information. Monroe had a right to dissolve his contemplated connection with the McDougalls, and it was competent to show that some three months before the plaintiffs sold to said firm, and therefore in full time to correct their previous information, Monroe informed the agent of said R. G. Dun & Co. in his town that he was no longer a member of the McDougall firm nor responsible for its debts. The plaintiffs had not up to that time become creditors of the McDougalls, and did not for nearly three months later. Monroe could not therefore give the plaintiffs notice. He did all he could when he gave notice to the traveling agent of said R. G. Dun & Co. then in his town.

In Cowan v. Roberts, 133 N. C. 629, 45 S. E. 954, it was held that it was not sufficient to give notice of the retirement of a partner to an employé or bookkeeper at the home office of the seller, but the notice must be given to the sellers themselves or their credit man. Here the defendant offered to show that notice was given to the traveling agent of R. G. Dun & Co. (to which agency the original advice had been given) that Monroe was no longer connected with the McDougall firm. It was the plaintiffs' own fault that they sold this bill some three months later without ascertaining whether there had been any change in the partnership or not.

If, before the withdrawal of Monroe, the plaintiffs had had dealings with the McDougall firm, then, of course, notice of Monroe's withdrawal from the firm must have been given to the plaintiffs. They would be entitled to rely upon the status remaining unchanged, until notified to the contrary. But here the first sale was made to the McDougalls long subsequent to Monroe's withdrawal. He could not anticipate that the plaintiffs would become creditors, and he should have been allowed to show, as he offered, that in January, 1903, he notified R. G. Dun & Co., withdrawing the statement made to them in his letter of October 8, 1902.

Error.

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(145 N. C. 283)

GILMORE et al. v. SELLARS et al.

(Supreme Court of North Carolina. Oct. 23, 1907.)

DOWER—ESTATES SUBJECT TO DOWER—LIFE ESTATE.

Testator devised land in trust for the sole benefit of his son and the son's family, the

whole of the property, with all its increase, on the death of the son, to belong to his lawful heirs, share and share alike. *Held*, that the son did not take the fee under the rule in Shelley's Case, but only a life estate, and hence his widow was not entitled to dower therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dower, § 36; vol. 49, Wills, §§ 1393–1416.]

Appeal from Superior Court, Anson County; Councill, Judge.

Petition by L. H. Gilmore and another against W. R. Sellars and others for the allotment of dower in land bequeathed petitioner's former husband. From an order affirming the judgment of the clerk, the petitioner appeals. Affirmed.

This is a special proceeding, instituted in the superior court of Anson county, wherein the petitioner L. H. Gilmore seeks to have dower allotted to her in the lands described in the petition. Defendants answered, and the cause came on for hearing before the clerk, and by appeal to the judge presiding. The material facts appearing upon the petition and answer are: Elijah Ratliff by his last will and testament devised the land in controversy and several negro slaves to John P. Ratliff upon the following trusts, to wit: "For the sole use and benefit of my son Eli Ratliff and his family; said property to be entirely under the control of my son-in-law John P. Ratliff, in such manner as not to be subject to any of his debts, contracts, liabilities, or incumbrances whatever, and the whole of the above-mentioned property, with all of its increase, at the death of my son, Eli Ratliff, to belong to his lawful heirs, share and share alike." Eli Ratliff intermarried with feme petitioner and died during the year 1884, leaving surviving the defendants, his children and heirs at law, who took possession of the lands, and, together with those of the defendants who are grantees of some of the children, have been in possession since that time. Partition was had in 1890. Petitioner, after the death of Eli, intermarried with A. G. Gilmore. His honor, being of the opinion that petitioner was not entitled to dower, affirmed the judgment of the clerk. Petitioner appealed.

H. H. McLendon, for appellees.

CONNOR, J. (after stating the facts as above). It is immaterial whether the trust declared in the will was, during the life of Eli Ratliff, active, and not executed by the statute, or whether it was passive, in which case, by the operation of the statute, the legal title vested in Eli. The right of the petitioner to dower depends upon the estate which her husband took under the will. It is clear that, if the words "share and share alike" had not followed the words "to belong to his lawful heirs," he would, under the rule in Shelley's Case, have taken a fee simple. While there are no words expressly limiting his interest to a life estate, that it was the intention of the testator to do so is manifested by the use of the words "after the decease of my son Eli Ratliff to belong to," etc. The exact question was decided by this court in a well-sustained opinion by Judge Ashe in Mills v. Thorne, 95 N. C. 362. There the limitation to the heirs of the devisee was followed by the words "to share and share equally." The learned justice, after reviewing the adjudged cases, says: "The consideration we have given the question leads us to the conclusion that the rule in Shelley's Case does not apply in this case; that the words to share and share equally indicate an intention on the part of the testator to give the property to his sister and her heirs, * * * to be divided between them as tenants in common, * * * to be distributed per capita between such persons as may bring themselves under that description when the life estate terminated." The "lawful heirs" of Eli Ratliff take per capita as purchasers under the will of their grandfather, thus limiting his interest to a life estate, to which, of course, no right to dower attached.

His honor's judgment was correct, and must be affirmed.

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(145 N. C. 452)

## STATE v. BOWMAN.

(Supreme Court of North Carolina. Oct. 30, 1907.)

1. WITNESSES—PRIVILEGE—AMNESTY—CONSTITUTIONAL LAW.

Revisal 1905, § 3201, providing that, in investigations concerning lynchings, no person shall be excused from testifying because his answer might incriminate him, but that the witness, when so examined, shall be altogether pardoned of any and all participation in any crime arising under the preceding section, is not in violation of Const. art. 3, § 6, conferring the pardoning power on the Governor; such power not being exclusive.

2. PARDON—WHAT CONSTITUTES.

Revisal 1905, § 3201, declares that participants in lynchings shall testify, and, when so examined as witnesses for the state, be altogether pardoned of any participation in any crime under existing law concerning which they are required to testify. *Held* that, where a witness testified for the state in a lynching investigation, he was thereby pardoned from all participation in any offense growing out of the lynching, though the evidence given by him did not tend to incriminate him.

3. CRIMINAL LAW—APPEAL BY STATE—PLEAS—MOTION TO QUASH.

Where a plea of amnesty was filed and sustained to an indictment for taking part in a lynching, such plea might be treated as a motion to quash, so as to sustain an appeal by the state, under Revisal 1905, § 3276, limiting the state's right to appeal in criminal cases to those where judgment has been given for the defendant on a special verdict, on demurrer, on a motion to quash, or on arrest of judgment.

Appeal from Superior Court, Union County; Peebles, Judge.

Clyde Bowman was indicted for taking part in a lynching. He filed a plea of amnesty, alleging that in proceedings instituted by the solicitor to determine who participated in the lynching, as authorized by Revisal 1905, §§

3200, 3201, defendant was summoned, sworn, and examined by the state touching his knowledge of the lynching under investigation, which plea was sustained, and the state excepted and appealed. Affirmed.

At the hearing it was made to appear, on plea duly entered, that in proceedings instituted by the solicitor under sections 3200, 3201, et seq., of the Revisal of 1905, and at his instance, the present defendant was summoned, sworn, and examined by the state touching this alleged lynching, which was then being investigated before his honor, Walter H. Neal. Judge Peebles dismissed the case against defendant, holding that, on the facts, the legislation on the subject protected defendant from further prosecution by reason of this charge; and thereupon the solicitor for the state excepted and appealed.

Hayden Clement, Asst. Atty. Gen., for the State. J. A. Lockhart, H. H. McLendon, F. J. Coxe, and T. L. Caudle, for appellee.

HOKE, J. (after stating the facts as above). Our statute on this subject (Revisal 1905, §§ 3200, 3201, et seq.) directs that, whenever a solicitor is advised that a lynching has occurred in his judicial district, he shall at once institute proceedings before a coroner, justice of the peace, or judge of the superior court for an investigation of the crime and the apprehension of the offender; that on such investigation, or any other, into the crime made pursuant to law, no person shall be excused from testifying on the ground that his evidence might subject him to prosecution or in any way tend to incriminate him, etc.; and the statute further provides as follows: "And such person when so examined as a witness for the state shall be altogether pardoned of any and all participation in any crime arising under the provisions of the preceding section or under existing law, concerning which he is required to testify." On the facts, therefore, which were established at the hearing, by the express provisions of the act, the defendant was fully pardoned of any and all participation in the crime now charged, as well as any and every offense against existing law concerning which he was required to testify; and the judge below correctly held that the charge should be dismissed, and the defendant protected from further prosecution concerning it. Legislation of this kind, acting in "abolition or oblivion of the offense," and applicable to all persons, or all persons in a given class, has been uniformly upheld with us, and is sustained by well-considered decisions in other jurisdictions. State v. Blalock, 61 N. C. 242; State v. Keith, 63 N. C. 140; State v. Applewhite, 75 N. C. 229; In re Briggs, 135 N. C. 119-144, 47 S. E. 403; State v. Nichols, 26 Ark. 74, 7 Am. Rep. 600; State v. Forkner, 94 Iowa, 733, 62 N. W. 683.

These cases in no way conflict with or trench upon the provisions of article 8, § 6, of our Constitution, conferring on the Governor the power to grant reprieves, commutations, and pardons after conviction, etc. As said in one of them: "The power thus granted is held not to be exclusive." And I apprehend the ruling could further be safely made to rest upon the principle that the section in question confers on the Governor the power to exercise clemency in a particular case, and in favor of an individual or individuals, especially charged with the offense; this being an executive act of a quasi judicial kind, permissible to the Governor by reason of this express provision of the Constitution, while an amnesty act establishes a general rule abolishing the offense, and applicable to all persons, or persons of a given class, whether charged or not, this being more especially an act legislative in its nature. In any event the power to enact such legislation is well established here, and, this being true, we hold that any and all further prosecution of defendant by reason of this offense is forbidden.

We are not impressed by the position, taken by the state's counsel, that defendant is not entitled to the benefit of the law, because "the evidence given by him did not in any way tend to incriminate himself." The statute makes no such qualification. The language is: "When so examined as a witness for the state, he shall be altogether pardoned of any and all participation in the crime under investigation, and all offenses under existing law, concerning which he is required to testify." The Legislature evidently considered that the crime of lynching, subversive as it is of all law, a menace to the very existence of organized society, should be dealt with by unusual and extraordinary methods, and intended to make the investigation as extended, searching, and effective as legislation could make it. The act, therefore, provides that every person may be examined by the state, and may be compelled to speak to every matter relevant to the inquiry, and the pardon is given in language so plain and so full that no claim or suggestion could arise or exist that any constitutional right of the witness would in any way be impaired or threatened.

We are not inadvertent to the suggestion made by defendant's counsel that no appeal lies for the state in cases like the present. The right of the state to appeal only exists in the four cases specified in Revisal 1905, § 3276—on special verdicts, upon demurrer, on motion to quash, and upon arrest of judgment; and the court has been very insistent in holding the state to the cases specified. State v. Moore, 84 N. C. 724; State v. Ballard, 122 N. C. 1024, 29 S. E. 899. Without deciding the question, the court is inclined to the opinion that this may, for the purpose of the appeal, be considered and treated as a motion to quash, and so brought within the direct provisions of the law. While it is held in many jurisdictions that a motion to

quash can only be made for matter apparent in the record (Clark's Criminal Procedure, p. 363), it is otherwise with us (State v. Horton, 63 N. C. 595); and a plea of the kind interposed here has been sanctioned as a proper method in motions to quash, by which the relevant facts existent dehors the record should be made to appear (State v. Smith, 80 N. C. 410).

There is no error in the proceedings below, and the judgment dismissing the case is affirmed.

Affirmed.

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(145 N. C. 300)

## DEW et al. v. PYKE et al.

(Supreme Court of North Carolina. Oct. 30, 1907.)

1. PUBLIC LANDS — NORTH CAROLINA GRANTS —EFFECT OF FAILURE TO REGISTER.

Under Rev. Code, c. 42, § 22 (Code 1883, § 2779; Revisal 1905, § 1729), requiring a grant to be registered in the county where the land lies within two years after the grant is perfected, failure to so register does not render the grant void, since the statute does not include a provision to that effect, as it does in relation to deeds and some other instruments, and, while registry of a grant is necessary to make it evidence of the title, it does not constitute an essential part of the title itself.

2. SAME—EFFECT OF GRANT.

An entry on public lands gives an equity or inchoate right to call for a grant, which may be devested by a subsequent entry laid and grant issued thereon before the grant based on the first entry is taken out, if the senior grantee had no notice of the first entry; but when the grant issues upon the first entry the title passes out of the state, and the land is no longer subject to entry.

3. SAME—PRIORITY OF GRANTEES.

A state grant issued in 1852 was not registered until 1888, at which time there was no law permitting it to be registered. Another grant to the same land had been issued in 1880, which was registered in 1881; but during that time the first grant could have been registered under extending acts then in force. An act was subsequently passed (Acts 1893, p. 52, c. 40), legalizing the registry of grants theretofore registered, but providing that nothing therein should have the effect to devest any rights, title, or equities in the land covered by such grant. *Held*, that the second grant was invalid, because the state had no title at the time it was made, and especially since the first grant could have been registered at the time of the issue and registry of the second grant and during the intervening time, and hence there was no vested title or equity to be affected by the act of 1893.

Appeal from Superior Court, Brunswick County; Webb, Judge.

Action by John A. Dew and others against W. H. Pyke and others for the possession of land. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

C. Ed. Taylor and Lewis & Schulken, for appellants. E. K. Bryan and Cranmer & Davis, for appellees.

WALKER, J. This is an action for the possession of land. The court intimated an opinion against the plaintiffs, who thereupon submitted to a nonsuit and appealed.

The state granted the land to Lewis Jones October 25, 1852. This grant was not registered until 1888, at a time when there was no law permitting the registration of it. On December 17, 1880, a grant for the same land was issued to Alexander Cox and legally registered January 28, 1881. The plaintiffs assert title to the land under the grant to Cox, and the defendants under the Jones grant, so that the question is: Which of these two grants should prevail? By Acts 1893, p. 52, c. 40, it was provided that grants which had theretofore been issued, but had not been registered within the time required by law, might be registered at any time within two years after January 1, 1894, "notwithstanding the fact that such specified time had already expired, and all such grants heretofore registered after the expiration of such specified time shall be taken as if they had been registered within such specified time: provided, that nothing herein contained shall be held or have the effect to divest any rights, titles or equities in or to the land covered by such grants, or any of them, acquired by any person or persons from the state of North Carolina, by or through any entry or entries, grant or grants, made or issued since such grants were respectively issued, or of those claiming through or under such subsequent entry or entries, grant or grants." This case is governed by Janney v. Blackwell, 138 N. C. 437, 50 S. E. 857. In both cases the junior grants were registered within the prescribed time, for while in the Janney Case the junior grant was registered more than two years after it was issued, Acts 1876–77, p. 68, c. 23, extended the time of registration, and it was registered within the extended period. In this case the junior grant was registered within two years from the date it was issued.

There is, though, this one difference between the two cases, which is that the senior grant in the Janney Case was registered at a time when its registration was authorized—that is, by the act of 1893 to which we have already referred, it having been registered April 5, 1895—while in this case the senior grant, which was issued to Jones, was registered in 1888, or at a time when there was no law authorizing its registration; the Legislature having failed from 1885 to 1903 to pass any act extending the time for the registration of grants. But that very act of 1893 validated the registration of all grants which had been registered after the time for registration had expired, except as to "rights, titles or equities" acquired in the land from the state since the issuing of the senior grant, or, in other words, any intervening "rights, titles or equities." While the two cases, therefore, differ in the respect indicated, they do not differ in principle, because it is clearly and distinctly held in Janney v. Blackwell that the junior grantee had acquired no such "right, title or equity" as was intended by the act of 1893 to have the effect

of defeating the title of the senior grantee, and, indeed, no "right, title or equity" at all, as at the time the junior grant was issued the land was not the subject of entry; the state having by the senior grant parted with all the title she had originally in the land. The language of the court in that case, as used by Justice Connor in this connection, is significant, and completely overthrows the plaintiff's contention in the case at bar. "It is not to be doubted," says he for the court, "that the Legislature had the power to impose upon the persons registering their grants after the time provided therefor had expired the condition that they should do so subject to junior grants which had been registered. The registration of a grant is not necessary to give it validity for the purpose of passing title"—citing 24 Am. & Eng. Enc. of Law (2d Ed.) p. 116, which fully sustains the proposition, if it required any authority to sustain it.

The distinction between deeds and grants in this respect is obvious, when we carefully read the statutes applying to them, respectively. In the case of a deed, it is provided that it shall not be valid, unless registered, as against creditors or purchasers for a valuable consideration from the bargainor, and then only from the registration thereof (Acts 1885, p. 233, c. 147; Code 1883, § 1245; Revisal 1905, § 980), while in the case of a grant it is simply required that the grantee shall cause it to be registered in the proper county within two years after it is issued (Rev. Code, c. 42, § 22; Code 1883, § 2779; Revisal 1905, § 1729). Why this radical difference in the phraseology of the two statutes, if it was intended that there should be no distinction between the two kinds of instruments with reference to the effect of registration upon their validity? It is perfectly evident that the two enactments were expressed in different words designedly, and with the purpose that they should have separate and distinct meanings and receive different constructions. If it was the purpose to provide that grants should be void if not registered within two years after they are issued, why not declare that intention in unmistakable language, as was done in the case of deeds? We also find that in the case of contracts to convey land and leases of land for more than three years (Revisal 1905, § 980), mortgages and deeds of trust (Revisal 1905, § 982), marriage settlements (Revisal 1905, § 985), and some other instruments, the intention that they shall be void if not duly registered is clearly expressed, and in the case of deeds of gift the difference is striking, and demonstrates to a certainty, we think, what was meant by the different phraseology. It is provided that a deed of gift shall be proved and registered within two years after its execution. So far the statute is like that in the case of grants. But the Legislature did not think this language sufficient to invalidate the deed of gift, if the provision as to registration was not complied with by the donee; so it took the precaution to add that if the deed was not registered within two years it shall be void, "and shall be good against creditors and purchasers for value only from the time of registration." If the requirement that a deed of gift should be registered within two years after its execution was intended as a condition, noncompliance with which should invalidate it, why superadd the words "or otherwise [it] shall be void"? Revisal 1905, § 986. This may be considered as a legislative construction of the words "shall be registered within two years after its execution," to the effect that, if the instrument is not so registered, it shall not be evidence, unless the time for registration is extended and a new authority to register it is thereby given. The English statute of enrollments (St. 27 Hen. VIII, c. 16) provided that no manors, lands, etc., shall pass from one to another, whereby an estate of inheritance or freehold shall be made to take effect, unless the deed of bargain and sale be enrolled within six months after the date of the writing indented. It was resolved that no estate passed until the enrollment of the deed. Dymnock's Case, Cro. Jac. 408; Iseham v. Morrice, Cro. Car. 110; Flower v. Baldwin, Cro. Car. 217. But it will be observed that the enrollment is annexed as a condition to the passing of the title, as in the case under our statutes, of mortgages, deeds of gift, and the other instruments above enumerated. This is all very significant, and plainly evinces, what we have confidently asserted to have been the intention, that the material difference in language should produce a marked unlikeness in meaning; and what difference could there be in the sense of the two statutes, other than that in the one case a failure to register the instrument within the specified time should invalidate it, and that in the other it should not. This reasoning is supported by the view of the law manifestly entertained by Judge Ruffin (afterwards Chief Justice) in Jones v. Sasser, 14 N. C. 378, for he recognizes the existence of the very distinction we have made between the act which there declared that gifts of slaves should not be good and available unless registered within one year after their execution and the general statute merely requiring registration within a given time of other instruments.

Passing to another view of the case, it is a mistake to suppose that no legal title passes from the state to its grantee by virtue of a grant until it is registered. The entry gives an equity or inchoate right to call for a grant, which may be divested by a subsequent entry laid and grant issued thereon before the grant based on the first entry is taken out, if the senior grantee had no notice of the first entry. Gilchrist v. Middleton, 107 N. C. 678, 12 S. E. 85; Kimsey v. Munday, 112 N. C. 316, 17 S. E. 583. But, when the grant issues upon the first entry, the title passes out of the state, and the land is no

longer subject to entry. Hoover v. Thomas, 61 N. C. 184; Gilchrist v. Middleton, 108 N. C. 705, 13 S. E. 227; Rowe v. Lumber Co., 129 N. C. 97, 39 S. E. 748; Stewart v. Keener, 131 N. C. 486, 42 S. E. 935; Berry v. Lumber Co., 141 N. C. 386, 54 S. E. 278; Janney v. Blackwell, supra. It was contended in Ray v. Wilcoxson, 107 N. C. 523, 12 S. E. 443, that an unrecorded deed confers no estate, and that it is no more than a mere executory contract. With reference to this contention, Shepherd, J., for the court, said in reply and with great force, following former decisions of this court, that it was a misconception of the law; for it is well established that such a deed is "a legal conveyance," and, although it cannot be given in evidence until it be registered, and therefore it does not pass a present legal title, it has, as a deed, an operation from its delivery. It may be set up in equity, whether voluntary or for value, and by it such an estate is conferred as may be sold under execution, and this even before the act of 1812. Its owner is a tenant of the freehold, and a recovery under a præcipe against him would be good, and his widow may be endowed in the same. Such a grantee is also deemed in equity to be seised of an equitable freehold. Price v. Sykes, 8 N. C. 87; Morris v. Ford, 17 N. C. 412; Walker v. Coltraine, 41 N. C. 79; Phifer v. Barnhart, 88 N. C. 333; Austin v. King, 91 N. C. 236; Arrington v. Arrington, 114 N. C. 151, 19 S. E. 351. A grant bears a close resemblance, in some of the respects above indicated, to a deed, and certainly to the extent, as said in Janney v. Blackwell, of not requiring registration to give it validity. Registration is, indeed, necessary to make it evidence of the title which the state has granted, but does not constitute an essential part of the title itself.

There is still another view of this case which is fatal to the plaintiff's contention. At the time the Cox grant was issued, and also at the time it was registered on January 28, 1881, and for some time afterwards, extending acts had been passed under which the senior grant issued to Lewis Jones in 1852 could have been registered. Acts 1876–77, p. 68, c. 23; Acts 1879, p. 380, c. 220; Acts 1881, p. 550, c. 313. Why was the grant to Jones not valid at the time the Cox entry was made and the grant issued thereon was registered? Surely at that time—that is, in 1880 and 1881—the land was not the subject of entry, and the Cox grant was therefore void; the state having already parted with its title. In Berry v. Lumber Co., 141 N. C., at page 393, 54 S. E., at page 281, we said: "The Houck and Berry grants were both ineffectual to pass title to any land covered by the Cathcart grant, as, the latter being of older date, the state had no title to that land at the time the junior grants were issued, and the lands were therefore not subject to entry and grant. The state could not grant that which it did not itself have, and therefore, where there are two or more conflicting titles derived from the state, the elder shall be preferred, upon the familiar maxim that he who is prior in time shall be prior in right, and shall be adjudged to have the better title." See, also, Janney v. Blackwell, supra.

We are not at all disposed to overrule Janney v. Blackwell, or even to modify the ruling of the court therein; for, upon a careful reexamination of the question presented in that case, we are now convinced (in view of past and of existing legislation upon the subject, showing what the true policy of the state is) that Janney v. Blackwell was correctly decided. Nor need we attempt to show that there is no difference between that case and this one, arising out of the fact that in Janney v. Blackwell the senior grant was registered at a time when its registration was authorized, while the grant to Jones was registered when there was no law authorizing its registration, and must, therefore, depend for its validity upon the retrospective clause in the act of 1893, making good all prior unauthorized registrations of grants, for that is, upon the facts of this case, clearly a distinction without a difference; the crucial question being whether Cox acquired a good title by his grant, and Janney v. Blackwell decides that he did not, and, if he did not, there was no one to be injured by the validating provision of the act of 1893, so far as appears in this case. There was no vested right or title to be affected by the retroactive legislation, even if it was not in itself valid. The fallacy of the plaintiff's argument consists in the fact that his premise is incorrect, namely, that registration of a grant is required to vest the title.

We need not discuss the interesting question raised in the learned and exceedingly well-prepared brief of Mr. Taylor as to the intervention of an equity or right in the plaintiff arising from the issuing and registration of the Cox grant before the Jones grant was recorded, under Scales v. Fewell, 10 N. C. 18, Isler v. Foy, 66 N. C. 547, and that class of cases, as we have shown that he had no such right or equity. The plaintiff having admitted that he cannot succeed in this case, upon the facts, unless the Cox grant is valid as against the Jones grant, it follows, from what we have said, that there is no error in the ruling of the court, and the nonsuit must stand.

No error.

(145 N. C. 308)

## SIBBERT v. SCOTLAND COTTON MILLS.

(Supreme Court of North Carolina. Oct. 30, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMED RISK.
The danger that employés working in mills will become entangled in the wheels, cogs, etc., though they are in proper repair, is a danger incident to the employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 550, 553.]

2. SAME—PROXIMATE CAUSE.
Where a mill operative is injured without any negligence as to the construction or repair of the machinery, or a failure to give proper instruction, the injury is attributable either to accident or the employé's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 162, 163, 257–263.]

3. SAME—DANGEROUS MACHINERY—CARE REQUIRED—INSPECTION.
Where defendant had attached to the frames in its cotton mill certain shifters controlled by levers, easily operated, by which, in an emergency, the frames could be stopped, it was defendant's duty to use reasonable care, by proper construction and frequent inspection, to keep such shifters in proper working order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 235–242.]

4. SAME—PROXIMATE CAUSE.
Where plaintiff's sleeve was caught in a cotton frame in the mill in which he was employed, and the frame could have been stopped and the injury avoided if the belt shifter attached thereto had not been out of order, such defect was the proximate cause of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 162, 163, 257–263.]

5. SAME—BOXING GEARS—CUSTOM—EVIDENCE.
In an action for injuries to a servant by an unboxed gear attached to a cotton frame, evidence that at one other mill the wheels of such gears were boxed was inadmissible to show that it was usual to box such gears.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 921.]

6. SAME—EVIDENCE.
Where plaintiff was injured by the alleged defective condition of a belt shifter on a cotton frame in defendant's mill, evidence of the condition of the lever after the injury was incompetent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 917, 918.]

7. SAME—QUESTIONS FOR JURY.
In an action for injuries to plaintiff, alleged to have been caused by the defective condition of a belt shifter on a cotton frame, evidence *held* to require submission to the jury of the questions whether the shifter was a safety appliance and in proper repair, and, if not, whether the defective condition was known, or ought by a proper inspection to have been known, to defendant, and whether such defective condition was the proximate cause of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1000–1050.]

8. SAME — ASSUMED RISK — EMPLOYMENT — ABANDONMENT.
Where plaintiff was injured by the alleged defective condition of a belt shifter attached to a cotton frame in defendant's mill, and such shifter became defective after plaintiff began work, he did not assume the risk incident to the danger of its defective condition because he did not abandon his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574–600.]

9. SAME—CONTRIBUTORY NEGLIGENCE.
In an action for injuries to plaintiff, while attempting to tie a band on one of the spindles in a cotton mill, evidence *held* to show that plaintiff was not negligent.

Appeal from Superior Court, Scotland County; Councill, Judge.

Action by Nash Sibbert against Scotland Cotton Mills. From a judgment for defendant, plaintiff appeals. Reversed.

Civil action for recovery of damages for injury sustained by plaintiff while at work in defendant's mill. The testimony of plaintiff tended to show that he was, at the time of the injury, 19 years of age, employed by one Terry, head boss of the night force; that he was instructed by Terry how to do the work to which he was assigned, "oiling and tying on bands" on 24 frames at night. He says: "All frames have shifters to throw belt which runs the frame from the tight to the loose pulleys. The shifter is a rod extending from the pulley at one end of the frame, looping over the belt, to the other end of the frame. This rod runs underneath top of frame and is connected with two levers coming out on top. The levers shift the belt from the tight to the loose pulley. Levers have cross-arms coming down to the edge of the frame. In working the shifter, you pull either lever and the frame is started; push the lever, and the frame is stopped. While standing by the frame there is no other way to stop, or start, it." Plaintiff further says that, when he first entered defendant's employment, the shifter was in good condition; got "out of fix" about two weeks before he was injured; that he did not known how to fix it; did not have much experience when he was injured. He was doing his work like Terry told him; never told him anything about the cogs under the frame. Plaintiff described the manner in which he was injured: "The band that ran one of the spindles had broken. I went to tie it on. As I reached in to do this, my shirt sleeve, just above the wrist, caught in the cogs of the travis gear under the frame. This drew my arm down and against the cogs, and produced the injury. * * * When I was caught in the cogs, my shirt sleeve was buttoned around my wrist. There are two of these cogs, called 'travis cogs,' and work together. At night there is no light under the frames, just shadows. When I saw my sleeve caught I called for help. Cora Norris first came to help me. She came when my sleeve was first caught, and took hold of the lever of the shifter to stop the frame. Then she tried the other lever. Neither would work. She then tried to throw off the belt at the end of the frame, but was not able." He says: "If the shifter had been in fix at the time my sleeve was caught, I could have reached the lever and stopped the frame." There was no other

way, except to pull the end of the shifter over or throw the belt off. Cora Sibbert, a sister of plaintiff, testified that both levers to the shifter were "out of fix"—had been so for three or four weeks before plaintiff was injured; that she asked the boss of the day force to fix them—asked him nearly every day. There was other evidence tending to show that the levers were "out of fix" at the time of the injury. At the close of plaintiff's evidence, his honor, upon defendant's motion, directed a judgment of nonsuit. Plaintiff appealed.

Cox & Dunn, for appellant. Morrison & Whitlock, for appellee.

CONNOR, J. (after stating the facts as above). It may be conceded that the frames at which plaintiff was put to work were of proper construction and in good condition; that there was no evidence on the part of defendant, either in respect to the frames or the travis gear; that defendant was guilty of no negligence in failing to instruct plaintiff in his work. It may be further conceded that his sleeve getting caught in the travis gear was an accident for which defendant was not responsible, or that plaintiff did not exercise due care to avoid the danger of getting caught in the cogs. The question arises whether there was negligence in permitting the levers of the shifters, provided for the purpose of starting and stopping the frames, to be "out of fix," and whether such negligence was the proximate cause of the injury. It appears that the wheels, upon which were the cogs of the travis gear, move slowly, and that, if the shifters had been in good repair and had performed the office for which they were intended, the frames could easily have been stopped by pushing the lever, throwing the belt from the tight to the loose pulley, and plaintiff would not have sustained any injury, further than tearing his shirt sleeve.

The plaintiff, assuming, as we must do, the truth of his testimony, was pursuing instructions—working as directed by the "head boss." There is always more or less danger that employés working in mills, even when the machinery is in proper repair, will become entangled in the wheels, cogs, etc. This is one of the dangers incident to the employment. Where there is no negligence in respect to the construction, repair of the machinery, or in failing to give instruction as to the manner of operating the machine, an injury sustained by the employé is attributed either to accident or the negligence of the employé. The risk of such injury is assumed. Recognizing the danger of such accidents, employers use such safety appliances as are in general use, either to avert the danger or to stop the machine in the event that an injury is imminent. Defendant had attached to the frames upon which plaintiff was employed shifters controlled by levers, easily operated, by which, in an emergency, the frames could be stopped. It was the duty of defendant to use reasonable care, by proper construction and frequent inspection, to have and keep them in working order. If it failed to do so, there was a breach of duty to plaintiff. He says that, after his sleeve was caught in the cogs, there was ample time to have stopped the frame, if the shifter had not been "out of fix." This is evident from the fact that plaintiff's sleeve was caught near to his wrist, while the injury sustained was at his arm pit, showing clearly that, if the shifter had worked, the injury would have been avoided. It seems that he and those who came to his relief did all in their power to stop the frame, but failed to do so because of the defective condition of the shifter, or the lever to it. If the jury find that the injury, notwithstanding preceding conditions, would not have been sustained but for the defective condition of the shifter, such defective condition would be the proximate cause of the injury—the last, real cause. This question, in the light of the evidence, should have been submitted to the jury.

We concur with his honor's ruling upon the questions of evidence presented upon the record. The fact that at one other mill the wheels of the travis gear were boxed does not tend to show that it was usual or customary to do so. Marks v. Cotton Mills, 135 N. C. 287, 47 S. E. 432. Nor do we think that the proposed evidence of the condition of the lever, after the injury, was competent. The only question presented by this record is whether the shifter was a safety appliance, and whether it was in proper repair and condition, and, if not, whether the defective condition was known, or ought, by proper inspection, to have been known, to defendant's servants, whose duty it was to inspect it, and whether such defective condition, if found by the jury, was the proximate cause of the injury. These were all questions for the jury. We do not perceive any evidence in the case, as now presented, of contributory negligence. If the shifters got in defective condition, after plaintiff began work, he was not required to abandon his employment. He did not assume the risk incident to danger by reason of such negligence. Simms v. Lindsay, 122 N. C. 678, 30 S. E. 19; Lloyd v. Hanes, 126 N. C. 359, 35 S. E. 611; Marks v. Cotton Mills, 138 N. C. 406, 50 S. E. 769.

In directing judgment of nonsuit there was error, for which there must be a new trial.

New trial.

(2 Ga. App. 804)

## CENTRAL OF GEORGIA RY. CO. v. MINOR. (No. 516.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

1. WRIT OF ERROR—REVIEW—NEGLIGENCE.
Questions of negligence are peculiarly within the province of the jury; and this court will not disturb a finding of its existence, when such an inference is warranted by any phase of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

2. DEATH—DAMAGES.
In an action for a homicide, in determining whether the verdict is excessive or not, the question will not be decided by reference to the deceased's expectancy according to the mortality and annuity tables alone. A verdict will not be set aside, as excessive, when it is not so large as to justify the belief that it is the result of bias or gross mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 125.]

3. SAME—MORTALITY TABLES.
The judge may properly instruct the jury, in explanation of the use of the mortality and annuity tables, that "if, under the evidence, the expectancy would be greater or less than that of the average man, or the earning capacity would increase or decrease, the cash value of the life should be increased or decreased accordingly," when there is evidence that the person, the value of whose life is in question, was a young man of good health and habits and was filling satisfactorily a responsible position.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 144, 145.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

H. N. Minor against the Central of Georgia Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Minor, the husband of the plaintiff, was employed by the defendant company to work in its yards at Macon in the capacity of "hostler helper," a kind of understudy, as it were, to the man who sees that locomotives are properly prepared and furnished for use in actual service. His regular occupation was that of member of the city fire department; but he was doing this service with the view of learning the trade, to the end of being regularly employed in the motive department of the railway company. He had been working in this service only three days when he met his death. A locomotive had been brought to a chute to be coaled. He mounted the tender, to help in loading the coal. The method by which this work is done is that the helper pulls down an apron—a kind of conveyor through which the coal runs from the chute to the tender—and then turns on the coal, which through the force of gravity runs from the chute, through the apron, into the tender. A cable attached to the upper portion of the apron, as it stands when not in use, is pulled, in order to lower the apron and admit the coal. Minor, after mounting the tender, pulled upon this cable, to lower the apron; and as he did so, and as the apron accordingly came down and into touch with the metal part of the tender, he was instantly struck and killed by a current of electricity which escaped from a wire against which the cable came into contact. The wire was part of an arc light circuit which supplied a lamp burning in front of the chute. The wires were attached to the chute, and so located that the cable swung down between them. On investigation of the wires, it appeared that the insulation had been worn away at about the place where the cable would come into contact with it, as it swung from the lowering of the apron of the coal chute.

From the testimony of the expert electricians who testified in the case the inference could be fairly deducible that the insulation had been worn away by the cable rubbing against the wire from time to time, though this was disputed by other testimony. The injury happened on a wet night, which tended to make injuries from the electricity more probable than when things were dry. It was shown that the wire had been installed by a reputable electric contractor; but there was no showing that the defendant had made any inspection. There was proof that the deceased, at the time of his death, "was 26 years old, perfectly healthy, and had no bad habits," and that "he was a bright young man." He had been a member of the city fire department for five years, and in that employment received $60 per month. The city also furnished him light, lodging, and heat free. A witness estimated this to be worth $12 to $15 per month, though, since the deceased was a married man and had to maintain a separate home, this probably resulted in no saving to him. The Carlisle Mortality and Annuity Tables were in evidence. The jury returned a verdict of $10,715 for the plaintiff.

The motion for a new trial, which was overruled, complains that the verdict is contrary to the evidence; also that it is excessive, especially so in light of the fact that it is in excess of the value of the life of the deceased, "calculated even upon the highest earnings shown during his life," wherefore it is apparent that no deduction whatever was made for decreased earning capacity due to illness or old age; also because the court charged the jury as follows: "If, under the evidence, the expectancy would be greater or less than that of the average man, or the earning capacity would increase or decrease, the cash value of the life should be increased or decreased accordingly." The specific objection to this excerpt from the charge is "that it allows the jury to consider the possibility of increased earning capacity of the plaintiff's husband, while the law does not authorize such recovery, for the reason that the same would be speculative, too uncertain, and too indefinite; also that there was no evidence before the jury that would authorize them to find that the plaintiff's husband's earning capacity would be increased, nor was there

any evidence that could authorize the jury to find that his expectancy would probably be greater than that of the average man."

Wimberly & Jordan, for plaintiff in error. Jos. H. Hall and Warren Roberts, for defendant in error.

POWELL, J. (after stating the facts as above). 1. As to the contention that the verdict is contrary to the evidence, that no negligence on the part of the master is shown, that the death of the deceased came about by reason of an accident, unforeseeable by ordinary care, it is necessary to say only that the evidence was such that a verdict either way could have been legally justified. Whether the wires were unsafely located in the beginning, whether the railroad company by ordinary care could have discovered this fact, whether an inspection reasonable under all the circumstances would have disclosed the probability of danger, were questions involved; and as to these things there was evidence pro et con. Possibly the members of this court, if they had been upon the jury which tried the case, would not have come to the conclusion reached by the jury; yet we cannot say that the inferences were not issuable.

"Now, who shall arbitrate?
Ten men love what I hate,
Shun what I follow, slight what I receive;
Ten, who in ears and eyes
Match me; we all surmise,
They this thing, and I, that."

Under the law of the land, the jury, the "ten men" and two, must, as to these questions, arbitrate; not we.

2. "The question of damages being one for the jury, the court should not interfere, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias." Civ. Code 1895, § 3808. This axiom is not so peculiarly applicable to cases of this character, where the law fixes the basis of the jury's calculations, as in those cases where the limit of enlightened conscience is the only measure; still the rule in a restricted sense exists in these cases also. It is contended by the plaintiff in error that the verdict is manifestly excessive; for, if the jury had allowed a recovery at the rate of the deceased's salary as a fireman, $60 per month, plus the $15 per month estimated by one witness as the value of the bed, heat, and light furnished him in the fire engine house (plaintiff in error says that it is not fair to consider this $15, since he, being a married man maintaining a home, got no financial benefit therefrom), for his full life expectancy, according to the Carlisle Tables, which were in evidence, it would have lacked $1.40 of reaching the amount actually found. It is further insisted that a man's expectancy of years of earning capacity is necessarily less than his expectancy of life, because it is absolutely certain that the average man (and the tables are based on the life of the average man) loses from his work a certain portion of the years of his life on account of sickness, the infirmities of old age, and similar causes. If the jury were by the law bound by the mortality and annuity tables, the criticism would be well founded. The jurors are permitted to use the tables; but they may disregard the tables, and may employ any method known to them as upright and intelligent men. Central R. Co. v. Wiggins, 91 Ga. 208, 18 S. E. 187; Florida Central R. Co. v. Burney, 98 Ga. 1, 26 S. E. 730; W. & A. R. Co. v. Cox, 115 Ga. 715, 42 S. E. 74 (1); Central R. Co. v. Crosby, 74 Ga. 748 (4), 58 Am. Rep. 463; W. & A. R. Co. v. Clark, 117 Ga. 548, 44 S. E. 1; Bussey v. C. & W. C. R. Co. (S. C.) 58 S. E. 1019. The jury may easily have concluded that the plaintiff, owing to his good health and good habits, would have had more years, both of life and of earning capacity, than the average man whose life is the subject-matter of estimate in the Carlisle Tables. At any rate, the verdict is not so excessive as to indicate gross mistake, if mistake at all.

3. We have carefully examined the complaint as to the excerpt taken from the charge of the court, and we conclude that it is not erroneous, especially when taken in connection with the context. The judge was explaining to the jury the method in which they should use the mortality and annuity tables, in the event they saw fit to use them. He said to them (we quote the excerpt complained of, together with the immediate context): "These figures I merely give by way of illustration, and you will not confuse them with the actual figures shown by the evidence adduced upon the trial. You will observe that these tables and observations of the court are based upon the assumption that the supposed person would live as long as the average man of that age would live. If, under the evidence, the expectancy would be greater or less than that of the average man, or the earning capacity would increase or decrease, the cash value of the life should be increased or decreased accordingly. In estimating the damages *in this case* [italics ours], you are authorized to consider feebleness of health, sickness, increased infirmities with age, and such other like causes that operate in human experience to *decrease* the earning capacity of a person." We must confess that we are wholly unable to see any injustice or injury done to the plaintiff in error by this charge. "It is simply an explanation of how and in what manner the tables should be used, if the jury should consider them at all. It appears to us that the judge is bound, when these tables are introduced in evidence, to explain to the jury how they may be used, just as he should explain a table of logarithms if it were introduced in a case involving questions which that table would illustrate. And so he should explain an almanac introduced to show the

phases of the moon or the time of the rising and setting of the sun, etc." Savannah, Florida & Western Ry. Co. v. Austin, 104 Ga. 618, 30 S. E. 770. The specific criticism is that "it allows the jury to consider the possibility of increased earning capacity of the plaintiff's husband, while the law does not authorize such recovery, for the reason that the same would be speculative, too uncertain, and too indefinite; also that there was no evidence before the jury that would authorize them to find that the plaintiff's husband's earning capacity would be increased, nor was there any evidence that could authorize the jury to find that his expectancy would probably be greater than that of the average man." We think that, when read in its entirety, the charge, instead of allowing the jury to consider the possibility of increased earning capacity, unduly limits the right; for, after explaining to them that the tables were based on the expectancy of an average man with a uniform earning capacity, and after showing them that it would be necessary to vary the result in like proportion as the actual facts might warrant a departure from that average, either on account of increase or diminution of either the expectancy or the earning capacity, he draws the specific application by saying: "In estimating the damages in this case, you are authorized to consider the feebleness of health, sickness, increased infirmities with age, and such other like causes that operate in human experience to decrease the earning capacity of a person." We cannot believe that any juror of sufficient capacity to grasp an explanation of the tables at all would be led to think that the judge, by the language used, intended that he should consider any likelihood of the increase in the deceased's expectancy or earning capacity. It is in this view that we have said that we thought the charge unduly limited the jury in favor of the defendant, and not against it; for we think that, under the evidence, the jury would have been authorized, not only to consider the chances of a decrease of earnings from the causes enumerated by the judge, but also to consider any probability of an increase of his expectancy beyond the average on account of his good health and good habits, as well as an increase of his earning capacity by reason of the fact that he was a young man of good health, good habits, and of such character and attainments as to warrant his employment and retention in the responsible position he had held, while he was yet in possession of those years in which, common experience tells us, men climb the hill of life's way before they begin to go down. "All men know that in the ordinary course of nature a man is born, grows to maturity, has his meridian, grows old, with waning powers, and dies." Southern Ry. Co. v. Scott, 128 Ga. 247, 57 S. E. 504.

In Georgia Cotton Oil Co. v. Jackson, 112 Ga. 620, 37 S. E. 873, as well as in the Scott Case, supra, it is held that "a charge instructing the jury to take into consideration and give the proper effect to any evidence before them, if there be such, tending to show that there was a reasonable prospect of increased earnings on the part of the plaintiff in case he had not been injured, should not be given, where there is no evidence to warrant it." These two cases are cited by counsel for plaintiff in error to sustain their attack upon the charge. If the proper distinction existing between "earnings" and "earning capacity," and between "prospects of increased earnings" and "probabilities of an increase of earning capacity," be kept in mind, it will be seen that the charge in question does not violate the inhibition of the authorities cited, even if it is conceded that the charge is fairly capable of being construed as submitting to the jury the right to consider any increase of earning capacity shown by the evidence. The damages are given on account of destruction of earning capacity. Evidence of actual earnings is received for the purpose of illustrating what the earning capacity is or probably will be. Richmond & Danville R. Co. v. Allison, 86 Ga. 149, 12 S. E. 352, 11 L. R. A. 43. It is error to admit prospects of advancement to a position of which the person in question has no definite assurance; but, to quote from the language of Mr. Justice Brewer in Richmond & Danville R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728, cited approvingly in the Scott Case, supra, "of course, there are possibilities and probabilities before every person, particularly a young man, and a jury, in estimating the damage sustained, will doubtless always give weight to these general probabilities, as well as those springing from any peculiar capacities or faculties." Possibly we can make the exact distinction we are seeking to draw clearer by having recourse to the example proposed by Chief Justice Simmons in the Allison Case, supra. After saying (86 Ga. 152, 12 S. E. 356, 11 L. R. A. 43): "While it is proper in cases of this kind to prove the age, habits, health, occupation, expectation of life, ability to labor, and probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, we think it improper to allow proof of a particular possibility, or even probability, of an increase of wages by appointment to a higher public office, especially where, as in this case, the appointment is somewhat controlled by political reasons"—in support of the proposition he cites the following example: "The deputy clerk of this court is very efficient and faithful, and, if there should be a vacancy in the office of clerk of the court, it is not only possible, but very probable, that he would be appointed to fill the vacancy, thereby obtaining a much larger salary than he now receives; but if he should be injured, as

Allison was, and were to sue the railroad company for damages, we do not think it would be competent for him to prove the possibility or probability of his appointment to fill a vacancy in the office of clerk, especially as the personnel of the court, upon which such appointment must depend, might change in the meantime. To allow the jury to assess damages in behalf of the plaintiff on the basis of a large income arising from a public office which he has never received, and which is merely in expectancy and might never be received, or, if received at all, might come to him at some remote and uncertain period, would be wrong and unjust to the defendant."

This opinion was written and this example give over 17 years ago. Time, as to the very example given, has justified the soundness of the proposition stated. The then efficient and faithful deputy clerk of the Supreme Court has not yet become the clerk of that court, because the kindness of Providence has preserved the loved and faithful clerk, so that a vacancy has never arisen; and it is the hope of the bench and bar of the state alike that the present hardiness of health of that most esteemed official will ward off for a long time the day when the vacancy must occur. So that, if the deputy referred to had been injured, and to enhance recovery of damages had sought to prove this contingent expectancy, and the court had allowed it, it would have (as time has demonstrated) given him the benefit of a prospect of earnings which has not become a reality. On the other hand, in such a suit, it would have been perfectly proper for him to have proved, and for the jury to have considered (and therefore have inferred a probability of an increase of earning capacity), the fact that he was a young man of good habits, good health, and good name, and that he was then capable of filling efficiently and faithfully a responsible position. And time has justified the wisdom of the rule as applied to the example given; for, although the deputy referred to has never become the clerk of the Supreme Court, still those very qualities of efficiency and fidelity, the good name and capacity for the filling of responsible office, led the judges of this court, upon its organization, to choose him as its clerk at the same salary he would receive if he were clerk of the Supreme Court.

Mr. Justice Lumpkin, in the Scott Case, supra, points out certain instances in which prospects of earnings, being definite and not wholly contingent, may be shown to the jury and considered by them along with such general probabilities of an increase of earning capacity as the proof of the person's age, character, health, habits, etc., may indicate. In such cases the court may charge the jury on both prospects of increased earnings and probabilities of increased earning capacity. In cases, such as the one at bar, where there is no evidence of a definite, reasonably certain prospect of increase of earnings, but there is evidence as to the age, health, habits, etc., of the person, from which the jury may reasonably infer an increase of earning capacity, the judge should not submit to the jury any instruction by which they would be authorized to consider prospects of earnings, but may properly charge them upon their right to consider the probabilities of an increase of earning capacity.

This disposes of all the assignments of error.

Judgment affirmed.

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(2 Ga. App. 762)

## MAYOR, ETC., OF CITY OF DUBLIN v. DUDLEY. (No. 408.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

1. NEW TRIAL—GROUNDS.

A judgment overruling a demurrer cannot properly be made a ground of a motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 27.]

2. TRIAL—INSTRUCTIONS—REQUEST.

The failure of the court to charge a proposition of law which is not applicable to any defense set up in defendant's plea is not, in the absence of a written request to so charge, reversible error, although there may be some slight evidence tending to support such theory of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 627–641, 648.]

3. WRIT OF ERROR—REVIEW.

The evidence warranted the verdict.

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action by C. D. Dudley against the mayor and city council of Dublin. Judgment for plaintiff, and defendant brings error. Affirmed.

W. C. Davis, for plaintiff in error. Ira S. Chappell, for defendant in error.

RUSSELL, J. One of the grounds of the motion for new trial is that the court erred in overruling a demurrer. It has been uniformly held for many years that this is not a proper ground of a motion for new trial, and, in the language of Chief Justice Lumpkin, as used in the case of Sutton v. McLeod, 29 Ga. 594, we now say: "This principle is hoary with age. We bow to it reverently." Nor is it a good ground for a new trial that the judge failed to charge a proposition of law, even though there was some slight evidence to support a charge thereon where such charge would have given the defendant the benefit of a theory not hinted at in his answer, and where no written request was presented to the trial judge. There being sufficient evidence to warrant the verdict, which is also approved by the trial judge, it should stand.

Judgment affirmed.

(2 Ga. App. 763)

VANZANT et al. v. BANK OF ABBEVILLE. (No. 462.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

BILLS AND NOTES—DEFENSES—FRAUD—PLEADING.

A. and B. borrowed money from a bank to pay their insurance premiums, and executed their notes therefor. When sued by the bank on the notes, they set up the defense that the notes were procured by fraud, in that the cashier of the bank had induced them to take out the policies of insurance and borrow the money from the bank to pay the premiums, by his promise that the bank would protect them in the first payment of the premiums whenever they became due; that, relying upon such promise, they took out the policies and executed the notes sued on, and delivered them to the bank for the money to pay the premiums of their policies of insurance. They further pleaded that the transaction was a fraudulent scheme to induce them to take out said policies and to execute their notes to the bank. This plea was demurred to, because the facts alleged were insufficient to show fraud, and because it was an attempt to vary the terms of a written contract by parol, and as constituting no defense. *Held*, that the demurrer was properly sustained, the plea stricken, and judgment thereupon entered for the plaintiff. Civ. Code 1895, § 3675, subsec. 7, and section 5201.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1524.]

(Syllabus by the Court.)

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by the Bank of Abbeville against R. E. Vanzant and others. Judgment for plaintiff, and defendants bring error. Affirmed.

E. H. Williams, for plaintiffs in error. N. M. Patton and M. B. Cannon, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 829)

LETT v. STATE. (No. 611.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE—INSTRUCTIONS.

The guilt of the defendant being dependent entirely upon circumstantial evidence, the failure of the trial judge to charge the jury upon that subject, and to instruct them that "to warrant a conviction on circumstantial evidence, the proven facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused," requires a new trial. Riley v. State, 1 Ga. App. 651, 57 S. E. 1031.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1883.]

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Mose Lett was convicted of crime, and brings error. Reversed.

M. C. Few, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and E. W. Butler, Co. Sol., for the State.

RUSSELL, J. Judgment reversed.

(2 Ga. App. 770)

ALBANY & N. RY. v. RAWLS. (No. 470.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

WRIT OF ERROR—REVIEW.

No error of law is assigned. The verdict is supported by some evidence. This court cannot interfere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928–3934.]

(Syllabus by the Court.)

Error from City Court of Albany; D. F. Crosland, Judge.

Action by Mollie Rawls against the Albany & Northern Railway. Judgment for plaintiff. Defendant brings error. Affirmed.

Lane, Maynard & Hooper and Pope & Bennet, for plaintiff in error. Mann & Milner, for defendant in error.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 770)

SELMAN v. MALCOM. (No. 471.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

EVIDENCE — NEGATIVE AND POSITIVE TESTIMONY.

This case is controlled on the only error of law assigned by Wood v. State, 1 Ga. App. 684, 58 S. E. 271 (3), and Phillips v. State, 1 Ga. App. 687, 57 S. E. 1079.

(Syllabus by the Court.)

Error from City Court of Monroe, John W. Arnold, Sr., Judge.

Action between G. C. Selman and J. H. Malcolm. From the judgment, Selman brings error. Reversed.

W. O. Dean, for plaintiff in error. Napier & Cox, for defendant in error.

HILL, C. J. Judgment reversed.

(2 Ga. App. 821)

MAIN v. SIMMONS. (No. 574.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

1. WRIT OF ERROR—REVIEW—HARMLESS ERROR.

While it is the duty of the court to construe a written contract, still a new trial will not be granted for failure to discharge this duty, where the contract is submitted to the jury and properly construed by them. Especially is this true in a case where, if the contract had been properly construed by the court, the construction would have been adverse to the plaintiff in error, and the result would have been the same as that reached by the jury in their verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4033.]

2. SALES—CONTRACTS—ENTIRE OR SEVERABLE.

The writing in this case evidenced an entire and not a severable contract, and the purchaser was not compelled to accept any of the lot of jewelry, unless the entire lot was of the character and quality purchased by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 171, 172.]

3. SAME—ACTION FOR PRICE.

The evidence fully sustaining the contention of the defendant that the greater portion of the lot of jewelry, which was the subject-matter of the contract, was worthless, the entire

contract was avoided, the verdict in behalf of the defendant was authorized, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from City Court of Eastman; W. M. Clements, Judge.

Action by William F. Main against D. W. Simmons. Judgment for plaintiff, and defendant brings error. Affirmed.

W. M. Morrison, for plaintiff in error. D. M. Roberts & Son, for defendant in error.

RUSSELL, J. The plaintiff in error, doing business as the American Jobbing Association, brought an action on a written contract for the purchase price of a lot of jewelry therein described and ordered by the defendant. The purchase price of the lot of jewelry was $215.50. The petition set out the contract, that the jewelry had been delivered to the defendant, and that the defendant had not availed himself of any of the three privileges set forth in the order or contract of purchase. The order was as follows:

"American Jobbing Association (Not Incorporated), Chicago, Illinois.

"Order.

"Gentlemen: Please ship me the assortment of goods described on the back of this order, in accordance with the terms hereon.

"Privilege No. 1. Any article in this assortment which the purchaser has sold to his customer and which does not give reasonable satisfaction, considering price paid for it, may be returned, and we will refund the price originally paid, and will repair or replace the article so failing to wear as it should, provided the article be so returned to us by registered mail and the name and address of the dissatisfied customer is given.

"Privilege No. 2. Any piece of jewelry purchased from us, not finding ready sale after being properly displayed for 60 days, may be exchanged dollar for dollar at the purchase price for any other jewelry in our stock within one year from date of purchase. Should any of the goods in this order prove unsatisfactory in style, price, quality, finish, assortment, or selling quality, they can be returned for exchange as above provided, but cannot be returned for credit. Repairs on jewelry free for one year.

"Privilege No. 3. Unsold goods can be returned for cash on the following terms: Should purchaser have sold less than three-fourths of the jewelry contained in this order at the end of one year from date of shipment, we agree to purchase from him for cash at the purchase price all unsold goods which he originally bought of us and which remain unsold at the end of this year. This agreement is made with the understanding and as a condition that the purchaser send us every three months between the 1st and 10th of the month an itemized list of all goods on hand and that he keep the goods displayed for one year. These conditions may be omitted by customers who are satisfied with their sales, and by so doing they will void no portion of this contract except this paragraph.

"We assist you. Attraction creates attention, attention fosters curiosity, and curiosity makes demand. Therefore, for the purpose of assisting the purchaser and creating demand of all kinds of his goods, we furnish, with each full order only, 50 half pairs gent's cuff buttons without charge, and agree to mail 50 duplicates to 50 heads of families, the names and addresses of whom are to be furnished by the purchaser of this assortment by mail, within 10 days from date hereof, or vendors may, if they choose and find it convenient, if purchaser neglects to furnish list as agreed, obtain the list otherwise. An appropriate letter and a certificate good for the duplicate button will also be mailed, and when the holder thereof had purchased any goods from the merchant equal to $5 in value the certificate becomes good, and he will be given a duplicate button.

"Terms of settlement. Long time, if closed by acceptance. The amount of this order is payable in six equal installments, due 2, 4, 6, 8, and 12 months from date of invoice, provided purchaser sends us within 15 days from date of shipment from our most convenient place of business his six acceptances for amounts and time of above payments, payable to our order at Chicago, Ill.

"Liberal cash discount. If acceptances are not sent us as above, terms are cash. Five per cent. discount if paid in full within 15 days from the date of shipment.

"Special Notice.

"No privileges herein granted will be allowed unless terms of sale are complied with and acceptance, if any, paid when due. Delivery to transportation company at our most convenient place of business is hereby considered delivery to the purchaser. In consideration of the special terms and conditions of this order, purchaser agrees not to countermand either before or after it is accepted by us. The representative of the American Jobbing Association is a soliciting agent only, and has no authority to make agreements of any kind for that company. If any changes in the order are desired, they must appear in writing hereon. I acknowledge that all the terms and conditions under which I desire to purchase the goods listed on this order appeared hereon. This order is given subject to the acceptance of the American Jobbing Association.

"Signature of purchaser: D. W. Simmons.

"Post office: Eastman, Ga.

"Nearest express office: Eastman, Ga.

"Date/195. ————, Salesman.

"To insure long and pleasant business relations, misunderstandings must be guard-

ed against. Purchasers will therefore please carefully read this order.

"Citizens' Banking Company.

"Original.

"Order itemized.

"Carefully read of these terms and conditions contained in this order.

"Salesmen are not authorized to receive money or goods from customers."

Following this order is the statement of the articles comprised in the assortment of jewelry and the price of each; the entire assortment aggregating $215.59.

The defendant denied all of the allegations of the plaintiff's petition, except as to the jurisdiction of the court and that he gave the order above quoted, and for further answer admitted that he purchased the lot of goods described in the order, but averred that the plaintiff did not ship the goods he purchased as described in the order, but fraudulently substituted, in place of the goods ordered and described in the contract, a lot of cheap jewelry, of no value whatever and utterly unsalable. He further pleaded that, as soon as the goods reached him and he had an opportunity to examine them, he tendered back the jewelry to the plaintiff's attorney; that he still had on hand all the lot he had received; and defendant made a continuing tender. He admitted that he refused to sign the acceptances referred to in the petition and in his order, because he never received the articles described in the order, but, on the contrary, the articles sent were spurious and worthless, and were not the goods he had purchased from the plaintiff, described in said order.

The testimony of the defendant in support of his plea was uncontradicted. He testified that the plaintiff never shipped him the goods he ordered; that the goods shipped were brass, and worth nothing at all; that the goods he ordered, as described in the contract, would have been salable. He further testified that, as soon as he saw the goods he received, he notified plaintiff that the goods were subject to his order, and he had not sold or exposed for sale any of the articles included in the order. The defendant further testified, on cross-examination, that he had no complaint to make of the articles included in the lot of jewelry which were not claimed to be gold; that his only complaint related to the goods described in the order as gold filled, or rolled-gold filled. He admitted that some of the articles shipped were as ordered, but testified that two-thirds of the goods ordered were to be gold filled, and that he refused the jewelry because this portion of the lot of jewelry was not as ordered.

The jury rendered a verdict in favor of the defendant. Plaintiff moved for a new trial upon the grounds, that the verdict is contrary to law and evidence, that the court erred in submitting to the jury the question whether the contract upon which the plaintiff's action is based is an entire or a severable contract, that the court erred in not construing said contract to be a severable one and not charging the jury that the plaintiff was at least entitled to recover the purchase price and value of the lot of goods embraced and described in said contract which are not described as being gold filled or rolled-gold filled.

1. The court erred in submitting the construction of the contract to the jury. "The construction of a contract is a question for the court." Civ. Code 1895, § 3672. This is the general rule, and it is only in the case of ambiguity that parol evidence is admissible, or that the meaning of the contract can be submitted to the jury. But, while it is the duty of the court to construe a written contract, still failure to discharge this duty is immaterial, if the jury by their verdict properly construe such contract. As we have already held in Moss Manufacturing Co. v. Carolina Portland Cement Co., 1 Ga. App. 232, 57 S. E. 914, this is especially true where it appears that the proper construction of such contract would be adverse to the contention of the complaining party; and the same doctrine was laid down in Tilton v. Butts, 78 Ga. 30, where the court held that "it is the duty of the court to construe a written contract, but, if he had properly construed the contract in this case, it would not have benefited the plaintiff in error, and the result must have been the same as that reached." The first assignment of error, therefore, must be considered solely with a view to the question whether the jury properly construed the contract, and, having so construed it whether their verdict was the proper conclusion in the case.

2. The real point in the case, then, is whether the contract is entire or severable; and the counsel for both parties concede this to be the controlling issue. We hold that the order for the lot of jewelry, which we have quoted above, when signed by the purchaser and accepted by the vendor, evidences an entire contract of purchase of the lot of jewelry identified and described in the bill of particulars, but summarized in the gross sum for which suit was brought and based upon the written order. The privileges mentioned were to be enjoyed only subsequently to the completion of the real contract of purchase and delivery of the goods and after the payment of the purchase price. That did not in any way rebut the evident intention of both parties to create an entire contract. This being true, the purchaser, when he discovered that there had been palmed off on him spurious articles more than for two-thirds of the amount of the entire purchase, which bore no comparison in value to the articles he had ordered, was at perfect liberty to consider the contract as avoided by the seller, and to reject, as he did, the en-

tire lot. "Where the contract is entire, performance by the party undertaking the contract is a condition precedent to a recovery against the other party upon the contract." Hill v. Balkcom, 79 Ga. 444, 5 S. E. 200. See Cutter v. Powell, 2 Smith's Leading Cases, part 1, p. 1.

3. Though the court should have construed the writing to be an entire contract, the verdict of the jury properly construed it. The evidence for the defendant fully authorized him to reject the entire lot of jewelry, and fully warranted the finding of the jury in his favor.

Judgment affirmed.

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(2 Ga. App. 834)

FORD v. STATE. (No. 725.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

1. CRIMINAL LAW—PRACTICE—EXAMINATION BY JUDGE.

The practice of examining witnesses by trial judges is disapproved. Such practice frequently delays and defeats justice, and impairs or destroys the right of a fair and impartial trial by jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1525.]

2. SAME—DUTIES OF JUDGE.

The practice in harmony with our judicial system requires trial judges to confine themselves to an enunciation of the law, leaving to counsel the duty of elucidating the facts, and to juries the right of finding the truth in the evidence.

3. SAME.

While the mere multiplicity of questions propounded to witnesses by the judge does not of itself constitute error, such usurpation of the prerogative of counsel approaches dangerously near to the border line of prohibited judicial interference with the exclusive right of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1525.]

4. SAME.

The rigid and extended examination of the witnesses for the defendant on the vital points of the defense by the trial judge had a tendency to discredit the testimony, and, following the decisions of this court in Sharpton v. State, 1 Ga. App. 542, 57 S. E. 929, Rouse v. State, 2 Ga. App. —, 58 S. E. 416, and Taylor v. State, 2 Ga. App. —, 59 S. E. 12, a new trial must be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1525.]

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

George Ford was convicted of murder, and brings error. Reversed.

Jesse W. Walters, for plaintiff in error. W. E. Wooten, Sol. Gen., and J. H. Tipton, for the State.

HILL, C. J. Plaintiff in error and the deceased, two negro boys, aged, respectively, 15 and 19 years, were participants in a dance at night. A difficulty took place between them, and the plaintiff in error shot the deceased three times with a pistol, killing him almost instantly. The evidence was conflicting as to every material fact. The testimony for the state made a case of unprovoked murder following a previous difficulty the night before in which the defendant was the aggressor, and after which he made repeated threats to kill the deceased. It appeared therefrom that on the night of the homicide the defendant without any provocation assaulted and cursed the deceased, who was unarmed, and immediately drew his pistol and shot him. The testimony for the defense entirely contradicted these facts. According to it the deceased was the aggressor at the previous difficulty, made threats thereafter to kill the defendant, and at the time of the killing, without any provocation, cursed and assaulted the defendant, drew his pistol, and was advancing on the defendant, endeavoring to shoot him, when the defendant, who was trying to avoid the encounter, shot and killed him in self-defense. There was also evidence of a mutual combat, deliberately planned and sought, and, after preparation with deadly weapons, engaged in with premeditated deadly purpose. There was also some evidence presenting the old doctrine of manslaughter, where two draw their weapons upon a sudden quarrel, a combat ensues, no undue advantage being sought or taken on either side, and one kills the other. The jury settled the conflict in the facts, and declared that the truth made the defendant guilty of voluntary manslaughter. There was ample evidence to support such finding. We cannot, therefore, disturb the verdict, unless some material and harmful error of law was committed.

1. The charge of the court very clearly and very fully submitted to the jury every grade of homicide, as well as the law of self-defense, as laid down in the Code of this state, and we think the several exceptions to certain portions thereof, whether considered alone or in connection with the entire charge, are without substantial merit. The court not only accurately and clearly presented the law of the case, but submitted fully and impartially the issues in controversy.

2. It is insisted that the court committed error, and "exceeded its power and discretion as the trial judge, in taking charge of the witnesses both of the state and the defendant, conducting a great part of the examination of the witnesses, asking many leading questions, many of which were of a discrediting character, and had a tendency to discredit defendant's witnesses in the opinion of the jury, and thereby injured and damaged him, all of which is shown by the questions and answers of the witnesses. Defendant insists that it is the province of the court to ask questions where the matter is misunderstood, and better, perhaps, to suggest to counsel and have him elicit the information for the court, and that it is not the proper practice to ask so many ques-

tions of the nature of those set out. Defendant insists, again, that such practice on the part of the court is calculated to impress the jury with the court's opinion of the case." The errors complained of in the foregoing assignment are not clearly and specifically pointed out. All the questions propounded by the court, and the answers thereto, are fully set out as a part of this exception. This court's attention is not called to any question or answer claimed to have been damaging to the defendant; but it is invited to consider the entire examination conducted by the trial judge, consisting of probably 500 questions and answers, and condemn the whole, or pick out therefrom such as the court thinks justly amenable to the criticisms made. The duty of pointing out error devolves upon him who charges error, and courts of review can with propriety refuse to embark upon "a voyage of discovery to find and expose errors."

While the complaint in this connection is entirely too general, it challenges the fairness of the trial because of the conduct of the judge in an examination of the witnesses. The court is charged with making an assault upon the very citadel of the defendant's rights—a fair, impartial, and exclusive trial by the jury of the facts. Because of the gravity of the accusation, this court has waived the lack of definiteness as to specifics, and has given to the entire examination of the witnesses by the judge the most careful consideration. This examination was of great and unusual length, and, while we are not prepared to say that the multiplicity of questions propounded by the court in itself proves error, we do think such indulgence by the judge approaches dangerously near the line of judicial expression or intimation of opinion. As we have before said in the Sharpton Case: "It is almost an intellectual impossibility for a judge to engage in an examination of a witness on vital questions of the case on trial without in some manner and to some extent indicating his own opinion." When the examination is not confined to one witness, but extends to many witnesses, and exhibits an active participation by the judge in the elucidation of the facts, we are inclined to think it becomes not "almost," but altogether, "an intellectual impossibility." The jury necessarily regards the bringing out of the facts as the duty of the counsel engaged on opposite sides; and when the judge enters upon the arena occupied by the contending parties, he brings to the combat with the witnesses the overwhelming weight which attaches to the idea of judicial impartiality. By the very fact of his examination of the witnesses, jurors are led to the conclusion that the judge entertains an opinion, and they become most alert to discover such opinion. The examination of witnesses at great length by the judge diverts the attention of the jurors from the testimony of the witnesses to the questions asked by the court, in the effort to find out what the judge thinks of the matter at issue. Besides, such usurpation of duty on the part of the judge tends to confuse and disparage the attorneys conducting the case. Viewed from every standpoint, the practice of trial judges participating in the examination of witnesses is unwise. Such practice in criminal cases most frequently results in the eventual escape of the guilty, for, where there is a violation of either the spirit or letter of the statute forbidding the intimation of opinion on the facts, however clearly guilt appears, a reversal inevitably follows, and the fact of reversal has great moral weight on a second trial. But while this practice now under condemnation causes frequent, unnecessary, and costly delays of justice, and in many cases its ultimate defeat, yet even the guilty have the right to an absolutely fair, impartial, and exclusive trial on the facts by the jury. The voice of the law is clear and mandatory. On facts, it seals the lips of the judge and makes the jury its only mouthpiece. It is always wiser, safer, better, and juster that trial judges should confine themselves exclusively to an enunciation of the law, leaving to counsel the duty of elucidating the facts, and to juries the finding of the truth in the evidence.

Applying the foregoing remarks to the examination of the witnesses by the trial judge in the instant case, we have come to the conclusion, after weighing every question and answer, that the positive mandate of the law which forbids the judge from entering the domain of conflicting facts was violated at least in one instance at a point where the combat between the prosecution and the defense was crucial and critical. Two vital facts were relied upon by the defense—the backing of the defendant before he shot the deceased, and the possession of a pistol by the deceased which he was trying to use when shot. The court, by a rigid, lengthy examination of the witnesses who testified in favor of the defendant on these two points, must have discredited to some extent this testimony in the minds of the jury. We are all the more clear that this was harmful error from the fact that a belief by the jury in its truth would have authorized a verdict of acquittal. Following the ruling of this court in Sharpton v. State, Rouse v. State, and Taylor v. State, supra, we are constrained to grant a new trial on this ground.

Judgment reversed.

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(2 Ga. App. 330)

## HOWARD v. STATE. (No. 722.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

1. HOMICIDE — VOLUNTARY MANSLAUGHTER — ASSAULT AND BATTERY.

Upon the trial of one charged in the same indictment with murder and assault with intent to murder, where there is no evidence of a mutual intent to fight, neither the law of voluntary

manslaughter nor that of assault and battery is necessarily involved. The law of voluntary manslaughter is, however, applicable to evidence showing the homicide to have been committed under that sudden, violent impulse of passion, supposed to be irresistible and justly aroused, either by an assault or other equivalent circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 54.]

2. SAME—ASSAULT TO MURDER—PREMEDITATION.

The deliberate intent to kill must be shown before a conviction of assault to murder is authorized. The nature of the instrument used in making the assault, the manner of its use, and the nature of the wounds inflicted, as well as the brutality and duration of the assault, are each and all circumstances from which an intent to kill may be inferred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 262, 263.]

3. SAME—INSTRUCTIONS.

The evidence as to the circumstances of the assault, being uncontradicted and suggesting no reasonable hypothesis save that the assault was made with intent to kill (either maliciously or in self-defense), a charge upon the subject of assault and battery would have been error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 658.]

4. CRIMINAL LAW—NEW TRIAL.

Every phase of the law of justifiable homicide and self-defense having been fairly and lucidly presented to the jury, and the evidence fully authorizing the verdict rendered against the defendant, there was no error in the judgment refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; Wm. A. Little, Judge.

Jule Howard was convicted of assault with intent to murder, and brings error. Affirmed.

T. T. Miller, for plaintiff in error. S. P. Gilbert, Sol. Gen., and Spencer R. Atkinson, for the State.

RUSSELL, J. The defendant was convicted of assault with intent to murder. His motion for new trial was overruled, and he excepts. The complaint of the plaintiff in error, though variously presented by the learned and ingenious counsel, is addressed to only one point—the failure of the court to instruct the jury that the defendant might be found guilty of assault and battery. The exceptions contained in the seventh and eighth grounds of the amended motion for new trial, in which it is insisted that the court erred in certain instructions, are without merit when the excerpts complained of are considered in connection with the entire charge. In the lucid presentation of the law of murder and of justifiable homicide and of assault with intent to murder, we cannot find a single flaw. The jury could not have been misled or confused by any of the instructions of the court, and they were told more than once that the defendant could not be convicted of assault with intent to murder unless the proof showed a deliberate intention on his part to kill the deceased. But the court did not instruct the jury upon the theory of the law of mutual combat, except as related to the defense of voluntary manslaughter. If the law of voluntary manslaughter should have been given in charge to the jury, to guide them in case they believed the death of the deceased was due to the act of the defendant, the jury should have been instructed that if they believed that the defendant assaulted the deceased under such circumstances as that, if death had resulted, the defendant would only have been guilty of voluntary manslaughter, and in that event, if they were not satisfied that the death of the deceased resulted from the act of the defendant, but were satisfied that the defendant assaulted him, then the defendant might be guilty of assault and battery. No exception is taken to the charge of the court upon the subject of voluntary manslaughter. The complaint is that the jury should have been instructed that the defendant might be convicted of a lesser offense than that of assault with intent to murder. The exception is presented in the tenth ground of the amended motion for new trial, as follows: "Because the court erred in failing to charge the jury upon the law of assault and battery in connection with his charge of the law of assault with intent to murder, there being evidence of mutual combat between the deceased and the accused, so that the jury may have been instructed that, in the event they should believe from the evidence that the defendant, though not justifiable in striking the deceased, and though they may not have believed that if death had ensued the crime would have been murder, the jury, under such circumstances, could return a verdict against the defendant for the offense of assault and battery."

In our view of the case there is no phase of the evidence under which a charge upon the subject of either voluntary manslaughter or of assault and battery is required. The defendant might have taken exception to the charge upon the law of voluntary manslaughter, but he has preferred not to do so. But the fact that the law of voluntary manslaughter was charged, where the evidence in the case did not authorize this instruction, affords no ground of exception to the failure to charge the law of assault and battery. The issue between the state and the accused at the conclusion of the testimony was clear-cut and well-defined. The assault of the defendant upon the deceased was either justifiable, because in self-defense, or it was a wanton, cruel, and unprovoked attack with intent to kill. If the jury believed the defendant was justifiable, he should have been acquitted. If they believed, as they were obliged to do from the barbarous character of the injuries inflicted upon the deceased, that the defendant intended to kill him, then there remained only one question for the jury to settle, which was whether the death of the deceased was caused by the wounds inflicted by the defendant, or whether his death resulted from wounds received at the hands of another. If the jury

believed that the defendant struck the deceased repeatedly with a cedar stick, until the back of his head was a mass of matted blood and brains, under the circumstances testified to by the witnesses for the state, and further believed that the wounds with the stick caused the death of the deceased, they should find the defendant guilty of murder. If they were not satisfied, or had reasonable doubt, as to whether the death of the deceased resulted from the blows inflicted by the defendant, or whether the stabs and pistol wounds were the immediate cause of death, then they should find the defendant guilty of assault with intent to murder. There is not a particle of testimony in the record which evidences that there was a mutual intent to fight on the part of the defendant and the deceased, unless it be the statement of the deceased, drunken, helpless, bleeding, perhaps dying, with his face to the ground, that he would kill the defendant if he ever got up. And this statement was made after he had been beaten to the ground by from five to eight blows from the heavy cedar stick used by the defendant.

According to the testimony in behalf of the defendant, he struck the deceased because he was obliged to; and this is also his statement. It was a case of urgent, pressing necessity, in absolute protection of his life and safety. The deceased, according to this testimony, was advancing upon the defendant in a terrible passion, inflamed to madness by liquor, with a long and dangerous knife, with the evident present intent, if possible, to kill the defendant, and the defendant used no more force than was necessary to protect himself in this imminent danger. The jury were fully instructed on the only theory of justification presented by the defendant, and no theory of mitigation was presented by the evidence. According to the testimony for the state, the defendant rushed upon the deceased, who was engaged in a quarrel with some negroes, before the deceased was even aware of his presence, threw him to the ground, first choked him, and then beat him with a large cedar stick, while the deceased was prostrate upon the ground, until there were left, as a result of the beating, two complete fractures of the skull and various other wounds. From the standpoint of this testimony, the assault was unprovoked, the deceased had no time to form any intent to resist, and as he had, up to that time, been upon the best of terms with the defendant, it could not be said that he participated mutually with the defendant in an intent to fight. It has been decided that a mutual intent to fight can exist and never a blow be struck. But according to the evidence, if the deceased had time to form any intent before he was wounded nigh unto death by the defendant, it could hardly be said to be an intent to fight. The only intent must have been the intent to resist, in order, if possible, to defend himself; for, according to the testimony for the state, he had not fetched his weapons (he had none), nor had he begun a difficulty with the defendant, because he was attacked by the defendant while engaged in a quarrel with other parties.

After a laborious inspection, re-reading, and review of the voluminous mass of testimony in this case, we are satisfied that there is no error of law or of fact of which this plaintiff in error can justly complain. The record pictures one of the darkest tragedies and one of the most diabolical scenes which has ever been brought to our attention. It discloses a carnival of crime upon the fateful Sabbath day upon which the deceased lost his life. It is pathetic that, as he bid his wife and little children farewell, he kissed them each in turn. It is a sad testimonial to the frailty of human nature that he was hardly out of sight of his home, where he might have spent a very different Sabbath, before the desire for strong drink had overmastered his better impulses. All Sunday morning (and the evidence shows that it was a bright and sunny Sabbath), the deceased, the defendant, and another companion spent their time in the successful search of one blind tiger after another. Bottle after bottle of whisky was consumed as they went from one gambling rendezvous to another until they reached the house which, as it turned out, was to be the scene of the tragedy, and more whisky was obtained. It is shown from the evidence that, while the deceased had never before visited the Bryant house, the defendant was thoroughly at home there. In a short time the deceased, maudlin with inebriety, became engaged in a wordy difficulty with two of the negroes in the yard, while the defendant according to his own statement, was conversing with the negro women and children in the house. Some one cries out that there is going to be a difficulty between the deceased and the negroes, and the defendant rushes from the house with an oath, telling the deceased that these are his negroes, and throws him to the ground. This much of the case is left in no doubt. Nor is it contradicted that the defendant struck the deceased several times with the knotted cedar stick, though it was testified that these blows were given in self-defense. There is ample evidence, on the other hand, from more than one witness, that the blows with the stick were wholly unprovoked. The jury had the right to determine which was the truth of the transaction; and the character of the stick and of the wounds inflicted (if the jury believed the assault was unprovoked) could leave no room whatever for speculation as to the intention with which the wounds were inflicted. There could be but one intent—whether it was successful or not—to kill the deceased.

Judgment affirmed.

(2 Ga. App. 771)

## CAPITAL CITY BRICK CO. v. JACKSON.
(No. 477.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

1. CORPORATIONS—POWER OF PRESIDENT—EXECUTION OF NOTES.

The presumption that the president of a business corporation is authorized to execute negotiable instruments in the name of the corporation arises only where such instruments are apparently made for corporate purposes, in the ordinary course of the corporate business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1726, 1727.]

2. SAME—BURDEN OF PROOF.

A negotiable promissory note made in the name of the corporation by its president, in which he is named as payee, is prima facie void as to such corporation. The burden is upon the holder of such note to show that it is in fact the contract of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1730.]

3. BILLS AND NOTES—BONA FIDE PURCHASER—NOTICE.

The naming of the officer of the corporation, who executes a note ostensibly in its behalf, as the individual payee therein, is a danger signal, and such note "bears its death wound upon its face."

4. SAME.

Such instrument being sufficient in itself to put the taker on inquiry, he is chargeable with whatever knowledge he could have acquired by such inquiry, and cannot claim the protection and rights of a bona fide holder.

5. CORPORATIONS—OFFICER'S AUTHORITY—EVIDENCE.

The presumption that the note sued on was not the authorized contract of the corporation not having been overcome, but being confirmed by the evidence, the verdict should be set aside, and a new trial granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1737.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by N. F. Jackson against the Capital City Brick Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. M. & G. F. Mitchell, for plaintiff in error. Tye, Peeples, Bryan & Jordan and H. M. Scott, for defendant in error.

HILL, C. J. This writ of error challenges the validity of a judgment based on the following promissory note: "Atlanta, Ga. July 1st, 1903. Ninety days after date we promise to pay to the order of T. F. Stubbs two hundred and eighty three and $^{20}/_{100}$ dollars at any bank in Atlanta, Georgia. Value received. Capital City Brick Company, per T. F. Stubbs, Pres." The note was indorsed in blank by Stubbs and transferred to the plaintiff in payment of a pre-existing debt which Stubbs owed him. The defense made by the corporation was that Stubbs had no authority to make said note, and that the plaintiff was not a bona fide holder of the same, as he knew that Stubbs had no right or authority to issue the note in the name of the corporation, or could have known it by making reasonable inquiry. The evidence is clear that Stubbs did not have authority from the corporation to execute the note, and that the plaintiff took the note from Stubbs in payment of a private pre-existing debt in which the company had no interest.

The controlling question in the case is whether the note carried upon its face sufficient indicia of authority to entitle the plaintiff to the protection and rights of a bona fide holder. It was insisted by him that the note, having been executed in the name of the company by its president, was apparently and presumptively the authorized contract of the corporation. On the other hand, the defendant insisted that the note, having been made payable to the officer as an individual, who made it in the name of the company, was sufficient to put the plaintiff on inquiry as to the authority of such officer to execute the same. A promissory note executed in the name of the corporation by its president, in the ordinary course of business, and taken by one not connected with the corporation, may carry with it the presumption that it was issued for corporate purposes and under lawful authority; but a note executed in the name of the corporation by its president, payable to himself as an individual, is accompanied by no such presumption. On the contrary, this fact raises the presumption that such note is not the authorized act of the corporation, and is itself notice that it is without the scope of his general power as such official. Such a note is a danger signal, which the discounter or purchaser disregards at his peril. In the language of Lord Denman: "It bears its death wound on its face." Joyce, in his work entitled "Defenses to Commercial Paper" (section 485), states the principle as follows: "It is out of the usual course of business for a corporation to issue its obligations to its officers. The fact that an obligation is so made suggests that it may be irregular, and consequently a third person taking such an obligation, and knowing that the payee is an officer of the maker corporation, is put upon his inquiry as to whether or not the obligation has been lawfully issued. When the note or obligation shows upon its face that it is made to an officer, the note itself conveys the notice to all persons into whose hands it may come." We think this statement of the law is sound in principle, and it is abundantly supported by the highest authorities.

In Park Hotel Company v. Fourth National Bank (C. C. A. 1898) 86 Fed. 742, 30 C. C. A. 409, the note sued on was signed "Park Hotel Co., by Ed Hogaboom, Pres.," was payable to Ed Hogaboom, and was indorsed by him to a third party, who took the note without evidence of its invalidity, except as appeared from inspection. In an elaborate opinion, collating the authorities, the court held that there could be no recovery against the corporation. The case is so much in

point that we quote a portion of the opinion: "The general authority of the president of a business corporation to make and discount its promissory notes gives him no power to make a note of the corporation payable to his own order, and one who discounts such a note cannot recover thereon against the corporation without showing special authority for its execution. To the general rule that the acts and contracts of a general agent within the scope of his powers are presumed to be legally done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is notice of the fact that it is, without the scope of his general powers, and no one who has notice of its character may safely recover on it without proof that the agent was expressly and specially authorized by his principal to do the act or make the contract." The basis of the rule is well stated by the court in the following language: "This exception is a striking illustration of the policy of the law to prevent the possibility of conflict between the duty and the personal interest of an officer or agent. It prohibits him from acting both for himself and his principal wherever their interests clash, and makes every act and contract in which he violates the inhibition voidable at the election of his principal. It forbids him to act at the same time as vendor and purchaser, or as lender and borrower, or as promisor and promisee. It forbids him to sell as the agent of his principal, and to buy for himself; to lend as the agent of his principal, and to borrow for himself; to promise as the agent of his principal, and to accept the promise and reap the benefits himself."

In Porter v. Winona & Dakota Grain Company, 78 Minn. 210, 80 N. W. 965, the note was made payable to "W. H. Garlock," and signed "The Winona & Dakota Grain Company, by W. H. Garlock, Pres." Garlock indorsed the note in blank and transferred it to a third party. The court held that such a note was prima facie void, and that the person seeking to recover on it had the burden of showing that the officer assuming to execute it had actual authority. In the course of the opinion, it is said: "It [the note] was made by the president of the corporation in its name, seemingly for his own accommodation, and thus bore on its face the evidence of its invalidity. He could not by virtue of his general authority as agent bind the corporation by a contract made by him as such agent with himself; and he had no authority whatsoever, unless it was specially given, to bind it by the execution and delivery of a negotiable paper, which apparently was issued for his own use and benefit. And notice of the want of authority was the instrument itself."

In West St. Louis Savings Bank v. Shawnee County Bank, 95 U. S. 557, 24 L. Ed. 490, it appears that the cashier of a bank made his own note payable to the order of the bank, indorsed his official signature upon it, and borrowed money of one whom he told that he intended to use it to pay for some stock which he had purchased from the bank. In a suit by the indorsee against the bank, the court held there could be no recovery, because "the very form of the paper itself carries notice to a purchaser of a possible want of power to make the indorsement and is sufficient to put him on his guard. If he fails to avail himself of the notice and obtain the information which is thus suggested to him, it is his own fault, and as against an innocent party he must bear the loss."

The Supreme Court of Oregon, in Saylor v. Banking Company, 38 Or. 204, 62 Pac. 652, goes to the extreme limit in support of the law here announced. In that case White, as president, and Marshall, as secretary, without, so far as the record shows, the knowledge or authority of the directors, and without any consideration moving to the corporation, executed and delivered to White individually the promissory note of the corporation. The note was thereafter transferred by White to a private creditor, who in turn indorsed it to the plaintiff, and a default judgment was subsequently rendered on it against the corporation, after service on the president. In an attack on the validity of this judgment the court held: "A promissory note of a corporation, executed by the president and secretary, to the president personally, and indorsed by him to a third party, is prima facie fraudulent, and a judgment thereon is no better than the note. The holder of such a judgment has the burden of proof as to the validity of both note and judgment."

It is needless to multiply authorities. As far as we have been able to find, there has been no contrary opinion in a case involving a similar state of facts; but both courts and standard text-writers are in accord on the subject. Brown v. Pettit, 178 Pa. 17, 35 Atl. 865, 34 L. R. A. 723, 56 Am. St. Rep. 742; Wheeler v. Home Saving Bank, 188 Ill. 34, 58 N. E. 598, 80 Am. St. Rep. 161; Third National Bank v. Marine Lumber Co., 44 Minn. 65, 46 N. W. 145; Wilbur v. Lynde, 49 Cal. 290, 19 Am. Dec. 645; Chemical v. Wagner, 93 Ky. 525, 20 S. W. 535, 40 Am. St. Rep. 206; Eastman v. Cooper, 15 Pick. (Mass.) 290, 26 Am. Dec. 600; Wilson v. Metropolitan Elevated Ry. Co., 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625; Cook on Corp. (5th Ed.) § 293; 10 Cyc. 942. The cases of Kaiser v. U. S. National Bank, 99 Ga. 258, 25 S. E. 620, and Jacobs' Pharmacy Co. v. Southern Banking & Trust Co., 97 Ga. 573, 25 S. E. 171, relied upon by the defendant in error, are easily distinguishable, on the facts, from the present case. See Cheever v. Pittsburgh R. Co., 150 N. Y. 59, 44 N. E. 701, 34

L. R. A. 69, 55 Am. St. Rep. 646; Rochester & Charlotte Turnpike Road Co. v. Paviour, 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790.

The law must be as herein contended, else corporations would be at the mercy of dishonest officials, and positions of corporate trust would be prostituted to private gain, and corporate property be exhausted in payment of personal debts. A bona fide holder of a promissory note executed by an officer in the name of the corporation and payable to the officer executing it, as an individual, in legal contemplation cannot exist. The person and the subject are in positive contradiction. The point in question has never been directly ruled on by the Supreme Court of Georgia; but the principle as herein announced has been substantially upheld in Dobbins v. Etowah Mfg. Co., 75 Ga. 238, where it was held that a note made by the president of the corporation to himself could not be enforced against the corporation without proof of actual authority to make it. And in Exchange Bank v. Thrower, 118 Ga. 434, 45 S. E. 316, where it is declared that: "Authority to borrow money is one of the most dangerous powers which a principal can confer upon an agent. Whoever lends to me, claiming the right to make or indorse a negotiable paper in the name of another, does so in face of all the danger signals of business. He need not lend or discount until satisfied beyond doubt that the principal has in fact appointed him agent, who, by the stroke of a pen, may wipe out his present fortune and bind his future earnings. The very nature of the act is a warning, and, if the lender parts with his money, he does so at his peril."

We think the principle contended for in this opinion is fully supported by our Civil Code (section 3699): "Any circumstances which would place a prudent man upon his guard in purchasing negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due." The fact that a note made in the name of a corporation by an officer is made payable to such officer as an individual constitutes a sufficient circumstance of itself to put a prudent man on notice that such note was made without authority, and therefore not binding upon the corporation. Besides, this presumption of law raised by the note itself, the extrinsic evidence indisputably proved that the note sued on was executed by the president of the corporation in its name, not only without authority, but in violation of the by-laws of the corporation, and was made solely for his benefit in payment of a private pre-existing debt. The taker of the note, therefore, having been notified by its terms that it was executed without authority, was put upon inquiry, and was bound by the facts which such inquiry would have disclosed. Even if this were not so, the evidence shows that he knew at the time he took the note that it was made and given in payment of a private debt of the president as an individual in which the corporation had no interest. In no way was he entitled to protection as a bona fide holder, and the verdict in his favor was contrary to law and wholly without evidence to support it.

Judgment reversed.

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(2 Ga. App. 789)

## TODD v. GERMAN-AMERICAN INS. CO. OF NEW YORK. (No. 487.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

1. INSURANCE—CONTRACT.

A completed contract of insurance exists when the minds of the insurer and of the person to be insured meet upon the essential elements, to wit, the subject-matter to which the policy should attach, the risk insured against, the duration of the risk, the amount of the indemnity, and the premium to be paid, subject to the limitation that by statute in this state the policy must be written, though not necessarily delivered. All these essentials need not, however, be expressly negotiated upon, but may be understood from custom, course of dealing, or other circumstances from which assent to them may fairly be implied.

2. SAME — INSURANCE AGENTS — SCOPE OF AGENCY.

It is error to nonsuit the plaintiff in an action upon a fire insurance policy, on the ground that no completed contract of insurance is shown, where it appears that the plaintiff directed an insurance agency, in which the defendant company, as well as other insurers, was represented, to carry for him, on the property subsequently burned, a certain amount of insurance, that policies to the amount specified were written in different companies, chosen by the agency, and that, upon one of these companies becoming bankrupt, the agency replaced the portion of insurance which was carried by that company by writing a policy of similar amount in the defendant company, notwithstanding it further appears that the plaintiff did not know of the substitution of policies until after the fire occurred, and although the new policy was never actually delivered to him.

(a) The adjudication that a fire insurance company is insolvent ipso facto cancels all existing policies upon which no loss has previously occurred.

(b) From a general instruction by a customer to an insurance agency that it shall keep certain specified property of his insured in a designated amount, his assent may be implied, so as to give mutuality to a contract of insurance, in usual form, and upon the usual premium, written by that agency to replace a policy which has become canceled by the insolvency of the company originally insuring.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 196.]

3. SAME—RATIFICATION.

If one, though not duly authorized, assumes to act as agent for another, and in the name of the latter procures a fire insurance policy on his property, which is subsequently burned, the person in whose name the policy has been issued may, upon discovery of the facts, ratify the assumed agency and assert liability against the insurer, to the same extent he could have done if his authority had been originally conferred upon the person who undertook to act as his agent.

(a) While, as a general rule, public policy forbids dual agencies, and therefore forbids that the same person shall act as the agent of both the insurer and the insured, still this general rule is subject to many just exceptions.

(b) If an insurance company, knowing, or

from the surrounding circumstances being reasonably aware, that its local agent is acting or assuming to act for the customers of his agency in applying for policies of insurance in their names on their property, and without depending on the skill, advice, or loyalty of the agent in the transaction, but acting upon its own judgment as to the desirability of the particular risks, authorizes the agent to write the policies, it will not be allowed to complain that such local agent was also the agent of the opposite parties to the contracts, but it will be held bound on the policy so written.

(c) "The maxim that 'no man shall serve two masters' does not prevent the same person from acting as agent, for certain purposes, of two or more parties to the same transaction, when their interests do not conflict, and where loyalty to the one is not a breach of duty to the other."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 127, 134; vol. 40, Principal and Agent, § 146.]

4. EVIDENCE—RELEVANCY.

"It is relevant to put in evidence any circumstances which tend to make the propositions at issue either more or less probable." 1 Whart. Evidence, § 21.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 123.]

5. INSURANCE—CONTRACT—CUSTOMS.

"It is well settled that insurers are bound to know the customs of a place where they transact business, and are assumed to have made their contracts in reference to such customs."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 314.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by P. D. Todd against the German-American Insurance Company of New York on two fire policies. Judgment for defendant, and plaintiff brings error. Reversed.

Todd sued the German-American Insurance Company of New York on two policies of insurance for the sum of $2,000 each. The court, at the conclusion of the plaintiff's testimony, awarded a nonsuit, and the plaintiff brings error. We shall report only so much of the evidence as is necessary to the understanding of the points decided.

Todd purchased a stock of goods in Macon from the Dixie Company. This company was carrying insurance in several agencies, among which was that of Turpin. Todd caused some of the policies which had been carried by the Dixie Company to be canceled; others to be transferred. Of the insurance through the Turpin agency Todd requested that $6,000 be transferred and the remainder canceled. Todd testified: "I told Mr. Turpin at the time to keep me insured for $6,000, and I might give him more later. * * * I thought Mr. Turpin had $6,000. I didn't know what companies. I told the agent to keep me insured for so much, and I thought I had that much." On June 6, 1906, the stock of goods was destroyed by fire. Todd had never examined any of the policies, and did not know the names of any of the companies until after the fire occurred. Upon examining the policies written through the Turpin agency, he found a $2,000 policy of the Orient Insurance Company and two $2,000 policies of the Traders' Insurance Company. Upon discovering that the Traders' Insurance Company had failed, he went to Turpin and inquired of him whether these two policies had been rewritten. Turpin then told him that he had rewritten these two policies in the German-American Insurance Company, and that he had the German-American policies in his vault. Todd inquired if he owed any further premium, and Turpin replied that he did not; that he (Turpin) at his own expense had reinsured all his Traders' business. Todd did not demand the policies at the time, and subsequently, upon instructions from the general agent of the insurance company, Turpin refused to deliver them. It further appeared from the testimony that prior to the fire the German-American policies had been sent to Todd's store by a clerk in Turpin's office for delivery, but that the clerk, finding Todd absent, had brought the policies back with him. After the fire the German-American Insurance Company denied all liability on the policies.

From the evidence it appeared that Turpin's authority to rewrite his Traders' business in the German-American Company arose in the following manner: Turpin's agency, along with other insurance companies, represented the German-American. On May 4, 1906, Turpin received from that company the following telegram: "Traders' of Chicago in the hands of receivers." Turpin then called up by telephone Reynolds, the German-American Company's general agent in Atlanta, and asked him to reinsure the risks thus canceled by the insolvency of the Traders' Company, without expense to him or his customers. Reynolds refused to do this. Turpin said: "It will be a great loss to us." Reynolds replied: "We can't help that. You can protect the business." Turpin said: "Yes, if we have got enough money." The result of the conversation was that Reynolds authorized him to rewrite the Traders' business in the German-American Company, but with the understanding that he was to pay the premiums. On May 5th the home office of the German-American Insurance Company sent a telegram, which they confirmed by letter, as follows: "General Agent Reynolds advises he has authorized you to rewrite in German-American all Traders' business, to become binding from today. We approve his action. Please forward immediately schedule of all lines in excess of $2,500, and let schedule of balance of business follow as soon as possible." On May 7th, Turpin received the following letter from General Agent Reynolds: "In re Traders' business. Please do not fail to immediately comply with company's request to forward schedule of all lines in excess of $2,500, for the reason that they want to protect their excess liability, if any exists.

* * * It is my intention to visit Macon again in the next day or two, when I will be able to go over the Traders' business with you, and, if there is anything we don't want, cut it out." Turpin reported to the German-American Company the premiums in the Traders' business in his May account, and in this report the premium on the Todd policies was included. On July 6th, a month later than the fire, Turpin received from the insurance company the following letter: "The purpose of this letter is to advise you that we have eliminated from your May account the premiums on canceled policies No. 5,462 and No. 5,493 [the Todd policies], reducing the balance to be remitted by you for that month to $1,192." These policies in suit were duly written along with the policies on all the other Traders' business which Turpin rewrote in the German-American Company, and they were duly entered upon the policy register of that company prior to the date of the fire. Reynolds, the general agent, looked over the policy register at the time he came to Macon in pursuance to the appointment made in his letter above quoted, and these Todd policies were registered there at that time.

By certified transcript from the records of the circuit court of Cook county, Ill., and of the United States Circuit Court for the Northern District of Georgia, it was shown that the Traders' Insurance Company was judicially declared insolvent on May 5, 1906. There was other testimony, but a consideration of it is unnecessary for the determination of the propriety of a nonsuit.

In addition to excepting to the nonsuit, the plaintiff in error further complains that the court erred in excluding testimony going to show that Turpin rewrote all his Traders' business in the German-American Company, that as to all the other policies so rewritten that company had accepted the risk, although at the time of Todd's fire nearly all of these policies were in Turpin's possession, and that the company accepted the premiums on all these policies from Turpin; also, that these other policies, as well as Todd's, were duly entered upon the German-American Register in Turpin's office. The further exception is made that the court refused to allow the plaintiff to prove that it was a custom of long standing in Turpin's agency to rewrite policies for customers as they expired, without previous instructions, and to hold these policies for the convenience of customers, and to pay the premiums to the insurance companies for customers, whether they had been collected from the customers at the usual time for remittance or not; also to prove that this custom existed generally in all insurance agencies in the city of Macon.

Lane & Park, for plaintiff in error. Spencer R. Atkinson and John P. Ross, for defendant in error.

POWELL, J. (after stating the facts as above). 1. It may be said generally that, to constitute a completed contract of insurance, the minds of the parties should meet and agree upon five things: (1) The subject-matter to which the policy should attach; (2) the risk insured against; (3) the duration of the risk; (4) the amount of indemnity; (5) the premium to be paid. 1 Wood on Insurance, § 5; Michigan Pipe Company v. Michigan Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; May on Insurance, § 43 et seq.; Joyce on Insurance, § 43. "All the essentials need not, however, be expressly negotiated upon, since they may be understood, as where the terms of the usual policy are presumed to have been intended, or where the usual rate of premium is presumed to have been meant, or in case the duration of the risk is understood to be the same as in a former policy, or whereby custom and usage a certain course of dealing has been established." Joyce on Insurance, § 46; Winne v. Niagara Insurance Co., 91 N. Y. 186; Audubon v. Insurance Co., 27 N. Y. 222; Home Ins. Co. v. Adler, 71 Ala. 516. In this state, by Civ. Code 1895, § 2089, "such contract, to be binding, must be in writing; but delivery is not necessary if, in other respects, the contract is consummated." New York Life Ins. Co. v. Babcock, 104 Ga. 67, 30 S. E. 273. 42 L. R. A. 88, 69 Am. St. Rep. 134; Southern Ins. Co. v. Kempton, 56 Ga. 339. Although a policy of insurance has been written, the insurer may defend against an action thereon, provided it is made to appear that the minds of the parties have never met as to the essential elements. On the other hand, a plaintiff in an action against an insurer may recover upon a policy written, but not delivered, if it appears that the policy was executed by the insurer in response to an offer on the former's part to take such insurance, which offer may be direct, immediate and express, or may be implied from general language, surrounding circumstances, or a previous course of dealing. This offer need not be made personally, but may be made by an agent. The consideration of the contract may consist either of the payment of the premium by the insured or by another, or of a promise, express or implied, to pay it, which promise likewise need not be the personal promise of the insured, but may be the promise of any other person, acceptable to the insurer. These generalizations are not only deducible from those recognized rules of law which govern nearly all contracts, but are also sustained by the practically unbroken current of authority in England and America. See, in addition to the authorities cited above, Fireman's Ins. Co. v. Pekor, 106 Ga. 1, 31 S. E. 779; Mechanics' Ins. Co. v. Mutual Ass'n, 98 Ga. 266, 25 S. E. 457; Lebanon Ins. Co. v. Hoover, 113 Pa. 591, 8 Atl. 163, 57 Am. Rep. 511, and notes. We have thus outlined these general principles, prefatory to the discussion of the

particular phases presented by the case at bar, with the intention of using them as postulates.

2. The trial court granted a nonsuit against the plaintiff. The question, therefore, presented is whether there is any view of the evidence under which he was entitled to have his case submitted to the jury. After a review of the facts set out in the record, we are of the opinion that there are at least two theories on which a verdict in his favor could have been sustained. First, we think that, under Todd's testimony that he had directed Turpin's agency to carry $6,000 of insurance on his stock of goods, the jury could have found that this request or direction amounted to a standing offer on his part to the insurance companies represented in that agency to take from them to that amount, according to a distribution among them to be made in Turpin's discretion, insurance policies in usual form at the usual rate of premium on the stock of goods in question. This offer to take would not alone make a contract, but the insurance company's issuance of the policy in response thereto would complete it; for, in this view, it is easy to see that the minds of the parties would meet upon the necessary elements of the contract, namely, that the subject-matter should be the stock of goods in question; the risk insured against, fire; the duration of the risk, the uniform expiration of the policies; the amount of the indemnity, that portion of the $6,000 that Turpin should write in each company; the premium, the usual and customary rate. In those cases where the customer of an insurance agency, by leaving a standing order for so much insurance, or for certain lines (to quote a phrase from the parlance of the insurance world), or by reason of allowing that agency from year to year to renew certain policies, gives warrant to the inference that he desires a uniform amount of insurance on a certain risk kept in force; and if, in response to this implicit offer to take such insurance policy, the insurer writes one in exact accordance with what the circumstances imply the nature of it should be, it violates neither law nor common sense to allow the jury to find that a contract exists. It is true that under this course of dealing the person taking the insurance may not know what particular insurer stands as the other contracting party, as in this case Todd did not know the names of the insurance companies in which his policies were written. But this is nothing new to the law of contracts. As is said in 9 Cyc. 372: "It is not necessary, however, that both parties [to a contract] shall be ascertained or in existence at the time the offer is made, if the offer is accepted by one who is within its terms." A familiar example is exhibited in cases of offers of reward. This court also noted an example in the case of Anderson v. State, 2 Ga. App. ——, 58 S. E. 412.

In Michigan Pipe Co. v. Michigan Fire Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277, the same contention was made as is made in this case—that the person claiming the insurance had not effected it because he had not made his application to any particular company, but had merely asked an insurance agency to write him so much. The court there says: "An application to an insurance agent representing several companies for a certain amount of insurance on specified property, the agent to select the companies and distribute the risk, and his agreement so to do and give the insurance, constitute a valid contract of insurance with each company as soon as its policy is signed, although the policies are not delivered until after the property is destroyed by fire, since in distributing the risk the agent acts for the assured. That the rate of premium has not been paid or fixed will not prevent the commencement of a valid contract of insurance, where there is a generally understood rate on that class of risks and the usual course of business between the parties has been for the agent to collect the premiums at his convenience after the issuance of the policies." Further in the majority opinion the court, in referring to the request made by the plaintiff to Schmeck, the manager of the insurance office, to write him so much insurance, without designating the companies, says: "Indeed, in the ordinary course of business this very service might well be contemplated and expected by both parties. Schmeck having been directed to select the insurers and distribute the risk, both parties were bound by that selection and distribution when made. Both parties contemplated several contracts, and both were bound as the several contracts were executed. Neither defendant nor any of the other insurers were bound until that selection and distribution were made. Neither had agreed to take all or any specific portion of the amount. Defendant received no proposition to issue a policy for the whole amount. It received an application for the exact amount for which the policy executed by it was issued. The illustration [proposed by Grant, J., dissenting] as to the 1,000,000 feet of lumber is not an apt one. If A. directs B. to purchase 15,000,000 feet of lumber, knowing that it must be purchased in 15 different parcels and of as many different persons, and B. enters into 14 different separate contracts with as many persons on behalf of A. for 14,000,000 feet, it is evident that neither of the 14 persons could repudiate the contract simply because B. had not contracted with still another person for an additional 1,000,000 feet, nor could A. repudiate his contract because his agent had not purchased the additional 1,000,000 feet. To the extent that B. dealt with each, his authority was ample, and bound his principal, and neither of the parties with whom B. contracted were concerned in his favor to make further contracts. The insurers in the pres-

ent case were in no different position than if the lumber had been insured for the entire amount and one of the policies had been canceled, and it is not claimed that the amount of the additional insurance was represented as greater than it actually was. The name of the company and the location and amount of the risk in each case had been committed to Schmeck. The rate of premium not having been paid or fixed by the parties, plaintiff became liable to pay the usual or going rate. The policies contained no promises that they should not become operative until the premiums were paid. Schmeck had written other policies for the same parties, and had afterwards, in the usual course, collected his premiums, and no demand was made for the premiums at the time that the insurance was applied for. In determining such matters, consideration must be had for the manner in which the business had been usually carried on. To lay down the rule that in all cases the premiums must expressly be agreed upon and paid, or credit expressly given, would be contrary to the general understanding among business men, and contrary to prevailing methods." In the footnote to the case from which these quotations are taken, in 20 L. R. A. 277, are cited many cases sustaining in principle the proposition asserted.

It is to draw no strained inference to say that Todd's expression to Turpin of a desire that his agency should carry $6,000 of his insurance was authority to Turpin, in the event any portion of the insurance originally written should become canceled by intervening events, to replace it with a policy in some other company represented in that agency. In accordance with Todd's direction, Turpin was carrying in his agency the $6,000 of insurance desired. The Traders' Insurance Company became bankrupt, and therefrom followed the legal result that the two $2,000 policies which Turpin had written for him in that company were ipso facto canceled. See 4 Joyce, Ins. § 3591; Boston R. Co. v. Mercantile Trust Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Doane v. Millville Ins. Co., 43 N. J. Eq. 522, 11 Atl. 739. Under these circumstances, may not the jury imply from Todd's previous directions, from the transaction as it followed, from the very relationship created, an assent on Todd's part to a new policy in lieu of the old one? If his assent is supplied, the contract is complete; for the insurance company expressed its assent by writing the policy. In determining whether Todd's assent is to be inferred or not, the jury would be authorized to take into consideration, not merely his exact words, but also all the surrounding circumstances, and to apply their common knowledge as intelligent men as to what a customer means when he asks an insurance office to carry so much insurance for him. This view of the case is tenable, without asserting that Turpin in any wise acted as agent for Todd in the procurement of the insurance. At first blush it might seem that, in choosing from among all his companies the particular companies to which this business should be given, Turpin acted as Todd's agent; but there is no logical necessity for this conclusion. If I ask the liveryman to send me a carriage, I do not constitute him my agent to pick out a particular carriage from among the many he owns. The choice as to which one he shall send, when I do not specify, is but a part of his own business. If a retail grocer asks a commission merchant, who represents several producers having cabbages for sale, to send him a shipment of cabbages, the commission merchant does not act as agent for the grocer when he decides to fill the order through his principal A., rather than through his principal B. We have adverted to this proposition because the defendant in error has stressed the argument that Turpin could not be the agent of Todd to procure the insurance and of the company to write it; and we have endeavored to show that in the transaction as thus viewed no dual agency exists, and that Todd, in asking Turpin to carry the line of insurance, although he did not designate the companies, was dealing with him strictly as the agent of the opposite party.

3. We shall now take up the other view of the evidence upon which recovery could have been sustained, and this view does conceive of Turpin's acting as agent for Todd as well as for the company. Let us first show that if Turpin (the legality of a dual agency for the moment being pretermitted), assuming to act for Todd, but without any real authority to bind him, procured from the insurance company a policy of insurance in Todd's favor, and paid the premium, or by an arrangement with the company substituted his promise to pay for actual payment, Todd could, after the fire, upon discovery of the fact that Turpin had assumed to act for him, ratify the contract and hold the company upon it. "The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him, or subsequently ratifies the acts of another in his behalf." Civ. Code 1895, § 2997. "By the ratification of an unauthorized act, the relation of principal and agent, with all the rights and duties thereto, is as fully established as if the authority had been conferred originally. The ratification relates back to the time of performance of the act." 1 Am. & Eng. Enc. of Law (2d Ed.) 1213; Civ. Code 1895, § 3019; Atlanta Buggy Co. v. Hess Spring Co., 124 Ga. 342, 52 S. E. 613, 4 L. R. A. (N. S.) 431. "As, from what has already been said, the principal thus acquires a right to elect whether he will adopt the unauthorized act or not, it must be admitted that the parties do not generally stand upon equal terms, since the principal may always elect to ratify the act, if

it is for his benefit, and to disavow it, if it is to his injury. But this consequence has never been allowed to overcome the force of the general doctrine. Thus, for example, where an unauthorized agent procured an insurance to be made upon a certain ship for the benefit of the owner thereof, and the ship was lost during the voyage, and long after the loss the owner ratified the insurance, and a suit was brought against the underwriters, it was held to be no objection to the recovery that the ratification was not until long after the loss, and that the owner would not have been bound to pay the premium, if the ship had safely arrived; for the agent had still a right to effect the insurance, and to take the chance of its being adopted, and he could not have recovered back the premium paid by him to the underwriters, upon the ground that he had no authority, and that, therefore, there was no interest insured, because the underwriters would have borne the risk until there had been a disavowal by the principal." Story on Agency (8th Ed.) § 248. See, also, to the same effect, 3 Kent's Com. *260, *261; Hagedorn v. Oliverson, 2 Maule & Selwyn, 485; Routh v. Thompson, 3 East, 274 (new Ed. 144); 1 Joyce on Insurance, § 642. 1 Clark & Skyles on Agency, § 112, states the same doctrine, but takes care to confine its application to cases where a sufficient consideration has been paid by the agent to the opposite party to the contract; but in this case this is an immaterial limitation, because the insurance company accepted Turpin's promise to pay the premium as a sufficient consideration for the policy. So that, leaving out of consideration the lawfulness of Turpin's acting as agent of both parties, it will be seen that if he, assuming to act for Todd, procured a contract of insurance for him, the latter, although ignorant of the existence of the policy until after the fire, might then ratify the former's act and sue upon the policy.

The defendant in error resists the proposition just announced, by saying that if Turpin, acting as Todd's agent by his authority, or assuming to act in his behalf without his authority, procured the insurance from himself as agent for the insurance company, the policy is void; a dual agency being contrary to public policy. It is ruled in Ramspeck v. Patillo, 104 Ga. 772, 30 S. E. 962, 42 L. R. A. 197, 69 Am. St. Rep. 197, and in Phœnix Insurance Co. v. Hamilton, 110 Ga. 14, 35 S. E. 305, that "an agent of a fire insurance company, authorized to contract for insurance in its behalf, cannot, without the company's consent, become in his individual character the agent of a property owner who desires to obtain insurance in that company, * * * for the reason that an agreement to act as agent for both parties would be an undertaking to perform inconsistent duties, and a mutual agency of this kind requires the consent of both parties." In the recent well-considered case of Arispe Mercantile Co. v. Capital Ins. Co. (decided by the Supreme Court of Iowa on February 9th of the present year) 110 N. W. 593, 36 Ins. Law J. 513, it is held: "An agent of a fire insurance company, who is an incorporator of a mercantile company, cannot, acting as such agent, issue a valid policy to the mercantile company, though acting in good faith, where the insurer is ignorant of his relations to such company, on the principle that he cannot act as agent in transacting business for his own benefit." By the very exceptions borne on the face of the rule as stated in the decisions cited the present case is distinguished from them. All duality of agency is not forbidden. If the principal who seeks to repudiate knows that his agent is also acting for the other party, or if he authorizes a course of dealings wherein, from the very nature of the agency, the agent is expected to act also for the other party, the principal cannot complain. Another exception to the doctrine generally forbidding dual agencies is that the agent may represent both parties, provided that the acts in which he is to represent the one in no wise conflicts with the full exercise of his duty to the other. An agent may perform mere ministerial acts, involving no discretion, for one of the parties to the contract, though he is agent for the other party. He is forbidden to act for both only when there is opportunity that the skill and judgment which he should exercise for the one may conflict with the skill and judgment he should exercise for the other. "It is held that the rule that an agent cannot act for both parties does not preclude an agent from acting for both parties, where he acts in certain matters for one party, and then in different transactions for the other party, even though the parties are insurer and insured, and the acts are done in relation to the insurance; nor does the rule preclude an agent from acting for two principals in their mutual transactions." 1 Joyce on Insurance, § 663, citing Fitzsimmons v. Express Co., 40 Ga. 330, 2 Am. Rep. 577; 2 May on Insurance (4th Ed.) § 500; Red Cypress Lumber Co. v. Perry, 118 Ga. 876, 45 S. E. 674; Insurance Co. v. Wilkinson, 13 Wall. (U. S.) 222, 20 L. Ed. 617; Michigan Pipe Co. v. Michigan Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; Petersburg Ins. Co. v. Manhattan Ins. Co., 66 Ga. 446; Clay v. Phœnix Ins. Co., 97 Ga. 44 (2), 53, 25 S. E. 417; Clark & Skyles on Agency, §§ 29, 414. "The maxim that 'no man shall serve two masters' does not prevent the same person from acting as agent, for certain purposes, of two or more parties to the same transaction, when their interests do not conflict, and when loyalty to the one is not a breach of duty to the other." Northup v. Germania Ins. Co., 48 Wis. 420, 4 N. W. 350, 33 Am. Rep. 815.

Now it will be noted in the present case that the defendant company did not rely upon Turpin's judgment, skill, or loyalty as its

agent in the writing of the policies sued on. Turpin was not called upon to do more than the ministerial act of writing out the policies; for the company, acting upon its own judgment, agreed to take over all the canceled Traders' Insurance Company risks in bulk; and as further evidence of the fact that it was not relying upon Turpin's judgment as to the desirability of particular risks, it gave him instruction to write "all Traders' business, to become binding to-day," and also notified him that the general agent would come in a few days and go over the risks, and said, in that connection: "If there is anything we don't want, will cut it out." The controlling elements which rendered the dual agency in the case of Ramspeck v. Patillo, 104 Ga. 772, 30 S. E. 962, 42 L. R. A. 197, 69 Am. St. Rep. 197, and Phœnix Insurance Co. v. Hamilton, 110 Ga. 14, 35 S. E. 305, obnoxious to public policy, were entirely absent here. In the case at bar, the agent's duties were merely ministerial, as they were in the case of Petersburg Ins. Co. v. Manhattan Ins. Co., 66 Ga. 446 (7). Nor can it be contended with any countenance whatever that the insurance company did not know that Turpin was assuming to act in behalf of all such of his customers as formerly had Traders' policies in obtaining new insurance for them. From the telephone message between Turpin and the defendant's general agent, from the letters subsequently written by the home office, and from the fact that the general agent afterwards came to Turpin's office, checked the policy register, and saw the way the business had been written, the conclusion is irresistible that the company knew that Turpin, out of a desire to maintain the good name of his insurance office and to avoid a loss of customers by reason of the failure of one of his companies, was, for his own benefit, as well as for the benefit of his customers, endeavoring to procure for them, at his own expense, new insurance on the canceled risks. The defendant company necessarily knew, from the circumstances surrounding the transaction, that, while Turpin was their local agent, he was, in this instance, acting, not in its interest alone, but in his own interest, and also in the interest of all of his customers who had held Traders' policies. There is always some slight conflict between the interest of the local agent, whose commissions depend upon the volume of the business he writes, and that of the company he represents, for there is a natural temptation that he should increase the volume by taking risks not wholly desirable, and on this occasion the agent's adverse interest was measurably greater; but, knowing all this, the company expressly authorized him to transfer in bulk to them all these risks, and accepted from him a debit memorandum for the premiums. If the defendant company did not expect to be liable to all the holders of the Traders' policies, it should not have telegraphed Turpin to rewrite all these policies in bulk, and should not have accepted his promise to pay the premiums thereon. Insurance companies should not reach out for premiums in bulk, without expecting to incur a corresponding liability for losses. Turpin, by thus securing the interests of his customers, did no actual or constructive wrong to his principal, the defendant company. In probable anticipation of converting to itself the Traders' business, it sent Turpin a telegram telling him of that company's insolvency. In response, he confronted it with his needs in the situation. It, with full knowledge, offered to meet that need, not gratuitously, as Turpin at first desired, but in consideration of the usual premium.

Test this transaction by considering whether Turpin therein incurred any civil liability to his principal; for, if an agent unlawfully and without his principal's consent becomes a dual agent in violation of the loyalty due the first principal, he is civilly liable therefor. Could the defendant company successfully sue Turpin on account of this transaction? To ask the question is to answer it. The company's instructions in the record would be a perfect defense. Therefore, while Turpin became the agent both of the insurer and of the insured, he was lawfully so; and the insurer will not be allowed to repudiate the contract made through him. Our conclusion is that Todd would have been entitled to recover upon the theory that the policies sued on were issued in pursuance to his standing instruction to Turpin's office; but our further conclusion is that, irrespective of any previous request on his part for the insurance, he had the right, upon discovering that Turpin, with the consent of the insurance company, had assumed to represent him in obtaining the policies, to ratify Turpin's act and hold the company liable for the loss.

4. The court erred in not allowing the plaintiff to prove that, pursuant to the authority given by the defendant, Turpin had rewritten all the Traders' policies, and had entered them upon the register of the defendant company. This circumstance, especially in connection with the fact that the general agent of the defendant came to Turpin's office to inspect this business and made no objection, was relevant.

5. While it was not competent for the plaintiff to prove the custom of Turpin's agency alone of rewriting expired policies without explicit requests from customers and of paying the premiums, becoming personally responsible to the company for them, and of holding the policies at his office for the convenience of those insured, unless knowledge of the custom was brought home to the insurer in this case, yet it was competent for the plaintiff to show that there was a general custom of that kind prevailing in the city of Macon; and, as a part of this proof to that end, it might show that

the custom existed in Turpin's office, provided this was supplemented with proof, such as was tendered, showing that it likewise prevailed generally in other agencies. "It is well settled that insurers are bound to know the customs of a place where they transact business, and are assumed to have made their contracts in reference to such customs." Joyce on Insurance, § 50; May on Insurance (4th Ed.) §§ 23b, 582; Pol. Code 1895, § 1, par. 4; Civ. Code 1895, § 5206; Lebanon Insurance Co. v. Hoover, 113 Pa. 591, 8 Atl. 163, 57 Am. Rep. 511, and notes; Lauchheimer v. Jacobs, 126 Ga. 261, 265, 55 S. E. 55; Hardeman v. English, 79 Ga. 387, 5 S. E. 70; Clark & Skyles on the Law of Agency, § 69.

Judgment reversed.

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(2 Ga. App. 826)

## RANSOM v. STATE. (No. 600.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

1. CRIMINAL LAW—SUFFICIENCY OF EVIDENCE—ALIBI.

There are two branches of the rule controlling alibi in this state. The first is that the accused is only required to establish his alibi to the reasonable satisfaction of the jury—not beyond a reasonable doubt. The second is that, nevertheless, any evidence of alibi whatsoever is to be considered on the general case, with the rest of the testimony, and, if a reasonable doubt of guilt is raised by the evidence as a whole, the defendant should be acquitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §1290.]

2. SAME—INSTRUCTIONS—WORDS AND PHRASES—CONFESSION—ADMISSION.

Proof of an inculpatory admission will not authorize a charge upon the subject of confession. A confession is a voluntary admission of guilt. An admission, as applied to a criminal case, is the statement by the defendant of a fact or facts pertinent to the issues, and tending, in connection with proof of other facts or circumstances, to prove the guilt of the accused, but which is of itself insufficient to authorize conviction. An admission is a circumstance which requires the aid of further testimony to generate a reasonable conclusion of guilt. The nearer an admission approaches the completeness of a plenary confession of guilt, without attaining thereto, the more likely is any reference in the charge to the subject of confession to confuse the jury and harm the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1139, 1140, 1864, 1865.

For other definitions, see Words and Phrases, vol. 1, pp. 204, 205; vol. 8, p. 7566.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Pearline Ransom was convicted of larceny from the house, and she brings error. Reversed.

Payton & Hay, for plaintiff in error. J. H. Tipton, for the State.

RUSSELL, J. The defendant was convicted of larceny from the house, and, upon the overruling of her motion for new trial, excepted. It is needless to discuss any of the 12 assignments of error, except 2. The others are wholly without merit. So far as the facts are concerned, the issue between the state and the accused is clear-cut and well-defined. The evidence for the state tended to show the larceny of a cap and hat pin. The evidence in behalf of the defendant, if believed by the jury, established an alibi and made it impossible for the defendant to be the thief, even if the corpus delicti was proved.

1. For this reason we think that the judge should not have perhaps stressed the burden devolving upon the defendant, and perhaps magnified it, by reading and then repeating to the jury section 992 of the Penal Code of 1895, without telling them, in the same connection, that the onus was on the accused to verify the alibi, not beyond all reasonable doubt, but only to the reasonable satisfaction of the jury, and, further, that any evidence whatever of alibi is to be considered on the general case, with the rest of the testimony, and, if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence. No request to charge upon the subject was presented, and therefore we should not reverse the judgment upon this ground. We refer to it, however, because we know that the upright and impartial judge who presides in the city court of Sylvester needs only to have the matter suggested, in order that there may be even no vestige of ground for complaint on the future trial of this case, which we are constrained to award upon another ground.

It has been frequently ruled that, when the defense of alibi is set up in a case and is sustained by testimony, the failure to charge upon the law of alibi will cause a new trial. The judge in this case charged the law of alibi by twice repeating to the jury section 992 of the Penal Code of 1895. In the absence of a written request for more specific instructions, this may be a compliance with the letter of the rule laid down in Moody v. State, 114 Ga. 449, 40 S. E. 242, Fletcher v. State, 85 Ga. 666, 11 S. E. 872, and other decisions. But we think the far better and fairer practice is to specially instruct the jury in every case, further, that the accused is not required to establish his defense of alibi beyond a reasonable doubt, but only to the reasonable satisfaction of the jury, and to charge in addition that, even if the alibi be not established to the satisfaction of the jury, any evidence whatsoever of alibi must be considered with the rest of the testimony, and, if a reasonable doubt of guilt be raised upon the consideration of the evidence as a whole, the defendant should be acquitted. Harrison v. State, 83 Ga. 130, 9 S. E. 542; Landis v. State, 70 Ga. 651, 48 Am. Rep. 588. As said by Judge Jackson in Ledford v. State, 75 Ga. 858 (3): "The charge excluded all the evidence about the alibi from being weighed by the jury on the subject of reasonable doubts of defendant's guilt, on the

issue of guilty or not guilty of the riot. Though the burden was the defendant's to show alibi to the satisfaction of the jury, and on that issue reasonable doubts would not avail him, yet, on the final issue of guilty or not guilty of the riot, all the evidence is for the consideration of the jury, and it is for them to say whether, from all of it, he is guilty beyond a reasonable doubt. See 3 Blackstone, 363; Ransom v. Roberts, 65 Ga. 304; Barron v. State, 74 Ga. 833; Bryan v. State, 74 Ga. 393; Johnson v. State, 59 Ga. 142."

We think a new trial should have been granted because the court erred in charging the jury upon the subject of confessions, as excepted to in the seventh ground of the motion for new trial. After properly instructing the jury upon the law of circumstantial evidence (as he should have done in this case), the court gave sections 1102 and 1005 of the Penal Code of 1895 in charge to the jury. Section 1005 is as follows: "All admissions should be scanned with care and confessions of guilt should be received with great caution. A confession alone, uncorroborated by other evidence, will not justify a conviction." This charge was not followed by any further instruction by the court on the subject, nor was the attention of the jury called to the difference between an inculpatory admission and a confession. If the court had in the charge clearly drawn the distinction between a confession of guilt and an inculpatory admission, the error would not have been so grave. But we do not think that any reference to the subject of confession was authorized by the evidence in this case. And we are further of the opinion that the reference was peculiarly harmful to the defendant, for the very reason that, unless the attention of the jury was specifically and directly called to the marked distinction between a confession and an inculpatory admission, they would most probably be misled into the conclusion that there was evidence of a confession. This, however, is not the case.

The evidence of the prosecutor was that he asked the defendant where she got her hat pin, "and she said she got it out of a hat there on the table." This was no confession that she had stolen the hat pin. It was an inculpatory admission—a circumstance which, in connection with the facts that the defendant had the hat pin partly concealed under her apron and that she voluntarily gave up the hat pin and the cap upon being discovered with them, would have authorized the jury to find a verdict of guilty. But it does not amount to a confession, because it required other facts, to which we have alluded, to develop the conclusion that the taking was with intent to steal. This court has heretofore ruled, in Riley v. State, 1 Ga. App. 651, 57 S. E. 1031, in which the subject is fully treated, that "proof of an inculpatory admission will not authorize a charge upon the subject of confession." There is a very marked difference between voluntarily admitting guilt of a criminal offense or admitting the main fact or facts which are absolutely inconsistent with innocence, and admitting a fact or a number of facts which could be true and yet consistent with innocence. The admission of the defendant that she got the hat pin out of a hat on the table in the prosecutor's store, considered alone, was a statement consistent with innocence; for it did not admit the main fact, that the taking was with intent to steal. Proof of the intention, without which there cannot be guilt of larceny, had to depend on other facts and circumstances in the testimony. It would be proper to instruct the jury that, if they believed any admissions were made by the defendant as to any fact or facts illustrative of her guilt or innocence, they might consider this circumstance in connection with and in the light of any other facts, if there be any such established to their satisfaction, bearing upon the guilt or innocence of the accused, and from all of the testimony determine her guilt or innocence, but that all admissions should be scanned with care and received with great caution. But, unless a confession has been shown, the subject should not be presented to the jury at all. This is no new doctrine of the law. It has been held repeatedly by our Supreme Court, and more than once by the Court of Appeals. To refer to the subject of confession in a charge to the jury, where nothing but the circumstance of an incriminatory admission has been shown, is the more harmful the more nearly the admission approaches the completeness of a plenary confession of guilt.

Judgment reversed.

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(2 Ga. App. 812)

## BELL v. NEW ORLEANS & N. E. R. CO. (No. 521.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

1. ERROR, WRIT OF—GENERAL EXCEPTIONS.

Under the decision of the Supreme Court in the case of Lyndon v. Georgia Ry. & Elec. Co., 129 Ga. —, 58 S. E. 1047, the writ of error is not subject to dismissal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1621.]

2. ABATEMENT AND REVIVAL—OBJECTIONS TO JURISDICTION — MODE OF MAKING OBJECTION.

Where the record shows a return of service prima facie valid, and the defendant discovers the existence of the return prior to judgment, the objection of lack of service can be made only by plea in abatement, accompanied by a traverse of the official return.

(a) Such a plea, being dilatory in its nature, should be verified.

(b) If the return of service be made by a deputy sheriff, both he and the sheriff are necessary parties to the traverse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 223; vol. 39, Pleading, § 883.]

3. PLEADING — VERIFICATION — PLEA TO JURISDICTION.

A plea to the jurisdiction must be verified.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 182½.]

4. CORPORATIONS—FOREIGN—SERVICE OF PROCESS.

Service of process on a nonresident corporation may be legally perfected, so as to give jurisdiction to the courts of this state for the rendition of a judgment of at least local efficacy, by handing a copy personally to an agent, designated as a "commercial agent," who maintains an office in this state, furnished him by the defendant company, wherein he does chiefly correspondence, and who represents the defendant in soliciting freights and other business, but who has no authority to make contracts, sell tickets, or to collect money for the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2610.]

5. APPEARANCE—WAIVER OF OBJECTIONS—DEFECTS IN SERVICE.

A special appearance, urging lack of service and lack of jurisdiction, is not waived by the filing of a demurrer or plea to the merits under the express protestation that the special appearance is not waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, § 143.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by G. A. Bell against the New Orleans & Northeastern Railroad Company. Judgment for defendant, and plaintiff brings error. Defendant in error moves to dismiss the bill of exceptions. Motion denied, and judgment reversed.

Bell instituted his action in the city court of Atlanta against the New Orleans & Northeastern Railroad Company, alleging that the defendant had an office and an agent in the county in which the court is located. A deputy sheriff made the following return: "Served the defendant New Orleans & Northeastern Railroad Company, a corporation, by serving Ray Knight, its commercial agent, by leaving a copy of the within writ and process with him in person at the office and place of doing business of said corporation in Fulton county, Georgia. This January 30th, 1906." At the first term the defendant filed the following defense: "The defendant prays leave to appear specially for the purpose herein set forth, and for no other purpose, and hereby traverses the return of service made by J. T. Jones, deputy sheriff, upon the summons and process issued in said cause, and moves the court to make said Jones a party hereto, and to set aside the said return of service, for the reason that said return is untrue in fact; and defendant moves the court to disregard said return for the reason that it is insufficient in law, and to dismiss said cause, and hereby prays the judgment of the court whether it should be compelled to appear therein or plead to the petition filed therein, for the reason that it has not been served with process therein, and has not acknowledged, and does not acknowledge, service therein, nor waive due service of process upon it, on the following grounds, to wit: (1) The city court of Atlanta has no jurisdiction over the person of defendant, for the reason that it is a nonresident corporation and is not doing business in the county of Fulton and state of Georgia, and has no place nor office in said county for transacting the usual and ordinary business of said corporation, and no officer or agent of said corporation is located in said county. (2) The person mentioned in said deputy sheriff's return of service in said cause, to wit, 'Ray Knight,' is not such an officer or agent of said corporation as is subject to service of process in suits against said corporation in order to bind said corporation thereby, nor has he any power or authority to acknowledge service of process, so as to make said acknowledgment binding upon said corporation, nor to waive such process. Said Knight was employed by the defendant, at the time of the alleged service of said process, for the sole purpose of diverting freight to such railroads leading out of Atlanta, Ga., as had running connection with the defendant's line at Meridian, in the state of Mississippi. He had no authority to sell tickets, or to make contracts or rates, for the transportation of freight or passengers over the defendant's road, nor to collect money due defendant for such transportation of freight or passengers. In order to enable said Knight to serve defendant in said employment of thus diverting freights over defendant's line, it supplied him at its own expense with a deskroom in the Equitable Building, in the second floor of said building, in Atlanta, Ga., which room was occupied in part by the employés of the Philadelphia & Reading Railway and in part by another person, who was not connected in any way with, nor employed by, either defendant's road or the Philadelphia & Reading Railway. This room was of small size, and had only one door leading out into the hall of said building, and on said door was printed the following words and notice, to wit: 'N. O. & N. E. R. R., A. & V. Ry., V., S. & P. Ry., Office Commercial Agent. Philadelphia & Reading Railway, Office Traveling Freight Agent, John J. Lynch.' The letters and initials aforesaid, preceding the words, 'Office Commercial Agent,' were intended to refer to three different railroads by which said Knight was employed for the purpose hereinbefore set forth, viz., the New Orleans & Northeastern Railroad, the Alabama & Vicksburg Railway, and the Vicksburg, Shreveport & Pacific Railway. Said Knight's employment and line of work for the said three railroads necessitated his traveling about the territory adjacent to Atlanta most of the time and hence he was out of his said office or room in the Equitable Building and away from the city of Atlanta from four to five days in every week. In fact, he merely kept his desk in said room as a place for his mail to be sent and a place to write letters while in Atlanta, and his said deskroom in said room was paid for in part by each of the said three railroads by which he was employed as aforesaid."

By order the deputy sheriff was made party to the traverse and acknowledged service. The plaintiff filed his motion to strike the plea to the jurisdiction and the traverse and exceptions to service filed by defendant in said case, on the following grounds: Because the same is not sworn to. Because said traverse is insufficient in law; because it appears from said traverse or plea to the jurisdiction that the defendant did have an agent in said county and a place of business. It is immaterial that the office was small, and that it had but one door to it, and that other companies had the right to use it. It is immaterial that the defendant's agent also represented other companies. It is immaterial that said agent was limited in authority. It is not material that said agent was frequently out of the office. By way of amendment the plaintiff also filed the following: "Plaintiff moves to strike the defendant's plea to the jurisdiction on the following grounds: Said defendant company has filed a general demurrer to plaintiff's cause of action, and in so doing has thereby pleaded to the merits of plaintiff's cause of action. The demurrer, under our code pleadings, must be filed at the first term, and must be disposed of before either the plea or answer, and, in being disposed of, is an admission and waiver of the court's jurisdiction. Defendant has pleaded to the merits of plaintiff's cause of action, and in so doing waives the right to plead to the jurisdiction of the court. Defendant has pleaded to the merits, and thereby invokes protection of the court in its defense, and hence cannot deny the court's authority to enforce the right of the plaintiff (on the ground that the defendant is not within the jurisdiction of the court) or to judge the liability of the defendant company. Said plea to the jurisdiction is not sufficient, because it is not set up therein what court in this state has jurisdiction of said defendant company. Said plea to the jurisdiction does not show on its face jurisdiction in another court. Wherefore plaintiff prays that the said plea be stricken. Plaintiff demurs to the defendant's traverse, and says that the same is not sufficient, for the following reasons: The prayer in the traverse does not set up the fact that the sheriff has been notified that he is to be made, or of his having been made, a party defendant in the traverse. There has not been such service on the sheriff, appearing upon the face of the traverse and the entries thereon, as to make the sheriff a party defendant to the traverse, in that it is not shown. The foregoing defects appear on the face of the traverse. Wherefore plaintiff prays that said traverse be stricken."

The court, upon hearing these motions, overruled them, and the plaintiff excepted pendente lite. From additional record which we have required the clerk of the lower court to send up, it appears that at the first term the defendant filed a demurrer to the plaintiff's action, but this demurrer is prefaced with the following limitation and protestation: "On the first day of the term to which the above-stated cause is returnable comes the New Orleans & Northeastern Railroad, the defendant therein, and without waiving or acknowledging service of process, or the jurisdiction of the court therein, but insisting upon the want of jurisdiction, and the want of legal service of process, set up in a special appearance plea this day filed therein, defendant demurs to said petition as follows." By consent, the judge, acting as trior, without the intervention of a jury, heard evidence, which was substantially in accord with the facts alleged in the defendant's special plea in abatement, and he sustained the plea and dismissed the action. In the bill of exceptions sued out by the plaintiff error is duly assigned upon the exceptions taken pendente lite. To the final judgment, finding in favor of the plea, exception is taken, but the assignment of error is general, being in the following language: "To which ruling the plaintiff in error excepted, and now excepts and assigns the same as error." The defendant in error filed in this court a motion to dismiss the bill of exceptions, on the ground that the assignments of error are not specific.

Burton Smith and Lawton Nalley, for plaintiff in error. Tye & Bryan and Chas. A. Read, for defendant in error.

POWELL, J. (after stating the facts as above). 1. Irrespective of whether the assignment of error to the final judgment is sufficiently specific or not, there is an exception to the final judgment, and error is duly assigned, through the exceptions pendente lite, to a controlling interlocutory ruling. Therefore, under the decision in Lyndon v. Ga. Ry. & Elec. Co., 129 Ga. —, 58 S. E. 1047, the writ of error will not be dismissed.

2. It is the right of a defendant to appear specially before pleading to the merits and have the action dismissed on the ground that there has been no legal service of process. If lack of proper service appears on the face of the record, advantage of this defect may be taken by motion or any other appropriate procedure, either before or after judgment, provided the defendant by his conduct has done nothing to waive service. Hobby v. Bunch, 83 Ga. 1, 10 S. E. 113 (5), 20 Am. St. Rep. 301. When the record shows a valid return of service, and it is necessary to resort to extrinsic testimony to show that there has been no service, or that the service was for any reason invalid, the objection can be made only by plea in abatement (if before judgment), and in connection therewith the sheriff's return must be duly traversed. 19 Am. & Eng. Enc. Pl. & Pr. 707; Civ. Code 1895, § 4988; Livingston v. Marshall, 82 Ga. 281, 11 S. E. 542. Being a dilatory plea, it

must be filed at the first term, at least at the first term after notice, and must be sworn to. Civ. Code 1895, §§ 4988, 5049, 5058. Unless duly traversed, the return of the sheriff is conclusive. If the return is made by a deputy sheriff, both the sheriff and the deputy sheriff must be made parties to the traverse. We are not able to cite any Georgia decision in support of the proposition that the sheriff must be made party when the return of the deputy is traversed; for, so far as our investigation has disclosed, this point has never been made previously. However, the reason of the rule seems to demand that the sheriff be made a party. The rule that the officer is a necessary party to the traverse had been previously announced in several cases; but in O'Bryan v. Calhoun, 68 Ga. 218, Speer, J., states the reason as follows: "He and his securities on his bond have a vital interest in the question thus made, and they should have an opportunity to be heard on the issue the defendant has made." It may be noted, too, that in Elder v. Cozart, 59 Ga. 199, the alleged service was made by a deputy; but it is spoken of as the sheriff's act, in regard to the necessity for a traverse. By sections 4372 and 4379 of the Civil Code of 1895 the sheriff and the sureties on his bond are primarily liable for the misconduct of his deputy, although a concurrent liability may exist against the deputy and his bondsmen. Therefore, when the return is by the deputy sheriff, both he and the sheriff are necessary parties to the traverse.

3. The plea to the jurisdiction is likewise defective, in that it is not verified. Civ. Code 1895, § 5083.

4. For these formal reasons the demurrer to the special appearance should have been sustained. We also think that the general demurrer to it was well taken. "There are many years and manifold changes in economic conditions between the old rule, which denied the right to sue a foreign corporation in personam outside the jurisdiction of its creation, and the modern doctrine, that the question of jurisdiction and suability is not so much one of citizenship as one of finding. * * * The true test of jurisdiction is not residence or nonresidence of the plaintiff, or the place where the cause of action originated, but whether the defendant can be found and served in the jurisdiction where the cause of action is asserted. A corporation can be found in any jurisdiction where it transacts business through agents located in that jurisdiction, if the laws of the same provide a method of perfecting service on it by serving its agents. From 1845 to the present time the law of Georgia has provided that service of process necessary to the commencement of 'any suit against any corporation in any court,' with certain exceptions which are not material to this discussion, may be perfected by serving any officer or agent of such corporation, or by leaving a copy of the process at the place of transacting the usual and ordinary business of such corporation, if such place shall then be within the jurisdiction of the state in which the suit is commenced. Civ. Code 1895, § 1899. The language of this section is sufficiently broad to authorize the service of process in a suit against a foreign corporation that has a place of doing business in this state. * * * A corporation is not always present where its officers are, but it is present in any place where its officers or agents transact business in behalf of the corporation under authority conferred by it. * * * At common law service upon a corporation could be perfected only by serving its head officer, but whether service upon any officer would be sufficient to bring the corporation into court is a matter to be determined by municipal law. The law of this state permits its own corporations to be brought into court by serving any officer or agent transacting the business of the corporation, and the statute is broad enough to allow service upon a foreign corporation in the same way. The state of Georgia either expressly grants to these foreign corporations the right to do business within its limits, or tacitly permits them to transact business here. They are allowed to open offices in this state, and here deal with our citizens and others who may be temporarily within its limits. The state protects them in the property which they hold. The courts of Georgia are open to them for the enforcement of any claim of any character which they may have against her citizens, or citizens of other states passing through this state, subject only to the qualification above referred to. Can it be said that it is a hard rule, or a violation of any sound principle, that they should be put upon the same footing as regards causes of action against them as that on which our own corporations are placed by the law of the land?" Reeves v. Southern Ry. Co., 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513.

In the case of Denver & Rio Grande R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, the service was perfected under the California statute upon a soliciting agent who maintained an office and performed, for the nonresident defendant company, services substantially similar to and in no wise broader than those performed by the agent in this case. The court, in sustaining the service, says: "The object of the service is attained when the agent served is of sufficient rank and character as to make it reasonably certain that the corporation will be notified of the service, and the statute is complied with if he be a managing or business agent in any specified line of business transacted by the corporation in the state where the service is made. That Shotwell, upon whom the service was made, was such an agent, is manifest from the facts above stated." A similar ruling as to a similar agent was made in the case of Tuchband v. Chicago & Alton R. Co., 115 N. Y. 437, 22

N. E. 360. In the case of Green v. C., B. & Q. Ry. Co. (decided April 29, 1907) 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, the Supreme Court of the United States decided: "While in a case of diverse citizenship the suit may be brought in the Circuit Court for the district of the residence of either party, there must be service within the district; and, if the defendant is a nonresident corporation, service can only be made upon it if it is doing business in that district in such a manner and to such an extent as to warrant the inference that it is present there through its agent. A railroad company which has no tracks within the district is not doing business therein in the sense that liability for service is incurred because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic." By way of distinguishing that case from the Roller Case and the Tuchband Case, cited supra, the court says: "The question here is whether service upon the agent was sufficient, and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. In support of his contention, that the defendant was doing business within the district in such a sense that it was liable to service there, the plaintiff cites Denver, etc., R. Co. v. Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77, and Tuchband v. Chicago, etc., R. R., 115 N. Y. 437, 22 N. E. 360. The facts in those cases were similar to those in the present case. But in both cases the actions were brought in the state courts, and the question was of the interpretation of a state statute, and the jurisdiction of the state courts." This language connotes the idea that certain modes of service may be sufficient to give jurisdiction for state purposes and not for federal purposes. It may be that the service in this case is of such a nature that if, upon a judgment rendered by virtue of it, suit should be brought in a sister state, the full faith and credit clause of the federal Constitution would not compel recognition of its validity; yet such a judgment is as enforceable as any other judgment may be in the courts of this state. That a judgment may have such attributes, see the case of Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867.

We are satisfied that the Legislature of this state intended that service upon an agent bearing such relation to a corporation as Knight does to the defendant in this case should be sufficient, under the broad language of section 1899 of the Civil Code of 1895: "Service of all subpœnas, writs and attachments, and other process necessary to the commencement of any suit against any corporation in any court, except as hereinafter provided, may be perfected by serving any officer or agent of such corporation, or by leaving the same at the place of transacting the usual and ordinary public business of such corporation, if any such place of business then shall be within the jurisdiction of the court in which said suit may be commenced. The officer shall specify the mode of service in his return." To this legislative intent it is our duty to give effect, and we will let the federal question take care of itself. See Southern Bell Tel. Co. v. Parker, 119 Ga. 727, 47 S. E. 194. It was the privilege of the defendant to file demurrer, thereby pleading to the merits, without waiving the right to object to the service, upon expressly stating, as it did, that it was filed subject to the action of the court upon the preliminary question. High v. Padrosa, 119 Ga. 648, 46 S. E. 859; Medical College of Georgia v. Rushing, 124 Ga. 239, 52 S. E. 333 (3). Such an appearance, if the defendant had been successful in its effort to dismiss the action through the special appearance, would not have conferred jurisdiction upon the court, and would not have amounted to a waiver of process.

Judgment reversed.

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(2 Ga. App. 776)

## WHOLESALE MERCANTILE CO. v. JACKSON. (No. 485.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

1. WRIT OF ERROR — REVIEW — VERDICT ON CONFLICTING EVIDENCE.

The evidence on the only material point in the case was conflicting, and we have more than once held that in such a case this court cannot interfere with the finding of the jury upon the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

2. SALES — ACTIONS — INSTRUCTIONS—HARMLESS ERROR.

There was no error in giving in charge to the jury the exceptions to the statute of frauds, contained in Civ. Code 1895, § 2694; the defendant having pleaded the seventh paragraph of section 2693 in defense, and there being evidence to authorize such a charge. The charge on this subject, considered as a whole, is a fair presentation of the principles applicable to the evidence. If there was error in presenting the third exception to the jury, the error was harmless to the plaintiff in error.

3. SAME—ACCEPTANCE.

There being evidence in behalf of the plaintiff that he delivered the exact quantity of goods bought, and no dispute as to the quality or price of the goods, it was no error to charge the jury that, if they believed the testimony for the plaintiff, the defendant would have no right to reject the goods, nor any reason for inspection. Acceptance follows necessarily on the impossibility of rejecting the goods contracted to be bought, when the goods delivered are in every respect the exact articles purchased.

4. ERROR, WRIT OF—REVIEW.

The assignments of error contained in the first, second, fifth, seventh, eighth, and ninth grounds of the motion for new trial are not, for any of the reasons assigned, erroneous.

5. TRIAL — INSTRUCTIONS—AMBIGUITY—CURE BY OTHER INSTRUCTION GIVEN.

The court having more than once instructed the jury that plaintiff's right to recover was

dependent upon his compliance with his contract and acceptance of the goods by the buyer, the charge complained of in the fourth ground of the motion was not erroneous, and could not be understood by the jury as relieving the plaintiff from compliance with his contract. Even if there had been ambiguity in the charge complained of in the fourth ground, it was relieved by the instruction of which complaint is made in the sixth ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703–711, 718.]

6. SAME—INSTRUCTIONS—REQUESTS.

There is no merit in the seventh ground of the motion for new trial. One cannot complain if the court charges the jury in accordance with his own suggestion, although such charge must necessarily be qualified, in order that the jury may be legally instructed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3602.]

7. SAME—NECESSITY OF REQUEST FOR MORE SPECIFIC INSTRUCTIONS.

The charge complained of in the tenth ground of the motion was given in compliance with an oral request, and could well have been declined if presented in writing, because the principle involved had already been fully covered in the general charge. If more specific instructions were desired, they should have been requested in writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Appeal and Error, §§ 628, 651–659.]

(Syllabus by the Court.)

Error from City Court of Cartersville; A. M. Foute, Judge.

Action by W. A. Jackson against the Wholesale Mercantile Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jackson brought suit against the Wholesale Mercantile Company to recover the contract price of goods sold and delivered as set forth in the petition. The defendant filed a plea denying the contract of sale as alleged, and claimed that a smaller quantity of the goods were bought. It further pleaded that the alleged contract was within the statute of frauds. The issue was submitted to the jury, and a verdict was rendered in favor of the plaintiff for the full contract price as claimed by him. The Wholesale Mercantile Company assigns error upon the refusal of a new trial. In addition to the general grounds, it insisted, in its motion for a new trial:

(1) That the court erred in omitting to clearly state to the jury certain contentions of the defendant, and, by stating the defendant's contentions inaccurately, prejudiced its case before the jury.

(2) That the court erred in stating the contention of the defendant on the subject of the statute of frauds, in that the statement of the defendant's contention under the statute of frauds was too general and indefinite.

(3) That the court erred in charging the jury the first and third exceptions to subsection 7 of section 2693 of the Civil Code of 1895. It is insisted that the first exception to that subsection, as set forth in section 2694, and given in charge by the court, was inapplicable, upon the ground that there was no evidence whatever tending to show that the alleged contract of sale had ever been fully executed, and that, therefore, the court's statement of said exception as a rule of law for the guidance of the jury was erroneous and misleading, and calculated to confuse the jury, to the injury of the defendant. Exception is taken to the statement by the court of the third exception upon the same ground, and, further, because the court, after charging the jury the third exception in section 2694, failed to instruct the jury as to what the nature, character, and extent of the part performance of said contract of sale must have been, in order that refusal to comply with said contract would be a fraud by the defendant such as to authorize the court to compel it to perform; and it is further contended that the instruction of the court that said exceptions referred to facts which the jury must determine from the evidence, without indicating how such exceptions referred to facts, or what facts were referred to, confused and misled the jury.

(4) Error is also assigned upon the following charge: "If the clerk, Hawkins, had no authority to receive the goods, if you believe that the company knew that the fruit was being put into its warehouse and had reason to believe the plaintiff expected pay therefor, you should find for the plaintiff"—defendant insisting that the charge does not limit the jury to the evidence as the basis for the conclusions of fact which may be reached by them, and that mere knowledge of the defendant that the fruit was being put into its warehouse, and reason for belief on defendant's part that plaintiff expected to be paid for it, would not alone suffice to authorize the jury to find for the plaintiff, and that said charge amounted to a direction of a verdict against the defendant.

(5) In the fifth ground of the motion it is contended that the court erred in charging the jury that they need not consider the custom as to the amounts generally purchased by the parties, if they found, from the evidence, that plaintiff and defendant had a contract with reference to the fruit, but that the contract would control.

(6) In the sixth ground error is assigned on the following instruction to the jury: "You will consider all the facts incident to this transaction, and whether or not this defendant company knew that these goods were being placed in their warehouse at the time they were; and if you find that they did know this, and that it was being done in pursuance of the contract which the general manager had made with this plaintiff, then the company would be bound; otherwise, it would not be bound." It is contended that this made the defendant liable without an inspection or acceptance of the goods, and without regard to the statute of frauds, and also without regard to whether the goods delivered corresponded in quality, aggregate

quantity of the whole, or relative quantity of each of the three kinds of goods bargained for.

(7) It is insisted that the language of the court in response to an oral request to charge, preferred by the defendant's counsel, contained a strong intimation that allowing the goods to be placed in the warehouse was a waiver of the right to reject them, and amounted to an acceptance, although the clerk who received them had no authority to accept them.

(8) The assignment of error in the eighth ground is practically the same as that contained in the third.

(9) In the ninth ground of the motion exception is taken to the following charge: "If you find from the evidence that these goods were bought by sample, and that the sample inspected was satisfactory to the buyer, ther the defendant would be bound by the inspection he made, unless he understood that later on he had the right to examine other parcels or parts of the same. If you find that the plaintiff, by the request of the defendant, carried samples of these goods to the defendant company, and that they were examined and accepted as satisfactory to the defendant company, and goods of this same class were delivered to the defendant company, and nothing else appeared, then the company would be bound to pay for them."

(10) Immediately following the charge last quoted, and in response to a suggestion by the defendant's counsel that the defendant had the right to refuse the fruit for not corresponding in quantity as well as quality, the judge charged the jury as follows: "I thought I had covered that. I charge you, gentlemen, that if you find that the plaintiff is mistaken about his right to deliver them all the goods he had of this kind, and that the defendant is right in insisting that it only bought 75 cases, or whatever you find to be true, then the defendant would have the right to object to the quantity as well as the quality, if done at the proper time." The defendant insists that this charge was erroneous, because it wholly ignored the effect of the statute of frauds on the alleged oral contract of sale, and in effect instructed the jury that the defendant would be bound to accept the goods when delivered, unless the jury should find that the plaintiff was mistaken about his right to deliver all the goods he had of the kind, and unless the jury should also find that defendant was right in insisting that it bought only the amount of goods contended by it. It is insisted that the jury should have been instructed that the defendant had the right, on delivery of the goods, to examine the same for the purpose of determining whether they corresponded in quantity as well as quality with the contract of purchase, before accepting them, and that unless the defendant accepted them, whether its refusal to do so was right or wrong, the oral contract of sale was, under the statute of frauds, incapable of enforcement. It is further insisted that the charge assumes that the oral contract was valid and binding, and makes the right of the defendant to refuse acceptance of the goods dependent upon the terms of the oral contract; whereas, it is insisted, unless accepted, the oral contract was invalid under the statute of frauds.

Neel & Peeples, for plaintiff in error. Colquitt Finley and Thos. W. Milner & Son, for defendant in error.

RUSSELL, J. (after stating the facts as above). Summarizing the contentions of both parties, the evidence for the plaintiff tended to show that the manager of the defendant company bargained for all of the canned peaches and tomatoes he had for sale. He testified that he expressly informed the manager, Mr. McCormick, that he accepted his bid in preference to that of Mr. Strickland, another buyer of fruit, upon the ground that Mr. Strickland had only offered to take a portion of his canned goods. He further testified that he delivered the goods according to his contract, at the warehouse of the defendant and to one of its employés, who received them and stored them in the warehouse of the defendant. The defendant's manager, Mr. McCormick, testified that he only contracted for a fixed quantity of each of the three kinds of fruit offered for sale by the plaintiff; that this was one of the express terms of the contract, and that under no consideration would he have bargained for as large a quantity as the plaintiff claimed to have sold him. He contended that there had been no delivery of the goods to the defendant, that the clerk who received the goods at the warehouse was not authorized to effect an acceptance, and that as soon as he knew that the fruit was being delivered he refused to accept or pay for it. There was no conflict as to the price at which the fruit was to be delivered, nor any evidence tending to show that it was not the quality contemplated by the parties. Upon a complete view of the evidence we find no error in the judgment refusing a new trial. We base our decision upon the following reasons:

1. The evidence upon the only material points in the case was conflicting, and we have more than once held that in such a case this court cannot interfere with the finding of the jury upon the facts.

2. There was no such error in the instruction of the court with reference to the application of the statute of frauds to the evidence submitted as will authorize a reversal of the judgment. Considered in dismembered fragments, the instructions of the court might appear subject to the objections urged by counsel for the plaintiff in error; but, when the charge upon this subject is considered as a whole and in the light of the evidence, there was no error in the court's giving in charge to the jury, in connection

with paragraph 7 of section 2693 of the Civil Code of 1895, the three exceptions provided by section 2694. It is not strenuously insisted by the learned counsel for plaintiff in error that the court erred in presenting the second exception to the jury. It is apparent to any one that the evidence in behalf of the plaintiff required that the jury be instructed that, although the value of the goods might amount to more than $50, the contract of sale would not have to be in writing where there had been performance on the part of the plaintiff and acceptance, as the plaintiff testified, on the part of the defendant. And we think, moreover, there was no error in further charging the jury that the contract of sale need not be in writing if the jury believed the contract had been fully executed. This was held by the Supreme Court in Johnson v. Watson, 1 Ga. 348, before the passage of the act now embodied in section 2694; and it was further held, in the same case, that the question of delivery by the vendor and acceptance by the vendee is one of fact for the jury. As stated by Chancellor Kent (2 Kent's Com. 491): "When the terms of sale are agreed on, and the bargain is struck and everything which the seller has to do with the goods is completed, the contract of sale becomes absolute, and the property and risk of accident to the goods rests in the buyer." See, also, Woodward v. Solomon, 7 Ga. 246. If the jury believed the testimony in behalf of the plaintiff, the contract was executed; and the jury were properly instructed to apply the first exception mentioned in section 2694. It may be that the court might have more fully instructed the jury, as insisted by counsel for plaintiff in error, as to the applicability of the third exception; but in view of the evidence of the plaintiff and the fact, as demonstrated by the verdict, that the jury rested their verdict upon his testimony, the omission of the court in this regard would not be error of which defendant could complain, for the reason that the exception is provided for the benefit of plaintiffs to be used in resistance of a plea that the contract is not binding because not in writing.

3. Conflict in the evidence arose upon the subject of the quantity of the goods sold, and whether the goods were delivered and accepted. Plaintiff in error insists that it was indisputably established that the goods were never accepted, but were rejected the moment its authorized agent was informed of the quantity tendered and insisted on by Mr. Jackson, the plaintiff; that the clerk, Hawkins, had no authority to accept the goods for defendant, but merely the duty of reporting the same to the general manager, McCormick; and that upon his reporting in this instance, McCormick rejected the goods and refused to accept the same. It is, of course, well settled that mere receipt of goods, without acceptance, will not meet the requirements of the statute of frauds. Loyd v. Wight, 20 Ga. 578, 65 Am. Dec. 636, s. c., 25 Ga. 215; Tiedeman on Sales, § 66. Nor is an agent who is merely authorized to receive and count goods, or weigh them as delivered, the agent of the buyer to so accept the goods as to bind his principal. It is also true that acceptance cannot be inferred from mere receipt of goods into the possession of the buyer, provided he does not retain them longer than may be reasonably necessary to enable him to examine their quality and quantity. 20 Cyc. 249. Upon these well-settled principles the learned counsel for the plaintiff in error based most of the contentions urged in his brief. We must not, however, lose sight of the fact that these contentions are not based upon the evidence for the plaintiff, and that the jury had the right to give the preference to his testimony. According to this testimony he delivered to the defendant at its place of business exactly what he had contracted to sell, both as to quantity and quality; and, quantity and quality both being complete, and the goods delivered at the stipulated time and for the stipulated price, the defendant had no right to reject, nor any reason for inspection. If goods of exactly the quantity and quality bargained for were delivered according to the terms of the contract, it became absolutely immaterial whether the agent who received them had or did not have the right to accept them. Acceptance followed necessarily on the impossibility of rejecting the goods contracted for, and to decline to take them would have been a fraud.

4. Several exceptions are taken to certain portions of the charge in which it is assumed that the contentions of the defendant were not sufficiently presented to the jury; and it is also alleged that certain excerpts from the charge either contain intimations of opinion by the court or assume facts to be in evidence which were not supported by the testimony. We have referred to several of these in the statement of facts preceding this case, but any further discussion than is contained in the headnotes is unnecessary. Viewing them in the light of the charge as a whole, these exceptions are without merit. Such are the assignments of error contained in the first, second, fifth, seventh, eighth, and ninth grounds of the motion for new trial.

5. Much stress is laid on the fourth ground of the motion for new trial. The excerpt from the charge complained of (which is quoted in the statement of the case) immediately follows the instruction to the jury that the company would be liable only provided it appeared that the goods were actually accepted by the company, and precedes the instruction complained of in the tenth ground of the motion for new trial. Judged in this connection, the jury could not have been misled or confused into believing otherwise than that it was absolutely essential for the plaintiff to demonstrate by the evidence that the

defendant accepted the goods tendered by him, nor was led to suppose that mere knowledge on the part of the defendant that the fruit mentioned was being put into its warehouse proved that the defendant accepted it and expected to pay for it; the court having more than once instructed the jury that the plaintiff's right was dependent upon compliance with his contract and acceptance by the buyer. What we have just said in reference to the fourth ground of the motion is clearly applicable to the sixth. The charge complained of in the sixth, however, relieves the ambiguity, if any existed, in the instruction complained of in the fourth ground; for the court expressly charged the jury that they could consider whether the defendant knew that the goods were being placed in its warehouse, and if the jury should find that it did know it, and that it was being done in pursuance of their contract, the company would be bound; otherwise, it would not be bound. What could be plainer? If the delivery was being made in compliance with the contract, as testified to by the plaintiff, the company would necessarily be bound. The defendant could not ask to be relieved, except upon the testimony of its manager that no such contract was made and that the contract that was made was not complied with.

6. There is no merit in the seventh ground of the motion. The excerpt complained of was addressed to the jury in response to an oral request made by the defendant's counsel, who asked the court to charge the jury that, if the company did know that the goods were being placed in its warehouse by Mr. Jackson for the purpose of delivery, it would not bind the company, if it understood that it still had the right to reject them. The court assented to this proposition (stated in the presence of the jury) by using the word "Yes," thus giving it his sanction, but very properly qualified the instruction by adding that "that would depend upon the additional fact whether or not the company had the right, after the goods were actually placed in its warehouse, to examine the goods and accept or reject them." The word "that," in the charge quoted, refers to the proposition stated by counsel, and sanctioned by the court by the use of the word "yes." The word "yes" relates back, so as to mean that the company would not be bound if it understood that it had the right to reject the goods, and the qualification of the court simply meant that while, as before stated, the acceptance depended upon the defendant's understanding of its right to reject (which was not a correct statement of law applicable to the evidence), the evidence must show a real right to reject. The court, therefore, while sanctioning and indorsing to the jury the proposition stated by the defendant's counsel, very properly qualified this statement (adopted pro tanto as his own) by further instructing the jury, in effect, that the understanding of the defendant was, after all, dependent upon and subordinate to its actual rights to accept or reject the goods, as fixed by the contract, whatever the jury might find, from the evidence, that contract to be. As there was no contention on the part of either party that he misunderstood the contract, nor any evidence showing that either party was known by the other to be acting under a misapprehension of the contract, the understanding of either party could not affect the contract, and could be of no use to the jury, except in so far as it might aid in enabling them to find the true contract.

7. The complaints urged against the excerpt from the charge on which error is assigned in the tenth ground of the motion for new trial appear to be groundless, on consideration of the entire charge and the circumstances under which the instruction complained of was given. It appears in the record that the court had practically completed the charge to the jury, and that first the defendant's counsel and then the plaintiff's attorney had made oral requests for additional instructions. The only request refused was one preferred by the plaintiff's counsel. Immediately following the charge which is assigned as error in the ninth ground of the motion (and which will be found in the statement of the case), defendant's counsel suggested: "That leaves out altogether the question of quantity. They had the right to refuse them for not corresponding in quantity, as well as quality." Upon this suggestion of counsel on the subject of the quantity, the court replied to counsel, "I thought I had covered that," and proceeded, in compliance with the suggestion, to relieve the objection of the defendant. It was addressed to only one point; but nothing more would have been required, even if the request had been in writing, and the request might have been declined, even if in writing, because the subject had already been fully covered in the charge to the jury. The assignments of error depend (a) partly upon the assumption that it is necessary for a trial judge to repeat, in treating of each and every phase of the case, and in every possible connection to reiterate, the law applicable to all of each party's contentions; (b) partly upon an alleged intimation on the part of the judge; and (c) partly upon verbal criticism of the language employed in the instruction to which exception is taken.

(a) The judge, having already fully explained the purpose and effect of the statute of frauds, was not required to repeat these instructions to the jury in connection with a charge invoked upon a different subject and one wholly disconnected with defendant's defense under the statute of frauds. Especially is this true where the request was preferred by him who now complained, and where the request was directed expressly to only one point in the case and was fully complied with by the court. The charge com-

plained of in this ground of the motion did not ignore the effect of the statute of frauds, or withdraw from the jury the defendant's defense based thereon, although the judge did not refer to the subject in connection with this instruction. The plaintiff's case, according to his testimony, had but one foundation—a contract of sale fully executed on his part. The defendant's defense traveled on two legs—the one, the plea that there was no completed contract of sale nor acceptance of the goods; the second leg, the plea in which the statute of frauds was invoked as a defense. In one view of the defendant's case the effect of the statute of frauds was entirely immaterial. If the contract was for a limited quantity of the canned goods as a whole, and for a limited quantity relatively of each kind, and the plaintiff, in violation of the contract, attempted to deliver a larger quantity as a whole and different quantities relatively of each from those contracted to be delivered, and the defendant, as would have been his right, declined to accept them, no recovery could be had against the defendant. And this without regard to the defendant's plea of the statute of frauds. The plaintiff's failure to comply with the provision in reference to the quantity, and the defendant's rightful refusal to accept the articles tendered, would defeat the sale. The statute of frauds was immaterial to either view of the plaintiff's case as made by him in the record. If the goods were bought and delivered, as testified, according to contract, he would be entitled (regardless of the provisions of section 2693 of the Civil Code of 1895) to recover the purchase price. If the contract of sale was as testified to in behalf of the defendant, and there was no acceptance by the defendant of the goods tendered, then (regardless of the operation of the statute of frauds) the plaintiff could not recover. When we consider that the portion of the charge now under consideration was made supplementary to a presentation of one phase of the plaintiff's contention as requested by plaintiff's counsel, expressly to present defendant's claim of the right to reject the goods on account of defect in quantity, and for the purpose of preventing any limitation or restriction of the defendant's right to inspect the goods and ascertain whether they corresponded in quantity as well as quality with those purchased by the defendant, and further discover from the record that the jury had been fully and, we think, correctly instructed as to the law applicable to the defendant's plea of the statute of frauds, we think it is quite clear that the intelligence of the jury could safely be trusted to remember that the defendant had two pleas, and to recall and apply the instructions already given by the court on the subject of the statute of frauds to the evidence applicable to the defense based on section 2693 of the Civil Code of 1895.

(b) The language of the instruction in question does "make the legal right of the defendant to refuse acceptance of the goods dependent upon the terms of the oral contract as found by the jury," as insisted by plaintiff in error, because, as stated above, the court is, at this point, only presenting the law applicable to one issue in the case, to wit, whether there was or was not a sale of the goods, as insisted by the plaintiff. But there is nowhere any intimation of opinion upon the facts by the court. This ground of the exception is destroyed when the charge to which exception is taken is read.

(c) The instruction now under review may be subject to verbal criticism. The trial judge was perhaps too complaisant in his language in referring to the sharp conflict between the parties. He was perhaps too much imbued with the spirit which it is the duty of the jury to exercise in case of conflict in the evidence—that of harmonizing conflicting testimony, so as to make all the witnesses speak the truth. No exception is taken to this. But if, instead of saying, "If you find that the plaintiff is mistaken about his right to deliver," etc., and that "the defendant is right in insisting that," etc., the judge had substituted more vigorous and explicit language, so as to have charged the jury that if they found from the evidence that the plaintiff was not to deliver all the goods of this kind that he had, and if they believed that the defendant bought only 75 cans (or whatever they might find to be the number), then the defendant would have a right to object to the quantity as well as the quality, if it did so at the proper time, the only possible objection would have been removed. The jury might possibly have been led, by the language used, to suppose that they could settle the rights of the parties according to their opinion of right, instead of by the testimony as they found it to be true; but no exception is based upon that ground. The exception is taken to the words "this kind" in the charge; it being insisted that the words "all the goods of this kind" furnish no indication as to whether the court meant table peaches, pie peaches, or tomatoes. We cannot approve of this exception, because it appears, in the evidence for the plaintiff, that he sold to the defendant company all the canned goods he had, and that he declined to sell part of them either to Strickland or to the defendant, and it further appears that these canned goods embraced only pie peaches, table peaches, and tomatoes. No other goods are hinted at in the testimony, except canned goods; and, if he sold all he had of "this kind," it is undisputed that he must have sold, not only "table peaches" and "pie peaches," but "tomatoes" as well, and the exception is without merit.

We are satisfied, at the end of a most thorough and painstaking investigation of the merits of every assignment of error and of every argument in its support, that our

respect for the profound legal ability of the learned counsel for plaintiff in error has caused us to search more diligently (if it be possible) than usual for every error pointed out in the record and brief, and to unduly lengthen our discussion of the points involved. After all, we find no error which requires the grant of a new trial. After all, in a fair trial (but with conflicts irreconcilable in the evidence), the jury preferred to base its verdict on the testimony for the plaintiff, instead of on that in behalf of the defendant.

Judgment affirmed.

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(145 N. C. 337)

## STREATOR et al. v. STREATOR.

(Supreme Court of North Carolina. Oct. 30, 1907.)

1. PLEADING—JUDGMENT ON PLEADINGS.

Where a complaint alleged that defendant procured certain lands to be conveyed to himself under a parol agreement, etc., an answer setting up that defendant has no knowledge or information sufficient to form a belief as to the truthfulness thereof, and therefore denies the same, was an insufficient denial of matters alleged to be in the personal knowledge of defendant, and the court properly rendered judgment on such allegation for want of denial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1056.]

2. APPEAL—QUESTIONS REVIEWABLE—AMENDMENT TO ANSWER.

The refusal to permit an amendment to a pleading is not reviewable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 706.]

3. TRIAL—ISSUES NOT RAISED BY PLEADINGS.

Issues not raised by the pleadings are properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587–595.]

4. APPEAL—EXCEPTIONS—SUFFICIENCY.

An exception to a charge "for errors therein contained," without specifying the errors, cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1620, 1621.]

Appeal from Superior Court, Anson County; Peebles, Judge.

Action by Maggie Streator and others against W. B. Streator. From the judgment, defendant appeals. No error.

H. H. McLendon, for appellees.

CLARK, C. J. The complaint alleges that the defendant procured the lands to be conveyed to himself in pursuance of a parol agreement that he would hold the same in trust for the benefit of his mother, himself, and the other heirs at law of his father, and that the deed was executed to him upon that parol trust and condition. To this averment the answer sets up that the defendant "has no knowledge or information sufficient to form a belief as to the truthfulness thereof, and therefore denies the same." This is an insufficient denial of matters alleged to be in the personal knowledge of the defendant, and the court properly rendered judgment on that allegation for want of a denial. Machine Co. v. Mfg. Co., 91 N. C. 74; Avery v. Stewart, 134 N. C. 299, 46 S. E. 519. The point is so fully discussed and clearly stated by Walker, J., in Avery v. Stewart, 136 N. C. 432, 48 S. E. 775, 68 L. R. A. 776, as to render repetition here entirely unnecessary. The answer being insufficient, and in law and in fact no answer, on this point, judgment on this point for want of an answer was the right of the plaintiff (Phifer v. Insurance Co., 123 N. C. 410, 31 S. E. 716; Carroll v. McMillan, 133 N. C. 140, 45 S. E. 530), unless the court in its discretion had allowed an amendment. Its refusal to do so is not reviewable. Avery v. Stewart, 134 N. C. 299, 46 S. E. 519. The learned judge in this case acted carefully and intelligently, and refused to allow an amendment only after full inquiry and investigation.

The issues tendered by the defendant were not raised by the pleadings, and were properly refused. The exceptions for exclusion of evidence are without merit, and need no discussion. The additional issues were proper for the full elucidation of the case. Their submission after the argument to the jury on the other issues was in the discretion of the court. Though made late, counsel were given full opportunity to discuss them before the jury, and we can see no prejudice to defendant. If his counsel declined to discuss them, it was doubtless because they had already discussed the evidence fully in all its aspects.

The exception to the charge of the court "for errors therein contained," without specifying the errors, is a "broadside exception," and cannot be considered. Pierce v. Railroad, 124 N. C. 99, 32 S. E. 399, 44 L. R. A. 316, and cases there cited.

No error.

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(145 N. C. 312)

## DUNLAP v. HILL et al.

(Supreme Court of North Carolina. Oct. 30, 1907.)

1. HUSBAND AND WIFE—ANTENUPTIAL AGREEMENTS — CONSTRUCTION — WIFE'S SEPARATE ESTATE—REQUISITES OF CONTRACT TO CONVEY.

Where a wife, under a marriage settlement, deeded her separate estate to a trustee for her sole and separate use, giving him the power to convey with her consent, and providing for no other conveyance, a mortgage upon any of the property so deeded, executed by the wife and her husband without the knowledge or consent of the trustee, is invalid, since such a deed limits the wife's power of disposition during her marriage to the mode prescribed therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 190, 191.]

2. SAME—WIFE'S POWER TO ALIENATE.

In order that a marriage settlement may restrict a wife's power to control and dispose of her future acquired property, real and personal, the language of the instrument, especially since the Constitution of 1868, should be plain, and the intent to do so unequivocal.

3. SAME.

In a deed of marriage settlement conveying to a trustee all the estate, both real and personal, and all the choses in action, that the wife may be possessed of or entitled to receive, etc., "and all the estate, either real or personal, or choses in action, that the above-named C. [the wife] may hereafter receive or be entitled by right, devise, or bequest," the word "receive," in the clause quoted, refers only to the personal property, leaving the deed, so far as it relates to the future acquisition of real estate, as if it read, "and all the real estate that the above-named C. may hereafter be entitled to by right, devise, or bequest"; and hence land conveyed by deed to the wife during her coverture is not within the deed of settlement, and may be mortgaged by her without the trustee's consent.

4. SAME—"RIGHT, DEVISE, OR BEQUEST."

In such a deed, the words "by right, devise, or bequest," under the rule of "noscitur a sociis," mean by right of inheritance, devise, or bequest, and refer to land descending upon the wife by operation of law, and not to land acquired by purchase.

5. SAME—DEED.

Where the methods of devolution by which realty must be acquired in order to come within the terms of a marriage settlement are expressed in the deed, the maxim of the law, "Expressio unius est exclusio alterius," will exclude from its operation land acquired in other ways.

Appeal from Superior Court, Anson County; Justice, Judge.

Action to foreclose a mortgage by D. R. Dunlap against Rufus Hill and others. From a judgment dismissing the action, plaintiff appeals. Reversed and remanded, with directions.

Action to foreclose a mortgage deed dated March 17, 1903, executed by John C. Hill and wife, Caroline, to plaintiff, conveying two tracts of land; one containing 87 acres, and the other 105 acres. From the judgment dismissing the action, plaintiff appealed.

John T. Bennett, for appellant. Robinson & Caudle and J. A. Lockhart, for appellees.

BROWN, J. It appears from the record that in 1861 Caroline Coley entered into a marriage settlement with John C. Hill, who immediately thereafter became her husband. The wife is dead, and the husband survives. The tract of land containing 87 acres is conveyed in the deed of settlement. The other tract was conveyed by deed directly to Caroline Hill some years after her marriage. She and her husband duly executed the mortgage sued on to plaintiff, conveying both tracts, to secure the debts described in the complaint. The trustee in the deed of settlement did not join in the execution of the mortgage. It is contended by defendants that the mortgage is void.

1. As to the 87-acre tract we concur with his honor below that the mortgage is void for lack of power in the mortgagors to make a valid conveyance. In the deed of settlement the only method provided for a conveyance of any part of the estate of the feme covert is as follows: "G. A. Smith [the trustee] shall have the right, by and with the consent of the said Caroline Coley, to sell and convey away any of the real or personal estate that he may hereafter hold for the said Caroline Coley." It is further provided that said trustee shall have the right to reinvest moneys received from the conveyance of real or personal estate for the use of said Caroline Coley. It seems to be settled in this state that where a feme sole has made a deed of marriage settlement of her separate estate, whether real or personal, to a trustee for her sole and separate use, her power of disposition over the same during marriage is limited to the mode and manner prescribed by that instrument. If she and her husband join in a mortgage conveying her estate without the knowledge or consent of the trustee, and outside of the powers conferred, said deed is invalid. Hardy v. Holly, 84 N. C. 661; Kirby v. Boyette, 116 N. C. 165, 21 S. E. 697; Shannon v. Lamb, 126 N. C. 38, 35 S. E. 232. The matter is so fully discussed in the cases cited and others in our Reports that it is useless to do more than cite them. It is plain that according to our authorities Caroline Hill, although with the consent of her husband, could not convey the 87-acre tract without the joinder of the trustee.

2. The plaintiff contends that the 105-acre tract is unaffected by the marriage settlement, and as to that the mortgage is valid. We note the fact that the deed of settlement not only conveys real and personal property by specific description, but purports to convey, subject to the trusts declared, such property as said Caroline should acquire in the future; the language of the instrument being as follows: "Have bargained, sold, and conveyed, and by these presents doth bargain, sell, and convey, unto the said G. A. Smith, all the estate, both real and personal, and all the choses in action that the said Caroline Coley may be possessed of or entitled to receive from any and all sources whatsoever, and all the estate, either real or personal, or choses in action, that the above-named Caroline Coley may hereafter receive or be entitled by right, devise, or bequest." As to the personal estate acquired by said Caroline during her coverture it is unnecessary to determine whether that came under the dominion of the trustee by virtue of the deed or not. No question of that sort is presented in the record. As to the tract of land conveyed by deed to said Caroline during her coverture we are of opinion that it does not come within the terms of the marriage settlement, and that consequently the mortgage is valid, and that the plaintiff is entitled to a decree of foreclosure as to that. We do not controvert the proposition, contended for by the learned counsel for the defendants, that marriage settlements may include the disposition and control of future acquired property, both real and personal. 19 A. & E. p. 1239. But in order to restrict the wife's power to acquire property by purchase, and to control it when so acquired, especially since the Constitution of 1868, the language of the instrument

should be plain, and the intent to do so unequivocal.

In respect to the real property, we think the instrument is justly susceptible of a different construction from that contended for. The words of the deed relating to the future acquisitions of real estate are so mixed with those properly relating to personalty that, in order to construe the former, it is well to eliminate them and place them in a sentence by themselves, reading them as follows: "And all the real estate that the above-named Caroline Coley may hereafter be entitled to by right, devise, or bequest." The other words in that part of the deed quoted plainly refer to personalty. The word "receive" is entirely appropriate when used to denote an acquisition of choses in action and other personal property, but entirely unusual and inappropriate in describing an acquisition of land by purchase. We may say "a man receives his inheritance," but we do not use that word in describing a purchase of land. While we have been unable to find after diligent search "a case in point," we have no difficulty in concluding that the words "by right, devise, or bequest" taken in connection with each other indicate by their association a purpose to bring within the scope of the instrument only such lands as Caroline Coley should receive by right of inheritance, devise, or bequest. If the purpose was to embrace all lands, however acquired, why use the words "right, devise, or bequest" at all? If such was the purpose, those words were unnecessary and inappropriate. The words "be entitled by right" are used in connection with "devise or bequest," and evidently refer to land descending upon Caroline Coley by operation of law, by right of inheritance, and not to land acquired by purchase. "Noscitur a sociis." The methods of devolution, by which the realty must be acquired in order to come within the terms of the settlement, being expressed in the deed, the maxim of the law will exclude from its operation land acquired in other ways. "Expressio unius est exclusio alterius."

The cause is remanded, with direction to enter a decree of foreclosure in accordance with this opinion.

Reversed.

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(145 N. C. 331)

## BROWN et ux. v. SOUTHERLAND et ux.

(Supreme Court of North Carolina. Oct. 30, 1907.)

COVENANTS—ACTION FOR BREACH.

Defendant and her husband contracted to sell a share allotted to her on partition in the lands of S. and H. The scrivener in drawing the deed described the interest in the H. land as all the interest in the land of H. "as divided by the committee," said to contain about 5½ acres. There was, in fact, no tract of 5½ acres. Plaintiffs got under the description all of the interest of defendants in the S. and H. land. *Held*, that the failure to acquire all the land described in the deed did not render the grantors guilty of a breach of covenant of seisin and warranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 108.]

Appeal from Superior Court, Wayne County; E. B. Jones, Judge.

Action by R. Q. Brown and wife against R. B. Southerland and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

The pleadings and admissions disclose this case: Spiars Smith died seised of a tract of land which descended to his five children, one of whom is the feme defendant and another H. C. Smith. The land was partitioned, and a lot of 70 acres, described by metes and bounds, allotted to feme defendant. The share of H. C. Smith was allotted in two tracts, one of 47 acres, lying south of the feme defendant's tract, and one of 50½ acres, lying north thereof. Thereafter said H. C. Smith died intestate, whereupon his share was partitioned among his surviving brothers and sisters, 20 acres of the 47-acre lot being allotted to feme defendant. On July 6, 1900, feme defendant and her husband contracted to sell the share allotted her in the Spiars Smith and in the H. C. Smith land to the plaintiffs, and, pursuant thereto, gave to Mr. Hill the plat showing the first partition by which to draw the deed. He described the 70-acre tract by metes and bounds, and proceeded to describe the interest in the H. C. Smith land, as follows: "Second tract. All interest in the land of H. C. Smith, deceased, as divided by Committee, first on the North side of the first tract, said to contain about 5½ acres. Third tract. All interest in the land of H. C. Smith, deceased, S. of the first tract of 70 acres and said to contain about twenty acres, more or less, or being the interest of Section No. 1, as plotted by Jno. M. Caldwell in November, 1887." Mr. Hill did not have, before him, the plat showing partition of H. C. Smith land. There is no tract of 5½ acres. This action is brought to recover damages for breach of the covenant of seisin and warranty contained in the deed from defendants to plaintiffs. It is conceded that plaintiffs got, under the description in the deed, all of the interest of defendants in the Spiars Smith and the H. C. Smith land. His honor, upon the pleadings and admissions, was of the opinion that the deed, construed in connection with the admitted facts and the evidence of plaintiff, did not purport to convey anything but the interest of the defendants in the Spiars Smith and H. C. Smith land. He rendered judgment for defendants. Plaintiffs excepted and appealed.

W. C. Munroe, for appellants. F. R. Cooper, for appellees.

CONNOR, J. (after stating the facts as above). The case seems to have been tried

upon the pleadings and admissions. Neither party tendered any issues and, of course, no prayers for instructions. It is manifest that the defendants only intended to convey, and plaintiffs to buy, the interest of the defendants in the Smith land. It is equally clear how the draftsman fell into the error of supposing, in the absence of any plat showing partition of the H. C. Smith land, that such interest extended to both the 47-acre and the 15½-acre tract, whereas the defendants had no interest in the last-named tract. It is equally clear that the controlling thought of the grantors was the conveyance of their interest in the H. C. Smith land "as divided by the committee." If there had been no division, the deed would have conveyed only the undivided interest, and not any specified number of acres; hence, the mention of the number of acres only indicated the extent of the interest. If the number of acres is controlling, the plaintiffs got more than they were entitled to in the 47-acre tract. If this was the basis upon which the contract price was fixed, plaintiffs have 90 acres, whereas they would have had but 86 acres. It it was "an undivided interest" which they were buying, they got "the interest" of the grantors in the land of H. C. Smith, as divided by the committee, which is all that the deed purported to convey. Hence they show no breach of the warranty.

We think that his honor's view was correct, and that, reading the entire description in the light of the admissions, the deed conveys all that the parties intended to grant or plaintiffs entitled to receive. Plaintiffs suggest that they were entitled to have the question, whether there was a mistake in the deed, submitted to the jury. It does not appear that any request was made to his honor to do so. We are of the opinion that his honor correctly interpreted the deed.

The judgment should be affirmed.

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(145 N. C. 456)

## STATE v. HARRIS.

(Supreme Court of North Carolina. Oct. 30, 1907.)

1. PERJURY — INDICTMENT — SUFFICIENCY OF ACCUSATION.

The word "feloniously" is not essential to an indictment under Laws 1889, p. 86, c. 83, which establishes a form for a bill of indictment for perjury without using the word "feloniously," and provides in express terms that the form shall be sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 65–71; vol. 27, Indictment and Information, §§ 261–265.]

2. INDICTMENT—REQUISITES.

The General Assembly has the right to modify old forms of bills of indictment, or establish new ones, provided in each instance the charge is sufficient to apprise the defendant with reasonable certainty of the nature of the crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 91.]

3. PERJURY—INDICTMENT.

An indictment drawn up in accordance with Laws 1889, p. 86, c. 83, setting out the court, the cause, the statement alleged to be false, the scienter, and charging that defendant "did unlawfully commit perjury," sufficiently apprises defendant of the charge against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, §§ 90–94.]

4. SAME—MATERIALITY OF TESTIMONY.

In a prosecution for removng crops without having paid the rent, where the defendant claimed that he paid the rent to an assignee thereof, the landlord's testimony that he made no assignment of the rent, and did not instruct the defendant to pay it to a third party, was so material to the issue as to support a charge of perjury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 38–54.]

Appeal from Superior Court, Anson County; Councill, Judge.

Riley Harris was convicted of perjury, and he appeals. Affirmed.

Defendant was indicted and convicted for perjury on the following bill of indictment: "The jurors for the state, upon their oaths, present that Riley Harris, late of the county of Anson, on the ——— day of March, in the year of our Lord one thousand nine hundred and six, with force and arms, at and in the county aforesaid, did unlawfully commit perjury upon the trial of an action in the court of a justice of the peace in Anson county, wherein the state of North Carolina was plaintiff and Jeff. Ratliff was defendant, by falsely asserting on oath that he, the said Riley Harris, never turned over to Y. C. Allen his account and statement of rent due him, the said Riley Harris by Jeff. Ratliff as security for the payment of house rent due said Y. C. Allen, and that he never told Jeff. Ratliff to pay the same to Y. C. Allen, and that he, the said Riley Harris, never delivered to Y. C. Allen a statement of said account of rents due him by W. T. Ingram, knowing the said statement or statements to be false, against the form of the statute in such case made and provided, and against the peace and dignity of the state. Robinson, Solicitor." There was judgment on the verdict, and defendant excepted and appealed.

Clement, Asst. Atty. Gen., and H. H. McLendon, for the State. J. W. Gulledge, for defendant.

HOKE, J. (after stating the facts as above). It is chiefly urged against the validity of this conviction and sentence that the word "feloniously" is not used in the bill of indictment. The question is distinctly and properly raised both by motion to quash and in arrest of judgment, but we are of opinion that the position cannot be sustained. It has been frequently held with us that in indictments for felonies the word "feloniously" must appear as descriptive of the offense, and that no other or equivalent term will suffice. This principle, however, does not obtain where the Legislature otherwise expressly provides, and so it is here. Our

Revisal of 1905, c. 80, § 3247, establishes a form for a bill of indictment for perjury, and enacts in express terms that this form shall be sufficient. The statute does not make the word "feloniously" a part of the bill, and it does not appear in the form set out, and the same is therefore no longer required. The General Assembly has the undoubted right to enact legislation of this character to modify old forms of bills of indictment, or establish new ones, provided the form established is sufficient to apprise the defendant with reasonable certainty of the nature of the crime of which he stands charged. "To be informed of the accusation against him" is the requirement of our Bill of Rights; and, unless such legislation is in violation of this principle, or in contravention of some express constitutional provision, it should and must be upheld by the courts. The act in question is open to no objection of the kind suggested. "Did unlawfully commit perjury" is the descriptive part of the charge required by the statute, giving in addition the court, the cause, the statement alleged to be false, with proper averments, also, as to the scienter, and by the terms of such bill, therefore, the defendant is fully notified of the charge made against him, and the present indictment, following with exactness the form established by the law, the objection of the defendant must be overruled. State v. Hester, 122 N. C. 1047, 29 S. E. 380; State v. Moore, 104 N. C. 743-751, 10 S. E. 183; Commonwealth v. Freelove, 150 Mass. 66, 22 N. E. 435; Cooley on Constitutional Lim. (7th Ed.) p. 382, note 3, and page 436, note 2. The form established by the statute has been expressly approved in several decisions of this court. State v. Thompson, 113 N. C. 638, 18 S. E. 211; State v. Gates, 107 N. C. 832, 12 S. E. 319; State v. Peters, 107 N. C. 876, 12 S. E. 74.

Our attention has been called by counsel to the cases of State v. Bunting, 118 N. C. 1200, 24 S. E. 118, and State v. James Shaw, 117 N. C. 764, 23 S. E. 246. These cases were indictments for perjury, in which it was expressly held that the term "feloniously" was required to make a good bill of indictment for this offense. Both of them, too, were on indictments instituted after the statute, which established the form followed in the present bill. The court, however, in rendering these decisions, was evidently not advertent to the statute above referred to for the reason probably that it does not appear in the General Code of 1883, and was therefore not called to their attention; the statute having been enacted at a subsequent session, and being chapter 83, p. 86, Laws 1889. This law we hold to be controlling on the question, and the cases cited are overruled.

It is further contended that the bill is defective for that the matter alleged therein to be false is not material, and objection is made on this account to the form of the bill and to the testimony offered in support of the charge as laid; but this objection is without merit. It is undoubtedly a correct position that one of the essentials in a charge of "perjury" is that the matter alleged to be false must be material. The conclusion is sound, but the premise is defective, or rather it is nonexistent, for the alleged testimony was material. It was given in a criminal action in which the present defendant as landlord was prosecuting one Jeff. Ratliff, a tenant, for removing crops without having paid the rent. Ratliff's defense was that the defendant's claim for rent had been assigned by him to one Y. C. Allen, and that he, Ratliff, had paid the claim or adjusted it with the assignee. This testimony, tending, as it did, to establish the assignment of defendant's claim as landlord, was not only material, but directly relevant to the issue, and the judge below made a correct ruling on defendant's objection.

There is no error, and the judgment of the lower court is affirmed.

No error.

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(145 N. C. 334, 335)

## NELSON v. HUNTER.

(Supreme Court of North Carolina. Sept. 12, 1907. On Motion to Modify Judgment Oct. 30, 1907.)

1. APPEAL—SECOND REHEARING.

A second rehearing is permissible only when, on the first rehearing, the court has reversed or materially changed the opinion sought to be reheard.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3214.]

2. SAME — JUDGMENT — MODIFICATION — APPLICATION.

Where a second application for a rehearing was unsustainable as such, but asked for a modification of the judgment, it would be treated as a motion for modification.

3. SAME—JURISDICTION.

Where a petition to the Supreme Court for a rehearing was dismissed, and the judgment appealed from affirmed, the court at the next term has no jurisdiction to modify the judgment for error.

On application for rehearing. Application treated as motion to modify judgment, and denied.

For former opinions, see 53 S. E. 439, 56 S. E. 506.

W. J. Peele, for defendants.

PER CURIAM. This is in form an application for a rehearing, but as such it cannot be entertained, as there was a rehearing at last term which reaffirmed the opinion at the previous term. A second rehearing is permissible only when, on the first rehearing, we have reversed or materially changed the opinion that was sought to be reheard, as in Elmore v. Railroad, 132 N. C. 865, 44 S. E. 620. But, on examining the petition, we find that notwithstanding its prayer it does not call in question the rulings of law in the opinion, but, taking them as conclusive, asks that the judgment based thereon be

modified. It is ordered therefore that it be treated as a motion to correct and modify the judgment, and set down to be heard at the morning hour, Tuesday October 1st, at the beginning of the call of the Sixth district to which it belongs; that notice of this order be given to both parties who will file printed briefs, and that 10 minutes will be allowed each side for oral argument.

BROWN, J. The defendants move the court to re-examine the record in the above-entitled action and determine if they are not entitled to share with the plaintiff in the distribution of their intestate's estate. This cause first came before this court at spring term, 1906, upon appeal from the judgment of the superior court. The entire record was reviewed, all the exceptions of defendants were passed upon, and the judgment of the lower court affirmed. 140 N. C. 599, 53 S. E. 439. At the succeeding term, in apt time, the defendants filed a petition to rehear, and, the petition having been favorably acted upon according to our rules, the appeal was again heard, and after due consideration the original judgment was again affirmed, in an opinion filed February 26, 1907. 144 N. C. 763, 56 S. E. 506. In the original opinion it is said "the plaintiff claims the property as the only legitimate child of Jackie Nelson. The defendants claim to share with plaintiff as the illegitimate children of Jackie." It would seem from reading the original record in this case that the question at issue was the right of the plaintiff to the entire estate of Jackie Nelson in the hands of the administratrix, to the exclusion of the defendants. The judgment of the superior court awarded it to plaintiff in the following language: "It is therefore ordered and adjudged that the said Charles S. Nelson is the only legitimate child of Jackie Nelson, and as such is entitled to the entire estate of his mother, Jackie Nelson, after the payment of the debts thereof and the costs of administration." This judgment, after due consideration of the several exceptions presented in the record, has been twice affirmed by this court.

It is upon the hearing of this motion for the first time contended (quoting from the brief of the defendants) "that in the case of real estate the bastard can never inherit from the mother if she have legitimate issue, for the statute says: 'When there shall be no legitimate issue,' etc. But these words do not appear in Code, § 1486 (Revisal 1905, § 136), and it would, therefore, seem that the legitimate and illegitimate children would all share alike in the distribution of the personal estate of the mother. I do not find that this has been passed upon by the court—therefore it must be taken cum grano salis." Mordecai's Law Lectures, pp. 1187–1188. We regret that we are debarred from considering this interesting question so ably presented in the argument of Mr. Peele, but the case passed out of this court at the last term when the petition to rehear was dismissed and the judgment of the superior court affirmed. We have now no jurisdiction over it, and no power to change or modify the final judgment of that court. This court has said that "the court has no power to amend or modify the final decree entered at last term upon an application like this. After final judgment the court cannot disturb it unless upon an application to rehear, or for fraud, accident, or mistake alleged in an independent action." Again: "The practical effect of granting the prayer of the petitioners would be to give them the benefit of a rehearing upon a summary application to change the final decree at a term of the court subsequent to that at which it was granted. We are not aware of any rule of procedure or practice that warrants such action." Ruffin v. Harrison, 91 N. C. 398. To same effect are Cook v. Moore, 100 N. C. 294, 6 S. E. 795, 6 Am. St. Rep. 587; Moore v. Hinnant, 90 N. C. 163.

The motion is denied.

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(145 N. C. 460)

## STATE v. JONES.

(Supreme Court of North Carolina. Nov. 6, 1907.)

1. INDICTMENT — MISDEMEANORS — NECESSITY OF INDICTMENT.

Pub. Laws 1907, p. 857, c. 573, creates the recorder's court at Winston for the trial of petty misdemeanors, giving a right of appeal to the superior court. Section 5 of the act makes larceny of goods less than $10 a petty misdemeanor. The defendant, convicted in the recorder's court of stealing $3 worth of goods, appealed to the superior court, was tried de novo, found guilty, and appealed. *Held*, that no indictment was required to try the cause in the superior court.

2. SAME.

When a case is tried in the superior court on appeal from a justice of the peace, no indictment is required.

Appeal from Superior Court, Forsyth County; Ferguson, Judge.

William Jones was convicted of a misdemeanor, and he appeals. Affirmed.

Asst. Atty. Gen. Clement, for the State.

PER CURIAM. By chapter 573, p. 857, Pub. Laws 1907, the recorder's court was created at Winston for the trial of petty misdemeanors, but with right of appeal to the superior court. By section 5 of said act larceny of goods less than $10 was made a petty misdemeanor. The defendant, convicted in said court on a charge of petty misdemeanor in stealing shipstuffs, of the value of $3, appealed to the superior court, and, being put on trial de novo, objected because no indictment against him had been returned by a grand jury. The judge overruled the exception, the defendant excepted, and, there being a verdict of guilty, appealed.

There is no error. The same point has been fully discussed and settled in State v.

Lytle, 138 N. C. 738, 51 S. E. 66. In like manner, when a case is tried in the superior court on appeal from a justice of the peace, no indictment is required. State v. Quick, 72 N. C. 243; State v. Thornton, 136 N. C. 616, 48 S. E. 602.

No error.

(145 N. C. 354)

## BROCKENBROUGH v. MUTUAL RESERVE LIFE INS. CO.

(Supreme Court of North Carolina. Nov. 6, 1907.)

EQUITY—LACHES—LAPSE OF TIME.

Defendant, a mutual life insurance company, of which plaintiff was a member, in 1897 adopted a resolution assessing plaintiff according to the table for attained age indorsed on his policy. He paid the first assessment on this basis under protest, and thereafter paid such assessments without objection until February, 1899, when he dropped out of the company without making any complaint or demand. In January, 1906, he instituted an action for wrongful cancellation of his policy. *Held* that, although limitations had not run in favor of the defendant, a nonresident, plaintiff, by his delay of seven years, was estopped to assert any rights under the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 204–209.]

Walker and Connor, JJ., dissenting.

Appeal from Superior Court, Mecklenburg County; Peebles, Judge.

Action by C. H. Brockenbrough against the Mutual Reserve Life Insurance Company to recover damages for the cancellation of an insurance policy. From a judgment for defendant, plaintiff appeals. Affirmed.

Chase Brenizer, for appellant. John W. Hinsdale, for defendant.

CLARK, C. J. On December, 15, 1897, the defendant adopted a resolution under which it would assess the plaintiff according to the table for "attained age" indorsed on his policy. He paid the first assessment made upon that basis under protest, and thereafter paid them without objection till an assessment was levied February 1, 1899, when he quietly and silently dropped out, making no complaint or demand, till the summons was issued in this action January 18, 1906. In Green v. Insurance Co., 139 N. C. 812, 51 S. E. 887, 1 L. R. A. (N. S.) 623, it is said that "the plaintiff voluntarily ceased payment and abandoned his policy. He cannot be heard to ask damages for its cancellation. Insurance Co. v. Phinney, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088; Insurance Co. v. Sears, 178 U. S. 347, 20 Sup. Ct. 912, 44 L. Ed. 1096; Ryan v. Insurance Co. (C. C.) 96 Fed. 796. In every case where damages have been allowed for the cancellation of a policy of insurance it was alleged and proved that the cancellation was wrongful. Braswell v. Insurance Co., 75 N. C. 8; Lovick v. Life Ass'n, 110 N. C. 93, 14 S. E. 506; Burrus v. Insurance Co., 124 N. C. 9, 32 S. E. 323; Hollowell v. Insurance Co., 126 N. C. 398, 35 S. E. 616; Strauss v. Life Ass'n, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; Simmons v. Life Ass'n, 128 N. C. 469, 39 S. E. 966. His motive, or the method of reasoning by which he arrived at his conclusion to abandon his policy, was irrelevant."

It is true that the statute of limitation does not run in favor of the nonresident defendant (Green v. Insurance Co., supra), but the plaintiff, having abandoned his policy and stopped payment thereon in February or March, 1899, cannot be heard to assert any rights thereunder in this action, nearly seven years thereafter. He is estopped by his abandonment and delay. 2 Pom. Eq. § 818, says upon this head: "This species of estoppel, as well as other kinds, which consist of affirmative acts or representations, applies to corporations in their dealings with third persons and with their own stockholders. Conversely, stockholders may be estopped by their acquiescence from objecting to the acts of the corporations which are not illegal or mala prohibita, but ultra vires. When the rights of innocents third parties have intervened, express assent is not necessary to estop the stockholders. When they neglect to promptly and to actively condemn the unauthorized act and to seek judicial relief after knowledge of its being done, they will be deemed to have acquiesced and will be estopped as against innocent third persons." To same purport many other authorities can be cited. An insurance company exists by means of the payments it receives. These must be regular that it may meet its liabilities. A member cannot drop out, disregard his duties, and make no payments for nearly seven years, and then assert by action a claim that the other members be assessed to pay him what possibly he might have recovered, if he had asserted his claim in apt time. Many thousands of new members have come in who ought not to have the fund, created almost, if not entirely, of payments made since the plaintiff dropped out, subjected to payment of claims of which they had no notice, and which may be thousands in number, and aggregate hundreds of thousands of dollars in amount. If seven years' acquiescence and nonpayment of assessments do not estop the plaintiff, then there is no limit of time or of nonpayment that will bar. No one would be safe in becoming a member of a mutual life insurance company under such circumstances. "Leges subveniunt vigilantibus non dormientibus." The court properly sustained the demurrer to the evidence.

No error.

WALKER, J. (dissenting). The defendant contracted to insure the life of the plaintiff for the benefit of his wife on March 10, 1888, for the sum of $5,000, in consideration of an admission fee, annual dues, and death fund assessments to be levied from time to time and called mortuary premiums, which were payable at stated intervals, the amount of the

premium varying according to the number of death losses, and depending upon the "sum which the executive committee may deem sufficient to meet the existing claims by death" for the period immediately preceding the date of the assessment, but the rate of assessment was fixed at $1.20 per $1,000 of insurance, that being the rate fixed by the schedule as of his then attained age, 34 years, the maximum amount to be collected annually being $11.77 on each $1,000 of insurance. This was to be the permanent rate. The plaintiff paid the admission fee, the annual dues, and the assessments regularly for more than 17 years, when the defendant, without his consent, and, as will appear hereafter, against his protest, which was made when he was apprised of the fact, changed the rate of assessment by increasing it in June, 1895, and again in January, 1898, not content with having once grossly and arbitrarily violated its contract with the plaintiff, the terms of which had been clearly and irrevocably settled by itself in the contract, the defendant again raised the rate of assessment considerably and much higher in proportion than the increased rate of 1895. The plaintiff then protested against the increase of his rate, which the company had solemnly agreed should remain at the figure stated in the schedule for his age of entrance as a member of the company, telling the defendant at the time that he considered the increase as illegal. The company notified him that, if he did not pay what was clearly an extortionate amount, his policy would be forfeited, and, under the compulsion of this unwarranted and inexcusable threat and under his protest, he continued to pay the unlawful assessments for the short period of the year 1898 between March and December, when he refused to pay any longer. He testified that he thought the assessment was illegal, but he paid under protest because the company threatened, in its notice to him, that, if he did not pay the assessments, his policy would be forfeited, and that he thought his protest against the illegality of the increase was sufficient to protect him. He was corroborated by the agent of the company to whom he paid the assessments. And yet it is decided that the plaintiff is equitably estopped to recover damages for this arbitrary conduct of the company and its willful breach of the contract, because, having paid the increased premium for a few months, under protest, he refused in January to be longer imposed upon by the defendant through its illegal exactions or to be intimidated by its threats, and failed after January, 1899, for a few years, or until this action was brought, to pay the unlawful assessments. It is said that these premiums are necessary to the continued existence of the company. Surely it cannot be meant that the law regards illegal assessments in this light. But there is one thing that is essential to the maintenance of insurance companies of every kind and of every other legitimate enterprise, and this is honesty and integrity in the administration of its affairs, and recent events have convinced us, more and more, if we needed any such proof, of the truth of the assertion. And I may say that it applies with peculiar force to insurance companies, as the contract on the company's part is to be performed at a time when the member or policy holder may not be present to vindicate his rights, or those of the beneficiary or object of his bounty, under the contract. He must rely very largely upon the good faith of the company, and, unless by a careful regard for their obligations, a strict compliance with their engagements and a faithful fulfillment of their promises, the confidence of those whose patronage they seek, is secured, they will in very truth find their career eventually cut short for the lack of premiums to pay expenses, much less of profits.

With profound respect for my Brethren, from whom I greatly differ, the doctrine of equitable estoppel has nothing to do with the facts of this case, when they are properly considered, than the doctrine of contingent remainders. To apply it will produce the very wrong which was sought to be avoided when it was first adopted. It is founded, in part, upon the maxim of the law that no man shall be permitted to take advantage of his own wrong; and yet, if it is to control the decision in this case, the defendant will be permitted to do that very thing. In Farmers' Ins. Co. v. Knight, 162 Ill. 470, 44 N. E. 834, decided by a court whose opinions are entitled to the greatest weight, it was said: "The evidence introduced on the trial tends to prove that the managers of the insurance company for several years in making assessments did not adhere to the statute, and that in a number of cases more money was raised than was at the time required to meet losses. But these violations of the statute did not ripen into a right; nor are we aware of any principle which would preclude a policy holder of the insurance company from calling in question the validity of an assessment, although he may have previously paid assessments which did not conform to law. We do not think the doctrine of estoppel applies to such a case." Our case is even stronger than that one, because here the managers did not merely raise more than was necessary to pay losses, but actually made a radical change in the contract. In other words, repudiated the contract with the plaintiff and attempted by threats and compulsion to substitute one of its own.

But I now cite a case which seems to be exactly in point. The court said in Covenant Mutual Life Ass'n v. Tuttle, 87 Ill. App. 328: "In 1895 another change was made in the manner of assessing. The group plan was abolished, and each member was assessed according to the estimated cost of his insurance at the time he entered the society, and he was also assessed not only to pay death

losses, but also for the purpose of creating a permanent fund. Rather than take the possible chances of having his certificate forfeited and losing his insurance, Tuttle paid these assessments. Now this is the extent of his supposed wrongdoing, upon which is predicated the right of invoking the doctrine of estoppel against appellee. Can it be that because appellant violated its contract on former occasions by making illegal assessments, and Tuttle did not take the chance of having his certificate forfeited by refusing to pay them, that he or his beneficiary is estopped from denying the legality of assessment No. 149, which was for an amount so largely in excess of any previous assessment? We think not. He might have been content to pay a small increase on his original contract rate; and because he did so shall it be said he was therefore bound to pay an amount ten times as great? We think to so hold would be unreasonable, and would be permitting the wrongdoer to invoke the doctrine of estoppel against the party injured. This, we think, ought not to be done. The doctrine of estoppel, when properly applied, is founded upon the highest principles of morality, and recommends itself to the common sense and justice of every one. Herman on Estoppel, p. 291, § 272. Equitable estoppels, or estoppels in pais, only arise when the conduct of the party estopped is fraudulent in its purpose or unjust in its results. Herman, p. 335, § 321. Or, as the rule is otherwise stated: 'Where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.' Bigelow on Estoppel, 433, 434. It certainly cannot be said that Tuttle in paying previous illegal assessments acted fraudulently, or that he willfully did anything calculated to mislead others to their injury. When he paid illegal assessments, he did so under a moral compulsion, and the threat, implied at least, that, if he did not pay, his certificate would be forfeited, and the provision made for his wife in the event of his death be thereby lost. Did this conduct on his part warrant appellant in increasing Tuttle's assessments tenfold? In other words, can appellant thus be permitted to take advantage of its own wrong? Would this commend itself to the common sense and justice of every one, or be in accordance with the highest principles of morality, upon which the doctrine of estoppel is said to have its foundation? We certainly think not." I must be indulged for quoting so fully from that case, because it appears to be so much like ours, and the principles stated certainly fit the facts in this record. Besides it is a clear, strong, convincing statement of the law, and, I may add, is based upon an eminently just principle. The morality of this case is all with the plaintiff, the equity surely is, and I believe the law also is. Why multiply authorities to sustain a proposition which to my mind, at least, is self-evident?

But it is suggested that he should be estopped in equity, mind you, because after paying unjust and unlawful premiums under protest for a short time after March, 1898, when the second increase of the rate of assessment was made, and after being threatened with a loss of a policy upon which he had paid the defendant premiums for many years, he refused to be longer intimidated and ceased paying until this suit was commenced? Cooley, in his Briefs on the Law of Insurance, vol. 3, p. 234, says: "As a member of a fraternal association is not liable for an assessment, unless the same is valid and made in accordance with the rules of the association and the provisions of his certificate, it naturally follows that a member's rights under his certificate are not subject to forfeiture for a failure to pay an invalid assessment. This being the rule, the burden is on an association, relying on a forfeiture of a certificate for nonpayment of assessments, to prove a duly authorized and valid assessment." He cites many authorities to sustain the principle, and, strange to say, they all regard it as a proposition that should be taken for granted. Margesson v. Benefit Ass'n, 165 Mass. 262, 42 N. E. 1132; Langdon v. Ben. Ass'n, 166 Mass. 316, 44 N. E. 226; Rowswell v. Eq. Aid Union (C. C.) 13 Fed. 840; Am. Mutual Aid Soc. v. Helburn, 85 Ky. 1, 2 S. W. 495, 7 Am. St. Rep. 571; Stewart v. Grand Lodge, 100 Tenn. 267, 46 S. W. 579; Miles v. Life Asso., 108 Wis. 421, 84 N. W. 159; Shea v. Mass. Ben. Ass'n, 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475; Coyle v. Benefit Society (Ky.) 2 S. W. 676. In Illinois the matters involved in this case have been frequently before the courts, and invariably have they decided against the contention now made by the defendant. N. L. Assur. Co. v. Erlenkoetter, 90 Ill. App. 99; Life Society v. Wilson, 91 Ill. App. 667; Tourville v. Brotherhood, 54 Ill. App. 71; Order of Chosen Friends v. Austerlitz, 75 Ill. App. 74; P. R. C. Union v. Warczak, 82 Ill. App. 351. See, also, Murphy v. Life Ass'n (C. C.) 114 Fed. 404. These authorities and many others to the same effect, which could be cited, variously state the governing principle, as follows: A member of a beneficiary association is not bound by an illegal assessment, and no forfeiture can be insisted upon because of its nonpayment. Life Society v. Wilson, 91 Ill. App. 667. The corporate rights of a member of an insurance company may be subject to the control of the corporation, but his rights as a party insured rest on the contract (Bragaw v. Supreme Lodge, 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602), and, when the party is not bound by an assessment, because made in violation of his contract, he does not forfeit his insurance, and

such a forfeiture can rest only upon strict legal right, and it must abide inflexibly the terms of the contract. 90 Ill. App. 99; 100 Tenn. 267, 46 S. W. 579. A benefit association has no right to cancel insurance for failure to pay an illegal assessment, and the fact that earlier calls under the same assessment have been made and paid does not enlarge the contract or justify the association in declaring a forfeiture, nor does it constitute any defense by way of estoppel or otherwise. 165 Mass. 262,[1] and 166 Mass. 316.[2] A benefit association claiming that a membership certificate has been forfeited by failure to pay an assessment must show affirmatively that the assessment was imposed in exact accordance with the insurance contract, otherwise its defense must fail. 108 Wis. 421, 84 N. W. 159, and 13 Fed. 840. A legal assessment and proper call are treated by the law as conditions precedent to the right to declare a forfeiture upon a subsequent refusal by the member to pay. 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475; 114 Fed. 404; 100 Tenn. 267, 46 S. W. 579. So strict is this rule that the association is not even allowed to show that its new plan of assessments is more equitable than the old, because it is bound by the contract of insurance as ascertained from its charter and the agreement with the member. 85 Ky. 1, 2 S. W. 495, 7 Am. St. Rep. 571. An offer to pay the illegal assessment constitutes no more than a waiver of notice that it has been made, and is no waiver of matters affecting its regularity or validity, and it is no estoppel. 100 Tenn. 267, 46 S. W. 579. Until a member is in default, he cannot be suspended or his right forfeited. It is incumbent upon the association to prove that unpaid assessments were legally made and due, and there is no default by reason of nonpayment of them, or any of them, until this appears. The company must act first, and take the burden of proof, and not the member. 82 Ill. App. 351. Forfeitures are not favored by the law, and an association insisting upon one must make clear proof, and show that it has acted regularly and legally before it can call upon the member to prove anything. If there has been an illegal assessment, there can be no forfeiture when the member has simply ceased to pay. 75 Ill. App. 74. The association will not even be permitted to allege a forfeiture for failure to pay an assessment, unless it appears affirmatively at the same time by proper averment that it has proceeded legally in levying, and, in the absence of such allegation and proof, a tender of the amount of the assessment is, of course, unnecessary. 54 Ill. App. 72. Lastly and convincingly, in a contract of mutual benefit insurance the member acts for himself, and not as a part of the society. His rights rest upon his contract of insurance, and not upon his contract of membership in the society. A corporator in a mutual benefit society, like a stranger, may enter into a contract of insurance with it, and his rights under the contract will be as fully protected as those of a stranger. A member of such a society in paying previous illegal assessments cannot be said to have acted fraudulently, or willfully to have done anything calculated to mislead others to their injury, so as to equitably estop himself from questioning subsequent illegal assessments and refusing to pay the same. 87 Ill. App. 309. It is well settled that no forfeiture can be established, except for a violation of the precise terms and conditions laid down in the laws of the society and the contract, and, if an assessment be levied illegally, the member is under no obligation to pay it, nor are his rights in the least affected by its nonpayment. Bacon on Benefit Societies (3d Ed.) § 377. This last statement of the law is supported by the citation of numerous cases in the notes to section 377. I might cite authorities indefinitely stating this proposition one way or another, but they all come to this: That a wrongdoer cannot take advantage of his own wrong, and avail himself of so just a doctrine as that of equitable estoppel to enable him to do so. That principle was introduced into equity jurisprudence to prevent wrong, and not to encourage or promote it, and, further, it does not apply in favor of a benefit association seeking to forfeit insurance with one of its members for nonpayment of assessments when the latter has not been imposed according to his contract or the law.

It is not necessary for me to argue that the defendant has violated its contract of insurance with the plaintiff. It has made such a fundamental change in it as to relieve him from paying any assessment until it restores him to his rightful position as a member of the company under his contract. Strauss v. Life Ass'n, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; s. c., 128 N. C. 465, 39 S. E. 55, 54 L. R. A. 605, 83 Am. St. Rep. 699. It had no power to violate the contract or to injuriously affect vested rights. Bragaw v. Supreme Lodge, 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602; Makely v. Legion of Honor, 133 N. C. 367, 45 S. E. 649; Sherrod v. Insurance Co., 139 N. C. 167, 51 S. E. 910.

It seems to me that the decision in this case is in conflict with two well-considered precedents in this court. Upon the question of estoppel, or waiver, it sets aside the principle stated and applied in Makely v. Legion of Honor, 133 N. C. 367, 45 S. E. 649. It was there said that no proof had been offered of an intentional waiver, and "he [plaintiff] received nothing from defendant in consideration of any implied waiver." The plaintiff had paid and continued to pay according to the change made by the society. As to the question of estoppel, it was decided in Strauss v. Life Ass'n, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699, that, when the defendant broke the contract

[1] 42 N. E. 1132. [2] 44 N. E. 226.

of insurance, the plaintiff had the right to cease paying the illegal assessments and could recover his damages for the breach, which, in that case, it was said, should be measured by the amount of premiums and dues paid by him. Whether this is in principle the correct rule for assessing the damages it is not necessary for me now to say. It is the right of the plaintiff to recover, and not the quantum of his damages, that I am discussing. The decision in Green v. Insurance Co., 139 N. C. 312, 51 S. E. 889, 1 L. R. A. (N. S.) 623, so much relied on by the majority, has no bearing upon this case. It was decided upon a principle which has nothing whatever to do with the facts of our case. I admit that when a party "voluntarily" and wrongfully abandons his policy, as the plaintiff did in Green's Case, he cannot recover. Nobody will gainsay that proposition. In that case the decision is put expressly upon the ground that it did not appear that the insurance company had violated its contract. It was simply a case where the defendant lawfully laid assessments, and the plaintiff without any legal excuse refused to pay them. And the other cases, which are cited in the opinion of the court with Green's Case, are to the same effect. It is not denied and cannot be that there was a clear and willful breach of the contract in our case. It does not appear that anybody has, in fact, been prejudiced by the action of the plaintiff, if that is a relevant inquiry. The case was tried on the plaintiff's proof alone, and he was nonsuited. We are confined to that proof, and it is to be taken as true. The plaintiff protested against the increase of the assessment, and his subsequent payments were, of course, covered by the protest. He was not protesting against payments, but against the illegal action of the society in raising the assessment so as to increase his payments. His payments therefore did not estop him upon any principle of the law, and certainly not upon the authorities. He had the right to stop paying at any time under an illegal assessment, and to continue to refuse to pay, as he did, until a proper assessment was made. He was not bound to make any tender for two reasons: First, because the assessment was excessive and illegal; and, second, because he could not know the amount until there was a lawful assessment.

It does not lie in the mouth of the defendant to say that it did not know why Mr. Brockenbrough had refused after December, 1898, to pay the assessments. He distinctly and positively protested against the increase of the rate, the gross violation of its contract with him, and its arbitrary conduct, and paid for a short time under this protest, and the constant threat that he would lose the benefit of the insurance if he failed to pay when called upon by the society for the money. This was done, as he says, by reason of the threat and perhaps also in the hope that, upon reflection, the defendant would see the error of its way and repent of the grievous wrong it had done. His refusal to submit to its illegal exactions any longer is the same as if he had resisted the unlawful action of the society in the beginning and continued to do so, and we have seen that, by the highest authority, he is not to be prejudiced, either by the payment under protest or by the failure to pay that which he did not owe.

It is strange that, upon the facts appearing in the record, the defendant, who has been, from the beginning of the transaction to the end, in the wrong, can successfully resist the plaintiff's recovery. My conclusion is that the nonsuit should be set aside, and the plaintiff be allowed to recover the amount of his damages to be fixed by the jury under the principles of law applicable to that phase of the case.

CONNOR, J., concurs.

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(145 N. C. 397)

## McDUFFIE v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Nov. 6, 1907.)

CARRIERS—CARRIAGE OF GOODS—FURNISHING CARS—RULES OF CORPORATION COMMISSION.

A written application by a shipper to a carrier for a freight car to be furnished within two days is not a compliance with rule 9 of the Corporation Commission, requiring carriers of freight to furnish cars within four days upon application in writing therefor; and hence a carrier to whom such application was made incurred no penalty for failure to comply therewith.

Appeal from Superior Court, Chatham County; Webb, Judge.

Action by T. J. McDuffie against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Reversed.

Action to recover a penalty for failure to furnish cars as provided by rule 9 of the Corporation Commission. The court submitted these issues: "Did the plaintiff apply in writing for the car as alleged? A. Yes. Did the defendant fail to furnish the car as alleged? A. Yes; 23 days. What amount is plaintiff entitled to recover? A. $23, including Sundays."

Day, Bell & Allen and Womack, Hayes & Bynum, for appellant.

BROWN, J. The provision made by the Corporation Commission to compel carriers of freight to furnish cars within four days, as embodied in rule 9 of the commission, has been superseded by Acts of Assembly 1907, p. 253, c. 217, § 3, which went into effect July 1, 1907, after plaintiff's alleged cause of action accrued. The learned counsel for the defendant contends, in an argument of much force: (1) That the regulation is unreasonable, in that it fixes an arbitrary time within which the cars are to be furnished, allows no excuse or exception, and fixes no limit to the penalties that may be incurred; (2) that the commission had no power to make it;

(3) that the shipper himself did not comply with it.

It is true, as contended, that the Supreme Court of the United States did hold a statute of Texas unconstitutional and void which required railroad companies to furnish cars within six days in unlimited numbers, within a time arbitrarily fixed by the statute, and without regard to the circumstances or facilities of the company. Houston & Tex. Railroad v. Mayes, 201 U. S. 329, 26 Sup. Ct. 493, 50 L. Ed. 772. In commenting upon the unreasonableness of the statute, the court says: "It makes no exception in cases of a sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts, or other unavoidable consequences of heavy weather." In that case the court held it to be an unreasonable regulation of interstate commerce. In this case the car was not to be used in such commerce, but wholly within the state, viz., for transporting logs from Colon, N. C., to Raleigh, N. C. Whether we will follow the persuasive force of that authority in passing upon a matter of intrastate commerce we need not and do not now determine. Nor need we pass upon the power of the commission to make such a rule, as we are with the defendant upon his third proposition.

In this case it appears that the plaintiff applied in writing on January 3d for a car to be furnished "by January 5, 1907." The rule allows the carrier four days in which to furnish cars to those who apply in writing and make the deposit. This application required the car to be furnished within two days. The defendant was not, therefore, required to fill it, and incurred no penalty for its failure to do so. The plaintiff is not entitled to recover, and the defendant's motion should have been granted. Let the action be dismissed.

Reversed.

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(145 N. C. 399)

McDUFFIE et al. v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Nov. 6, 1907.)

Appeal from Superior Court, Chatham County; Webb, Judge.

Action by T. J. McDuffie and another against the Seaboard Air Line Railway. From a judgment for plaintiffs, defendant appeals. Reversed.

Civil action to recover a penalty under rule 9 of the Corporation Commission, for failure to furnish a car.

Day, Bell & Allen and Womack, Hayes & Bynum, for appellant.

BROWN, J. The record discloses that the order for the car is dated December 8, 1906, and requires that the empty car be furnished by December 10, 1906. For the reasons given in McDuffie v. Railway (at this term) 59 S. E. 122, the plaintiff is not entitled to recover, and defendant's motion should have been granted. Let the action be dismissed.

Reversed.

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(145 N. C. 367)

BLACKWELL'S DURHAM TOBACCO CO. v. AMERICAN TOBACCO CO. et al.

(Supreme Court of North Carolina. Nov. 6, 1907.)

1. CORPORATIONS — FOREIGN CORPORATIONS — RIGHT TO DO BUSINESS IN STATE—COMITY.

In the absence of any prohibitive statute, a corporation having its domicile of origin or creation in one state has, as a matter of comity, the right to carry on its corporate business and perform its corporate functions in any other state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2490, 2494.]

2. SAME—CORPORATE NAME—USE BY OTHERS—INJUNCTIVE RELIEF.

Where a foreign and a domestic corporation both have the same corporate name, the latter cannot, it would seem, sue to enjoin the former from using such name within the state and doing business therein, unless the corporate rights of the domestic corporation were in existence before the foreign corporation committed the acts against which the relief is sought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2551.]

3. SAME.

A corporation may acquire an exclusive right to the use of its corporate name and when so acquired, its use will be protected by injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 137.]

4. SAME.

A domestic corporation did not acquire by the mere adoption of a corporate name the exclusive right to use the same or such a property right as would be protected by injunction in the absence of actual user.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 129, 137.]

5. INJUNCTION — PLEADING — BILL—REQUISITES.

In an action for injunction, plaintiff is required to make a full, fair, and frank statement of the essential facts upon which its right is based showing to the court upon demurrer that he has a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 223–242.]

6. CORPORATIONS — FOREIGN CORPORATIONS — RIGHT TO DO BUSINESS—COLLATERAL INQUIRIES.

The right of a foreign corporation to do business in the state in violation of the statutory requirements in such cases cannot be raised collaterally by private persons, unless there is something in the statute, expressly or by necessary implication, authorizing them to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2559.]

7. SAME—EQUAL PROTECTION OF LAWS.

So long as foreign corporations are permitted to be within the state either by compliance with the laws or as a matter of comity, they are entitled to have the laws of the land administered so that they have equal protection and equal justice done them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2530.]

Clark, C. J., dissenting.

Appeal from Superior Court, Durham County; Biggs, Judge.

Action by the Blackwell's Durham Tobacco Company against the American Tobacco Company and others, to restrain the use by defendants of plaintiff's corporate name. From an order of the superior court of Durham county vacating and quashing an order of the district court for the examination of the defendants, and the production of their books, plaintiff appeals. On appeal defendants demurred ore tenus, and moved the court to dismiss the action. Motion allowed, and action dismissed.

See 57 S. E. 5.

This action is brought by plaintiff against defendants, American Tobacco Company, Blackwell's Durham Tobacco Company (of New Jersey), C. W. Toms, W. W. Flowers, Geo. W. Watts, and D. W. Andrews. So much of the complaint, as is material to the decision of the appeal, is in the following language:

"(1) That the plaintiff, Blackwell's Durham Tobacco Company, is a corporation duly created, organized, and existing under and by virtue of the laws of the state of North Carolina, with its principal office at Durham, in the county of Durham, state of North Carolina, and was so chartered and organized for the purpose of buying, manufacturing, and selling tobacco in its various forms, including smoking tobacco, at Durham, within the county of Durham, in said state of North Carolina.

"(2) That the defendant, the American Tobacco Company, is a corporation created, organized, and existing under and by virtue of the laws of the state of New Jersey, and is engaged in the business of buying, manufacturing, and selling tobacco in various forms, including smoking tobacco and cigarettes, at Durham, in the county of Durham, in said state of North Carolina.

"(3) That the defendant, Blackwell's Durham Tobacco Company (of New Jersey), is a corporation, created, organized, and existing under and by virtue of the laws of the state of New Jersey, as the plaintiff is informed and believes, and the plaintiff alleges that the said Blackwell's Durham Tobacco Company (of New Jersey) is engaged in the manufacture of smoking tobacco under said alleged corporate name of Durham, in the county of Durham, in the state of North Carolina, and in the sale thereof in the manufactured condition under the aforesaid alleged corporate name of 'Blackwell's Durham Tobacco Company.'

"(4) That the defendant, Blackwell's Durham Tobacco Company (of New Jersey) is not a copartnership, and is not a corporation of the state of North Carolina, and there is no other existing corporation of this state, except the plaintiff, which has the corporate name of 'Blackwell's Durham Tobacco Company,' and if said defendant is a legal corporation at all, created and organized under any other state or government, the plaintiff is informed, and is advised by counsel learned in the law, and believes and so alleges, that the defendant, Blackwell's Durham Tobacco Company (of New Jersey), has never complied with the corporation laws of the state of North Carolina in that behalf made and provided, nor become domesticated as a North Carolina corporation, and it is not therefore authorized, but is expressly forbidden, by the laws of the state of North Carolina to do the business aforesaid, or any other business at Durham, in the county of Durham, or elsewhere within the state of North Carolina, under the aforesaid corporate name of 'Blackwell's Durham Tobacco Company' and the said defendant, 'Blackwell's Durham Tobacco Company' (of New Jersey), has been, and is now, unlawfully doing the aforesaid business of manufacturing and selling smoking tobacco at Durham, in the county of Durham, in said state of North Carolina, under the identical name of the plaintiff, in violation of the laws of this state, and in violation of the plaintiff's corporate rights in the premises, to the plaintiff's irreparable injury and damage.

"(5) That, as plaintiff is informed and believes, and so alleges, the defendant, the American Tobacco Company, under and pursuant to some business arrangement, contractual agreement, combination of business interests, or trust understanding between it and its codefendants, said Blackwell's Durham Tobacco Company (of New Jersey), the terms of which said business arrangement, contractual agreement, combination of business interests, or trust understanding are unknown to the plaintiff, has been, and still is, aiding and assisting and co-operating with the defendant, Blackwell's Durham Tobacco Company (of New Jersey), in the aforesaid unlawful and unauthorized business of manufacturing and selling smoking tobacco at Durham, in the county of Durham, and in the said state of North Carolina, in violation of the laws of this state, and in violation of the plaintiff's rights in the premises, and to plaintiff's irreparable injury and damage."

That the other defendants are residents of this state and are officers, agents, etc., of both defendant corporations. Whereupon plaintiff demands judgment: "(1) For a perpetual injunction against each and all of the defendants and their officers, agents, employés, servants and assigns, to perpetually enjoin and restrain them from using plaintiff's corporate name of 'Blackwell's Durham Tobacco Company,' or any other name so

similar thereto as to lead to uncertainty or confusion in business, at Durham, N. C., or within the state of North Carolina. (2) For such other and further relief as plaintiff may be entitled to, together with the costs of this action."

Plaintiff obtained from the judge presiding in the Ninth judicial district an order for the examination of the officers, etc., of the defendant corporations before a commissioner appointed for that purpose, and for the inspection of the books of said corporations. Defendants moved the judge to set aside and vacate the order for the reasons set out in the motion, and the notice thereof. Upon the hearing, the motion was granted, and plaintiff appealed to this court. When the case was called here for argument, defendants demurred ore tenus, and moved the court to dismiss the action for that: "(1) There are no facts alleged in said complaint impugning the right of defendant, Blackwell's Durham Tobacco Company, to use its trade-name of 'Blackwell's Durham Tobacco Company,' except that it is alleged that said defendant 'has never complied with the corporation laws of the state of North Carolina in that behalf made and provided,' nor become domesticated as a North Carolina corporation, and it is not therefore authorized, but is expressly forbidden, by the laws of the state of North Carolina to do the business aforesaid or any other business at Durham, in the county of Durham, or elsewhere within the state of North Carolina, under the aforesaid corporate name of 'Blackwell's Durham Tobacco Company.' Failure to comply with the corporation laws of said state and to become domesticated cannot be complained of by any one except the Attorney General in an action prosecuted by him in the name of the state to recover the penalty provided by the statute. (2) It is not alleged in said complaint that plaintiff corporation has ever engaged in business in the state of North Carolina, or elsewhere, and it is only by engaging in business that a corporation becomes entitled to a trade-name so as to complain of the use of that name by any one else."

Guthrie & Guthrie, for appellant. Fuller & Fuller and Junius Parker, for appellees.

CONNOR, J. (after stating the facts as above). Plaintiff's right to equitable relief by way of injunction depends upon the maintenance of several propositions. The learned counsel in his argument before us insists that, by its charter and organization "for the purpose of buying, manufacturing, and selling smoking tobacco, in its various forms at Durham, within the county of Durham," plaintiff acquired a property right in the corporate name "Blackwell's Durham Tobacco Company"; that defendant company of the same corporate name, chartered and organized in the state of New Jersey, by "engaging in the manufacture of smoking tobacco at Durham in the same county" has so injured and damaged this property right and threatens to continue to do so that plaintiff is entitled to invoke the injunctive power of a court of equity for its protection; that the continued manufacture and sale of smoking tobacco at Durham, by defendant, will work irreparable injury to plaintiff. For the purpose of discussing this phase of the controversy, the domicile of origin of defendant corporation is immaterial. In the absence of any prohibitory statute, a corporation having its domicile of origin, or, as is sometimes said, of creation, in one state, has as a matter of comity the right to carry on its corporate business, perform its corporate functions in any other state. Range Co. v. Carver, 118 N. C. 329, 24 S. E. 352. "In harmony with the general law of comity, obtaining among the states comprising the Union, the presumption should be indulged that the corporation of a state not forbidden by the law of its being may exercise, within any other state, the general powers conferred by its own charter, unless it is prohibited from doing so, either in the direct enactments of the latter state, or by its public policy, deduced from the general course of legislation, or from the settled adjudication of its highest court." Union v. Yount, 101 U. S. 356, 25 L. Ed. 888; Bank v. Earle, 38 U. S. 519, 10 L. Ed. 274; Womack, Pr. Corp. § 640. This right is, of course, subject to the power of the state to prohibit altogether or to prescribe the terms and conditions within the limitations of the federal Constitution upon which a foreign corporation may come into its borders and exercise its corporate powers. We are therefore for this purpose to regard the plaintiff and defendant corporations as exercising in a lawful manner, so far as the state is concerned, the powers conferred by their charters. It does not appear from the complaint, and upon this motion we may not find it elsewhere, which of the two corporations first acquired their charter, or whether the plaintiff acquired its charter before the defendant entered the state and engaged in the manufacture of smoking tobacco. It would seem that it was incumbent upon the plaintiff to allege that such corporate rights as it possesses and of which it invokes protection were in existence before the defendant committed the wrongs of which it complains. It is not easy to see how a corporation can successfully invoke the interference of a court of equity without alleging its corporate creation prior to the alleged wrongful act of its adversary. If, for instance, the defendant had, before the creation of the plaintiff corporation, obtained its charter under its corporate name, acquired its corporate powers organized and commenced to exercise them in this state, and in the town of Durham, it would seem that it was the folly of the incorporators of plaintiff to take the

same corporate name as that of the defendant, and that if any annoyance, inconvenience, or injury was occasioned by reason of the similarity of names, no relief could be had in a court of equity.

In Grand Lodge, etc., v. Graham, 96 Iowa, 592, 65 N. W. 837, 31 L. R. A. 133, it is said: "We do not think that a corporation can, under the statutes of this state, select a name which is then in use by some other person, or persons, and, after recording its articles, insist that this person or (these) persons must abandon the use of the name they have previously selected, and under which they are operating. If any damage results to a corporation which selects its name in this manner, it is due to its own folly and indiscretion in selecting a name which is already in existence, and which is used by another body upon which the name was originally conferred." So, in Ottoman Cahvey Co. v. Dane, 95 Ill. 203, it is said: "The fact that a corporation was organized under the laws of this state subsequent in date to the time defendant commenced business which assumed the same name under which defendants were carrying on their business could confer no right upon complainant to invoke the aid of a court of equity to restrain the defendants from the use of the name." As it does not otherwise appear from the complaint, and as the demurrer admits all allegations and reasonable inferences to be drawn therefrom, we will, for the purpose of this discussion, assume that defendant either acquired its corporate name, or that it began to engage in the business of manufacturing smoking tobacco in the city of Durham, subsequent to the corporate birth of the plaintiff. The question is thus presented whether the plaintiff has acquired, by its incorporation, the exclusive right to the use of its corporate name and to exercise its corporate powers in such name in the city of Durham, and whether it has so alleged in its complaint. That such right may be acquired, and that, when acquired, its use will be protected by the injunctive power of the court, is well settled. Brown Chem. Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; Elgin Watch Co. v. Ill. Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. "The law having authorized the selection of a name and having declared the name so selected to be the name of the corporation, we see no reason why the law should not protect the corporation in the use of that name, upon the same principle and to the same extent that individuals are protected in the use of trade-marks. Hence, it necessarily follows that corporations in the exercise of discretionary powers conferred by the statute must so exercise them as not to infringe upon the established legal rights of others." Holmes v. Holmes & Others, 37 Conn. 278, 9 Am. Rep. 324. "It is well settled that an exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual and it will be protected against infringement by another who assumes it for the purpose of deception or even when innocently used, without right, to the detriment of another, and this right, which is in the nature of a right to a trade-mark, may be sold or assigned. * * * In respect to corporate names, the same rule applies as to the names of firms and individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion, and to enable the latter corporation to obtain, by reason of the similarity of names, the business of the prior one." Higgins v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769. The property right in the name of a corporation, as in a trade-mark, is acquired not simply by adoption, but by using it. The interference of courts is based upon the principle that the use of the name, or a trade-mark already acquired and used by another, is a fraud upon the person, or corporation, whose property it has become. Lee v. Haley, L. R. 5 Ch. App. 155. "A trade-mark can be acquired only by actual user of the mark in the market. A mere intent to use particular terms or marks as a trade-mark, however clearly manifested, is insufficient in the absence of actual user." 28 Am. & Eng. Enc. 393. That incorporation does not confer such right is clearly stated and illustrated in the opinion of the present Chief Justice in Bingham School v. Gray, 122 N. C. 699 (707) 30 S. E. 304, 41 L. R. A. 243, in which he says: "That the plaintiff is incorporated as the 'Bingham School' does not give it the exclusive right to that name. Another corporation might be created by and operated under the same title, when not in the same locality, in the absence of proof of an intent to injure the first named corporation or to avail itself fraudulently of the other's good name and reputation. * * * The incorporation of the Bingham School at Asheville has only the usual effect of a charter; that is, to confer the corporate right of perpetual succession. * * * It did not have the effect of creating a trade-mark of the Bingham name, and of conferring the exclusive right to use it in connection with school purposes upon that corporation, nor is it a prohibition upon all others named Bingham whether of that family or any others of the same name using it in connection with any school they might establish." This is manifestly true, upon the reason of the thing. It cannot be the law that three or more persons may, either under our general corporation law or by special act of the Legislature, become incorporated by any name which they may select for the purpose of engaging in some branch of trade or manufacture, and thereby, without engaging in the business of buying, selling, or manufacturing the article or product named in its charter, acquire a perpetual

monopoly in the corporate name. This would be to create a monopoly in a corporate name without ever using it by legislative enactment and violation of our fundamental law and the well-settled policy of the state. The law has been settled against plaintiff's contention in many cases. In Lawson v. Bank of London, 86 E. C. L. 84, Jervis, C. J., said: "All that appears is that the plaintiff was the promoter of a certain bank called the Bank of London, which he proposed to establish in the city of London; that he had incurred expense in putting up the name on a brass plate, and in publishing prospectuses; and that some one else has beaten him in the race, and established a bank under the same name by virtue of letters patent. It does not appear that the plaintiff has ever carried on the business of banking, or that he had a single customer, or that he was in a position to be damnified by the acts of the defendants. I therefore think, without entering into the question how far a corporation established for trading purposes might render itself liable to a charge such as that now sought to be fixed upon these defendants, enough is not alleged in the declaration to show that the plaintiff has sustained any injury and consequently the action will not lie." The language of Cresswell, J., is very pertinent: "The plaintiff in his declaration cautiously abstains from averring that he has carried on the business of a banker, and has sustained damage in that business through the fraudulent acts of the defendant."

When this cause was before us at the last term, on a motion for removal, we intimated that the complaint was defective, calling attention to the decision in the Bingham School Case. We are quite sure that the learned counsel for plaintiff would have amended his complaint in this respect, as he had ample right and opportunity to do, if the facts had justified him in doing so. In Maxwell v. Hogg, L. R. 2 Ch. App. (1866–67) 305, the plaintiffs sought to enjoin defendants from publishing a magazine, the name of which they claimed to have acquired. They alleged that they had advertised it and made expenditures in its preparation. Turner, L. J., said: "The first principle which applies, not only to this case, but to every case in this court, is that the plaintiff must show some property, right, or interest in the subject-matter of his complaint. The question, then, in that point of view, is whether the expenditure made by Mr. Maxwell upon his intended work of 'Belgravia,' and the advertisements issued by him from July to October, have created any such right of property in him as to entitle him to an injunction restraining another person from using the same title." His conclusion that no such right is acquired is stated so strongly that we quote his language: "If it is to be considered as doing so the consequence will be that, without having made any new publication at all, he might come to this court saying: 'I have advertised my intention to publish, in October, a given work under a given title, and nobody else shall publish a work under that title, until I have had an opportunity of bringing my work before the public.' He does not, by his advertisements, come under any obligations to the public to publish the work, and therefore the effect of holding the advertisements to give him a title would be that without having given any undertaking, or done anything in favor of the public, he would be acquiring a right against every member of the public to prevent their doing that which he himself is under no obligation to do, and may never do." Lord Cairns says: "The question, then, reduces itself to this: Can property of that character which is had in a trade-mark be acquired in a name before the vendible articles, bearing the name, have actually been put upon the market for the purpose of sale?" The learned justice concludes by saying that "all the definitions which have been given in this court of the nature of the right to protection in the case of trade-marks seem to me to be opposed to the idea that protection can be given where there has been no sale, or offering for sale, of the article to which the name is to be attached." The bill was dismissed. So, in Civil Ser. Sup. Ass'n v. Dean, 13 L. R. Ch. Div. 512, Malins, V. C., said: "An intimation by the association that they intended to open a shop for a particular purpose can give them no right to restrain anything which any other person may think fit to do." The same principle has been announced and enforced by the courts in this country. Kathreiner's M. F. B. H. Fab v. Pastor Kneipp Med. Co., 82 Fed. 321, 27 C. C. A. 351; Jaeger's San. Co. v. Le Boutillier, 47 Hun (N. Y.) 521. In Caswell v. Hazard, 121 N. Y. 484, 24 N. E. 707, 18 Am. St. Rep. 833, in an exhaustive opinion upon the subject, Ruger, C. J., says: "The right to a trade-mark is derived from its appropriation and continual user and becomes the property of those who first employ it and give it a name and reputation." Kohler Mfg. Co. v. Beeshore, 59 Fed. 572, 8 C. C. A. 215. The authorities cited by plaintiff fully sustain its contention that "a man's name is his own property, and he has the same right to its use and enjoyment as he has to any other species of property." Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247, and other cases. It is also true, as contended, that to enjoin the unlawful use of a man's name, or his trade-mark, it is not necessary to allege or show actual fraud. So far as the corporate name taken by plaintiff is concerned, it is too well settled to admit of controversy that, as said by this court in the Bingham School Case, supra, the mere incorporation does not confer an exclusive right to the name. While it is true that, under the provisions of our general incorporation law

(Revisal 1905, § 1137), no corporation will be chartered by the name of another corporation existing in this state, if the Legislature see fit, there is no reason why it may not charter more than one corporation of the same name. This is not a matter in which the state is concerned, and, if it does so, the rights and liabilities of each corporation, in respect to the use of its name will depend upon well-settled principles of law. If plaintiff, as it must do, relies upon the right to its name as assimilated to that of a trademark we have seen there must be an allegation that the name has been used to such an extent and in such a manner as to confer a property right to it. Courts of equity only interfere, by injunction, to protect property rights when there is some substantial injury done or threatened. They will not do so when the alleged right is uncertain, speculative, and may never become otherwise. In the absence of any allegation that plaintiff has used its corporate name, or exercised its corporate powers in the manufacture, purchase, or sale of smoking tobacco at Durham, or elsewhere, we find no ground upon which it may successfully invoke the power of a court of equity to prevent defendant from continuing to do so. We have so far discussed the complaint upon the theory that there was an allegation of plaintiff's prior corporate origin to that of defendant. To prevent misconception, it is proper to say that there is no such averment. When a plaintiff comes into court asking injunctive relief, it is a well-settled rule that there should be a full, fair, frank statement of the essential facts upon which its right is based, so that the court may see, upon demurrer, that it has a cause of action. It would have been easy for plaintiff to have stated the date of its incorporation and organization and the date upon which defendant began the manufacture of smoking tobacco in Durham, or at least that it was subsequent to the date of plaintiff's charter.

Plaintiff insists that, however this may be, the defendant should be enjoined because, being a New Jersey corporation, it has never complied with the corporation laws of this state, nor become domesticated, as a North Carolina corporation, as required by law, and is not therefore authorized, but is expressly forbidden, to carry on business in Durham, or elsewhere in this state. The demurrer admits this to be true, but defendant insists that by such failure to comply with the statutes of this state a penalty is imposed to be sued for by the Attorney General, and that plaintiff has no power to interfere with it by means of a civil action. Judge Thompson, in this connection, says: "When the facts do not otherwise entitle the complaining party to relief, the fact that the defendant may, under a name similar to that of the plaintiff, be engaged in an unlawful undertaking—such as carrying on the business of life insurance in violation of the state law—will not entitle the plaintiff to have the defendant enjoined from using the plaintiff's name in such business; since the question, whether the defendant is engaged in an unlawful business, is collateral to the particular action, being a question more properly determined in a proceeding by the state against the offending body." 7 Corporations, § 8195. Every foreign corporation, before being permitted to do business in this state, is required to comply with the provisions of section 1194 of the Revisal, and for failing to do so it shall forfeit $500 to the state, etc. Similar statutes are found in many, if not all, of the states. The right of private persons, or corporations, to enforce these provisions, either by invalidating contracts made by such foreign corporations subject to the penalty, or by enjoining them, has been uniformly denied by the courts. The right of foreign corporations to do business in the state, in violation of the statute, "cannot be raised collaterally by private persons unless there be something in the statute expressly, or by necessary implication, authorizing them to do so." Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; Columbus Ins. v. Walsh, 18 Mo. 229. In Wright v. Lee, 4 S. D. 237, 55 N. W. 931, we find the principle universally adopted well stated. Referring to the status of a foreign corporation doing business in the state in violation of the statute, it is said: "The statute was designed to place foreign corporations, in respect to a knowledge of their powers, the object of their incorporation, and the jurisdiction of our courts within the state over them, in the same position as domestic corporations. In the case, either of domestic or foreign corporations, the state names the conditions upon which it may do business. It does it in its sovereign capacity, as the conservator of the rights and best interest of its citizens. The state, which alone can name the conditions, can enforce their observance. * * * The wrong done in disregarding the law is against the state, and not against the individual. Transacting business in the state without compliance with the statutory conditions is a usurpation of power by the corporation, but with the state rests the right to elect whether it will acquiesce in such usurpation or dispute, or prevent it." In MacGinniss v. B. & M. C. C. & S. M. Co., 29 Mont. 428, 446, 75 Pac. 89, 92, it is said: "Much argument in the appellant's brief is also devoted to the question whether or not the Amalgamated Company is engaged in doing business in this state in violation of the law, and whether it is a monopoly. * * * The plaintiff sues as a private citizen. He is not, as such, authorized to present, through the medium of a civil action, and try the issue whether the defendant Amalgamated Company is doing business in this state in violation of the law. A determination of this issue as an independent ground of relief must be had, if at all, by the state and in its own behalf through the

Attorney General." Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; Toledo, T. & L. Co. v. Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925; 2 Morawitz, Pr. Corp. § 665. The authorities are uniform to this effect. While the question has not, heretofore, been before this court, the general principle has been recognized (Railroad v. Newton, 133 N. C. 132, 45 S. E. 549; Womack, Pr. Corp. 68) where the cases are collected. The wisdom of this rule is manifest. If, in the absence of express power to do so, private citizens or corporations were permitted to enforce penalties and forfeitures which the state has reserved to itself, confusion would result. The plaintiff insists that the statute shows that it is the policy of the state to prohibit foreign corporations coming into her borders without first complying with her laws. This is undoubtedly true, but the same statute shows that the state has prescribed the penalty for doing so and reserved to herself its enforcement, and this excludes any other mode of doing so. It is not the policy of the state, so far as expressed by her legislation, to prohibit foreign corporations from doing business here, but to prescribe the conditions upon which they may do so. If the Legislature shall, in its wisdom, prohibit this defendant or any other corporation from doing business in the state, it will be the duty of the courts to enforce obedience to the law when called upon in the manner prescribed by the statute. So long as it permits them to be here, either by compliance with the laws or as a matter of comity, they are entitled to have the law of the land administered so that they have equal protection and equal justice done them. We cannot make the law of "none effect" for even so desirable an object as fostering domestic corporations. Their safety, as well as the safety of the individual citizen, is dependent upon the due and orderly administration of the law as it is written. We have given to this record our anxious consideration, and the conclusion to which we have arrived is, as we intimated when the cause was first before us, that the complaint states no cause of action.

Following the course pursued by this court in Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161, the action must be dismissed. We have not considered, or discussed, the exceptions regarding the proceeding before Judge Biggs, because, in the view which we take of the case, they are immaterial. The right to examine witnesses is based upon the statement, in the complaint, of a cause of action, or an application, based upon affidavits, to have such examination for the purpose of enabling the plaintiff to file its complaint. No such question is presented here.

The motion of defendant is allowed, and the action dismissed.

CLARK, C. J. (dissenting). The defendant, a foreign corporation, was doing business in this state in violation of our laws. It is true that the $500 penalty prescribed for such violation (Revisal 1905, § 1194) cannot be sued for by the plaintiff, and that a quo warranto could be brought only by the Attorney General or by his permission. If it further be conceded that the plaintiff had only recently been incorporated and had done no business when this action was brought; still it avers that it is prepared to do business and that the defendant is illegally doing business here, and by using the same name with the plaintiff will interfere with and injure its business. Under these circumstances, it would seem clear that the legal corporation is entitled to the injunctive process of the court to protect it from interference by another corporation doing business here, under the same name, in violation of our laws.



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(145 N. C. 400)

## TAYLOR et al. v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Nov. 6, 1907.)

1. NUISANCE—PRIVATE NUISANCE — EXERCISE OF LEGAL RIGHT.

In an action against a railroad company for a nuisance, it is immaterial as affecting its liability whether it acquired its property by purchase or eminent domain.

2. SAME.

Noises of locomotives, shifting of cars, smoke, offensive odors, loading and unloading of freight, and the like, occasioned by and incident to the use and conduct of a railroad freight and passenger terminal, and resulting in damage to premises as a place of religious worship and residence of the pastor, do not constitute an actionable nuisance, where the railroad company conducts its operations with reasonable care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 4–8, 24.]

3. SAME.

Though a railroad operated with reasonable care, however disagreeable it may be, is not an actionable nuisance, yet a railroad so operated as to needlessly cause injury and inconvenience is such a nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 4–8, 24.]

4. SAME.

The running of trains and shifting of cars on Sunday, at the time of the regular church services held on premises near the railroad freight and passenger terminal, does not per se constitute a nuisance, since under the express provisions of Revisal 1905, § 2613, a railroad company may operate its trains on Sunday; but it must further appear that the same was done in an unreasonable or improper manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 21, 24.]

5. SAME—ACTIONS FOR DAMAGES—DAMAGES.

Permanent damages to premises by a nuisance cannot be recovered, but the owners thereof may enjoin commission of the acts constituting the nuisance and recover the temporary damages sustained therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 93–94½, 124–126.]

6. SAME.

Trustees of a religious society cannot recover in an action for an alleged nuisance near premises used as the place of worship and resi-

dence of the pastor for any physical suffering by the pastor or persons composing the congregation.

Appeal from Superior Court, Granville County; Councill, Judge.

Action by L. C. Taylor and others against the Seaboard Air Line Railway for a nuisance. From a judgment for plaintiff overruling defendant's demurrer to the complaint, defendant appeals. Reversed and remanded, with directions.

Day, Bell & Allen and Graham & Devin, for appellant. B. S. Royster and T. Lanier, for appellees.

BROWN, J. It appears from the complaint that plaintiffs are the trustees of the Oxford Presbyterian Church, situated, with the manse for the use of the pastor, on the east side of Gilliam street, and that the congregation for which they are trustees have been using the property for religious purposes since 1833. The complaint alleges that defendant operates a line of railway to the town of Oxford, and that the terminus of the said line of railroad is within the corporate limits of the said town, and very near the center thereof; that the freight depot and passenger station of the said railroad, which are used, operated, and controlled by the defendant, are on the west side of said Gilliam street, and nearly opposite to the said church building and dwelling, and the tracks of the said railroad leading to the said freight depot and passenger station cross said Gilliam street very near said church and dwelling. Plaintiffs further aver that, in the use and operation of the said railroad, freight depot, passenger station, and tracks thereon, the defendant has wantonly and negligently created, maintained, and permitted its terminal premises contiguous to the plaintiff's lot and on the opposite side of the street therefrom, such nuisances as to greatly endamage the church and manse, and to render them less valuable as a place of worship and residence. The pleader then sets out specifically the particular acts constituting the alleged nuisances: (1) By the ringing of bells, sounding of whistles, blowing off of steam and the loud puffing of engines, and by smoke, cinders, soot, dust, and foul, noxious, and offensive odors from defendant's engines, being operated on its tracks. (2) By odors from cars of fertilizer being moved about and left remaining on the terminal tracks. (3) By the maintenance and use of a freight and passenger depot so near the plaintiff's property that the smoke, odors, noise, and vibrations from its engines and trains are annoying to the congregation and occupants of the parsonage. (4) By blocking Gilliam street with trains very near the church and dwelling, and obstructing the passage of the members of the congregation desiring to attend church and the children going to Sunday school. (5) By loading and unloading circuses on defendant's tracks near the plaintiffs' property. (6) By running trains and shifting cars on Sunday near the plaintiffs' church, and at the time of their regular services. The complaint further alleges that, by reason of the nuisances aforesaid, the said church and dwelling have been greatly and most seriously damaged as a place of worship and for a residence, to wit, damaged in the sum of $5,000.

The plaintiffs do not seek to enjoin defendant from the use of its terminal station, but to recover permanent damage once for all for the diminution in the value of their property caused by the propinquity of the terminal and the manner of its use. It is alleged that the defendant acquired its terminal property by purchase, and not by condemnation. It is immaterial so far as it affects the rights and liability of a railway corporation how it acquired its property, whether by purchase or under the exercise of the delegated power of eminent domain. It holds the same rights, is subject to the same governmental regulation, and incurs the same liabilities to the public in either case. The principal legal propositions presented on this appeal were very fully and recently considered by this court in the Thomason Case, 142 N. C. 322, 55 S. E. 205, and the law of nuisance as applicable to railroads is there elaborately discussed by Mr. Justice Connor. Applying the principles of law as there laid down to the facts as stated in the complaint, we are of opinion his honor erred in overruling the demurrer. The several alleged acts charged against the defendant are well within its chartered powers, provided they are performed with reasonable care. It is out of the question in this advanced age to apply to railways, our great arteries of commerce, the doctrines of the common law in relation to nuisances. As an eminent judge has recently said: "A rigid enforcement of rules and definitions announced in an age that knew nothing of locomotives and blast furnaces would have stopped the wheels of commerce, put out the fires of furnaces, and silenced the rattle of manufactories." Simmons, C. J., in Austin v. Terminal Co., 108 Ga. 687, 34 S. E. 852, 47 L. R. A. 755. We live in an age of progress which requires the modification of old rules and their judicious application to changed conditions. Personal interests and comfort must yield to public necessity or convenience. To deny to the defendant the use of its road and terminal would be to exclude all railroads from our cities and towns. The extension of such a ruling would stop all machinery driven by steam and restrain the use of coal because of its annoying smoke. There are thousands of manufacturing plants, mills, and other kindred establishments in the cities and towns of this country about which no complaint has been made in the courts which would have been adjudged actionable nuisances according to the old view of such structures. We cannot afford to silence the hum

of industry or destroy the city that has grown up around the loom. In the Elevated Railroad Cases abutting property owners recovered permanent damage arising from smoke and noise, but upon the sole ground that the elevated structures invaded the owner's easement of light and air, and greatly interfered with means of access to his property. Speaking of those cases, the Supreme Court of Georgia says: "But in no case has the owner of property on a cross-street or a parallel street, no matter how close to the elevated road, been held entitled to recover, so far as we have found. And yet it is almost certain, on a business proposition, that persons owning property abutting on cross-streets have found their property depreciated in value as a result of the construction and operation of the elevated roads." Austin v. Terminal Co., supra. In this complaint there is no allegation of any physical interference with plaintiffs' property by defendant from which damage may flow, as in the Elevated Cases. It is therefore manifest from an unbroken line of precedents that the mere establishment and proper use of a freight and passenger station across the street from plaintiffs' property does not constitute an actionable nuisance. Having been established by authority of law, all damage that flows from its reasonable and proper use is damnum absque injuria. 2 Elliott on R. R. 718; 2 Wood on Nuisance, § 753; R. R. & Banking Co. v. Maddox, 116 Ga. 64, 42 S. E. 321; 19 Am. & Eng. (1st Ed.) 923, 924, and cases there collected. And it further follows that injuries and inconveniences to those who reside near this terminal from noises of locomotives, shifting of cars, loading and unloading freight, smoke and the like, which result from the necessary, and therefore proper, use and conduct of the terminal, are not actionable nuisances, but are the necessary concomitants of defendant's franchise. Wood, R. R. p. 722; Beseman v. Railroad, 50 N. J. Law, 235, 13 Atl. 164; R. R. v. Speer, 56 Pa. 325, 94 Am. Dec. 84.

While we hold that a railway lawfully operated with reasonable care, however disagreeable it may be to the residents of the neighborhood, is not an actionable nuisance, we are far from holding that it cannot be so operated and conducted as to become one. The Baptist Church Case, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, is a weighty and often cited authority illustrative of the lawful and unlawful use of railroad property. The rail road had located an engine house away from its business terminal, close under the eaves of the church windows, and had erected 16 smokestacks lower than the church windows, almost up against them, and so constructed that the volume of smoke from each stack poured directly into the body of the church. The Supreme Court of the United States applied the law of nuisance wholly independent of reasons of public policy and business convenience, for no such considerations required the construction of a roundhouse immediately under the eaves of a church. But in that case the court holds that for all usual and necessary noises and inconveniences occasioned by the operation of the railway, as such, in the discharge of its public duty, a property owner cannot recover. When railroads so conduct their operations that they needlessly and heedlessly cause suffering and inconvenience, their statutory authority will not protect them. Such grant of power does not give railway corporations an unbridled license to use their own property as they please without consideration for the rights and property of others. If it did, then, instead of being the servants of the public, they would be its masters. Railroad companies have been held liable for creating an actionable nuisance in using defective engines, which scatter great and unnecessary quantities of sparks, cinders, and smoke, for continued and unnecessary noises and disturbance from shrieking whistles and hissing steam, for maintaining their stations, depots, and cattle yards in a filthy condition, for maintaining coal shutes and roundhouses at improper places, and operating them so carelessly and noisily as to create a nuisance. In such and other like contingencies their charters afford them no protection.

Speaking of a railway terminal becoming a nuisance, the Supreme Court of Georgia says: "Although properly constructed, its negligent and improper operation might produce noises, smoke, cinders, etc., largely in excess of what would result from its proper operation, and thus create specific nuisances which the plaintiff might enjoin." Railroad v. Maddox, supra. In their complaint these plaintiffs have specified as actionable nuisances those general things which the defendant under its charter has the right to do, without stating in any particular wherein the defendant has done them in an unnecessary, improper, and unlawful manner, thereby exceeding its chartered powers. The defendant may do these lawful acts in an unlawful manner, and, if so, it may commit an actionable nuisance, but, if it performs them in a proper manner, the act is lawful, and not actionable, although disagreeable. The complaint should have pointed out in a specific manner the particulars wherein the defendant has exceeded its legal authority. "A complaint which alleges negligence in a general way, without setting forth with some reasonable degree of particularity the things done, or omitted to be done, by which the court can see that there has been a breach of duty, is defective and open to demurrer. While pleadings are to be liberally construed, they are to be so construed as to give the defendant an opportunity to know the grounds upon which it is charged with liability." Thomason v. Railroad, supra. For instance, the complaint charges as nuisance the running of trains and shifting of cars on Sunday at the time of the regular church services. As set out in the complaint, these acts do

not per se constitute an actionable wrong, for the statute expressly confers upon railway companies the right to operate their passenger, express, and mail service on Sundays, as well as freight trains run for the purpose of transporting fruits, vegetables, live stock, and perishable freight. And when there are not sufficient cars of live stock or other perishable freights to make a complete train, or section of a train, the company may add cars loaded with other freight to complete it. Revisal 1905, § 2613. The loading and unloading of freight trains on Sunday is expressly prohibited, and consequently the shifting and moving of freight cars on that day would be unnecessary, unless they should be in the way of a passenger train, and this should be anticipated and guarded against as much as possible. The complaint should specify wherein the defendant is violating the statute, and wherein it is creating an unnecessary and unjustifiable noise and disturbance on the Sabbath Day.

In our view of the law, the plaintiffs cannot in any event recover permanent damage for the depreciation of their property by reason of the establishment of the railway terminal on Gilliam street opposite it. If they can allege and prove unlawful and unwarranted acts and conduct by defendant in the management of its terminal which amount to a nuisance, they may enjoin the further commission of such acts, as well as recover such temporary damage as their property has sustained thereby. As trustees they could not recover for any physical suffering upon the part of their pastor, his family, or the individuals composing the congregation. As the case is to be remanded, we will direct that plaintiffs have leave to replead, and file another complaint, if so advised, and, if not advised, the case will be dismissed.

Reversed.

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(145 N. C. 461)

## STATE v. GODWIN.

(Supreme Court of North Carolina. Nov. 6, 1907.)

1. CRIMINAL LAW — TRIAL—PEREMPTORY INSTRUCTION TO CONVICT.

It is error to peremptorily charge the jury to find accused guilty, without any direction to pass upon the evidence, or even the credibility of witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1727–1729.]

2. MUNICIPAL CORPORATIONS — OBSTRUCTION OF STREET—CRIMINAL NUISANCE.

If a fence obstructs a street which is a public highway, and thereby renders its use less convenient, it is an indictable nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1492–1508.]

3. SAME—ABATEMENT.

If a public street is obstructed to the inconvenience and detriment of the public, the obstruction may be rightfully removed by one who is annoyed or prejudiced by it, or by an officer acting under the order of the proper authorities, whose duty it is to keep the streets open, since possession of a street by any one claiming it adversely cannot divest or destroy the right of the public therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1502–1505.]

4. FENCES — REMOVAL — CRIMINAL RESPONSIBILITY—QUESTIONS FOR JURY.

In a prosecution under Revisal 1905, § 3673, for injuring and removing a fence surrounding a yard, etc., whether the fence was within the terms of the statute and the indictment, and whether the land had been dedicated to the use of the public as a street, *held*, under the evidence, questions for the jury.

Appeal from Superior Court, Jackson County; Justice, Judge.

Vernon Godwin was convicted of injuring and removing a fence surrounding a yard, etc., under a peremptory instruction, and appeals. Reversed, and new trial ordered.

This is an indictment for injuring and removing a fence surrounding a yard, garden, and cultivated field, under Revisal 1905, § 3673. When the evidence was closed, the court instructed the jury to return a verdict of guilty. The defendant contended that the fence obstructed West street (extended) in the town of Polkton, while the state insisted that the land surrounded by the fence had not been dedicated to the public for the purpose of being used as a street, and to these respective contentions the testimony was addressed. There was evidence tending to show, as we think, that the property was originally owned by L. L. Polk, who extended West street, as at first dedicated or laid out by him and accepted by the town, and then sold lots—at least two—on the extended portion of the street. The defendant testified as follows: "Mr. Briley lives in my house, which is situated in the town of Polkton. The residence is situated on the Sturdivant lot, which is one square acre. There was a street in front of my house when I bought it 25 or 30 years ago. Elms had been set out as shade trees along this road, which were 8 or 10 years old at the time. The street was opened at that time 75 or 100 yards below my house. The fence constructed by Dr. Smith ran straight across the space opened up for the street, and then ran down the space with my line for some distance and across this space again. The road had been used up to the house. It had been cut out for some distance below, but had never been used. There was a clear space of 40 or 50 feet wide opened along my eastern line to the Austin line, now the Beachum line. All of this property was owned by L. L. Polk when I bought the Sturdivant lot and when the Sturdivant lot was bought from me, and also the second lot that I bought from L. L. Polk. Large trees had been cut out and this space opened up for a street, and has now grown up in bushes. I set out shade trees along the space, which had been opened for this street 18 or 20 years ago. The shade trees are there now, some of them 8 or 10 inches in diameter or larger. When I bought my property, this

open space and the street in front of my house was called 'West Street Extended.' or the 'Extension of West Street.' I had no ingress to my property below this fence, except along this avenue which had been opened." There was also evidence that the defendant, as town marshal, removed the fence as an obstruction to the street, under an order from the proper authorities of the town, which was incorporated by Private Acts 1874–75, p. 704, c. 158. Notice of 10 days was given to the prosecutor, L. C. Smith, to remove the fence before the defendant tore it down. A map of the premises was introduced which shows the extension of West street and a lot or lots fronting upon it. There was other evidence supporting the defendant's contention, and also evidence contradicting it and sustaining the theory of the state. In view of the charge of the court, it is not necessary to state it. There was a verdict of guilty and judgment was entered thereon. Defendant excepted and appealed.

Asst. Atty. Gen. Clement, for the State.
H. H. McLendon and T. L. Caudle, for defendant.

WALKER, J. (after stating the facts as above). The charge of the court was a peremptory one, by which the jury were instructed to find the defendant guilty, without any direction that they should pass upon any of the evidence or even the credibility of the witnesses. Manufacturing Co. v. Railroad, 128 N. C. 280, 38 S. E. 894. We cannot approve the form of the charge. It is for the jury to find the ultimate fact of guilt upon the evidence and under the instructions of the court as to the law. The jury were not even told that if they believed the evidence or if they found the facts to be according to the evidence, which is the better form of expression even when all the evidence bears one way, or if they found certain facts, they should then return a verdict of guilty, but were simply directed to find the defendant guilty. We have recently disapproved an instruction much less mandatory upon the jury than the one given in this case. State v. Simmons, 143 N. C. 613, 56 S. E. 701. See, also, Merrell v. Dudley, 139 N. C. 59, 51 S. E. 777; State v. Garland, 138 N. C. 675, 50 S. E. 853; State v. Barrett, 123 N. C. 753, 31 S. E. 731; Sossaman v. Cruse, 133 N. C. 470, 45 S. E. 757; State v. Green, 134 N. C. 658, 46 S. E. 761; Bank v. Pugh, 8 N. C. 206; Manufacturing Co. v. Railroad, supra.

But we think the court erred in directing a verdict, because there was evidence in the case that the place where the fence stood was a part of West street. It can make no difference in the result whether it was a part of the original street or of the extension. The question to be considered was whether the fence was built across a public street, and thereby became an obstruction to its free use by the citizens of the town. If so, the authorities of the town had not only the right, but it was their duty, to have the fence removed, under the powers vested in them by the town charter, if it constituted a nuisance, and there was evidence tending to show that the defendant himself also had the right to remove it, irrespective of the order to do so. Wolf v. Pearson, 114 N. C. 621, 19 S. E. 264; State v. Parrott, 71 N. C. 311, 17 Am. Rep. 5; State v. Dibble, 49 N. C. 107. If the fence obstructed the street, which is a public highway, and thereby rendered its use less convenient, it was an indictable nuisance. State v. Whitaker, 66 N. C. 630; State v. McIver, 88 N. C. 686; State v. Long, 94 N. C. 896; State v. McCarson, 8 N. C. 446; State v. Hunter, 27 N. C. 369, 44 Am. Dec. 41; State v. Smith, 100 N. C. 550, 6 S. E. 251; State v. Eastman, 109 N. C. 785, 13 S. E. 1019; Revisal 1905, § 3784 (Code, § 2065). And such a nuisance is abatable by the town authorities charged with the duty of keeping the streets open and in proper repair, and also by any person who is annoyed or injured by it. State v. Higgs, 126 N. C. 1023, 35 S. E. 473, 48 L. R. A. 446; State v. Parrott, 71 N. C. 311, 17 Am. Rep. 5; Wolfe v. Pearson, 114 N. C. 634, 19 S. E. 264; Hester v. Traction Co., 138 N. C. 293, 50 S. E. 711, 1 L. R. A. (N. S.) 981.

The questions whether the fence was of such a description, with reference to the character of the land it surrounded, so as to come within the terms of the statute and the indictment thereunder (State v. Biggers, 108 N. C. 763, 12 S. E. 1024), and whether the land had been dedicated by L. L. Polk to the use of the public for a street and perhaps others, were for the consideration of the jury upon the evidence and under proper instructions of the court as to the law. The question of dedication may depend somewhat upon whether L. L. Polk plotted the ground and in the map described this street and thereafter sold lots fronting on it, as the defendant's testimony, if true, might convince the jury was done. Moose v. Carson, 104 N. C. 434, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681; State v. Fisher, 117 N. C. 740, 23 S. E. 158; Smith v. Goldsboro, 121 N. C. 355, 28 S. E. 479; Hughes v. Clark, 134 N. C. 460, 46 S. E. 956, 47 S. E. 462; Milliken v. Denny, 135 N. C. 22, 47 S. E. 132.

It may be inferred from what was said on the argument and what we find in the briefs that the court charged as it did because it was thought not to be necessary to show any criminal intent, the doing of the prohibited act being sufficient if it was done intentionally, and that the question of title was not in controversy; but this was not the only point upon which the case should have turned. If it was a public street and the prosecutor obstructed it to the inconvenience and detriment of the public, the defendant

could rightfully remove it, if himself annoyed or prejudiced by the obstruction, or he could lawfully do so, if acting under the order of the proper authorities, whose duty it was to keep it open. Possession of the street by any one claiming it adversely cannot divest or destroy the right of the public therein. Acts 1891, p. 186, c. 224; Revisal 1905, § 389. The court in Moose v. Carson, 104 N. C. 434, 10 S. E. 689, 7 L. R. A. 548, 17 Am. St. Rep. 681, seems to have overlooked what was decided in State v. Long, 94 N. C. 896, with respect to the effect of adverse possession of a highway upon the right of the public or the citizen therein prior to the act of 1891.

The material questions raised in this case should be submitted to a jury, and a new trial is ordered for that purpose.

New trial.

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(145 N. C. 339)

## JOHNSON LUMBER CO. v. LEONARD et al.

(Supreme Court of North Carolina. Nov. 6, 1907.)

1. CONTRACTS—MISTAKE.

Where, when a married woman with her husband signed a contract to convey timber land, she believed that the contract only purported to convey the standing timber, but on the same day that she signed, and several days before she privately acknowledged her signature, she ascertained from her husband that it was a contract to convey the land, and after this voluntarily acknowledged her execution thereof, such acknowledgment related back to the signing of the contract, and rendered it as effectual against her as if she had known the fact at the time of signing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 442–446; vol. 26, Husband and Wife, §§ 358–361.]

2. SAME—QUESTION FOR JURY.

Whether a married woman had knowledge before her private acknowledgment of a contract for the sale of timber land that the contract was for the sale of the land, and not merely the standing timber, as she believed when she signed it, *held* for the jury.

3. ACKNOWLEDGMENT — CORROBORATION—EVIDENCE.

Where a married woman had been permitted to testify that, at the time an officer took her private acknowledgment to an instrument, she told him that she thought she was signing a timber contract, instead of a land contract, the officer should have been permitted to testify that he would not have probated the instrument if he had understood her to say at the time that she thought she was signing a timber deed, to contradict her testimony.

4. SAME — IMPEACHMENT — WEIGHT OF EVIDENCE.

Where the certificate of a justice's acknowledgment to a land contract in due form and supported by evidence was sought to be impeached, an instruction that the burden was on defendant to show that it was untrue by the "greater weight" of the testimony was erroneous; very clear proof sufficient to fully convince the minds of the jury being required for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 346, 347.]

5. SAME—EFFECT OF CERTIFICATE—EXAMINATION OF MARRIED WOMAN—FRAUD—PARTICIPATION BY GRANTEE.

An officer's certificate of acknowledgment and privy examination of a married woman, in due form, precludes inquiry as to fraud, duress, or undue influence in the treaty, unless participated in by the grantee or his agent, and also precludes inquiry into fraud or falsehood in the factum of the privy examination itself, unless the feme covert shows by clear and convincing proof that no examination was had, or that she refused before the officer to voluntarily assent to the execution of the instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 290–315.]

Connor and Walker, JJ., dissenting.

Appeal from Superior Court, Franklin County; Cooke, Judge.

Action by the Johnson Lumber Company against M. F. Leonard and others. From a judgment for defendants, plaintiff appeals. Reversed.

F. S. Spruill and Wm. H. Ruffin, for appellant. W. H. Yarborough and W. M. Person, for appellees.

BROWN, J. We think there should be a new trial of this case.

1. The plaintiff in apt time handed up the following prayer for instruction, viz.: "That although the feme defendant, M. F. Leonard, did at the time she signed the contract to convey believe and suppose that it was only a contract to convey the standing timber, yet as she, after having ascertained that it was a contract to convey the land, subsequently acknowledged to the justice of the peace, separate and apart from her husband, that she signed the same freely and voluntarily, without fear or compulsion of her husband or any other person, and that she did still voluntarily assent thereto, such acknowledgment would relate back to the signing of the contract, and would be as effectual against her as if she had known at the time of the signing that it was a contract to convey the land that she was signing, and, if the jury should so find, they will answer the first issue, 'No.'" We think it was prejudicial error in the court to refuse to give this instruction. It deprived the plaintiff of its strongest position before the jury. It is admitted that Mrs. Leonard signed the deed a week before the justice of the peace came to her house to take her privy examination. She testifies herself that, when she signed the deed, she believed it to be a conveyance of the timber only, but that she learned from her husband that it was a deed for the land on the evening of the same day on which she signed it. She admits she knew its true purport a week before the official called to take her examination. Stokes, the justice of the peace, testified as follows: "Q. You are an acting justice of the peace of Franklin county, and were such acting justice on the 25th of September, 1905? A. Yes. Q. Examine that paper [exhibiting option], and see if it is your probate. A. Yes, sir. Q. When you took

that probate, what did you ask Mrs. Leonard? A. I asked her if she signed this paper of her own free will and accord, if she was forced by her husband or any other person, and— Q. How did she answer? A. She said she did. I asked her if she was forced by her husband or any other person. She said, 'No.' I says, 'You still assent, then, freely and voluntarily, on your part?' She says, 'Yes.' I asked her, 'Then you still say it is freely and voluntarily, of your own free will and accord'— By the Court: Did you ask her if she still voluntarily assented? A. I asked her them three questions. Q. Did she still voluntarily assent to it? A. She answered them, 'Yes.' Q. You asked her that, and she answered 'Yes'? A. Yes, sir. Q. At that time did she say anything about having misunderstood the purport of the paper? A. She said while I was there, I don't know whether to me or to Capt. Phil, says, 'When I signed that contract, I thought it was for timber only, instead of for the land and timber.' Q. Was that after you asked her those questions? I think it was." That testimony is plainly susceptible of the construction placed upon it by plaintiff, viz., that, although Mrs. Leonard did not know the option contract covered the land at the time she signed it, yet she was informed of it the same day by her husband, and that she acquiesced, and when the justice came the following week she duly acknowledged and voluntarily assented to the paper, although she stated after her privy examination was taken, either to "Capt. Phil" or the justice, that, had she known the true nature of the paper in the beginning, she would not have signed it. This is the justice's account of the matter, and it is entitled to great weight. The prayer for instruction was intended to present that phase of the testimony to the jury, and it is supported by Stokes' evidence. It seems to me erroneous to refuse it. The plaintiff had a right to have that phase of the evidence presented to the jury.

2. The following questions were asked witness Stokes, for the evident purpose of corroborating and strengthening his testimony: "Q. Would you have probated that paper as you have, had she said to you at the time that she signed it thinking it was a timber deed? (Defendants objected to the question.) Q. Would you have probated the paper at the time if you had understood her to say at the time that she thought she was signing a timber deed?" These questions were excluded by the court, and plaintiff excepted. We think this ruling was erroneous and prejudicial. The evidence was competent upon the ground that the judicial act of the officer was being inquired into, and the evidence tended strongly to support and corroborate his evidence and to affirm his good faith and integrity. The feme defendant having been permitted over plaintiff's objection to state that she told the officer at the time he took her acknowledgment that she thought she was signing a timber contract instead of a land contract, it was competent in contradiction of this testimony to show that, if she had made any such statement to him, the paper would not have been probated by him. I cannot imagine any statement that could be more strongly corroborative of the accuracy of the justice's recollection than the one which the excluded questions sought to bring out.

3. The court erred in charging the jury that "the burden of proof is upon the defendant in respect of the contentions, and the finding of either one of the issues in her favor must be by the greater weight of the testimony." The certificate of the justice is in due form, and is also supported by abundant evidence. It can only be attacked by clear, strong, cogent, and convincing proof. Benedict v. Jones, 129 N. C. 472, 40 S. E. 221. The court should instruct the jury with the greatest care in cases of this character, and explain to them that the solemn act of a judicial officer is not to be lightly set aside, and certainly not upon a mere preponderance of evidence, but only upon very clear, strong, and cogent proof which should fully convince the minds of the jury. Unless in their opinion the proof comes fully up to this standard, we think the judges of the superior court should not hesitate to exercise their discretion and set aside a verdict which destroys the legal effect of such an important judicial act, and one which is so essential to the security of titles.

4. Much may be said in favor of the contention that, "if the private examination of the wife shall have been certified in the manner prescribed by law," by the purport of section 956, Revisal 1905, it is not open to attack at all except upon the ground that "its execution was procured by fraud, duress, or other undue influence," to which the grantee must be shown to be a party. In other words, it is contended that if the officer certifies in due form the wife's voluntary assent, when, in fact, she refused to give it, it is a fraud perpetrated against the wife and the purchaser both, but one to which the grantee or his agent must be proven to be a party, in order to invalidate the certificate. However that may be, we are of opinion that the certificate of the officer of privy examination of a married woman shuts off all inquiry as to fraud, duress, or undue influence in the treaty, unless participated in by the grantee or his agent. It also precludes all inquiry into fraud or falsehood in the factum of the privy examination itself, unless the feme covert can make it appear by clear, cogent, and convincing proof, either that no such examination was had at all or that on such examination she refused to give her voluntary assent to the execution of the instrument, and so expressed herself to the officer at the time he undertook to examine her. In the case at bar, there is no such evidence offered in contradiction of the official certificate, the truth-

fulness of which has the additional support of the clear and unequivocal testimony of the officer who made it. On the contrary, the evidence shows that her entire objections and statements made when Stokes was at her residence related, not to the privy examination at all, nor to what she understood at that time, but to her act and mental attitude in respect to the execution of the instrument at the time she signed it several days before, when Stokes, the justice, was not present.

For the reasons given we think that there should be a new trial.

The CHIEF JUSTICE and HOKE, J., concur in above opinion. The CHIEF JUSTICE also files concurring opinion.

CLARK, C. J., concurs on the ground that the court erred in refusing plaintiff's prayer, and also in instructing the jury that the certificate of the privy examination could be set aside by "the preponderance of the evidence." In Benedict v. Jones, 129 N. C. 470, 40 S. E. 221, it is held that the presumption of the correctness of such certificate must be overcome "by clear, strong, and convincing evidence." It would shake the security of titles, if it could be done on a mere preponderance which a jury might in their gallantry to the sex give to the testimony of a young and pretty woman over the bare certificate of the justice who may be dead and when the holder of the property at a third or fourth conveyance perhaps may not and probably would not be, able to get corroborating testimony to support the certificate of the officer. Here the officer was living, but the rule as to the amount of evidence to overcome his certificate is the same. In the adjoining states to this, Virginia, South Carolina, Tennessee, as well as in many others, privy examination has long ago been abolished as a useless formality, and the execution of a deed by a married woman is binding on her to the same extent, and can be set aside only upon the same proof as if she were a single woman. It is hardly reasonable to suppose that a woman upon becoming married ipso facto reverts into the helplessness of non sui juris, a class whose only other members are "infants, idiots, lunatics, and convicts." The sole ground for such suggestion is the assumed possibility of "undue control or duress" by the husband. But in this case there is no allegation nor proof of such undue influence by the husband, and it is noteworthy that, if there had been, it would not vitiate the deed unless it had been participated in by the grantee or he had notice thereof before receipt of the deed. Revisal 1905, § 956. Revisal 1905, § 956, makes the execution of a deed by a married woman when there is a certificate of privy examination unimpeachable except for "fraud, duress or undue influence," participated in or known by the grantee, and absolutely unimpeachable in the hands of an innocent purchaser, though from a grantee who participated in, or had knowledge of such fraud, duress, or undue influence. Originally the privy examination was by the court, and the certificate was equivalent to a judgment of fine and recovery, and hence unimpeachable except as any other judgment would be. Woodbourne v. Gorrell, 66 N. C. 82. When the certificate was transferred to a single justice of the peace out of court, the courts were compelled to hold that the certificate was subject to inquiry and impeachment. Jones v. Cohen, 82 N. C. 75. This making titles insecure, the statute (Revisal 1905, § 956) intervened and allowed impeachment of the deed of a married woman, notwithstanding the privy examination, but only when there is duress, fraud, or undue influence, participated in or known to the grantee, thus putting her deed now practically on the same footing as would be the case if the privy examination were abolished.

CONNOR, J. (dissenting). The exception to his honor's refusal to submit the issue tendered by plaintiff is based upon a misconception of defendant's answer. In the first answer filed, the feme defendant alleged that she was induced to sign the contract by the false and fraudulent representations of plaintiff's agent. This answer, by permission of the court, was amended, and the charge of fraud expressly withdrawn. This was, in the light of the evidence, proper. I do not find any evidence of fraud on the part of any one connected with the transaction. I have no doubt that the contract was made by the husband to sell the land, and that it was fairly and correctly read, in the manner and under the circumstances testified to. It is entirely natural that the feme defendant did not hear it, or at least did not do so understandingly; that, knowing her husband was selling to a lumber company, she supposed the sale was of the timber only, and that "she did not feel deeply interested about it." It is but common justice to so interpret the conduct of all parties. His honor correctly interpreted the answer wherein the feme defendant says: "That she never legally consented to the conveyance of the land itself, nor acknowledged the execution of said option, as required by law. She further insists that in equity she ought not, and cannot, be compelled to specifically perform a contract for the conveyance of land which she signed with the belief that it was a contract for the conveyance of timber on the land alone, which she repudiated as soon as informed that it did purport to concern the land, and which she never acknowledged as required by the law governing the contracts and conveyances of married women." Her defense is substantially a plea of non est factum. It may be conceded that if she were sui juris her failure to read the deed, or give proper attention to its contents when read in her presence, coupled with the fact that there was no mistake on the part

of the plaintiff, would bar her of any equitable relief for rescission or reformation, if sui juris signing and delivery, in the absence of fraud or mutual mistake, would have made a completed contract valid at law, and, for the reasons stated, beyond the power of a court of equity to rescind or reform. She contends, however, that before the last and essential act was done which bound her she gave notice of her dissent and the reasons therefor. The question thus presented is, in an important respect, different from the cases cited in the opinion, wherein a married woman, with knowledge of the act and its legal effect upon her property rights, acknowledges the execution of the deed free from the control or undue influence of her husband and all other persons, and thereafter seeks to avoid it by averring that her acknowledgment was not true; that, notwithstanding her solemn statement to the contrary, she was coerced, etc. In such cases she attacks the certificate for fraud alleged to have been practiced upon her by her husband or some other person. It was formerly held that she was estopped by the certificate, and could have relief only in equity. Woodbourne v. Gorrell, 66 N. C. 82. The statute in this respect has been changed, as pointed out in Jones v. Cohen, 82 N. C. 75, and other cases. The ease with which this charge could be made, the difficulty of successfully meeting it and the frequency with which it was made, endangered titles to land in the hands of bona fide grantees and purchasers for value, without notice of such alleged fraud. To meet the evil, the General Assembly wisely enacted, at its session of 1889, a statute, now section 956 of the Revisal of 1905, protecting innocent grantees and purchasers. While the answer to the first issue is in accordance with the weight of the testimony, it is not decisive of the case, but, followed by the answer to the second issue, sustains the defendant's contention in regard to the manner in which the acknowledgment was taken. The principal question for decision, therefore, is presented by the plaintiff's exception to the charge. His honor, upon the second issue, told the jury that if they found the burden of proof being upon the defendant, that "at the time of taking her acknowledgment she did say that she signed the contract thinking it was only for the sale of timber, they will answer the second issue "No." It is too elementary to require the citation of authority that a married woman can convey her real estate or interest therein only in the manner and by complying with the essential requisites prescribed by law. Unless she does so, her signature and delivery of a deed or contract concerning her land is absolutely void, both at law and in equity. Scott v. Battle, 85 N. C. 184, 39 Am. Rep. 694, and numerous other cases in our reports. Acknowledgment and private examination by some one of the officers named in the statutes and in the manner pointed out is necessary to the valid execution of a deed or contract to convey. Until the last act in the proceeding has been done, and the matter has passed beyond the control of the officer, the contract is incomplete, and she may retract her signature; hence, it is that she must not only acknowledge that she signed it freely, voluntarily, etc., but, what is equally essential, she must declare that "she still assents thereto." So long as it is the policy of the Legislature to restrict the power of married women to dispose of their real estate and place around them the protective provisions found in our statutes, it is our duty to enforce the law in accordance with its spirit. The Legislature, to meet new conditions, has enlarged the number of officers having jurisdiction to take these examinations, and removed many of the strict requirements which were formerly found in the statute. The law still requires that she acknowledge the due execution of the deed, etc. There is great wisdom in the observations of Judge Ruffin in regard to the manner in which this duty should be performed. In Burgess v. Wilson, 13 N. C. 306, he says: "After confession in open court, she is then to be examined, where, in privacy, and with the self-collection which a timid female, in the presence of a crowd, and overawed by the authority of her husband, might not be able to command in public, that she may have an opportunity of retracting her deed after her interests have been weighed by her and her rights explained by an intelligent and upright judicial officer." While the law has, in some respects, been changed, it would be well for clerks, and other officers having probate jurisdiction, to read and observe the language of this great and wise judge. To permit the wife to be bound by a contract to release her dower when she, in the presence of the plaintiff's agent, the witness to the deed, and the officer taking the probate coupled her statement that she signed the paper freely, etc., with the declaration that, when she did so, she thought it was a contract for the sale of the timber, it seems to us would be trifling with the statutory protection thrown around her by the Legislature. There is no substantial difference in the testimony. Plaintiff's witness Harper and the justice corroborate Mrs. Leonard. There is, as we have said, no fraud charged or proven on the part of any one. She simply did not execute the contract as the law requires. If notice to the plaintiff of what occurred was necessary, it is shown by the evidence that Capt. Alston, the agent of plaintiff, was present, heard, and saw what occurred, in fact, took part in the conversation. The case does not come within the language or the spirit of section 956 of the Revisal of 1905. While it may be that the officer taking an acknowledgment of a married woman is not required to understand and explain to her all of the provisions of the deed, if, before he has completed the examination and affixed his certificate, he has good reason to think that she does not fully understand

its contents and its legal effect upon her rights, common prudence and fairness to her suggests, if they do not demand, that he withhold his certificate. In McCaskill v. McKinnon, 121 N. C. 214, 28 S. E. 343, the judge instructed the jury that it was the duty of the officer, taking the examination, to explain the deed to her, etc. This instruction was approved by this court. It must be conceded that language is found in the opinion in Benedict v. Jones, 129 N. C. 470, 40 S. E. 221, difficult to reconcile with what is said in McCaskill v. McKinnon, supra. In Benedict v. Jones, the wife simply said that she signed it freely, etc., but "she did not know what the paper was."

Without calling into question the correctness of the decision in that case, I think the language of the wife here was much more positive and free from ambiguity. While it is true that the exact language of the statute may not be required, it is equally true that, if, notwithstanding the formal use of its exact language, it is apparent to the officer taking the examination that the mind of the wife does not assent to the act, or that she does not understand it, he should not "stick in the bark" by contenting himself with formal answers to questions, but look to the substance of the judicial procedure in which he is engaged, and refuse to proceed until satisfied that the feme covert understands what she is doing. The verdict was in accordance with the evidence. Counsel for defendant earnestly insists that, if the admitted facts were insufficient to sustain the plea of non est factum, they disclose a case in which the court will refuse specific performance, and leave the plaintiff to work out its remedy by an action for damages. There is much force in the position, and, in view of the fact that the plaintiff is not out of pocket any money, nor has otherwise changed its position by reason of the conduct of the feme defendant and the contract was unilateral, plaintiff assuming no liability whatever, I should hesitate to decree specific performance compelling the wife to release her inchoate dower. While much has been said by writers on equity jurisprudence and by chancellors regarding the rules by which courts are governed in decreeing specific performance, I have not found any statement of the doctrine more satisfactory than that in Leigh v. Crump, 36 N. C. 299. "Even though the contract of which specific performance is sought be valid at law, and if it had been executed by the parties, could not be set aside because of any vice in its nature, yet if its strict performance be, under the circumstances, harsh and inequitable, a court of equity will not decree such performance, but leave the party claiming it to his legal remedy." Pendleton v. Dalton, 92 N. C. 185. The contract should be fair, just, certain, and understood by and between the parties. Tillery v. Land, 136 N. C. 546, 48 S. E. 824.

WALKER, J. (dissenting). I fully concur in all that Mr. Justice CONNOR has said in his opinion; but I have something else to say.

Whether the requirement of the statute that there should be privy examination be wise or expedient is not a question with which this court has anything to do. We do not belong to the legislative department of the government, and have no right to change the statute. We must construe the law as we find it. This is a government of the people, and not of any class or particular sect. It has been wisely provided that there should be three divisions of government—one to make the law, another to expound, and still another to execute it. The people have the right through their chosen representatives to say what the law shall be, and this court has no right or power to say otherwise. When we attempt to do so, we trench on the prerogative of the legislative department. The sooner we clearly understand the relation between the different co-ordinate departments of our state government, the more surely will we confine ourselves within the defined limits of our jurisdiction as prescribed to us by the people under their Constitution. I am not, of course, opposed to any such change of the married woman's law as the Legislature may think will accord more nearly with what we may suppose to be the enlightened spirit of the age. I believe that honorable body has proceeded so far cautiously, and that it has had due regard to the delicate relation always subsisting between husband and wife, not wishing to compel by legislation any course of action which may imperil the unity and harmony, and the happiness of the home, for "surely in the homes of the people lodge at last the strength and responsibility of this government, the hope and the promise of this republic."

I must respectfully protest against the suggestion that the law so classified married women, in respect to their right of contracting, as to place them in the same category with idiots, lunatics, persons non compos mentis, and convicts, for the purpose of degrading them in the estimation of society, as I well know that there was no such intention. It must occur to any one, who will consider and apply, candidly and frankly, the reason of the law, by which married women are required to be privily examined, that such was not the purpose. It is not because they are insane, idiotic, or non compos, nor even because they may be incapable of judiciously managing their own affairs, that the law was enacted. It is perfectly apparent that such is not the reason which actuated the Legislature. It is simply because of the delicate and confidential relation subsisting between husband and wife, and the fact that even a woman, with perhaps more sense and wisdom than her

husband has, and this is not infrequently the case, will sometimes yield to his wishes, or to his undue persuasion or influence, to prevent family jars or friction, and preserve peace in the household. It is the highest tribute the law could pay to woman that it recognizes her refined sense of propriety, her unselfish desire to do whatever may promote conjugal felicity, and her delicate sensibility in such cases. It is just for this reason that it provides against the abuse of those excellent virtues by a thriftless or perhaps brutal husband. And, again; it is to protect the weak and confiding wife, however sound of mind she may be, against the machinations of a designing and mercenary husband. It was never the purpose of the law to rank her, in the scale of intelligence or morality, with weaklings or convicts. I believe that many a good woman, endowed with mental faculties and capacity, at least equal to those of her husband, has been saved by this beneficient and wholesome law from destitution and poverty. If we regard privy examination as an idle ceremony, to be performed by the judicial officer in a merely perfunctory manner, and without due regard to the real protection of the married woman—a mere form and not a serious procedure as it is and was designed to be—it will be of little or no avail. But we must assume that officers will discharge their duty in the same spirit which actuated the Legislature in imposing it upon them, and in an efficient and not merely a formal way. The law, if I may be permitted to say so, is a wise and salutary one, when properly enforced, and, since the enactment of the recent statute mentioned in the opinion of Justice CONNOR, the rights of innocent purchasers are sufficiently safeguarded.

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(145 N. C. 333)

## TAYLOR v. SECURITY LIFE & ANNUITY CO.

(Supreme Court of North Carolina. Nov. 6, 1907.)

1. EVIDENCE—OPINIONS—STATEMENT OF FACT.
Testimony of witnesses, based on personal knowledge and observation, that deceased at and prior to the time of his application for insurance was not intemperate in the use of alcoholic liquor, is not objectionable as an opinion, but is a statement as to a fact based on knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149–2151.]

2. TRIAL—NUMBER OF WITNESSES.
Defendant, in an action for life insurance, involving the issue whether at and prior to the issuance of the policy insured was temperate in the use of alcoholic liquor, may not complain that a large number of witnesses, many of them of great weight in the community, were permitted to testify for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 133, 134.]

3. SAME—NECESSITY OF INSTRUCTIONS—POSITIVE AND NEGATIVE TESTIMONY.
There being no substantial contradictory statement as to the matter of drinking by insured prior to his application for insurance, but the real question being whether, conceding this, he was then intemperate, the testimony of witness, based on knowledge and observation as to whether he was temperate, does not call for an instruction on the weight to be given positive and negative testimony.

Appeal from Superior Court, Granville County; Justice, Judge.

Action by Addie D. Taylor against the Security Life & Annuity Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This is an action for the recovery of the amount of a policy of insurance on the life of Frank L. Taylor issued by defendant company payable to plaintiff. Defendant admitted that the policy issued, that plaintiff was the beneficiary named therein, the death of insured, the insurable interest of plaintiff in his life, and that proof of death had been duly filed. It alleged, by way of defense, that the insured had made false answers in his application to the following questions: "(14) Have you ever been intemperate in the use of malt or spirituous liquors? No. If so, when and how often? Never. (15) Do you use malt or spirituous liquors now? No. If so, definitely, how much and how often? X. (16) Do you now, or have you ever, used habitually opium, chloral, cocaine, or any other drug? No."

The following issues were submitted to the jury: "(1) Did the insured, Frank L. Taylor, represent in the contract of insurance sued on that he had never been intemperate in the use of malt or spirituous liquors? Ans. Yes. (2) If so, was such representation false? Ans. No. (3) If so, was such representation material? Ans. Yes. (4) What sum, if any, is the plaintiff entitled to recover of the defendant? Ans. $5,056.12, with interest thereon from October 15, 1906."

Plaintiff consented that the jury should answer the first and third issues in the affirmative. Defendant took the burden of establishing the second issue, and introduced the evidence of persons who were acquainted with insured for several years prior to the date of the application—knew his habits, etc. They testified in regard to his habit in the use of spirituous liquor, based upon their own knowledge. Several of defendant's witnesses were asked by plaintiff, on cross-examination: "How frequently did you see Frank Taylor while he lived in Wilson? Ans. Practically every day. Q. From your knowledge of him and your observation of him from day to day, would you say that he was a man of intemperate habits in the use of alcoholic liquors? (Defendant objected and excepted to admission of question.) Ans. No. (Defendant excepted.)" It was in evidence that insured lived in Wilson from 1901 to 1904. Plaintiff introduced a number of witnesses, among them Col. W. H. Osborne, who testified that he lived in Greensboro, and had lived there since 1892; that he was born and reared in Oxford; that he knew the insured in Greensboro, when, in 1904, he clerked in

the drug store of J. D. Helms; that insured lived in Greensboro several months; and that witness saw him nearly every day. Witness was asked by plaintiff's counsel: "If from his knowledge of insured and his observation of him and his habits he knew whether insured was temperate or intemperate in the use of malt or spirituous liquors?" Witness answered that he thought he did, and that the insured was temperate. On cross-examination, witness testified that at the time referred to he was mayor of Greensboro; that he was at Helms' drug store very often at night, but rarely, if ever, late at night; that he made the drug store his headquarters; and that insured was on duty when he was there. J. D. Helms testified that he lived in Greensboro, conducted a drug store there; that insured was prescription clerk in his store from June 20 to October 20, 1904, and that he (witness) had personal supervision of his store. Witness was asked by plaintiff's counsel: "From your knowledge of insured and your observation of him and his habits, would you say that he was intemperate in the use of spirituous or malt liquors?" Witness replied: "The insured was temperate." On cross-examination, witness said that if insured ever drank he had not heard of it. T. M. Washington testified: That he left Granville county in the year 1891 and went to Wilson county, where he had lived ever since; that he knew the insured intimately while he lived in Wilson; that witness saw insured every day, and sometimes several times a day when witness was in town. Witness was then asked by plaintiff's counsel: "From your intimate acquaintance with insured, your opportunities for observing him and his habits, was he temperate or intemperate in the use of malt or spirituous liquors?" Answer: "I consider him temperate. I think I know."

To each and every one of the questions and answers defendant duly excepted. Defendant's testimony tended to show that insured was under the influence of liquor several times in Wilson, Oxford, Morehead City, Greensboro, and once in Richmond. Defendant in apt time requested his honor to instruct the jury as set out in the opinion, and to his refusal duly excepted. His honor, in response to defendant's prayer, among other things, instructed the jury as follows: "The court charges the jury that the word 'intemperate' as used in this application is defined by the law to mean as follows: 'Intemperance is the use of anything beyond moderation, and it does not necessarily imply drunkenness. An occasional use of alcoholic liquors is not to be deemed intemperance, but there must be indulgence to such an extent as would be considered an excess.' The court charges you that an insurance company in North Carolina has a right to prescribe as a condition precedent to the issuing of a life policy that the applicant shall state in writing whether or not he has ever been intemperate in the use of spirituous or malt liquor, and that the answer to same is a material fact in said application. Intemperance does not necessarily mean habitual drunkenness. Habitual drunkenness is, of course, intemperance, but there may be intemperance in the absence of habitual drunkenness. Therefore, if the jury should find from the evidence that during the several years preceding the time when the insured Frank L. Taylor signed the application for the policy sued on in this case, he was often under the influence of some intoxicating liquor, and was from time to time what is commonly called drunk, and you should further find that he represented, when applying for said policy, that he had never been intemperate in the use of malt or spirituous liquors, then, and in that event, the court charges you, gentlemen, that his answer to the question, 'Have you ever been intemperate in the use of malt or spirituous liquors?' was false, and you should answer the second issue, 'Yes.' If the jury should find from the evidence that the insured's representation that he had never been intemperate in the use of malt or spirituous liquors was false, and that said representation was material, you would then have a plain duty to perform; and the court charges you that this duty ought not to be influenced and cannot be changed by any consideration of the manner in which the interests of the parties to this cause may be affected. While the policy in question, under all the circumstances of this case, might not be avoided by proof of an occasional use of malt or spirituous liquors, yet such occasional use does not mean occasional sprees of drunkenness; and if the jury should find from the evidence that, prior to the date of the application in question, the insured occasionally and from time to time, with intervals of perfect sobriety of greater or less duration between, got on what are called sprees, and became intoxicated, the court charges you that such sprees, although occasional, and although occurring with varying intervals of sobriety, would constitute an intemperate use of malt or spirituous liquors, and, if you should so find, it would be your duty to answer the second issue, 'Yes,' and the court further charges you, if you so find, to answer the second issue, 'Yes.'"

In addition to the special prayers given by request of defendant his honor charged the jury as follows upon the third issue: "On the second issue, the question for you to ascertain is whether the insured, Frank L. Taylor, was ever intemperate in the use of malt or spirituous liquors. Although you should find that the insured used malt or spirituous liquors in moderation, or that he even occasionally felt their effects, not to intoxication or immoderation, this would not be sufficient to enable you to answer the third issue, 'Yes.' In order to enable you to answer this third issue, 'Yes,' it is necessary for the defendant to satisfy you by the

greater weight of the evidence that the insured, Frank L. Taylor, had prior to the application been intemperate in the use of malt or spirituous liquors. Intemperate means excessive, immoderate. So the question in another form is this: 'Had the insured ever used malt or spirituous liquors intemperately, excessively, immoderately?' If you find from the testimony, by the greater weight of the evidence, that he had so used it prior to the date of his application, you will answer the second issue, 'Yes.' If the defendant has failed to so satisfy you, you will answer the second issue, 'No.' You will consider all the testimony offered by the defendant and by the plaintiff bearing on the question as to whether the insured has been intemperate in the use of malt or spirituous liquors."

The exceptions to his honor's refusal to give special instructions are noted in the opinion. There was judgment upon the verdict. Defendant excepted and appealed.

Brooks & Thomson, F. P. Hobgood, Jr., and A. A. Hicks, for appellant. Graham & Devin and B. S. Royster, for appellee.

CONNOR, J. (after stating the facts as above). The learned counsel for defendant pressed the exceptions to the admission of the statement of witnesses, based upon personal knowledge and observation, that insured, at the time of his application, was not intemperate in the use of spirituous liquors. The argument assumes that the testimony comes within the definition of "opinion evidence." Plaintiff insists that, properly interpreted, it is the statement by the witness of a fact, and not the expression of an opinion. It has been said that "if the witness had opportunity to know relevant facts himself, and did observe and note them," his evidence, although expressed in the form of an opinion, is really the statement of a fact. Gilliland v. Board of Education, 141 N. C. 482, 54 S. E. 413, citing Greenleaf, Ev. (16th Ed.) 441. It is very difficult to draw the line between testimony in which the witness states a fact—ascertained from observation, sensation, or other media—and in which he gives expression to an opinion by observing a number of facts from which, by a mental operation, he comes to a conclusion. Judges have felt themselves embarrassed by the general rule that, except within certain limitations, only facts, as distinguished from conclusions or opinions, were competent to be given in evidence. It is not improbable that too much refinement has found its way into judicial opinions, and that the practical side of the subject has suffered at the expense of substantial truth and justice. The effort to relieve the law from what has been termed "pedantry," and placing it upon a basis suited to the practical affairs of life, in this respect, is both interesting and instructive. Probably, in our jurisprudence, the most successful and well-sustained effort in this respect is found in the opinion of Gaston, J., in Clary's Adm'rs v. Clary, 24 N. C. 78, referred to by Judge Redfield as being done "with great ability and abundant success." Redfield on Wills, 143, note 16. Professor Wigmore thus refers to this opinion, and that of Justice Doe of New Hampshire. After referring to the controversy regarding the admissibility of the class of testimony presented in this appeal, he says: "Generally, the view favoring admission prevailed; the great law-making and argument-furnishing precedent for the earlier rulings being the opinion of Mr. Justice Gaston in Clary's Adm'rs v. Clary, in North Carolina in 1841, and for the more recent rulings being the opinions of Mr. Justice Doe, dissenting, in Boardman v. Woodman, 47 N. H. 144, and Mr. Justice Foster in Hardy v. Merrill, 56 N. H. 250, 22 Am. Rep. 441. In the same court in 1875 the opinion of Mr. Justice Doe succeeded in bringing about a change of heart in his own court and in the arsenal of arguments to whose supplies it is chiefly due that the courts of the country are to-day so unanimous in accepting the common-sense view of the subject." After defining the "opinion rule" as applied to cases in which "expert evidence" was admissible, Judge Gaston says: "But judgment founded on actual observation of the capacity, disposition, temper, character, peculiarities of habit, form, features, or handwriting of others, is more than mere opinion. It approaches to knowledge, and is knowledge, so far as the imperfection of human nature will permit knowledge of these things to be acquired, and the result thus acquired should be communicated to the jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observation of others."

The record in this case illustrates the truth of the observation of the learned judge. The question asked the insured is whether he has ever been intemperate in the use of liquors. This question is addressed, not to the opinion of the applicant, but to the fact, based upon the assumption that he has knowledge of the fact in regard to which he is asked. For the purpose of showing that the answer is not true, defendant introduces several witnesses, and asks them whether they have seen him "under the influence of alcoholic stimulants." They are not confined to the inquiry whether they have seen him drink liquor—if so, how much, and at what intervals of time, and then asked what he said, did, etc., so that the jury could draw their conclusions. The course of examination pursued was clearly admissible, because it is uniformly held competent to ask a witness whether a person was intoxicated (under the influence of liquor); that being a fact known to the witness from observation of conduct, other facts, etc. Why may not the witness, after stating the basis of his knowledge, be asked, with equal reason, whether the applicant was in-

temperate? It is not easy to see why one class of testimony is to be regarded as fact, while the other is opinion. If the question asked the insured had been, "Have you been under the influence of liquor within one year?" it would have been competent to ask a witness the direct question, "Have you seen the insured under the influence of liquor within one year?" Wherein is the distinction in principle between the two questions? To answer the first, requires large data, knowledge, or observation extending over a longer period, but is none the less a conclusion of fact drawn from personal knowledge and observation. That a witness may, having first stated knowledge of the essential facts, be asked whether a person was well or sick, angry or otherwise, and a multitude of other questions of like character, is settled beyond controversy.

For a collection of the cases illustrating the extent to which the courts of this country have gone in extending the principle upon which this class of testimony is admitted, see Greenleaf, Evidence (16th Ed.) 441; 3 Wigmore, Ev. § 1938, note 2. Greenleaf says: "There is, therefore, no rule admitting opinions or inferences when made by one class of persons (experts) and excluding them when made by another class (laymen); but there is a rule excluding them whenever they are superfluous, and admitting them whenever they are not." After stating the rule, as applied to persons having special skill or knowledge, he says: "Secondly. From persons who have no special skill, but have personally observed the matter in issue, and cannot adequately state or recite the data so fully and accurately as to put the jury completely in the witness' place and enable them equally well to draw the inference. The absurdities which disfigure the application of the rule come chiefly from a too illiberal interpretation of the latter notion—that is, it is frequently ruled that a personal observance can sufficiently state the observed data without adding his inference—although a just view of the situation would recognize that too much credit has been given to the witness' power of narration, and that, in truth, it is impossible for the data to be stated." The rule, with its limitations, underwent a most able and exhaustive discussion in the Supreme Court of New Hampshire beginning with the dissenting opinion of Mr. Justice Doe in Boardman v. Woodman and State v. Pike, 49 N. H. 399, 6 Am. Rep. 533, and the adoption of his opinion by Foster, C. J., in Hardy v. Merrill, as stated by Professor Wigmore. It is interesting to note, as said by Greenleaf (441), that "a more liberal tendency, in this respect, seems to be making its way in recent times." All of the writers on the law of evidence agree "that the reports are overloaded with decisions of the sort that ought never to have been called for." While it may be difficult to reconcile all of the cases in our reports, we think that, upon a careful examination of the peculiar facts in each case, there will be found a recognition of the principle announced in Clary's Adm'rs v. Clary, supra. In McRae v. Malloy, 93 N. C., at page 166, Smith, C. J., says of this class of testimony: "The opinion is but a condensed and summary method of stating the result of personal observation and communications with the party." In Insurance Co. v. Foley, 105 U. S. 350, 26 L. Ed. 1055, the question and answer appear to have been admitted without objection. Field, J., in the opinion, says of the witnesses: "All of them testified from their observation of the conduct of the deceased, and the jury would properly give weight to the testimony, not according to the positiveness of the averments of the witnesses as to their knowledge, but, other considerations being equal, according to their opportunities of observation of the deceased's conduct, and the manner in which those opportunities had been improved." He further says: "The question was as to the habits of the insured. His occasional use of intoxicating liquor did not render him a man of intemperate habits, nor would one exceptional case of excess justify the application of this character to him"—concluding: "And the testimony of witnesses, who had been intimate with him for years, and knew his general habits, may well have satisfied the jury that, whatever excesses he may at times have committed, he was not habitually intemperate." Mr. McKelvey after stating the general rule excluding opinion evidence, notes the exceptions to the rule, or, speaking more accurately, testimony which is sometimes erroneously supposed to come within it: "The matters referred to are those of which the mind acquires knowledge by the simultaneous action of several of the senses, so that an impression is produced on the mind which cannot be traced to any one fact produced by a single sense, but a statement of which is, nevertheless, a fact. A witness may say that a man appeared intoxicated, or angry, or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, 'matter of fact,' as used in the law of evidence, it is not an opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature." Evidence, 174; Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536. It would serve no good purpose to review the decisions made by this court in the cases cited in defendant's brief. We have examined them. Several

may be distinguished, while it may be that, in some, the court has fallen into the error of overmuch nicety of refinement. As said by Prof. Thayer in his admirable Treatise: "The law of evidence is the creature of experience, rather than logic." See, also, Holmes, Com. Law, 156.

It may be well to keep in view that this class of testimony is not to be confused with "expert evidence." There, the opinion of the witness is admitted, not because he has knowledge of the matter or conditions in regard to which he testifies, but upon an assumed state of facts, sustained by evidence, he, by reason of his skill or learning, is competent to form opinions. The distinction is clearly stated in McKelvey, Ev. 176 et seq. The defendant complains that a large number of witnesses, many of them of great weight in the community, were permitted to testify. The obvious answer to this objection is that, if insured was known to a large number of persons, his habits, conduct, demeanor, etc., and they all concur in the conclusion, formed from knowledge, that he was temperate, the question is thereby removed from the plane of conjecture (opinion) and placed upon "hard fact." We are of the opinion, both upon reason and authority, that the testimony to which exception was taken was properly admitted.

The court could not have directed the jury to answer the issue as a matter of law. The affirmative was upon the defendant, and certainly it could not be said that there was not ample room for more than one conclusion by fair-minded men. In the brief, the first, second, fifth, and ninth assignments of error are conceded to involve this contention. The sixth and seventh assignments raise the much-discussed question regarding the weight to be attached to positive and negative testimony. We do not think that the rule, for which defendant contends, applies in this case. The question was not whether any witness had seen the insured under the influence of liquor, but, conceding that he was so seen, as testified, he was not thereby shown to be intemperate. While this court has approved the instruction as given in Murray's Case, 139 N. C. 540, 51 S. E. 775, and we do not question the wisdom of giving it when the testimony presents the contention, for the purpose of aiding the jury, we should hesitate to find reversible error in the failure to give it, when the other instructions, as in this case, point out the manner in which the testimony should be considered. An examination of the testimony fails to disclose any substantial contradictory statements by the several witnesses. The real question was whether, conceding the truth of defendant's testimony, the insured had ever been intemperate in the use of alcoholic liquor. This was fairly submitted to the jury, and they found against the contention of defendant.

We find no reversible error.

The judgment must be affirmed.

WALKER, J. (concurring). The opinion of the court of this case does not conflict, as I understand it, with the rule of evidence that a witness cannot give his opinion, in answer to a question, which involves a matter of law as one of its ingredients, as, for example, whether a certain person had or had not sufficient mental capacity to execute a deed or will or to make a contract; what is mental capacity, and the standard by which it is to be gauged, being questions of law. I adhere to what I said in the case of In re Peterson, 136 N. C. at page 28, 48 S. E. 561, and concur in the decision of the court in this case, because I do not think the questions, which are now ruled to be competent, fall within the principle discussed by me in that case. There is a wide difference betwen mental condition or soundness and mental capacity, and, if this difference is carefully regarded, most of the cases in our reports can easily be reconciled. Crowell v. Kirk, 14 N. C. 356; Clary's Adm'rs v. Clary, 24 N. C. 78; Smith v. Smith, 117 N. C. 326, 23 S. E. 270; Lawson on Exp. & Op. Ev. (2d Ed.) p. 155; Fairchild v. Bascomb, 35 Vt. 416; Reg. Richards, Fos. & Fin. 87; Walker v. Walker, 34 Ala. 470; In re Arnold's Will, 14 Hun (N. Y.) 525. The case of Whitaker v. Hamilton, 126 N. C. 465, 35 S. E. 815, was, in my opinion, erroneously decided, and should be overruled. A witness is no more competent to express an opinion as to the mental capacity of a testator to make his will than he would be to state that an act was negligently done, both involving questions of law. The latter kind of testimony this court has steadily and consistently held to be incompetent. Tillett v. Railroad, 118 N. C. 1031, 24 S. E. 111. Nor can he state that another has acted bona fide. Wolf v. Arthur, 112 N. C. 691, 16 S. E. 843. In Tillett v. Railroad, at page 1042 of 118 N. C., page 112 of 24 S. E., Justice Avery said: "When, therefore, the witness was asked to state whether a car was coupled in a negligent manner, the question was calculated to elicit an opinion upon one of the very questions which the jury were impaneled to decide, and the objection to its competency, being made in apt time, was properly sustained." Smith v. Smith, supra. Mental state may be proved by a witness' opinion, as in McRae v. Malloy, 93 N. C. 166, cited in the opinion of the court. See, also, Sherrill v. Telegraph Co., 117 N. C. 353, 23 S. E. 277. It is also competent for a witness to give his opinion as to whether a person is a negro or not (Hopkins v. Bowers, 111 N. C. 175, 16 S. E. 1), or that his appearance indicates the presence of negro blood in his veins, as in Gilliland v. Board of Education, 141 N. C. 482, 54 S. E. 413. But in all the cases just noted, and in those cited in the opinion of the court, as well as in the principal case, the inquiry referred to a state or condition not complicated with a question of law. A witness cannot give his opinion as to what

the law is, either directly or indirectly, unless that is the very issue involved or the subject of inquiry, as when it relates to the law of some other jurisdiction, and he is called as a professional expert to prove it. That a nonexpert should not be asked a question requiring him to express his opinion upon a question of law would seem to be a proposition so plain as not to require any argument to demonstrate its correctness. He could just as well be asked if the will or deed had been properly executed. It is not the nature of the particular question of law involved as the fact that it is a question of law that renders the witness incompetent to answer such a question.

Although concurring with the court, I have discussed this matter in a separate opinion because it is considered by me as very important to preserve the true and proper distinction which separates competent from incompetent evidence; otherwise great injustice may be done in the trial of causes.

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(146 N. C. 31)

## LENTZ v. HINSON.

(Supreme Court of North Carolina. Nov. 13, 1907.)

JUSTICES OF THE PEACE — APPEALS — DOCKETING.

An appeal from a justice in a civil case, not regularly docketed before the next regular term of the superior court, will be dismissed, though the term is for the trial of criminal cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 593.]

Appeal from Superior Court, Stanly County; Moore, Judge.

Action by L. A. Lentz against James Hinson. From a judgment dismissing an appeal from a justice of the peace, plaintiff appeals. Affirmed.

R. E. Austin, for appellant. J. R. Price and R. L. Smith, for appellee.

BROWN, J. The record shows that the defendant secured judgment against plaintiff on a counterclaim before the justice of the peace on April 29, 1904, and at the time the plaintiff took an appeal to superior court and paid the justice's fees. The justice made out the transcript of appeal and handed it to the clerk of said court the same day. The clerk's fee for docketing was not paid or tendered, and he was not requested to docket the appeal, and it was not docketed or filed regularly until September 12, 1904. A regular term of the court was held July 18, 1904, and, although it was for the trial of criminal cases, the appeal should have been docketed by that term. The point is expressly decided, and the reasons given, in Blair v. Coakly, 136 N. C. 407, 48 S. E. 804.

Affirmed.

(78 S. C. 461)

## STATE ex rel. BIRCHMORE v. STATE BOARD OF CANVASSERS et al.

(Supreme Court of South Carolina. Nov. 16, 1907.)

1. ELECTIONS—RIGHT TO VOTE—REGISTRATION CERTIFICATE.

The production of a registration certificate, required by Civ. Code, 1902, § 185, is a condition precedent to legal voting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 113.]

2. SAME—CONSTITUTIONAL PROVISIONS—CONSTRUCTION.

Const. art. 2, § 4, subd. "c," provides for the registration of voters having certain qualifications up to January 1, 1898. It requires copies of the registration list to be kept by the clerk of court of the county and Secretary of State, and declares that the certificate of either of such officers shall be sufficient evidence of the citizen's right to subsequent registration, and the franchise under the limitations imposed. *Held*, that "subsequent registration," as so used, included any registration after the first prior to January 1, 1898, and hence a clerk's certificate of registration under such section was not a substitute for a registration certificate required by Civ. Code 1902, § 185, to entitle the voter to vote at a subsequent election, but was only evidence of his right to register and obtain the necessary certificate.

3. SAME — CERTIFICATE OF REGISTRATION — FORM AND CONTENTS.

Civ. Code 1902, § 185, provides for the issuance of registration certificates containing a statement of the elector's name, age, and place of residence, as entered in the registration books, which certificates are required to be signed by at least two of the members of the board of registration. *Held*, that a clerk's certificate of the registration of a voter prior to January 1, 1898, authorized by Const. art. 2, § 4, subd. "c," merely certifying that the voter's name appeared on the registration books in his office, was insufficient as a certificate under section 185.

4. INTOXICATING LIQUORS — LOCAL OPTION ELECTION—IRREGULARITIES.

That certain persons were permitted to vote at a local option election without having produced the necessary registration certificate was not such an irregularity as necessarily required that the election be set aside, under the rule that, where the result of an election is not made doubtful nor changed, irregularities will be deemed immaterial, in the absence of fraud.

5. ELECTIONS—MODE — CONSTITUTIONAL PROVISIONS—CONSTRUCTION—"BY BALLOT."

The words "by ballot," in Const. art. 2, § 1, providing that all elections by the people shall be by ballot, implies that the voting shall be secret, and not viva voce.

6. INTOXICATING LIQUORS — LOCAL OPTION ELECTION.

Const. art. 2, § 1, provides that all elections by the people shall be by ballot. *Held*, that the word "elections" included every expression of choice by voters of a body politic, and therefore included local option elections.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2336-2339; vol. 8, pp. 7647-7648.]

7. ELECTIONS—CONDUCT—SECRET BALLOTS.

Act Feb. 16, 1907, provides that local option elections shall be conducted according to the rules prescribed for general elections, one of which is that it be by secret ballot, as provided by Const. art. 2, § 1. Section 8 requires that two ballot boxes shall be provided at each election precinct, and that every voter in favor of the sale of liquors shall cast a ballot in the box provided therefor, on which shall be printed the word "For Sale," and every voter opposed shall cast a ballot, on which shall be printed the words "Against Sale," etc., and that every voter in favor of either of two modes of application of one-third of the dispensary proceeds should cast a ballot in the box provided therefor. Held, that where the officers of an election under such act provided boxes which were labeled "For Sale" and "Against Sale," respectively, into which the voters were required to cast their ballots as they voted for or against the sale of liquors, respectively, the election was void as destroying the secrecy of the ballot.

8. SAME—OBJECTIONS—ESTOPPEL.

Where a local option election was so held as to destroy the secrecy of the ballot, an elector, by voting without protest, did not estop himself from contesting the election.

Certiorari by the state, on relation of Charles W. Birchmore, against the state board of canvassers and others. Petition dismissed. Writ denied.

Kirkland & Smith, for relator. Bellinger & Welch, for respondents.

POPE, C. J. The relator, Chas. W. Birchmore, on behalf of himself and numerous other qualified electors of Kershaw county, by his petition seeks a writ of certiorari from this court to the state board of canvassers for the purpose of having the court review the findings of said board in the contest of an election held in Kershaw county on the 20th of June, 1907, under an act of the General Assembly approved February 16, 1907, entitled "An act to declare the law in reference to and to regulate the manufacture, sale, use, consumption, possession, transportation and disposition of alcoholic liquors and beverages within the state and to police the same." The sections germane to the discussion are:

"Sec. 3. At such election the election commissioners for such county shall at each voting precinct therein provide two ballot boxes in which the ballots must be cast. Any person who is a qualified elector of such county may vote in said election. Every voter who may be in favor of the sale of liquors and beverages in such county shall cast a ballot in the box provided therefor, on which shall be printed the words, 'For Sale;' and every voter opposed shall cast a ballot upon which shall be printed the words, 'Against Sale.' Every voter who may be in favor of the application of one-third of the dispensary profits to the county school fund shall cast a ballot in the box provided therefor, upon which shall be printed the words, 'For School Fund;' and every voter opposed thereto, but in favor of its application to roads and bridges shall cast a ballot on which shall be printed the words, 'For Roads and Bridges.'"

"Sec. 37. Any county may prohibit the manufacture and sale hereinbefore licensed within its limits in the following manner: Upon the petition of one-fourth of the qualified voters of such county for an election upon the question of manufacture therein being filed

with the supervisor of said county, he shall order an election, submitting the question of manufacture or no manufacture, which election shall be petitioned for, ordered and conducted in the same manner as provided in sections 2, 3 and 4 of this act, except that the ballots shall be 'For Manufacture' and 'Against Manufacture.'"

The illegality alleged by the contestants was the permitting of certain persons to vote without registration certificates and such arrangement of the ballot boxes as practically amounted to viva voce voting. The facts upon which these allegations are based are as follows: Pursuant to general instructions issued by the commissioners of elections, upon the question of sale or no sale of liquors, two ballot boxes were provided and used at each voting place in the county, upon one of the boxes were the words "For Sale," and upon the other box the words "Against Sale." Persons favoring the sale of intoxicants were required to cast their ballots in the box labeled "For Sale," and those opposed were required to cast their ballots in the box labeled "Against Sale." A similar arrangement was made as to the boxes for the determination of manufacture and application of the profits. Also in eight boxes 144 persons registered prior to 1898 were allowed to vote upon the production of certificates of the clerk of court of Kershaw county of which the following is an example: "I, I. P. Hough, clerk of court of Kershaw county, do hereby certify that the name of W. R. Hough appears upon the book in my office as No. 19, duly registered in Buffalo township prior to January 1, 1898, under article 2, § 4, subd. 'c,' of the state Constitution. Camden, S. C., this 29th day of May, A. D. 1907. I. P. Hough [Seal], Clerk of Court of K. C. The county board of canvassers upheld the election, but on appeal to the state board it was declared null and void and set aside on the two grounds contended for by the contestants.

It has been held by this court that the production of a registration certificate is a condition precedent to legal voting in elections in this state. Wright v. Board of Canvassers, 76 S. C. 574, 57 S. E. 536. In his petition to this court the relator seeks to show that a certificate such as the one above set out is a sufficient registration certificate as to electors registered prior to 1898. The Constitution provides that such certificate "shall be sufficient evidence to establish the right of said citizens to any subsequent registration and the franchise under the limitations herein imposed." Article 2, § 4, subd. "c." In order to construe this section consistently with the holding in the case of Wright v. Board of Canvassers, supra, we must overrule relator's contention. The language of the Constitution is plain. The first division of the clause above quoted provides that the certificate shall be sufficient evidence for subsequent registration. Subsequent registration certainly means any registration after the first registration prior to the 1st of January, 1898. Thus registration for a municipal election, or registration in a newly created precinct, or any other conceivable instance in which registration might be required, can be secured by the production of the clerk's certificate. Thus it was clearly not the intention to make the certificate of the clerk a registration certificate, but it was intended as evidence of qualification by which such certificate could be secured. It is expressly provided that the franchise is secured "subject to the limitations herein imposed." Now, one of those limitations is that the voter shall have a registration certificate, and the Legislature has provided that he shall produce it at the polls before he can legally vote. The importance of this certificate is emphasized in the case of Wright v. Board of Canvassers, above referred to; hence we shall not dwell upon it here. Suffice it to repeat that it was there held that the production of such a certificate was a condition precedent to legal voting. But are not certificates such as that above set forth really registration certificates? We think not. In the first place, the Legislature has provided that the registration certificate shall contain a statement of the elector's name, age, and place of residence as entered in the registration books, and such certificates shall be signed by at least two of the members of the board of registration. The form of the certificate is likewise established. 1 Civ. Code 1902, § 185. It is not expedient to discuss here the advisability of this legislation, but we think it very clear. The intelligent conduct of elections, the prevention of fraud, and other like objects are in view. The clerk's certificate does not set forth the facts required by law; therefore it does not comply with the legislative enactment. Such a certificate is primarily for the purpose of securing registration. Registration having been secured, the necessary certificate must follow. Where an elector, through negligence, or for other reasons, fails to secure his certificate, hard as it may seem in some cases, yet he must pay the penalty, namely, the denial of the right to cast his ballot.

However, if this be the only irregularity in the election, we do not think it necessarily follows that it must be set aside. The finding of the county board, which was not reversed by the state board, was to the effect that, even if these votes were declared illegal, nevertheless the result would not be changed, nor even made doubtful. This distinguishes the case here under consideration from the Wright Case. There the result could not be determined on account of the irregularities. The universal weight of authority is to the effect that, where the result of an election is not made doubtful nor changed, irregularity or illegalities, in the absence of fraud, will not cause the expressed will of the body of the voters to be set aside, unless a constitutional provision is violated or it is specifically

provided by legislative enactment that such irregularity or illegality shall invalidate the election. Thus it is said in 10 A. & E. Ency. of Law, p. 766, where authorities from numerous state courts, as well as the United States court, are quoted: "The general principles to be drawn from the authorities are that honest mistake or mere omissions on the part of election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not avoid an election, unless they affect the result, or at least render it uncertain." See, also, 15 Cyc. pp. 372, 416, and authorities.

But there are other objections raised by the respondent. They allege that they were deprived of the privilege of the secrecy of their ballots. The Constitution (article 2, § 1) provides: "All elections by the people shall be by ballot. * * *" The meaning of the phrase "by ballot" was extensively discussed in the case of State v. Shaw, 9 S. C. 132. That case arose over a contest as to the election of a circuit judge. The Constitution of 1868 (article 4, § 13) provided that circuit judges should be elected by joint ballot of the General Assembly. Shaw was elected viva voce. On account of the importance of the case the justices deemed it expedient to render their opinions seriatim. Justice Haskell, after reviewing numerous legal and literary authorities, reached the conclusion that the word "ballot" implies secret voting. Justice McIver uses the following language: "The sole question involved in this case is whether an election of a circuit judge by the General Assembly voting viva voce is a valid election. To determine this question it is necessary to consider the provisions of the Constitution of this state relating to this subject, for the purpose of ascertaining whether that instrument requires such election to be made in any particular mode, and, if so, what that mode is. For no one will deny that if, by the terms of the Constitution, the election is required to be made in any particular mode, that mode is essential to the validity of such election, and a person who has been elected in any other mode has no legal title to the office. It cannot escape the attention of the most casual reader of the Constitution that there are two distinct modes of voting, not only provided for, but prescribed, by that instrument in express terms—the one by ballot, and the other by the viva voce system. It is likewise equally certain that these modes of voting differ in one, at least, most essential particular—the one implying secrecy; the other involving publicity." Numerous other authorities are to the same effect. Johnston v. Corporation of Charleston, 1 Bay (S. C.) 441; William v. Stein, 38 Ind. 89, 10 Am. Rep. 97; People v. Pease, 27 N. Y. 45, 84 Am. Dec. 242; Temple v. Mead, 4 Vt. 535; People v. Cicott, 16 Mich. 283, 97 Am. Dec. 141; Cooley's Const. Lim. 604; Bouvier's Law Dictionary; Wharton's Law Dictionary. Therefore if the constitutional mandate applies to the election here under consideration, such election is void; for, as was said by Justice McIver in the language above quoted, if by the terms of the Constitution the election is required to be made in any particular mode, that mode is essential to the validity of the election.

The relator contends, however, that the section does not apply, as this was not an election of an officer, nor such a one as is provided for by the Constitution. Let us consider this proposition. By an attempted distinction of the general and special significance of the term "election," relator seeks to take the controversy here in question from the protection of the provisions of the Constitution invoked by the respondents. He would show that the phrase "all elections" was used by the framers of the Constitution in reference only to elections of officers and special elections provided for in the Constitution, and cites Valverde v. Shattuck, 19 Colo. 104, 34 Pac. 947, 41 Am. St. Rep. 208, Seaman v. Baughman, 82 Iowa, 216, 47 N. W. 1091, 11 L. R. A. 354, and Martin v. School District, 57 S. C. 126, 35 S. E. 517, to support his contention. We cannot approve, nor do we think these cases sustain so narrow a construction. An election is the expression of a choice by the voters of a body politic, and it seems to us that the preference so expressed, whether it be for a particular individual or in favor of a stated proposition, is nevertheless an election. The rule laid down in 10 Am. & E. Ency. 562, seems to be sustained by reason and authority. After defining the broad use of the term "election," the writer proceeds: "In a narrower sense the term is limited to the choice of persons for political offices by the vote of the people or of a somewhat numerous body of electors, as distinguished from an appointment by a single person, and to the determination of other questions submitted by law to popular vote. Of the latter class, which are called 'elections' in the statute and in the reports of cases, are such questions as the location of county seats, the adoption of municipal charters, the question of local option, and the question of incurring municipal indebtedness." It will be noted that by explicit terms the rule thus stated embraces local option elections. In 15 Cyc. 280, practically the same rule is laid down.

But, apart from this consideration, even granted that the term as used in the Constitution does not embrace local option elections yet the election is invalid. Relator admits that the Legislature has power to declare in what manner the election shall be held and to signify such irregularities or illegalities as will make it null and void. Has the Legislature exercised that power? The law of 1907, better known as the "Carey-Cothran Act," provides that local option elections shall be conducted according to the rules provided for general elections. It will not—in fact, it cannot—be denied that one of the essentials of a

valid general election is that it be by ballot, for the Constitution so provides. Ballot implies secrecy. State v. Shaw, supra. Therefore, if a general election is held viva voce, or there are such other irregularities as practically amount to such voting, and the electors are deprived of their constitutional right to secrecy in casting their ballots, the election is void. Now, when the Legislature enacted that this rule of general elections should apply to local option elections, it expressly declared that, if the rule was not applied, the election would be void; for, as we said above, under the Constitution it is a rule of general elections that, if the electors are not permitted to vote by ballot, the election is void. It would be highly illogical to hold that the Legislature intended to adopt the rule without its sanction. Therefore this election must be held invalid unless, as relator contends, the respondents have waived their right to contest the election by taking part in it without objection to the arrangements.

By waiver is meant the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right. Therefore, in order to constitute waiver, the person against whom the waiver is claimed must have full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such right. 29 A. & E. Ency. 1091, and authorities. From the nature of the doctrine it may and seems generally to be applied to all rights to which the party is legally entitled. A limitation, however, is usually recognized, and where such waiver would be against public policy it is not allowed to be operative. Would such a waiver as is claimed here by the relator be against public policy? The provision of the Constitution requiring popular elections to be by ballot had in view the purity of elections and the prevention of intimidation of voters at the polls. From earliest times such results have been recognized as highly beneficial to municipalities and commonwealths. While it might appear that primarily the object was to secure benefits to electors, yet we think this purpose can only be regarded as a means to an end. With the right of the individual elector secure, necessarily it must follow that the state's welfare in this respect would be safeguarded. To attempt to enumerate the advantages of a well-regulated franchise would unnecessarily prolong this opinion, yet many of them must be evident to the most casual observer. Therefore to hold that the respondents in this case are estopped from contesting the election because they cast their ballots in the election without protest at the time we think would be an invasion of the integrity of the franchise system of the state. Elliott v. Burke, et al., 113 Ky. 479, 68 S. W. 445; State ex rel. Anthony v. Barton, 58 Kan. 709, 51 Pac. 218. Of course, if the election is properly conducted, and the elector voluntarily puts aside his privilege of secrecy, the case is entirely different. The point is that he must be allowed the privilege. While in this particular instance it is possible that no evil results followed from the mode in which the election was conducted, yet we cannot be unmindful of the fact that we must be guided by those general principles of law and policy that will enable us to determine future litigations, under the election laws of the state consistently. With such principle in view, we are compelled to declare the election here under consideration void.

It is the judgment of this court that the petition be dismissed and the writ denied.

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(78 S. C. 445)

## ÆTNA FIRE INS. CO. et al. v. JONES, Comptroller General.

(Supreme Court of South Carolina. Nov. 6, 1907.)

PENSIONS—STATUTES—VALIDITY.

Act May 9, 1906, requiring fire insurance companies to pay annually a specified sum on premiums to create a pension fund for disabled firemen, violates Const. art. 3, § 32, prohibiting the granting of pensions except for military and naval services, a pension being an annuity from the government for past services.

Petition by the Ætna Fire Insurance Company and others against A. W. Jones, as Comptroller General of the state, to enjoin respondent from collecting a tax. Granted.

Smythe, Lee & Frost, and King, Spaulding & Little, for petitioners. J. F. Lyon, Atty. Gen., Geo. F. Von Kolnitz, and Mitchell & Smith, for respondent.

POPE, C. J. This is a petition to this court in its original jurisdiction whereby the plaintiff insurance companies, for themselves and others in like situation, seek to have the Comptroller General enjoined from proceeding to collect certain taxes provided for by an act of the General Assembly approved May 9, 1906, on the ground that the said act is unconstitutional, null, and void. Counsel for petitioners discuss at length the preliminary question as to the jurisdiction of this court to hear the cause, but an identical question having been passed upon in the recent case of Ware Shoals Mfg. Co. v. Jones, Comptroller General (S. C.) 58 S. E. 811, September 20, 1907, we proceed at once to the merits of the case.

The title of the act is: "An act requiring the payment of certain premiums to the fire departments of incorporated cities and towns by the fire insurance companies doing business in the state, for the purpose of creating a fund for the benefit of the members of the fire departments of such cities and towns, and providing for the collection and distribution of the same." The act is as follows: "Section 1. Be it enacted by the General Assembly of the state of South Carolina: Every fire insurance company, corporation or association doing business in any incorporated

city or town of this state, having or that hereafter may have a regularly organized fire department under the control of the mayor and council, or intendant and council of said city or town, and having in serviceable condition for fire duty fire apparatus and necessary equipments belonging thereto to the value of ($1,000) one thousand dollars, and upwards, shall return to the Comptroller General a just and true account verified by oath that the same is a true account of all premiums received from fire insurance business done in such incorporated cities or towns during the year ending December the 31st, or such portion thereof as they may have transacted such business in such cities and towns. Such returns must be made by said companies, corporations or associations within sixty days after the 31st day of December of each year." Section 2 requires such companies to pay within the said 60 days to the State Treasurer the sum of $2 on every $100 premiums collected on fire or lightning insurance business done in said cities and towns. Sections 3 and 4 require said insurance companies to keep accurate books of account of all business done in said cities and towns, and provide a penalty for failure so to do. Section 5 enacts that, in case of failure to pay said tax or any penalty imposed, the Comptroller General shall have power to revoke any license previously issued to said companies. Section 6: "That the State Treasurer shall pay over the money so collected from the insurance companies, associations or corporations doing business within the cities or towns having or that may hereafter have a regularly organized fire department as aforesaid in section 1 of this act, to the treasurer of the Firemen's Relief Association to be composed of the members of the fire departments of such cities or towns, and to be incorporated under the laws of this state; provided that all money so collected from the insurance companies, corporations or associations doing business within the cities or towns having or that may hereafter have a paid department, being such department in which the members are paid for full time or part of their time employed as firemen, and on duty at all times to respond to all duties required of them, and otherwise in accordance with the provisions of section 1 of this act, shall be paid by the State Treasurer to the treasurer of such city, and all the money so received shall be set apart and used by such cities or towns solely and entirely for the objects and purposes of this act by the Firemen's Relief Association of (or) Board of Trustees of Firemen's Pension funds of such cities or towns under such provisions as shall be made by the mayor and council or board of trustees thereof." Section 7: "All money collected and received under the provisions of this act shall be held in trust and used as a fund for the relief of any member of the fire department of such city or town who may be injured or disabled, and for the relief of, or the payment of gratuities to the widow or those dependent upon any member of such fire department who may be killed; for the payment of necessary funeral expenses of any member of such fire department, and for the purchase of accident insurance upon the members of such fire departments: Provided further that the boards of trustees of such cities having pension funds may also use said money for pensions to superannuated and disabled firemen: Provided that the fire department of such city or town should also be a member of the State Firemen's Association of this state."

The act is attacked on numerous grounds, but we think the pivotal question is: Has the General Assembly power to enact such legislation? In other words: Is the Constitution violated, in that the tax here under consideration is not uniform and for no public purpose? That the imposition is an attempted exercise of the taxing power conferred by the Constitution the respondent practically admits, in that it is sought to sustain the exaction on the ground that it is for a public purpose. "A tax," according to Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by the government for the use of the nation or state." Cooley in his Constitutional Limitations, § 479, says: "Taxes are burdens or charges imposed by the Legislature upon persons or property to raise money for public purposes." Applying either of these rules to the legislation here in question, if it be conceded that the aid of firemen is a public purpose, it clearly falls under the head of taxation for all of the requirements are fulfilled, namely, that it is an imposition on person or property by the government for a public purpose. In the case of Henderson v. Insurance Co., 135 Ind. 28, 34 N. E. 565, 20 L. R. A. 827, 41 Am. St. Rep. 410, where a question almost identical was under consideration, it is said that the decided weight of authority holds that such impositions are attempts at taxation and the cases of San Francisco v. Insurance Co., 74 Cal. 113, 15 Pac. 380, 5 Am. St. Rep. 425, State v. Wheeler, 33 Neb. 563, 50 N. W. 770, Philadelphia Association for Relief of Disabled Firemen v. Wood, 39 Pa. 73, and State v. Merchants' Ins. Co., 12 La. Ann. 802, are quoted as sustaining that view. The respondent here contends, however, that the imposition is not a tax, but is one of the conditions upon which foreign insurance companies are permitted to do business in this state. Such a contention we think cannot be sustained. In the first place, the act is general, applying both to domestic and foreign corporations. In the second place, the act itself does not purport to be conditional. It applies to "every fire insurance company, corporation or association doing business in incorporated cities or towns in this state." The participle "doing" is important here as throwing light on the intention of the Legis-

lature. The word implies that the corporations are already in existence, and are carrying on business. The license has already issued. True, the act does provide that under certain circumstances the certificate shall be revoked, but we regard this as merely a means for securing the collection of the imposition, and not as a condition subsequent. That the Legislature might have imposed such a condition upon foreign corporations, as well as domestic corporations, it is not our duty here to decide. Suffice it to say that no such condition was imposed.

Again, the respondent contends that the present enactment is a lawful exercise of the police power inherent in the state as a sovereignty, the exercise looking to the protection of the property of all the citizens of the state. Perhaps no subject is more fraught with difficulty than is the proper limiting and defining of the police power of a sovereign state. Generally courts refuse to attempt such definition, leaving each case to be decided as it arises. In our state, however, in the comparatively recent case of Stehmeyer v. City Council, 53 S. C. 277, 31 S. E. 331, where this power is discussed at length and numerous authorities are reviewed, the court with deference lays down the following: "The police power is that attribute of sovereignty in a state, by which it clothes the Legislature with power to regulate persons, natural and artificial, and property, in accordance with the provisions of the state Constitution, in all matters relating to the public health, the public morals, and the public safety." Again, in the case of Beer Company v. Massachusetts, 97 U. S. 33, 24 L. Ed. 989, it is said: "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection, health, and property of the citizens, and to the preservation of good order and the public morals." In 22 A. & E. Ency. of Law, p. 938, the following proposition sustained by much authority is laid down: "In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see (1) that the enactment has for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals, or general welfare; and (2) that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend towards the accomplishment of the object for which the power is exercised. The police power cannot be used as a cloak for the invasion of personal rights or private property, neither can it be exercised for private purposes, or for the exclusive benefit of particular individuals or classes." In other words, the exercise must have in view the good of the citizens of the sovereignty as a whole.

This brings us then to the question as to whether or not the legislation here under consideration has in view a public purpose. The money secured from the imposition on the insurance companies is to "be held in trust and used as a trust fund for the relief of any member of the fire department of such city or town who may be injured or disabled, and for the relief of, or payment of gratuities, to the widow or those dependent upon any member of such fire department who may be killed, for the payment of necessary funeral expenses of any member of such fire department and for the purchase of accident insurance upon the members of such fire departments," and in certain cases to be used for the payment of pensions. New York and Alabama and perhaps one or two other states, proceeding upon the theory that the prevention of conflagrations is a public duty which prior to the establishment of fire departments devolved upon the community; that in the discharge of these duties the firemen sustain such relation to the public as to become, in the true sense, public servants, have sustained the position that such enactments are for public purposes. Trustees of Exempt Firemen's Benevolent Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; Phœnix Assurance Company of London v. Fire Department of Montgomery, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468. In each of these cases, however, the legislation was sustained on the ground that it provided conditions upon which foreign insurance companies would be permitted to carry on business in the state. The above reasoning as to the publicity of the purpose of such enactments was considered and expressly repudiated by the Indiana court in the case of Henderson v. Insurance Co., supra. A like view is maintained in Philadelphia Association v. Wood, supra, where the court uses this language: "Of course, there was a good motive for this. The relief of disabled firemen is a purpose worthy of society; and firemen contribute much to save insurance companies from losses. And hence it is inferred that insurance companies ought to contribute to the support of those who have been disabled in working for their benefit. But the same argument might be quite as effectually used as a reason for imposing a burden in favor of this society, upon those who obtain insurances, and much more upon those who do not insure at all. Therefore, since the chief characteristic of justice is its equality, the justice of this provision is very far from being apparent. An untrained and unthoughtful benevolence is very apt to be unjust to those interests which do not attract its special attention." Likewise, in Louisiana v. Merchants' Ins. Co., supra, the court says: "But in the case be-

fore us there is no property improved or assessed. All is conjectural and arbitrary. One class of corporations is taxed an invariable sum for the benefit of another class. There is no possibility of ascertaining whether the tax is a quid pro quo. The fire companies are not compelled by the law to do anything for the insurance companies. A bounty is secured to the fire department by confiscating the money of the defendants, without providing that any service shall be rendered to the defendants by the fire departments; and, even if this could, for a moment, be regarded as an assessment for benefits conferred, its inequality is glaring. Every owner of buildings and other combustible property in New Orleans, who is either wholly or in part his own underwriter, is presumed to be benefited by the fire department in the same way as the insurance companies are. Why should the companies alone pay for this common benefit?" The question is exceedingly close and difficult, and the authorities, as we have seen, are conflicting, but we are inclined to give adherence to the latter view, especially where the benefits go to a Firemen's Benefit Association the public purpose seems to be lacking. Therefore we hold that the act cannot be sustained on the ground that it is a police regulation; the important characteristic, publicity of purpose, being wanting. It cannot be doubted that incidentally the public derives much benefit from fire departments of municipal corporations. Any organization that tends to enhance the value of property or the security of its possession, that gives work to unemployed persons in a given locality, or bridles powers hitherto unused, is certainly after a manner beneficial to the public at large. The wealth and welfare of a state lies in the well being of its individual citizens. Thus, if a factory employing hundreds of hands and annually turning out thousands of dollars worth of products is built, or a mine which yearly puts on the market hundreds of tons of mineral is opened up the incidental benefit to the public is great, yet the highest legal tribunal of the country has held that public funds cannot be appropriated for such a purpose. Loan Association v. Topeka, 20 Wall. (U. S.) 663, 22 L. Ed. 455. A fire department is a municipal institution. Its organization and control is purely a matter of municipal concern. True, interest in the establishment of such agencies would extend further than the municipal boundaries, but whether that interest could be manifested in action on the part of the General Assembly, otherwise than to encourage, seems a matter of doubt; the spirit of our law being that the Legislature may invest municipal governments with power, leaving the exercise of it to their discretion and corporate needs.

In the present case the Legislature has gone further than attempting to raise money for fire departments, municipal organizations, in that it seeks to raise a fund by taxation for what seems to us merely a benevolent purpose. The money collected under the act of 1906 is not for the use of the fire department, but it is to be paid to certain Firemen's Associations for benefits, gratuities, and pensions. These associations are incorporated under the law, and their sole purpose is to take charge of the funds collected and disburse them in the manner provided for by the act. As was said in the cases above quoted from, such a purpose is certainly a worthy one, and it would no doubt be a source of much comfort to the members of the various departments, and would have a tendency to allure men to the vocation; but can this effect justify the seemingly arbitrary appropriation of the income of the insurance companies? It is argued that the fire company by its work saves the insurance company from loss, and therefore the insurance company should compensate them. Let us see what this argument would lead to. It is well known that all insurance companies regulate their rate by the risk and expense relative to the insurance of a certain piece of property. Therefore the only reasonable view is that the insurance companies would in the end make the insured pay gratuities to the associations. It is likewise well known that in all cities and towns there are numerous persons who do not carry insurance. Now, it cannot be denied that such persons are even more benefited by the fire departments than those who carry insurance, for their entire risk is intrusted to the efficiency of such departments. Under the enactment being considered, the class of citizens who carry insurance must pay the whole of the imposition, while the latter get the benefits and have no burden to bear. On this reasoning the tax is not uniform.

That the fireman's work is a meritorious one, and that he deserves the highest regard of the community for the faithful performance of his duties, are facts that cannot be controverted. Yet his work is not altogether gratuitous. More and more is it the present day tendency to establish paid departments. In these the members are paid for their services. In the volunteer departments, too, the members are usually compensated in one way or another. There is also the fact that, where it is made a permanent vocation, as is usually the case in the paid departments, the individual assumes the responsibility of his own free will. That it is fraught with danger no one will deny, but it is not necessarily more dangerous than other callings in which numbers of men are employed daily. Can the engineer of a locomotive dashing across the country at the rate of from 50 to 90 miles an hour or the miner working hundreds of feet below the surface of the earth be said to be more secure than the

fireman who answers the alarm bell? Can one be said to render a greater service to humanity than the other? We think not. Nor can it be said that the fireman's duty is more public than that of the engineer. There are numerous callings in a sense quasi public, but not of such a nature as to justify the state in granting gratuities or pensions on the ground that the services are public. Any speculation as to this subject, however, is estopped by the constitutional inhibition (article 3, § 32) which provides: "The General Assembly * * * shall not grant pensions except for military and naval services." A pension has been defined to be an annuity from the government for services rendered in the past. That the pensions provided for by the act of 1906 fall within this rule is evident. The money is to be obtained by a governmental enactment, and is to be paid to superannuated or disabled firemen who in time past had been in active service.

We do not deem it necessary to continue the discussion further. In our opinion the act is clearly unconstitutional. Therefore it is the judgment of this court that the petition be granted and the prohibition issue as prayed for.

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(146 N. C. 32)

## GERRINGER v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Nov. 13, 1907.)

1. RAILROADS — CROSSING ACCIDENT — EVIDENCE.

In an action for death at a railroad crossing, evidence *held* to sustain findings that defendant's negligence was the proximate cause of the accident and that intestate was not negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1139, 1144.]

2. APPEAL—HARMLESS ERROR.

Where the trial judge would have been justified in withdrawing the issue of intestate's contributory negligence, error, if any, in the instructions on such subject, were not prejudicial to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

Appeal from Superior Court, Guilford County; Justice, Judge.

Action by S. W. Gerringer, as administrator of the estate of Leslie Gerringer, deceased, against the North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action to recover damages for the negligent killing of Leslie Gerringer. The following issues were submitted: "(1) Was the death of the plaintiff's intestate caused by the negligence of the defendant's lessee, as alleged in the complaint? Answer: Yes. (2) Was the plaintiff's intestate guilty of contributory negligence as alleged in the answer? Answer: No. (3) What damage, if any, is plaintiff entitled to recover of the defendant? Answer: $8,000."

King & Kimball, for appellant. R. C. Strudwick and Stedman & Cooke, for appellee.

BROWN, J. At the conclusion of the argument of the learned counsel for the appellant, this court intimated an opinion that it was unnecessary to hear from the appellee. The case appeared to us to present upon appellant's own presentation of the facts a clear case of liability. Our subsequent examination of the record confirms fully the correctness of our intimation, and that the presiding judge committed no error on the trial. The evidence showed that plaintiff's intestate was run over and killed by an engine of the Southern Railway Company, lessee of defendant, whilst backing over a crossing in the nighttime without any light or man with a light on the front in the direction in which the said engine was backing, and without giving any of the signals of its approach; that it rang no bell and blew no whistle; that the said Beck's crossing is a public crossing at Greensboro suburbs and in a thickly settled community; that there was a freight train passing said crossing on a parallel track going east towards Greensboro; that the engine which killed plaintiff's intestate was backing west towards Pomona; that they passed each other near the crossing; that the engine ran up some 50 yards after having run over and killed the plaintiff's intestate; that the engine was running along at a very slow rate of speed, and, as one of the witnesses said, went along like something slipping along on something soft; that plaintiff's intestate had been in a store at the crossing, and was talking with a number of people, who were witnesses in this case, and stated that he was going to church, and went towards the crossing; that he was not seen after he had gotten out of the light of the store door until his dead body was found on the track about five minutes later; that no engine, except the shifting engine, had passed along that track between the time the plaintiff's intestate left the store door and the time when his dead body was found, about five minutes later, upon the track; that the engine stopped, and the engineer stated that he had killed somebody, and came back with his lights to see who it was; that he was a sober, industrious boy, 16 years and 22 days old, and had been working for the railroad as a telegraph operator, and was getting $57.50 a month. Accompanying young Gerringer was a companion named Craven, who was evidently killed at the same time, and whose body was found near Gerringer's, on the first track next to Beck's store. No exception was taken to any of the evidence offered by plaintiff and defendant introduced none.

In the view we take of this case, it would be a waste of time to discuss seriatim the 25 exceptions appearing in the record. The

case appears to have been tried by the learned judge who presided upon well-settled principles laid down in numerous cases. Purnell v. Railroad, 122 N. C. 840, 29 S. E. 953; Stanley v. Railroad, 120 N. C. 514, 27 S. E. 27; Lloyd v. Railroad, 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764; Mayes v. Railroad, 119 N. C. 758, 26 S. E. 148. The evidence that the shifting engine was backing up the track towards the crossing upon a dark night without any light or precautionary signal, and ran over and killed the plaintiff's intestate and his companion, Craven, is full and convincing. The facts of this case disclose a degree of carelessness upon the part of the engineer in charge of the shifting engine that is almost criminal, and for the consequences of which the company could not reasonably expect to escape liability. It would seem to those who are not initiated in the methods of railway management that it would be profitable to the company, as well as a great protection to human life, to place a watchman at Beck's crossing, where so many people and so much traffic must necessarily cross its tracks. The recovery in this case alone would pay the salaries for a number of years to come.

The exceptions to his honor's charge upon the issue of contributory negligence cannot be sustained. While contributory negligence, like any other fact, may be proven by circumstantial evidence, there is no fact in this record from which contributory negligence can be justly and reasonably inferred. If the court committed any error in that portion of the charge, it is harmless; for the judge might well have instructed the jury that there was no evidence of contributory negligence.

The exceptions, so earnestly pressed upon the argument, to that portion of the charge upon the issue of damage, are untenable. His honor charged fully upon this phase of the case. The charge is full, comprehensive, and complete upon the rule for assessing damages, and is sustained by Mendenhall v. Railroad, 123 N. C. 278, 31 S. E. 480; Carter v. Railroad, 139 N. C. 499, 52 S. E. 642; Poe v. Railroad, 141 N. C. 525, 54 S. E. 406; Watson v. Railroad, 133 N. C. 188, 45 S. E. 555. In the charge is copied the very lucid statement of the rule by Judge Oliver H. Allen, commended by this court in the Mendenhall Case.

No error.

CLARK, C. J. (concurring). In view of the simultaneous deaths of these two young men at this crossing near Greensboro, and the not infrequent instances of death or maiming by railroads at the crossings near that constantly growing town (many of which have been presented by cases in this court), the railroads might well consider appropriate steps to abolish all grade crossings near that and other populous towns in this state, wherever accidents at crossings have become numerous. The crossing of public roads by a railroad track on the same grade is well-nigh unknown in Europe. They have been abolished in Massachusetts and Connecticut, and to a large extent in New York. The state courts and the United States Supreme Court have concurred in numerous decisions which hold that the abolition of grade crossings may be ordered at the expense of the railroads. See numerous cases cited, in Wilson v. Railroad, 142 N. C., at page 349, 55 S. E. 257, and Cooper v. Railroad, 140 N. C., at page 229, 52 S. E. 932, 3 L. R. A. (N. S.) 391. Acts 1899, p. 293, c. 164, now Revisal 1905, § 1097 (2), confers on the Corporation Commission power "to require the raising or lowering of a track at any crossing where deemed necessary." This is re-enacted and emphasized in Pub. Laws 1907, p. 675, c. 469, § 1 (c).

The laws and the courts are not solely for the protection of property rights, but for enforcement as well of the constitutional guaranty of the protection of life and limb. This court has performed this duty in Greenlee's Case, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, and Troxler's Case, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, which held that the absence of automatic car couplers is negligence per se, a negligence which is now punishable by act of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]); also by a similar holding as to the lack of a "block system" (Stewart v. Railroad, 137 N. C. 687, 50 S. E. 312, which was repeated and reiterated in the same case in 141 N. C. 253, 53 S. E. 877), and such system is now required by statute also (Pub. Laws 1907, p. 675, c. 469, § 1 [b]). There are other decisions of this court, which might also be cited, in which we have sought to protect the lives and limbs of those exposed to unnecessary danger by the application of familiar principles, or have called the attention of the Legislature to defects in the laws. This matter of abolishing grade crossings near populous towns is on the same footing as car couplers and block systems. As Lord Chancellor Erskine observed when at the bar: "Morality comes in the cold abstract from the pulpit, but men smart practically under its lessons when courts are the teachers."

The courts cannot be ignorant, nor should they feign to be, of matters well known to every intelligent person. We know, from the reports of the railroads themselves, as tabulated and published by the Interstate Commerce Commission as required by act of Congress, that last year 95,000 persons were injured and 10,000 were killed—a total of 105,000 people killed and wounded—by the railroads of the United States, as against a total of 1,685 killed and wounded in our army in the War with Spain. In the last 10 years the injured and killed by railroads in this country would make a procession of near 1,000,000 people, most of whom had others dependent upon them. That this im-

mense amount of suffering and death is largely due to mismanagement and recklessness in the railroad authorities is evidenced by the fact, equally well known, that in Europe, where there must also be some unavoidable accidents and some negligence, the ratio of casualties on the railroads in proportion to the number of passengers and employés is less than one-twentieth of what it is in this country.

Whatever the courts can do to sustain the constitutional protection of life and person to every citizen they should do. We have done so as to automatic couplers and the block system. On such an occasion as this of a double death at a crossing, it is not amiss to call attention to this evil also. It may be, and doubtless is, cheaper for the railroads to pay for those killed and wounded than to take efficient steps to prevent these lamentable casualties. But considerations of humanity should have some weight. That full nineteen-twentieths of these casualties are avoidable, the above figures for European railroads conclusively show. And is there no responsibility upon the authorities of the counties and towns where dangerous crossings are located to apply to the railroad officials to raise or lower their tracks at those points? If a reasonable and just application of this kind is refused, the county or town authorities can and should apply to the Corporation Commission, which is vested with full and complete power to compel the raising or lowering of the track, to remove all danger to those using the public roads. This has been done by the authorities of Wake county as to several crossings at or near Raleigh, where the street or county road now passes under the railroad track. Their example might well be followed elsewhere. In a government avowedly of and for the people, some consideration should be paid to the safety of the life and limb of the citizen.

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(145 N. C. 320)

## GODWIN et al. v. MURCHISON NAT. BANK et al.

(Supreme Court of North Carolina. Oct. 30, 1907.)

1. BANKRUPTCY — TITLE OF TRUSTEE — CLAIM AGAINST BANKRUPT.

A trustee in bankruptcy is in general vested with no better title to the property than the bankrupt had, so that, in the absence of some express provision of the bankrupt act, a claim against certain of the bankrupt's assets, valid as against him, will be upheld against the trustee, unless in contravention of public policy or some established legal principle.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 193.]

2. SAME — ASSIGNMENTS BY BANKRUPT — VALIDITY—WHAT LAW GOVERNS.

Unless the bankruptcy act otherwise provides, the validity of an assignment of a bankrupt's property must be determined according to the principles of local law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 275.]

3. ASSIGNMENT — VALIDITY — POSSESSION OF RES.

Where a person having a contract by which he was to receive certain bonds in payment for real estate contracted to assign the bonds to a bank in consideration for present loan, it was no objection to such contract to assign that at the time it was made he had not possession or control of the bonds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 6.]

4. BANKRUPTCY — EQUITABLE ASSIGNMENT — EXECUTED CONTRACT.

A debtor, having sold certain real estate in exchange for bonds which he was to receive on the purchaser's acceptance of the title, more than four months before he became a bankrupt agreed verbally to transfer the bonds to defendant bank if the bank would then loan him for certain others $10,000, which was done. The bonds not having been delivered promptly, a written contract was made within the four-month period, assigning to the bank all the bankrupt's right to the price of the land, and shortly after this the bonds were actually delivered to and assigned in writing to the bank. *Held*, that the words "agree to transfer" in the oral contract imported an agreement to "deliver," so that the agreement constituted an equitable assignment of the bonds to be delivered on their receipt by the bankrupt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 261, 262.]

5. SAME—WORDS AND PHRASES—"TRANSFER."

Under Bankr. Act July 1, 1898, c. 541, § 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], providing that the term "transfer" shall include a sale and every other mode of disposing of or parting with property or the possession thereof as a payment, pledge, mortgage, gift or security, an agreement to "transfer" property may be construed as an agreement to "deliver"—citing Words and Phrases, vol. 8, p. 7066.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 261, 262.]

6. SAME—ASSIGNMENTS—VALIDITY.

A bankrupt more than four months before bankruptcy contracted to deliver certain bonds to defendant bank, which he was to receive under a land contract, in consideration of the bank's agreement to make a present loan to him for the benefit of certain others. The bankrupt within the four-month period assigned in writing the proceeds of the real estate, and later, on receiving the bonds, assigned and delivered them to the bank. *Held*, that on such delivery the bank's title vested as of the date of the original equitable assignment, and was therefore valid under the rule that a contract, to create a positive lien, attaches in equity as soon as the assignor acquires title, both as against him and all persons claiming under him, either voluntary or with notice or in bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 261, 262.]

7. SAME—BONA FIDE PURCHASER — NOTICE — REGISTRATION.

Where a bankrupt made a present equitable assignment for a cash consideration of certain bonds, which he was to receive in payment for land, the bonds to be delivered or transferred to defendant when they came into the bankrupt's possession, and to be then appropriated to the bankrupt's indebtedness as far as they would pay the same, the sale of the land having been completed according to the contract, the bank's right to the bonds as the proceeds of the sale was not affected by the registration laws concerning sales of realty.

Appeal from Superior Court, Harnett County; E. B. Jones, Judge.

Action by R. L. Godwin and others, as

trustees in bankruptcy of E. F. Young, against the Murchison National Bank and others. From a judgment in favor of plaintiffs, defendant bank appeals. Reversed.

The action was brought by the trustees in the matter of E. F. Young, bankrupt, to recover the interest of the bankrupt's estate in $4,500 of Norfolk City bonds, said interest amounting to $3,150, as shown by the verdict, and under claim and allegation on the part of the trustee that the said bonds were transferred to defendant bank, under circumstances which made such transfer a voidable preference under the bankruptcy act, by reason of same having been made within four months prior to the filing of petition in bankruptcy, etc. Defendant bank, admitting that a written assignment of the bonds and actual delivery of same had been made within the four months as alleged, claimed that such action was not a voidable preference, by reason of the fact that same was in pursuance of a valid and binding agreement entered into prior to the four months, and which gave to defendant an unimpeachable title to the property. It was shown that proceedings of involuntary bankruptcy in Re E. F. Young followed by adjudication were instituted on June 4, 1904; that the written assignment was made on February 9, 1904, delivery of bonds being made shortly thereafter, and within the four months as stated, and the alleged agreement was entered into on December 9, 1903, prior to four months. At that time the bonds in question had not been obtained or received by the bankrupt, but were to be turned over to him on payment of some real estate, which the bankrupt had theretofore sold to Chas. W. Priddy, incorporated, of Norfolk, Va.

On the trial issues were submitted and responded to by the jury, and judgment had thereon as follows: "(1) In what amount, if any, was E. F. Young indebted to defendant bank, February 9, 1904, by reason of indorsement or otherwise? Answer: $34,000. (2) Did E. F. Young within the period of four months immediately preceding June 4, 1904, transfer by writing to the defendant bank the $4,500 Norfolk City bonds, and, if so, what was the cash value of same? Answer. Yes, $4,400. (3) Was the said E. F. Young insolvent on February 9, 1904, and did he so continue up to and including June 4, 1904? Answer. Yes. (4) Did the defendant or its agents at the time of the transfer of the $4,500 Norfolk City bonds as alleged in the complaint have reasonable cause to believe that such transfer was intended as a preference to the defendant bank by said E. F. Young? Answer. Yes. (5) Did the defendant E. F. Young in December, 1903, agree verbally with the defendant to transfer to said bank the Norfolk City bonds of $4,500, if said defendant bank would loan the said E. F. Young for Merchants' & Farmers' Bank $10,000, and the South Dunn Manufacturing Company $10,000, and did the defendant bank make said loans as agreed? Answer. Yes. (6) Did E. F. Young in furtherance of the agreement of December, 1903, execute the paper writing of February 9, 1904? Answer. Yes. (7) Did the transfer of the $4,500 Norfolk City bonds to defendant bank enable the defendant bank to obtain a greater percentage of its debt against E. F. Young than other creditors in the same class as bank obtain? Answer. Yes. (8) What interest did E. F. Young have in the $4,400 received by the defendant bank from a sale of the Norfolk City bonds? Answer. $3,150, with interest from March 1, 1904, at 6 per cent. It having been admitted of record that petition in bankruptcy was duly filed against said E. F. Young on the 4th day of June, 1904, and that subsequently he was duly adjudged a bankrupt, and that the plaintiffs are the duly chosen, qualified, and now acting trustees of said Young in bankruptcy, and that the defendant is a duly chartered, organized, and existing banking institution under the laws of the United States, now, upon motion of the counsel for plaintiffs, it is considered, ordered, and adjudged that the plaintiffs in this action, R. L. Godwin, J. D. Barnes, and J. M. Hodges, trustees, do recover of the defendant in this action, the Murchison National Bank, the sum of $3,150 and interest on that sum from March 1, 1904, and the cost of this action to be taxed by the clerk of this court."

Thereupon defendant bank excepted and appealed.

Godwin & Davis, D. H. McLean, and R. L. Godwin, for plaintiff. E. K. Bryan and Shepherd & Shepherd, for defendants.

HOKE, J. (after stating the case as above). The verdict of the jury on the fifth and sixth issues was as follows: "(5) Did the defendant E. F. Young in December, 1903, agree verbally with the defendant bank to transfer to said bank the Norfolk City bonds of $4,500, if said defendant bank would loan the said E. F. Young for Merchants' & Farmers' Bank $10,000, and the South Dunn Manufacturing Company $10,000, and did the defendant bank make said loans as agreed? Answer. Yes. (6) Did E. F. Young in furtherance of the agreement of December, 1903, execute the paper writing of February 9, 1904? Answer. Yes." And the paper writing referred to and established by the sixth issue and the response thereto contains the following recital as to the agreement between defendant bank and E. F. Young, of date December, 1903, and more than four months prior to the institution of the proceedings in bankruptcy: "Witnesseth, that, whereas, the Merchants' & Farmers' Bank of Dunn, N. C., is indebted to the Murchison National Bank of Wilmington, N. C., in a large sum of money which was loaned to the Merchants' & Farmers' Bank and the South Dunn Mfg. Co., at the request of the party of the first part, and, whereas, at the time

of said loans the party of the first part agreed with the said Murchison National Bank that, if it would make said loans, that the party of the first part had sold three brick stores in the town of Dunn, N. C., to one Chas. W. Priddy, incorporated, of Norfolk, Va., and that the deed of said stores was to be made when the abstracts of title for said stores had been approved by said Priddy (incorporated), and the purchase money was paid, and it was agreed by the said parties hereto that, if the said Murchison Bank would make said loans, the party of the first part would pay over the money derived from said sale, to wit, the sum of $4,500.00, to the party of the second part on account of the indebtedness then created to the said party of the second part, and, whereas, there has been more delay in consummating said sale than was anticipated, and the said party of the first part is desirous of carrying out said agreement: Now, therefore, in consideration of the premises, the said party of the first part doth hereby transfer and assign, sell, and convey to the said party of the second part all his right, title, interest, and estate in the three stores bargained to Priddy Co., Limited, and the purchase price thereof when same is received on the consummation of the sale." There is no allegation of fraud in the transaction between these parties in December, nor that the same was had with any intent to evade the general policy or express provisions of the bankruptcy act. This being true, on the facts established by these two findings, the court is of opinion that for a present cash consideration then passing a claim was created in favor of defendant to these bonds, the purchase price of the property referred to in the agreement, which attached as soon as they passed in consideration for the sale, good against the bankrupt himself, and enforceable in equity against the plaintiffs holding the estate as trustees under the bankruptcy proceedings, and there is nothing in the verdict on the other issues which destroys or impairs the force and effect of this position; the word "transfer" in the fourth issue evidently having the same significance as in the fifth.

It is accepted doctrine that as a general proposition the trustee in bankruptcy is vested with no better right or title to the property than the bankrupt had when the trustee's title accrued; and, unless in contravention of some established principle of law or public policy or some express provision of the bankruptcy act, a claim valid against the bankrupt will be upheld against his trustee. Mfg. Co. v. Cassell, 201 U. S. 344–352, 26 Sup. Ct. 481, 50 L. Ed. 782; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Smith v. Godwin (a decision at present term) 145 N. C. —, 58 S. E. 1089; Loveland on Bankruptcy (2d Ed.) p. 368. As said in this last citation (Loveland, supra): "The trustee takes the title of the bankrupt subject to all equities, liens, or incumbrances, whether created by operation of law or by the act of the bankrupt which existed against the property of the bankrupt, except in cases of levies, judgments, attachments, or other judicial liens created against the property within four months preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared to be fraudulent and void." It is also established that, unless the bankruptcy act otherwise provides, the validity of an assignment or claim is to be determined in accordance with the principles of local law. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956. And it will be observed that, under our law, no valid objection can be urged against the defendants' claim by reason of the fact that the bonds, the subject-matter of the contract, and which represented the purchase price of the property, were not in the possession or control of the bankrupt when the agreement of December was entered into. On the contrary, unless inhibited by some principle of public policy, our decisions expressly uphold and enforce such contracts, both as to tangible property and choses in action, to vested as well as contingent interests. Brown v. Dail, 117 N. C. 41, 23 S. E. 45; Williams v. Chapman, 118 N. C. 943, 24 S. E. 810; Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949; Nelson v. Edwards, 40 Barb. (N. Y.) 283.

Applying these principles, we are of the opinion that the force and effect of the verdict is to establish for a cash consideration, to wit, the loan, an equitable assignment of these bonds, the purchase price of the property in December, 1903, the date when the contract was made, to be consummated by delivery of the bonds whenever and as soon as they came into the control of E. F. Young, pursuant to the sale which was then being conducted. While the language of the issue, "verbally agreed to transfer," might be construed as constituting an executory agreement, when taken in connection with the pleadings and evidence, and especially in reference to the more explicit ascertainment of the terms of the December trade, made a part of the verdict on the sixth issue, we think that a present equitable assignment was thereby created, and the words "agree to transfer" clearly referred to an agreement to "deliver" the bonds whenever the same came to hand. This meaning of the term "transfer" is recognized in the definition of the word given by Bankr. Act July 1, 1898, c. 541, § 1, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], has been applied in various decisions rendered in administration of the law (Words and Phrases Judicially Defined, vol. 8, p. 7066), and is so clearly the significance contemplated by the parties in the transaction as established by the verdict that we have no hesitation in holding, as stated,

that the contract amounted to a present equitable assignment in December, more than four months prior to the institution of the bankruptcy proceedings, and the right of defendant to the bankrupt's interest in these bonds is supported by well-established principles of equity and by the great weight of authority. Walker v. Brown, 165 U. S. 655, 17 Sup. Ct. 453, 41 L. Ed. 865; Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075; Union Trust Co. v. Bulkeley, 150 Fed. 510, 80 C. C. A. 328; In re J. F. Grandy & Son (D. C.) 146 Fed. 818; Wilder v. Watts (D. C.) 138 Fed. 426; Sabin v. Camp (C. C.) 98 Fed. 974; Smith v. Godwin, Trustee, 145 N. C. —, 58 S. E. 1089; Brem v. Covington, 104 N. C. 589, 10 S. E. 706; Lawson v. Pringle, 98 N. C. 450, 4 S. E. 188. See, also, a very full and learned note by the editor to case of Moody v. Wright, 46 Am. Dec. 706–717 (the case being from 13 Metc. [Mass.] 17). In this last reference on page 717 it is said: "The grounds of these decisions are that the mortgage, though inoperative as a conveyance, is operative as an executory contract which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being held as trustee for him, in accordance with the familiar maxim that equity considers that done which ought to be done." Per Durfee, C. J., in Williams v. Briggs, 11 R. I. 478, 23 Am. Rep. 518. The case of Mitchell v. Winslow, 2 Story (U. S.) 630, Fed. Cas. No. 9,673, is a leading American case upon this subject. A mortgage was given in that case by two manufacturers of cutlery upon all the tools and machinery in their manufactory, and upon all the tools and machinery which they might purchase within four years, and all stock that they might manufacture during the same time. It was held to create a good equitable lien, and was protected as such under the bankruptcy act. At page 644 of 2 Story [Fed. Cas. No. 9,673], Story, J., said: "It seems to me a clear result of all the authorities that wherever the parties by their contract intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor, or not, or if personal property whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy." And in Walker v. Brown, 165 U. S. 655, 17 Sup. Ct. 453, 41 L. Ed. 865, the general doctrine is stated thus, citing with approval 3 Pomeroy's Equity, p. 1235: "Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers, or encumbrancers with notice." By the contract of December, 1903, when these bonds came into his possession and control, E. F. Young had no right to deal with them, except to deliver them to the defendant bank as required by its terms. On the equitable principle which considers that done which the parties are under a binding agreement to do, said Young had no right to make any other disposition of this specific property. This is the principal test by which an equitable assignment may be distinguished from an executory agreement to assign, and a case is presented where the claimant has a right to the specific property against the bankrupt himself, and where, in the absence of some interfering state regulation or of some adverse provision of the bankrupt law itself, the defendant's right is enforceable against the trustee. It is this creation of a present interest in the bonds themselves amounting to an equitable assignment thereof which differentiates the present case from many of those cited, and relied upon by the plaintiffs' trustees. Some of these were cases where from the very general terms of the agreement no right in any specific property was acquired at all. In others from the nature of the interest or by reason of some interfering principle of positive law or public policy no right in any specific property was created, except within the period when it was avoided by express provisions of the bankruptcy law itself. Thus in Sheridan's Case (D. C.) 98 Fed. 406, there was an executory agreement to pledge property made prior to the four months, and the property was actually delivered within such period. By the very nature of a pledge no interest passes until delivery, and this was on that ground avoided as a prohibited preference.

In several other decisions an executory agreement to give a chattel mortgage made prior to the four months was not allowed to validate the mortgages executed or registered within the prohibited period. In re Great Western Mfg. Co., 152 Fed. 123, 81 C. C. A. 341; Loeser v. Bank & Trust Co., 148 Fed. 975, 78 C. C. A. 597; In re Dismal Swamp Co. (D. C.) 135 Fed. 415. These and other like cases, as we apprehend them, were decided either because of some state law which avoided such mortgages against creditors, except from registration, or by reason of the amendment to the bankrupt act made on February 5, 1903 (32 Stat. 799, c. 407, § 13 [U. S. Comp. St. Supp. 1907, p. 1031]), to the effect that, "where a preference consists in a transfer, such period of four months shall not expire until four months after the recording and registering of the transfer, if by

law such recording and registering is required." And this requirement of registration distinguishes a decision of our own court. Lance v. Tainter, 137 N. C. 249, 49 S. E. 211.

Since the opinion was prepared, it has been earnestly contended that, inasmuch as the contract under which the defendant claims the bonds applies also in terms to realty, the case of Lance v. Tainter, supra, is direct authority against the defendant's claim. This position might avail the plaintiff if the sale of the land had not been carried out and the defendant was seeking to establish his claim against the land itself. The sale, however, was completed according to the contract with the Norfolk Company, and this litigation is over the proceeds. Our registration laws concerning realty have, therefore, no application to the cause, on the principle established in the decisions of Bourne v. Sherrill, 143 N. C. 381, 55 S. E. 799, and the authorities therein cited.

Without going into a careful analysis of these decisions which could serve no good purpose and would unduly lengthen our opinion, we deem it sufficient to say that they do not apply here. This case presents no executory agreement to make a pledge of personal property as security for a past indebtedness, nor is it an executory agreement to give a chattel mortgage or other lien which requires registration either by state law or the bankruptcy act and its amendments. But, as we have endeavored to show, it is a present equitable assignment for a cash consideration of the bonds, to be delivered or "transferred" to the defendant bank whenever they came into possession of the bankrupt, and to be then appropriated to the indebtedness as far as it would pay the same. We are of opinion, therefore, and so hold, there was error in the judgment as rendered, and that, as a conclusion of law on the verdict as it now stands, there should be judgment entered that defendant go without day. Let this be certified, and judgment entered accordingly.

Reversed.

BROWN, J., did not sit.

(146 N. C. 14)

## MORROW v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Nov. 13, 1907.)

1. APPEAL—EXCEPTIONS—ABANDONMENT.

Exceptions in the record to admission of evidence will be deemed abandoned where they are not mentioned in the brief or called to the attention of the appellate court in the argument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4256–4261.]

2. RAILROADS — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE—EVIDENCE — QUESTION FOR JURY.

Plaintiff's testimony that when he reached the crossing of defendant's railroad a freight train was on it; that he waited five minutes for it to pass; that after it did so he looked to see if another train was coming, but could not see or hear any except the freight; that he then started across; that he could not see the passenger train that struck him, on account of the smoke and noise from the freight train, and because it was not lit up, it being a dark and cloudy winter evening, and there being a drizzling rain, and there being a fog rising from the ground—is sufficient to go to the jury on the question of freedom from contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1168–1189.]

3. SAME—INSTRUCTIONS.

The instruction, in action for injury to a traveler from being struck by a passenger train as he was going over a railroad crossing just after a freight train had passed, that if the conditions from the smoke and cloudy weather, the lateness in the day, and the moving of freight trains, were such that looking would not disclose the train, and plaintiff crossed even without looking and listening, he would be absolved from the usual consequences of such omission, is erroneous; the conditions of the atmosphere and the hour not being obstructions, and not excusing a traveler from exercising his senses of sight and hearing.

4. APPEAL—HARMLESS ERROR — UNNECESSARY INSTRUCTIONS.

Where an action for injury to a traveler from being struck by a train at a crossing was not tried on the theory that he did not look and listen and otherwise exercise due care, but that he did all the law required of him, and he offered no excuse for not looking and listening, but testified positively that he did both, and gave the conditions surrounding him as a reason for his failure to detect the train, and there was no conflicting testimony, an instruction, which excused him, because of the surrounding conditions, if he did not look and listen, was unnecessarily given, and harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219–4228.]

Appeal from Superior Court, Alamance County; O. H. Allen, Judge.

This was a civil action instituted by John W. Morrow against the North Carolina Railroad Company for personal injuries received by the plaintiff. A verdict and judgment was had for the plaintiff in the sum of $4,000. The court submitted the usual issues of negligence, contributory negligence, and damage, all of which were answered for the plaintiff. From the judgment rendered, the defendant appealed. Affirmed.

King & Kimball and Parker & Parker, for appellant. Brooks & Thomson and W. H. Carroll, for appellee.

BROWN, J. There are a number of exceptions in the record to the admission of evidence, but as none of them are mentioned in appellant's brief, or were called to our attention in the argument, we deem them to have been abandoned. The defendant offered no evidence. That which was offered on behalf of the plaintiff tended to prove these facts: The plaintiff, who lived in Alamance county, about the 17th day of December, 1905, went to Greensboro. While there, in company with a friend, he approached a crossing of the defendant railroad company

near the coal chute in the suburbs of Greensboro. Upon reaching the crossing, which was a public highway, he found it obstructed by a freight train headed in the direction of Charlotte. He waited about five minutes for the freight to clear the crossing, and at once started to the track to cross. A passenger train, coming from the direction of Charlotte into Greensboro at a high rate of speed, ran against him, knocking him off of the track and breaking his right arm. That it was between 4 and 5 o'clock in the afternoon on a cloudy day and drizzling rain upon melting sleet and ice. That from the ground, on account of the thawing of the ice and heavy atmosphere, a fog was rising from the ground. That the smoke from the outgoing freight train circled back, mingling with the fog and settling over the track and crossing. That before going upon the track in his effort to safely cross plaintiff stopped and looked out to see if there was any train approaching and listened likewise. That he saw no train and heard none. He did not know there was a double track along the line at this crossing, and the passenger came upon him suddenly, without ringing its bell or blowing its whistle, or giving any other signal or warning of its approach. At the close of the evidence, the defendant moved his honor to dismiss the plaintiff's complaint and for judgment as of nonsuit, for that on the plaintiff's evidence his injury resulted from his own negligence, and not from any negligence of the defendant. The refusal to grant this motion is assigned as error, and the correctness of the ruling seems to be the principal contention in the case.

In view of the decided character of the testimony of the plaintiff himself, it is difficult for us to comprehend upon exactly what theory of the law the court was expected to grant the motion. He states that when he reached the crossing a freight train occupied it, and he waited for five minutes until it could pass. After the freight train passed, he looked to see if there was another train coming, and he could neither see nor hear any except the freight. Then he started across the track. He further states that he could not see the incoming passenger train that struck him, on account of the smoke and noise from the freight train, and because it was not lit up, or anything of the kind. It was a dark and cloudy evening, just after a big sleet. It was in the winter time, it was misting rain, and the fog was rising from the ground, and the smoke and fog made it darker. According to this evidence, the plaintiff brought himself fully within the standard of duty laid down by the authorities. The duty of one approaching a railroad track is very clearly and fully discussed by Mr. Justice Hoke, in Cooper v. R. R., 140 N. C. 215, 52 S. E. 932, 3 L. R. A. (N. S.) 391, and the precedents are there collected. Tested by the rule there laid down, and by many other precedents that can be cited, the court did not err in holding that upon his own showing plaintiff was not guilty of contributory negligence. If we believe what he says about the matter, he exercised his senses of hearing and sight, and nevertheless failed to detect the approach of the passenger train. His honor was quite right in submitting the question to the jury upon the principle laid down in Laverenz v. Railroad, 56 Iowa, 689, 10 N. W. 268, and approved in Cooper v. R. R., supra: "That a person who voluntarily goes on a railroad track at a point where there is an unobstructed view of the track, and fails to look or listen to danger, cannot recover for an injury which might have been avoided by so looking and listening; but when the view is obstructed, or other facts exist which tend to complicate the matter, the question of contributory negligence then becomes one for the jury."

We think his honor was in error in instructing the jury that "If the conditions from the smoke and cloudy weather, the lateness in the day, and the moving of the freight trains, were such that looking would not disclose the approaching train, and there was no sounding of whistle or bells, so that listening would not disclose the approaching train, and the plaintiff crossed even without looking and listening, and was injured," he would be absolved from the usual consequences of the failure to perform such duties. The condition of the atmosphere and the hour of the day do not constitute the "obstructions" referred to in Cooper's and other cases, and do not excuse a traveler from exercising his senses of sight and hearing in crossing a railroad track. On the contrary, the darker it is the more careful he should be. Nor is the traveler to listen for bell or whistle, and nothing else. He must use due care to listen for the approach of the train as well, for common experience teaches us there are times when the approach of a train may be detected without hearing either bell or whistle. But we think this instruction was unnecessarily given, and, in view of the evidence, was entirely harmless to defendant. The case was not tried upon the theory that the plaintiff did not look and listen and otherwise exercise due care, but upon the theory that he did do all the law required of him. He did not offer as an excuse for not looking and listening the fact that the conditions were such he could neither see nor hear. On the contrary, he testifies positively that he did both, and gives the conditions surrounding him as a reason for his failure to detect the train until it was within six feet of him. We do not think this error could have possibly misled the jury, in view of the fact that there was no conflicting evidence whatever, and plaintiff's own evidence, if believed by them, established the fact that he both look-

ed and listened and exercised proper vigilance when he started across the track.

In all other respects, we find no error in his honor's instructions.

No error.

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(146 N. C. 18)

## McCOLLUM et al. v. CHISHOLM et al.

(Supreme Court of North Carolina. Nov. 13, 1907.)

1. EJECTMENT—BURDEN OF PROOF—INTERESTS CONVEYED.

N. conveyed land to J. and M., as tenants in common, and J.'s interest descended to M. M. reconveyed an undivided half interest in fee to N., and on the same day conveyed to him an undivided half interest for life. N. conveyed the entire tract to plaintiffs. J.'s administrator had J.'s interest sold to pay his debts, and the purchaser had the tract partitioned by metes and bounds, between himself and plaintiffs. In this action to recover possession, plaintiffs claim that M.'s deed to N. in fee simple conveyed her original interest, and that her other deed to him for life conveyed the interest descended from J. Defendants claim that the original interest was conveyed for life, and the descended interest in fee. *Held*, that the burden was upon plaintiffs to sustain their claim.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 238–245.]

2. SAME—EVIDENCE—ADMISSIBILITY.

That J.'s administrator's petition to sell J.'s interest alleged that it was that interest which was "deeded" to N. by M., and that one plaintiff herein as guardian ad litem of the other admitted the allegation, was admissible to show which interest was conveyed to N. in fee.

3. JUDGMENT — RECOVERY ON GROUND NOT PLEADED.

Where plaintiffs, in an action to recover an entire tract, unsuccessfully relied on a conveyance to them, they could not recover an undivided interest on the theory of an estoppel; the pleadings not suggesting a title by estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 434–436.]

4. SAME—ESTOPPEL—DECREE IN PARTITION.

Where plaintiffs failed to recover land under their claim of a conveyance to them, they could not recover, even by amending, upon the theory of an estoppel arising in a former partition proceeding by an outsider, in which plaintiffs and defendants herein were defendants, where the petition in partition did not undertake to set out the interests of the defendants therein inter sese, and the only fact adjudicated was that the outsider owned the interest set apart to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1263–1268.]

Appeal from Superior Court, Montgomery County; Justice, Judge.

Action by Anne Eliza McCollum and another against Mary E. Chisholm and others to recover land. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

This is an action for the recovery of a tract of land described in the complaint. Plaintiffs allege that they are the owners of the land, and that defendants are in wrongful possession thereof. Defendants denied plaintiffs' allegation of ownership and set out their chain of title. His honor, being of the opinion that, upon the entire evidence, plaintiffs were not entitled to recover, they submitted to judgment of nonsuit and appealed. The facts are set out in the opinion.

R. T. Poole and J. A. Spence, for appellants. Adams, Jerome, Armfield & Maness, for appellees.

CONNOR, J. The facts, as disclosed by all of the evidence, are: Neil McCollum was on and prior to July 2, 1892, the owner in fee of a tract of land, of which the locus in quo is a part, and on said day conveyed the entire tract to his two children, John McCollum and defendant Mary E. Chisholm, as tenants in common. On December 20, 1894, John McCollum died intestate and without issue; his one-half undivided interest in said land descending to his sister, defendant Mary E. On November 16, 1895, said Mary E. Chisholm conveyed to her father, Neil McCollum, "a one-half undivided interest" in said land in fee. On the same day, said Mary E. Chisholm conveyed to her said father "for the term of his natural life one-half undivided interest" in the same land. In this deed is a clause providing that upon his death the land should revert to her. On October 30, 1900, said Neil McCollum, for a recited consideration of $400, conveyed the entire tract of land to plaintiffs Anne Eliza, his wife, and Annie McK. McCollum, an infant child. This deed was recorded November 27, 1900. On November 29, 1901, E. D. McCollum, administrator of John McCollum, deceased, filed his petition in the superior court of Montgomery county against plaintiffs, Anne E. and Annie McK. McCollum, Mary E. Chisholm, and her husband, in which he alleged that his intestate died seised of one undivided half interest in the same land; that the said lands descended to his sister, M. E. Chisholm, and that she and her husband "deeded' the same to Neil McCollum, deceased, upon condition that he pay the debts of said John McCollum, deceased. The petition further alleged that Neil McCollum was dead, and that a sale of said land was necessary to pay the debts of said John McCollum. In said special proceeding the present plaintiff, Anne E. McCollum, was duly appointed guardian ad litem of the infant defendant therein, and plaintiff herein duly filed her answer, in which she admitted each and every of the allegations of the petition. An order was made in said proceeding directing the sale of the real estate of John McCollum, deceased. Sale was duly made to B. F. Simmons and confirmed. A deed was executed to him, by the administrator. On October 22, 1902, said B. F. Simmons instituted a special proceeding in the superior court of Montgomery county against plaintiffs and defendants herein, for the purpose of having partition of said land. In his complaint he alleged that he was tenant in common with defendants therein; that he was the owner of one half undivided interest, and defendants were the owners of the other half. In said

proceeding, the defendant therein, Anne E. McCollum, in behalf of herself and as guardian ad litem of the infant defendant, Annie McK. McCollum, filed an answer, admitting that plaintiff B. F. Simmons owned one half, and that she and her ward were the owners of the other half, thereof. An order was duly made for the partition of said land, and commissioners appointed, who filed their report, setting forth that they had allotted to plaintiff one half, by metes and bounds, and to "Daniel Chisholm and his wife, Anne Eliza McCollum, and Annie McK. McCollum" the other half by metes and bounds.

It will be observed that plaintiffs allege that they are the owners of the entire tract, being one-half of the land conveyed by Neil McCollum to his son John and daughter Mary. Defendants, denying the material allegations in the complaint, set out the several deeds of conveyance, alleging that defendant Mary conveyed to her father in fee the one-half undivided interest which descended to her by the death of her brother John, and the one-half undivided interest which was conveyed to her she reconveyed to her father for his life. Plaintiff replied to the answer, saying: "That the deed executed by Mary Chisholm and husband to Neil McCollum the 16th day of November, 1895, in fee simple, was her original one-half undivided interest in said land, and the other one-half undivided interest which she deeded to Neil McCollum, on the same day, for the term of his natural life, was that which descended to her from John McCollum." Thus the issue between the parties is clearly presented. The burden is upon the plaintiffs to show that the one-half undivided interest which they claim through Neil McCollum was the original share conveyed to defendant Mary by said McCollum and reconveyed to him in fee November 16, 1895. The two deeds are made on the same day, and contain nothing on their face to indicate which one refers to and conveys the original interest owned by the grantor Mary E., or which was executed first in order of time. In this condition of the evidence, there would be no presumption to aid the plaintiffs, and they would fail in their action. If permitted to speculate, we should say that, in view of the fact alleged by plaintiffs and not denied, that the deeds to both John and Mary were voluntary and "deed of gift," evidently made pursuant to some family settlement, it is probable that, upon the death of her brother John, unmarried and without issue, Mary reconveyed his interest, which descended to her, to her father and conveyed to him a life estate in the share originally conveyed to her. This view is strongly supported, if not conclusively shown, by the fact that, after the death of Neil McCollum, the administrator of John files a petition to sell John's undivided interest for the purpose of paying his debts. In his petition, to which the plaintiffs and defendants are made parties, he expressly alleges that it was John's interest which was "deeded" to Neil McCollum by defendants upon condition that he pay the debts of the said John McCollum deceased. This allegation is admitted by plaintiff Anne Eliza, as guardian ad litem of the infant plaintiff. Whether this admission, and the judgment rendered in that proceeding, constitute an estoppel of record, it is not necessary to decide. It is clearly competent evidence tending to show which interest was conveyed by defendant to her father in fee. In any point of view, the plaintiffs fail to make good their allegation and must fail in their action to recover the land described in the complaint. They insist that, notwithstanding this difficulty, they are entitled, by way of estoppel, to recover an undivided interest in the land, relying, for this purpose, upon the record in the proceeding for partition by B. F. Simmons. It will be noted that in the complaint herein plaintiffs allege title in themselves, generally, of the entire land. The defendants, in their answer, set out the history of the title, whereupon plaintiffs, replying, state specifically the basis of their title to be that the deed executed by Mary Chisholm to Neil McCollum in fee was her original one-half undivided interest in said land, and that the other one-half interest "deeded" to Neil for life was John McCollum's share. The plaintiffs thus set out clearly their title, and the parties are brought, by the pleadings, to a single issue: Did Mary Chisholm convey, by her deed of November 16, 1895, to Neil McCollum, in fee, her original one-half undivided interest? If so, plaintiffs are entitled to the land under the deed from Neil McCollum to them. If not, they fail in their action.

In this condition of the pleadings, may plaintiffs, failing to prove their allegation, rely upon an entirely different title, having its origin in an estoppel and entitling them to some unascertained interest? In Richards v. Smith, 98 N. C. 509, 4 S. E. 625, Merrimon, J., says: "If the plaintiff should allege title in himself, derived in a specified way, it may be that he would be compelled to prove it substantially as alleged, unless upon application to the court he be allowed to amend the complaint." In Tillinghast & Shearman, Tr. Tit. § 443, it is said: "If the plaintiff sets out a specific chain of title, his evidence will be confined to the title as alleged, and while it is not necessary to aver the evidences of plaintiff's title, yet, if these be alleged, the substantial elements of the title must be stated." This, we think, is in accordance with orderly procedure and good pleading. If the plaintiffs wish to rely upon some other title than that which they have set out and called upon defendants to answer, they should have an amendment to their complaint, giving defendants an opportunity to answer and prepare their defense to "the change of base." In the pleadings there is no reference to, or suggestion of, a title by estoppel, by reason of a proceeding for partition. We are of the opinion

that his honor, for this reason, correctly held that plaintiffs could not recover.

We are further of the opinion that, if plaintiffs had amended their complaint, they could not have succeeded. The sole purpose of the proceeding for partition was to enable Col. Simmons, who had purchased the one-half undivided interest of John McCollum, to have such interest set apart to him. There was no reason for making the plaintiffs herein parties, as they had no interest in the land after the death of Neil McCollum, under whom they claimed. The petition did not undertake to set out the interests of the defendants inter sese. No such question was presented or decided. The only fact adjudged in the proceeding was that Col. Simmons was the owner of a half undivided interest. It would have been entirely proper and probably better practice to have set forth the condition of the title as between all of the parties, but not necessary for the purpose of accomplishing what the petition desired. This case is easily distinguished from Armfield v. Moore, 44 N. C. 157, the leading case in this state. There, the interest of each party to the record was ascertained. Pearson, J., says: "An estoppel must be certain; that is, the fact agreed on, or found by the jury, must be some particular fact, and not a generality, or matter of inference. Here, the fact agreed on is certain, to wit, that Jane Moore was entitled, as a tenant in common, to one-third part of four slaves." Here, there is no finding in respect to the interest of the defendants, except that they are tenants in common with petitioner—that was the only fact alleged and the only fact necessary for him to allege. As between Simmons and the defendants, in that proceeding, all parties are estopped to deny that Simmons was entitled to one-half the land. Carter v. White, 134 N. C. 466, 46 S. E. 983, 101 Am. St. Rep. 853. The decision in that case is based upon the fact that the exact interest of each party was put in issue and settled by the judgment, citing Forder v. Davis, 38 Mo. 107, in which it is said of the judgment: "The partition establishes the title, severs the unity of possession and gives to each party an absolute possession of his portion." "As a general rule parties to a judgment are not bound by it in a subsequent controversy between themselves, unless they were adversary parties in the original action. That is to say, a judgment for or against two or more joint parties ordinarily determines nothing as to their respective rights and liabilities as against each other in their own subsequent controversy." 2 Black on Judgts. § 599. Of course, if codefendants, by appropriate pleadings, put their rights inter sese in litigation, they are bound by the judgment rendered upon the questions litigated. 1 Freeman on Judgts. § 158. It would work a great wrong to defendants herein to permit the judgment in the partition proceedings, the only purpose of which was to have Col. Simmons' one-half interest in the land set apart to him, to divest them of their title to a share of the land, not in any way in litigation. To do so would make estoppel justly odious.

The judgment of his honor must be affirmed.

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(146 N. C. 10)

## ADEN v. DOUB.

(Supreme Court of North Carolina. Nov. 13, 1907.)

1. BILLS AND NOTES — COLLATERAL AGREEMENTS AFFECTING CHARACTER OF INSTRUMENTS.

So far as the original parties are concerned, a negotiable instrument is not of such high dignity as a medium of exchange that the parties cannot annex any lawful condition to its payment at the time it is given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 64.]

2. NEW TRIAL — MOTION — AFFIDAVIT AS TO NEWLY DISCOVERED EVIDENCE.

A motion in the Supreme Court for a new trial on the ground of newly discovered evidence will be denied, where it appears that such evidence was merely cumulative, and not of sufficient weight to probably change the result, and that plaintiff was guilty of laches in not discovering the evidence before he did.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 218.]

3. PLEADING—SCOPE OF ISSUES OF FACT.

When the issues submitted fully present all the material matters in controversy, they are sufficient for the purpose of the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1212.]

Appeal from Superior Court, Forsyth County; Ferguson, Judge.

Action on a note by Joseph Aden against J. F. Doub. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action brought to recover the amount of $257.35, and interest, alleged to be due by a note given by the defendant to the plaintiff as agent for a policy in the Security Life & Annuity Company for the sum of $5,000. At the time of the execution of the note, the parties entered into a collateral written agreement, as a part of their contract, to the effect that the defendant should have one month after the date of the note to determine whether he would take the policy, and, if he decided not to accept it, then the note to be void. The court submitted to the jury certain issues, which, with the answers thereto, are as follows: "(1) Did the defendant execute the note described in the complaint? Ans. Yes. (2) At the time of the execution of said note, did the plaintiff execute the agreement set out in the answer? Ans. Yes. (3) Did the defendant, within one month from the execution of the note and agreement, notify the plaintiff that he would not accept the policy of insurance and offer to return the same and demand a return of the note? Ans. Yes. (4) What amount, if any, is due from the defendant to the plaintiff? Ans. Nothing." The plaintiff excepted to the submission of the first three issues, and insisted

that the fourth issue was sufficient to cover the matters in controversy. Upon the verdict, the court rendered a judgment for the defendant, and the plaintiff appealed.

J. E. Alexander and G. H. Hastings, for appellant. Watson, Buxton & Watson and Benbow & Hall, for appellee.

WALKER, J. (after stating the facts as above). There is nothing in this case, unless we greatly misunderstand it, but an issue of fact. The jury have found that the note was given subject to the written condition that the defendant might reject the policy within 30 days, upon due notice, which was given. The position taken by the plaintiff, that the evidence tended to contradict a written instrument, and besides a negotiable instrument, is clearly without any support in law. In the first place, the written agreement was made at the very time the note was given, as a part of the same transaction, and the plaintiff is the original payee. This does not bring the case within the rule of evidence by which it is forbidden to vary or contradict a written instrument, nor within that other rule protecting an innocent purchaser for value of a negotiable instrument. It is not a correct proposition in law, as stated in the plaintiff's prayer for instructions, that a negotiable instrument is of such high dignity, as a medium of exchange, that the parties cannot annex any lawful condition to its payment at the time it is given, when the action to recover it is between the original parties to it. The question is fully discussed in Evans v. Freeman, 142 N. C. 61, 54 S. E. 847. This suit is nothing more or less than an attempt by the plaintiff to recover from the defendant a sum of money, contrary to his express written agreement, which was executed cotemporaneously with the note, that the defendant should not be liable therefor, if he rejected the policy, which he did; that is, if the verdict is true, and there was strong evidence to support it.

The plaintiff moved in this court for a new trial, upon the ground that, since the trial of the cause, he had discovered other material evidence. We have examined this evidence, and find it to be merely cumulative to that introduced at the trial, and, besides it does not impress us as having sufficient weight so as to render it probable, or likely, that the result would be changed by it if a new trial is awarded. The nature of the evidence would indicate, too, that the plaintiff had been guilty of laches in not discovering it before he did. As he wrote the letter to the defendant dated May 15, 1905, and countersigned the receipt, he should certainly have known of their existence and called for their production at the trial by a specific notice or demand upon the defendant. In Turner v. Davis, 132 N. C. 187, 43 S. E. 637, the present Chief Justice states fully the law applicable to motions of this kind: "Our own decisions require as prerequisites for such motions, whether made below or in this court, that it shall appear by affidavit (1) that the witness will give the newly discovered evidence, (2) that it is probably true, (3) that it is material, and (4) that due diligence was used in securing it. Such motions have been allowed only in cases of manifest injustice and wrong, and when there was no other relief attainable. But the motion will be denied if the new evidence merely tends to contradict a witness examined on the trial, or to discredit the opposing witness, or is merely cumulative; and it is (not) sufficient to state that 'every means had been used to find out where the witness was.' The applicant should state what means he did use, and let the court judge of its sufficiency"—citing Carson v. Dellinger, 90 N. C. 231; Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748; State v. De Graff, 113 N. C. 688, 18 S. E. 507; State v. Starnes, 97 N. C. 423, 2 S. E. 447; and Shehan v. Malone, 72 N. C. 59. See, also, Wilkie v. Railroad, 127 N. C. 213, 37 S. E. 204; Simmons v. Mann, 92 N. C. 12; and Love v. Blewit, 21 N. C. 108. The motion is denied.

The objection to the issues is untenable. Those submitted fully presented all the material matters in controversy, and, when this is the case, the issues are sufficient for the purpose of the trial. Deaver v. Deaver, 137 N. C. 240, 49 S. E. 113; Hatcher v. Dabbs, 133 N. C. 239, 45 S. E. 562; Clark v. Guano Co., 144 N. C. 64, 56 S. E. 858; Moseley v. Johnson, 144 N. C. 257, 56 S. E. 922; Main v. Fields, 144 N. C. 307, 56 S. E. 943.

We find no error in the rulings of the court.

No error.

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(146 N. C. 25)

## In re BALDWIN'S WILL.

(Supreme Court of North Carolina. Nov. 13, 1907.)

1. WILLS — PROBATE — EVIDENCE — ADMISSIBILITY.

In proceedings to probate a will, parol proof that the paper offered for probate is a copy of the will of the testator which had been destroyed is inadmissible, in the absence of any physical connection between the paper and the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 232–234, 672, 673.]

2. SAME—EXECUTION.

Where, in proceedings to probate a will, the paper offered was written by a third person, who signed as a witness before testator signed, and not in his presence, and the third person never saw testator after the paper was left at his residence to be executed by him, the will was not proved, within Revisal 1905, § 3113, requiring that a will shall be subscribed in the presence of testator by witnesses, though, where the signing of the testator and of the witnesses takes place at the same time, it may be immaterial who signed first.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 299–301.]

3. SAME.

The presumption that testator signed his will before the attesting witnesses is rebutted by proof that the paper offered for probate was written by a third person and signed by him as a witness before the testator signed, and not in his presence, and that the witness never saw testator after the paper was left at his residence to be executed by him.

4. SAME—ATTESTATION.

The attestation by witnesses of a will must be on the same sheet of paper as that which contains the signature of the testator, or on some paper physically connected with that sheet.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 232-234, 277.]

Appeal from Superior Court, Montgomery County; Moore, Judge.

Application by H. T. Baldwin and another for the probate of the will of W. S. Baldwin, deceased, in which certain persons appeared as objectors. From a judgment denying probate, the propounders appeal. Affirmed.

The following are the findings of fact in the court below:

"(1) That the propounders, H. T. Baldwin and J. H. Le Grand, produced in court a paper writing purporting to be the last will and testament of W. S. Baldwin, deceased, a copy of which is made a part of this finding:

" 'State of North Carolina, Montgomery County.

" 'I, W. S. Baldwin, of the county and state above named, being of sound mind and memory, but considering the uncertainty of my earthly existence, do make and declare this my last will and testament, in manner and form following:

" 'I hereby will the children of my daughter, Dicey Le Grand, deceased, twenty dollars each; and to the children of D. C. Baldwin, deceased, ten dollars each; and to J. B. Baldwin, my son, 15 acres of land, including all the buildings where I now live after his mother's death; and if he should die without any children, his part to be equally divided between H. T. Baldwin, Rebecca Ewing and Emma Le Grand and their children after them. The remainder of my real estate to be equally divided between H. T. Baldwin, J. B. Baldwin, Rebecca Ewing and Emma Le Grand, and their children after them; and for my wife, Charlotte Baldwin, to have her dower off of each child's part equal, and for her to have all the personal property as long as she shall live, and at her death the same to be equally divided between H. T. Baldwin, J. B. Baldwin, Rebecca Ewing and Emma Le Grand, and their children after them.

" 'I do hereby constitute and appoint my son, H. T. Baldwin, and J. H. Le Grand my lawful executors to all interests and purposes, to execute this my last will and testament according to the true intent and meaning of the same and every part and clause thereof, hereby revoking and declaring utterly void all other wills and testaments by me heretofore made.

" 'In witness whereof, I have hereunto set my hand and seal, this the 11th day of September, 1907.

" 'W. S. Baldwin. [Seal.]

" 'Signed, sealed, published and declared by the said W. S. Baldwin to be his last will and testament, in the presence of us who at his request and in his presence do subscribe our names as witnesses thereto.

" 'J. A. Covington.

" 'B. B. Bowles.'

"(2) That the said witness, J. A. Covington, was called in by the alleged testator, W. S. Baldwin, and, as dictated by the said testator, wrote a paper writing purporting to be the last will and testament of the alleged testator, wrote the attestation clause, and at the request of the testator and in the presence of the said testator signed his name as a witness thereto. No other witness attested this paper writing. Said W. S. Baldwin signed paper writing as his last will in the presence of said J. A. Covington.

"(3) That the paper writing purporting to be the last will and testament of the alleged testator, W. S. Baldwin, deceased, as referred to in the second article of this finding of facts, not being on as good quality of paper as the said witness desired to have the same, said J. A. Covington took the said paper writing, above referred to, to the home of the said witness, and there transcribed it on better paper, and at the same time, at his home, and in the absence of the alleged testator, wrote out the attestation clause and wrote his name as a witness thereto.

"(4) That after making an exact copy of the paper writing, referred to in the second article of this finding, and signing his name thereto as an attesting witness, the said J. A. Covington returned the copy for probate and also the original copy of the said paper writing, to the home of the said alleged testator; and the said W. S. Baldwin, being away from home, left them with the wife of the said testator. Said Covington did not see the said paper writing any more until after the death of said Baldwin, and did not see said Baldwin sign it or hear him acknowledge it.

"(5) That some time after this the alleged testator brought the copy of the purported will, to wit, the one offered for probate, to the other witness, B. B. Bowles, and asked him to 'witness a paper for him,' which the witness did in the presence of the alleged testator, and the testator asked him to say nothing about it.

"(6) That the original paper writing, being the one written at the dictation of the alleged testator and signed by the said alleged testator in the presence of the witness, Covington, and witnessed by the said witness, Covington, at the request of and in the presence of the alleged testator, W. S. Baldwin, deceased, and also the copy of the original paper writing, being the one witnessed by the

witness, B. B. Bowles, at the request of and in the presence of the said alleged testator, were both in the possession of the said alleged testator at the time of his death.

"(7) That both copies of alleged will were signed by the alleged testator in his own handwriting.

"(8) That after the death of the alleged testator the copy (meaning the one that was on the best paper) was carried to the clerk of the superior court for probate, and the original copy was, at the request or advice of friends, burned by the wife of the alleged testator, then deceased.

"(9) That the alleged testator, at the time of his signing both paper writings, was of sound mind and discretion,

"(10) That the witnesses, J. A. Covington and B. B. Bowles, are men of sufficient knowledge to act as such.

"(11) That the said paper writing offered for probate, which purported to be the last will and testament of the said W. S. Baldwin, deceased, appeared on its face to be written and attested in due form."

And judgment was rendered as follows:

"Upon the foregoing facts the court is of the opinion that the paper writing offered for probate is not the last will and testament of W. S. Baldwin, deceased. It is therefore, on motion of R. T. Poole, Esq., attorney for the objectors, ordered and adjudged by the court that the said paper writing is not the last will and testament of said W. S. Baldwin, deceased, and is not entitled to probate as such, and that this proceeding for the probate of the same be, and the same hereby is, dismissed. It is further adjudged that said H. T. Baldwin and J. H. Le Grand, the propounders, pay the costs of this proceeding, to be taxed by the clerk."

J. T. Brittain and R. O. Frye, for appellant. R. T. Poole, for appellee.

BROWN, J. Our statute (Revisal 1905, § 3113), referring to wills of the character of the paper writing offered for probate, contains a specific requirement that the will shall be subscribed in the presence of the testator by two witnesses at least. The paper offered by the propounders was never signed by witness Covington in the presence of Baldwin. It appears that Covington wrote a will for Baldwin, and he and Baldwin signed it in presence of each other. There is no finding of fact that such paper had any other witness than Covington. It was destroyed after Baldwin's death. It was not attached in any way to the paper offered for probate and had no physical connection with it. The fact that it is said to be exactly like the paper offered, and that the latter is a copy of the former, does not "mend matters." In the absence of any sort of physical connection between the two papers, resort cannot be had to parol proof to show a similarity of contents, and that they constituted one and the same will.

The paper offered was written by Covington, and signed by him as a witness before the testator signed, and not in his presence. In fact, Covington never saw Baldwin at all after he wrote and attested the paper and left it at the former's residence to be executed by him. Not only did Covington not sign in the presence of the testator, but his attestation preceded the signing of the maker of the will. Some authorities hold that everything required to be done by the testator in the execution of a will shall precede in point of time the subscription by the attesting witness, and that, if the signature of the latter precede the signing by the testator, the will is void. Gardner on Wills, p. 236. Until the testator has signed there is no will and nothing to attest. There are eminent authorities, however, which hold that, where the signing of the testator and of the witnesses took place at the same time and constituted one transaction, it is immaterial who signed first. Gardner, supra. While this is very reasonable, it does not help the propounders upon the facts as found. Nor does the recognized legal presumption that the testator signed first, since that is rebutted by the admitted facts. The propounders can take no benefit from the fact that Covington signed the destroyed paper after testator had signed it, in his presence, and at his request, although the contents of the two papers may have been identical. That will not help out the probate of the paper offered, for the reason, as we have observed, that there was no physical connection between the two. The authorities all hold that the attestation or subscription by witnesses must be on the same sheet of paper as that which contains the testator's signature, or else upon some paper physically connected with that sheet. Mr. Schuler says: "Attestation or a subscription by witnesses on a paper detached and separated from the will and the testator's signature, nor affixed in his presence to the paper at the time of execution, fails of compliance with the policy of our law. We may assume it to be void, as otherwise a door must be open to fraud and perjury." Wills (2d Ed.) § 336; Cox's Will, 46 N. C. 323. Am. & Eng. Ency. (2d Ed.) says: "An attestation, if not on the same sheet of paper as the signature of the testator, must be on a paper physically connected with that sheet, although no particular mode of fastening the papers together is required." Volume 30, p. 603.

The judgment is affirmed.

Affirmed.

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(146 N. C. 1)

## EAMES v. ARMSTRONG et al.

(Supreme Court of North Carolina. Nov. 13, 1907.)

1. COVENANTS—SEISIN—TITLE IN PLAINTIFF.
Where, at the time plaintiff obtained a deed containing full covenants of seisin, he had title to a portion of the land attempted to be con-

veyed, and immediately conveyed the same to another, who took and retained possession, plaintiff could not recover for breach of defendant's covenant as to such land, under the rule that a covenant of seisin extends only to indemnify the grantee against title existing in a third person which might defeat the estate conveyed.

2. ESTOPPEL—ESTOPPEL BY DEED—TITLE PREVIOUSLY ACQUIRED.

A grantee is estopped to set up a title previously acquired as against his vendor.

3. TAXATION—ASSESSMENT OF LAND—SALE—REDEMPTION BY OWNER'S HUSBAND—TENDER.

Revisal 1905, § 2894, provides that the fact that land is listed in the name of another than the owner shall not invalidate a tax deed, unless the true owner has listed the land and paid taxes thereon. *Held*, that where land belonging to a wife was listed for taxation by her husband, and was sold for nonpayment of taxes, no tender to redeem having been made by her, or any one for her or claiming under her, a tender made by the husband was ineffectual; he having no "estate or interest" in the land, notwithstanding the birth of issue.

4. SAME — TAX DEED — DEFECTS — RIGHT TO URGE.

Land belonging to a wife, but listed for taxes by her husband, was sold to defendant A. for nonpayment of taxes. The husband and wife, thereafter having an opportunity to sell the land for $5,000, in order to clear the title, procured A. and wife to execute a deed with full covenants of seisin to plaintiff, the husband, for $2,300, which was paid, and immediately thereafter the husband and wife conveyed the property to W., whose possession had never been disturbed. *Held*, that plaintiff, in an action for breach of the covenant of seisin, was not entitled to show that the tax deed to A. was void, under Revisal 1905, § 2909, providing that no person shall attack a tax deed unless he or the person under whom he claims had title to the property at the time of the tax sale, and that all taxes due had been paid by such person under whom he claims.

5. COVENANTS—SEISIN—BREACH—MEASURE OF DAMAGES.

While, in general, the purchase money is the measure of damages for breach of a covenant of seisin, yet, if the covenantee perfects his title for a less sum, his recovery will be limited to the amount so paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 231–236.]

6. SAME—RIGHT TO SUE—INABILITY TO RECONVEY.

Where the grantee in a deed with covenants of seisin procured the deed in order to clear the title to the property which his wife had formerly held subject to a tax deed to the grantor, and thereafter both husband and wife conveyed the land to another, whose possession had never been disturbed, and thus disabled themselves from reconveying to their grantor, the husband could not recover for an alleged breach of such grantor's covenant of seisin.

7. SAME—COVENANTS RUNNING WITH LAND.

A covenant of seisin is a covenant of indemnity which does not run with the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 59.]

Appeal from Superior Court, Rowan County; Moore, Judge.

Action by Richard Eames against C. A. Armstrong and another. From a judgment for defendants, plaintiff appeals. Affirmed.

This was an action for breach of covenant of seisin. The facts, in regard to which there is no controversy, are as follows: The tract described in the deeds and in the complaint as the "Russell Gold Mine," containing 356 acres, was, prior to May 5, 1902, the property of Mrs. Elizabeth Eames, the wife of plaintiff. The tract described as the "Coggins Meeting House," containing 3 acres, was, at said date, the property of plaintiff. On May 6, 1903, W. D. Clark, sheriff of Montgomery county, executed to defendant a deed conveying, by the same metes and bounds set out in the complaint, the Russell Gold Mine, containing 359 acres. The preamble to the deed is in the following words: "Whereas, at a sale of real estate for the non-payment of taxes made in the county aforesaid on the 5th day of May, 1902, the following described real estate was sold, to wit: Three hundred and fifty-nine acres in Eldorado township listed by Richard Eames," etc. In this, and all other parts, the language of the deed conformed to the provisions of the statute. Revisal 1905, § 2906. The deed was duly proven and recorded May 7, 1903. On May 7, 1903, defendant C. A. Armstrong and his wife, in consideration of $2,300, executed a deed to plaintiff, conveying, by metes and bounds as in the deed to them, the Russell Gold Mine, containing 356 acres, and, by a separate description, the Coggins Meeting House, of 3 acres. This deed was duly proven and recorded, and contains the following covenant: "To have and to hold the aforesaid tracts of land, * * * and the said parties of the first part covenant that they are seized of said premises in fee and have a right to convey the same in fee simple, that the same are free and clear from all encumbrances." On May 9, 1903 plaintiff and his wife conveyed both said tracts to Geo. T. Whitney in consideration of $5,000. Plaintiff paid to defendant the consideration of $2,300 named in his deed. Plaintiff alleges that, at the time defendant executed the deed of May 6, 1903, and made the covenant therein, he was not seised of either of the tracts therein conveyed, and had no title thereto, and for breach of said covenant demands as damages the amount of the purchase money. Defendant denies the allegation, and alleges seisin, etc. In response to issues submitted, the jury found that at the date of the deed the Coggins Meeting House was the property of plaintiff, and, under the instructions of the court, found that plaintiff was not entitled to recover any damage on account thereof. That defendant was seised of the Russell Gold Mine, and that there had been no breach of the covenant in respect thereto. It was in evidence: That plaintiff was desirous of selling both tracts to one Whitney, and had entered into a contract to do so for the sum of $5,000. That his attorney, residing in Salisbury, went to the town of Troy, Montgomery county, for the purpose of examining the title. That a few days thereafter plaintiff met defendant in Troy, and, after some negotiations, agreed to pay him $2,300 for deed with full covenants. That

some question was raised in regard to whether the sheriff's deed covered the Coggins Meeting House, whereupon plaintiff said that, while the land was his, defendant could put it in the deed to satisfy Mr. Whitney, and that no trouble would ever come to him on account of it. Upon the execution of the deed by plaintiff and wife to Whitney, he went into, and has continued in, the unmolested possession of the land. His honor instructed the jury to answer the issues. Judgment was thereupon rendered for defendant. Plaintiff's exceptions are noted in the opinion. Plaintiff appealed.

J. S. Henderson, for appellant. T. F. Klutz, L. H. Clement, and T. J. Jerome, for appellees.

CONNOR, J. (after stating the facts as above). We were of the opinion, when this case was here, at the fall term, 1906, that the covenant of seisin, extended to the Coggins Meeting House tract. 142 N. C. 506, 55 S. E. 405. It appears that, at the time the deed was made by Armstrong to the plaintiff, the title to that tract was in the plaintiff, and that this was well known to him. It further appears that plaintiff immediately conveyed the same land to Whitney, who went into possession and remains therein. In Fitch v. Baldwin, 17 Johns. (N. Y.) 166, it is said: "The covenant of seisin extends only to guarantee the bargainee against any title existing in a third person, and which might defeat the estate granted." In Furness v. Williams, 11 Ill. 229, Treat, C. J., says: "It is attempted, on the part of defendant, to establish a breach of the covenant by proving that he was, himself, seised, instead of his grantor. That law does not allow this to be done. The covenant of seisin extends only to a title existing in a third person. It does not embrace a title that may be already in the grantee. The grantee is estopped from setting up the title previously acquired against his vendor." Tiedeman on Real Prop, § 851; Rawle on Cov. 431; Jones, Real Prop. 444; 11 Am. & Eng. Enc. 442. His honor therefore correctly instructed the jury to answer the issue in regard to that tract.

For the purpose of showing that defendant was not seised of the Russell Gold Mine tract, plaintiff sought to attack the deed executed by the sheriff to the defendant of May 6, 1903. To this end he offered to show that a tender of the taxes, interest, cost, etc., was made by his attorney and the attorney of Mr. Hambley to the defendant on May 5, 1903, and declined. He further offered to show that plaintiff tendered the amount to both the defendant and the sheriff, and that both were declined. He further offered to show that defendant had not given the notice required by the statute before calling for the deed. To each of the questions bearing upon these contentions defendant objected. His honor ruled: "That plaintiff, not having shown that he had title to the Russell Gold Mine tract of 356 acres, at the time of the sale of the same for taxes on the 5th of May, 1902, and not having shown that he now claims the same under the person who had the title at the time of such sale, and not having shown that all taxes due upon the property had been paid to him or the person who had the title at the time of the sale, the court held that the plaintiff could not be permitted to question the title which had been acquired by the defendant under the sheriff's tax deed, nor could the plaintiff question the validity of the deed." The objection was sustained, and plaintiff excepted. It will be observed that the land conveyed by defendant to plaintiff was, at the time it was listed for taxation, sold, and the deed executed by the sheriff, the property of Mrs. Eames. The deed recites that it was listed by Richard Eames. This, we think, in view of the provisions of section 2894, Revisal 1905, immaterial. It is therein expressly provided that the fact that the land is listed in the name of some one other than the owner shall not invalidate the deed, unless it is shown that the true owner listed and paid the taxes on it. No evidence was offered that Mrs. Eames did either. The tender to redeem was not made by Mrs. Eames or any one acting for her or claiming under her. That her husband had no "estate or interest" in the land, notwithstanding birth of issue, is settled. Tiddy v. Graves, 126 N. C. 622, 36 S. E. 127. Hallyburton v. Slagle, 132 N. C. 948, 44 S. E. 655.

Plaintiff, however, insists that he had a right to show that the defendant failed to give the notice required by section 2903, Revisal 1905, being sections 15–17, p. 790, c. 558, Laws 1901, and thereby invalidate the deed under the decision of this court in King v. Cooper, 128 N. C. 347, 38 S. E. 924, and Matthews v. Fry, 141 N. C. 586, 54 S. E. 379. It will be observed that in both of those cases the controversy was between the owner of the land and the purchaser; whereas, section 2909, Revisal 1905, which is the same as section 20, p. 792, c. 558, Laws 1901, provides: "In all controversies, actions and proceedings involving the title to real property claimed and held under and by virtue of a deed made substantially as required by this chapter, the person claiming title adverse to the title conveyed by such deed shall be required to prove, in order to defeat the title which such deed purports to convey, either that such real property was not subject to taxation for the year or years named in the deed, or that, the taxes had been paid before the sale, or that, the property had been redeemed from the sale according to the provisions of this chapter and that such redemption was had or made for the use and benefit of the persons having the right of redemption under the laws of this state, or that, there had been an entire omission to list or assess the property, or to levy the taxes or to

sell the property. No person shall be permitted to question the title acquired by a sheriff's deed made pursuant to this chapter without first showing that he, or the person under whom he claims, had title to the property at the time of the sale and that all taxes due upon the property have been paid by such person under whom he claims title." It is clear that the plaintiff never had any title to the property and never had any claim thereto under the owner thereof. He is, in contemplation of law, an absolute stranger to the title. If any effect is to be given to the plain language of the statute, it is manifest that his honor's ruling is correct. It is difficult to see how, or why, plaintiff should be permitted, as a volunteer, to come into the court to attack a deed, the validity of which can in no possible contingency affect him. Mrs. Eames, the owner of the property, assuming for the sake of the argument that the defendant's title was not good as against her, has parted with her title, and there is no person in existence who can attack the title of her grantor or disturb his possession.

The facts presented upon the record are peculiar. At the time the land was listed for taxation, it was the property of Mrs. Eames. The tax not having been paid on May 5, 1902, the sheriff sold it for nonpayment of taxes, when the defendant Armstrong became the purchaser. It appears that plaintiff had entered into a contract to sell the land to Mr. Hambley, who represented Mr. Whitney. On May 5, 1903, Mr. Henderson, who had gone to Troy to investigate the title "in behalf of Richard Eames and Hambley," offered to pay defendant "all the taxes, interest, cost, and penalties," which offer was declined. The same offer was made to the sheriff and declined. A few days after Col. Henderson's visit to Troy, plaintiff went there, and after some negotiation with defendant and his attorneys, agreed to pay him $2,300 and take the deed. Pursuant to this agreement, the deed, containing the covenant, was delivered, and the money paid on May 7, 1903. Plaintiff, before taking the deed, offered to pay defendant and the sheriff the taxes, etc., which offer was declined. On May 9, 1903, the plaintiff and his wife, Mrs. Elizabeth Eames, conveyed the land to Whitney for $5,000, and he went into possession, and has remained therein unmolested. This action was brought March 4, 1904. If plaintiff should recover, as he seeks to do, the purchase money paid defendant, he should be required to reconvey to him such title or interest as he acquired by the deed. This he cannot do, because, assuming his contention correct that the title was not divested out of Mrs. Eames, by the tax deed, he has joined with her in conveying his rights to Whitney. While it is true that usually the purchase money is the measure of damages for breach of covenant of seisin, it is equally true that, if the covenantee perfect his title for a less amount, he will recover only the amount paid by him therefor. In this case he and his wife sold to Whitney for $5,000. It does not appear that he paid Mrs. Eames any sum whatever for her interest or title, or whether the whole of the purchase money went to him. It does appear that his contract was to sell the land to Hambley, representing Whitney, for $5,000, and that, by reason of acquiring defendant's title, he was enabled to carry out his contract. It is certain that he and Mrs. Eames have conveyed to Whitney a perfect title, and that plaintiff cannot put defendant back in the position which he occupied when he made the covenant. This he should be able to do. Rawle, Covenants, § 184. Is it not clear that, as plaintiff should recover the purchase money upon the theory that defendant had no title, there was a total failure of consideration, that he should reconvey to the defendant? In Stinson v. Sumner, 9 Mass. 150, 6 Am. Dec. 49, Parker, J., says: "It would certainly be manifestly against the principles of justice that a grantee should recover, either his purchase money or the value of the land against the grantor, upon an alleged breach of covenant that nothing passed by the deed; and that he should be considered the owner of the land under the very deed which he had alleged to be inoperative." The plaintiff had conveyed the land to Whitney for an amount more than double the purchase money paid by him to defendant. The fact that his wife joined in the deed from this point of view does not affect the question. He cannot restore to defendant the title which he got from him. How, then, can he call upon him to restore the purchase money? It may be, assuming that there was a breach of the covenant, that he could recover such sum as he was required to pay out to perfect his title. In Bank v. Glenn, 68 N. C. 35, it is said: "If there be an outstanding, paramount title, which the covenantee purchases, he is not entitled to recover the whole of the purchase money, with interest, but only the amount paid to perfect the title, with interest from date of payment. In other words, when the loss has been less than the purchase money and interest, the plaintiff can recover only for the actual injury sustained." The language of the court in that case is applicable here. "The plaintiff does not stand in a very graceful attitude before the court, when it seeks to recover the purchase money, after its title to the land has been perfected, and when it has by a deed in trust conveyed the same land to secure its debts. The bank is seeking to have the land and the purchase money. To allow it to do so would be grossly inequitable." The purpose of the covenant is indemnity, not speculation.

The defendant, in addition to the defenses to which we have adverted, urges us to reverse the former rulings of the court that a covenant of seisin does not run with the land. He cites a number of cases in which it

is held that the breach is continuing and the right to sue passes with the title, and may be prosecuted whenever the paramount title is asserted to the disturbance of the possession of the grantee under the deed containing the covenant. From this position defendant concludes that Whitney is the owner of the covenant and the real party in interest, who alone can sue. It is true, as contended by the learned counsel, that the law has been so held by a number of highly respectable courts. The other view has always been held by this court, and we are not disposed to reverse these decisions. Mr. Rawle, in his excellent work on Covenants (5th Ed. 205), discusses the question, reviews the authorities, and concludes that the weight of authority is with the opinion of this court. We noted the cases upon the subject in Eames v. Armstrong, 142 N. C. 506, 55 S. E. 405. We are of the opinion that his honor's ruling upon the admissibility of the evidence offered by plaintiff for the purpose of attacking the sheriff's deed was correct. This renders it unnecessary to discuss a number of the plaintiff's exceptions. The constitutionality of our revenue and machinery acts are not presented.

The judgment must be affirmed.

No error.

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(62 W. Va. 433)

## BOARD OF EDUCATION OF FLATWOODS DIST. v. BERRY.*

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907.)

1. EQUITY—PLEADING—EXHIBITS.

Documents made exhibits, which are parts of a bill in chancery, are of controlling force in case of discrepancy between them and the bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 885.]

2. JUDICIAL SALE—NOTICE TO PURCHASER.

A purchaser at a judicial sale is charged with notice of every fact appearing upon the face of the record affecting the title acquired by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 81, Judicial Sales, §§ 90–109.]

3. EVIDENCE—JUDICIAL NOTICE.

An act of the Legislature creating an independent school district is a public law of which the courts of the state will take judicial notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 87.]

4. MUNICIPAL CORPORATIONS — CORPORATE EXISTENCE.

Where there has been a bona fide attempt to organize a public corporation with color of law and the exercise of corporate rights and franchises, the corporate existence cannot, as a general rule, be litigated in actions between private individuals, nor between private individuals and the assumed corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 41–44.]

5. SAME—WHO MAY QUESTION.

Proof of such corporate existence will be sufficient evidence of rights, except as against the state, where the inquiry is merely collateral, though put in issue by the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 49–51.]

6. SAME.

Where a corporation exists de facto, it may exercise the powers assumed, and the question of its having a right to exercise them will be deemed one which can be raised only by the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 34–44.]

(Syllabus by the Court.)

Error to Circuit Court, Braxton County.

Action by the board of education of Flatwoods district against William H. Berry. Judgment for defendant, and plaintiff brings error. Reversed.

Hines & Kelly, for plaintiff in error. Haymond & Fox and Jake Fisher, for defendant in error.

MILLER, J. In an action of unlawful entry and detainer in the circuit court, the defendant, besides the general issue, by plea put in issue the corporate existence of the plaintiff. In a trial before a jury, after the plaintiff had introduced all its evidence, the circuit court sustained the defendant's motion to exclude such evidence and directed a verdict for defendant, which the jury returned accordingly. The subsequent motion of the plaintiff to set aside the verdict and award a new trial did not prevail, and judgment was rendered dismissing the plaintiff's summons. It does not distinctly appear from the record upon what particular ground this action of the court was founded.

The property sued for was a lot of 1½ acres, with a schoolhouse thereon, conveyed to the board of education of Salt Lick District by W. F. Morrison and L. J. Berry, October 14, 1897, to which the plaintiff succeeded by virtue of its incorporation as the board of education of Flatwoods district. This lot was part of 54 acres conveyed to Morrison and Berry by W. E. Haymond, special commissioner, September 7, 1893. On October 14, 1897, Morrison and Berry conveyed the lot sued for to the board of education of Salt Lick district, and later on the same day to H. P. Pierce one acre out of the 54 acres, and on December 13, 1897, they conveyed to W. S. Stump 40 acres, more or less, described as being a part of the 54-acre tract. On February 21, 1899, the board of education of Salt Lick district conveyed to W. S. Stump 138½ square rods and 58 square feet, part of the lot so conveyed to it by Morrison and Berry. The plaintiff therefore, if entitled to recover, was entitled to recover only that part of the property described in the summons exclusive of the portion thereof conveyed to Stump.

The defendant offered no evidence, except in connection with the cross-examination of the plaintiff's witnesses. The material parts of the record of the chancery cause of the

* Rehearing denied January 7, 1908.

Merchants' National Bank against J. W. Morrison and others were put in evidence, consisting of the summons, extracts from the bill, the deeds from Morrison and Berry to Pierce and Stump, and from Haymond to Morrison and Berry, abstracts from the commissioners' reports, and of the decrees of sale and confirmation pronounced therein, and the notice of sale by the commissioners appointed to make sale of the lands decreed to be sold. This record shows that the defendant, William H. Berry, on November 23, 1903, became the purchaser of the residue of the 54 acres conveyed to W. S. Stump by the said Morrison and Berry, and was awarded a writ of possession. The final decree of confirmation was entered December 4, 1903. Neither his deed nor the writ of possession was put in evidence; but the deputy sheriff who executed the writ testifies that when he put Berry in possession thereunder in June or July, 1904, the board of education of Flatwoods district was in possession of the property.

The defendant makes no other claim of title, or right to possession of the property sued for, except by virtue of the judicial proceedings referred to. This suit of the Merchants' National Bank was a suit instituted February 11, 1898, to enforce the liens of sundry judgment creditors of the plaintiffs therein. The deed from Morrison and Berry to the board of education of Salt Lick district was not recorded until November 25, 1903, two days after the purchase by William H. Berry, but before the decree of confirmation. These judgments, recovered and docketed in April, 1897, were undoubtedly liens upon the whole tract of 54 acres which the creditors had the right to enforce. But the question is not what they had the right to do, but what their suit accomplished, and whether the defendant acquired title therein to the lot of ground in controversy. The plaintiff was no party to that suit; nor was it a pendente lite purchaser, for the deed was made to its predecessor prior to the institution of the suit. True, the liens of the judgments accrued prior to the deed; but unless the lot in controversy was sold, and purchased by the defendant, he acquired no title thereto or right to possession thereof.

We must then look to the bill and proceedings in that suit to determine what was actually sold and purchased. The bill alleged that Berry and Morrison acquired title to the 54 acres from Haymond, commissioner, by deed of September 7, 1893, "a part of which they conveyed to H. P. Pierce the 14th of October, 1897, and the residue thereof to W. S. Stump on the 13th of December, 1897," and copies of these three deeds were exhibited with the bill. The deeds from Berry and Morrison to Pierce and Stump, however, by the very words of description, exclude therefrom the schoolhouse lot conveyed to Salt Lick district; and, although the bill perhaps intended to charge that the deed to Stump conveyed all of the 54 acres except that part conveyed to Pierce, yet the Stump deed itself, being exhibited with the bill, is of controlling force. Richardson v. Ebert (W. Va.) 56 S. E. 887, recently decided by this court. The first commissioner found that the judgments were liens only upon the one acre conveyed to Pierce and the 40 acres conveyed to Stump; the second, that Morrison and Berry conveyed the one-acre tract to Pierce as part of the 54 acres, and subsequently the residue thereof to Stump, and these two deeds are vouched for this finding. But, as we have seen, these deeds exclude the schoolhouse lot. The decree of sale adjudged that Haymond, commissioner, conveyed to Morrison and Berry a tract of 54 acres; that Morrison and Berry, October 14, 1897, conveyed one acre thereof to Pierce, and on December 13, 1897, conveyed the residue of said 54 acres to Stump; and that the judgments were liens thereon, and directed sale thereof. The notice of sale described the land as "one acre of land at Shaverville conveyed to H. P. Pierce by W. F. Morrison and L. J. Berry, and the residue of 54 acres at Shaverville conveyed to W. S. Stump by said Morrison and Berry." The decree of confirmation refers to this land as "the residue of 54 acres at Shaverville conveyed to W. S. Stump by W. F. Morrison and L. J. Berry"; no reference being made in this decree to the one acre conveyed to Pierce. If we include the Pierce lot, however, how can we say that the court sold, or intended to sell, any of the 54 acres except the one acre conveyed to Pierce and the residue of the 54 acres conveyed to Stump?

By its terms the Stump deed bounds and describes 40 acres, more or less, and by its description excludes the schoolhouse lot; and any deed which the commissioners were authorized to make, and the writ of possession, were limited to the land described in these two deeds. We must presume, in the absence of the writ, that the writ of possession ran with the provisions of the decree. Moreover, not having been a party to the suit, the plaintiff should, before the writ issued, have been summoned to show cause why it should not surrender possession. Trimble v. Patton, 5 W. Va. 432; Paxton v. Rucker, 15 W. Va. 547; Williamson v. Russell, 18 W. Va. 612. A member of the board of education, who was present when the officer arrived and who had the key to the schoolhouse, stated to the officer that before surrendering the key he wished to see the president of the board, and, while he was absent for that purpose, the officer by force put the defendant in possession of the schoolhouse. This was an unauthorized and unlawful act, for which chapter 89 of the Code of 1906 gives the summary remedy here sought to the one so turned out of possession, no matter what right or title he had. The purchaser at a judicial sale is charged with notice of every fact appearing upon the face of the record

affecting the title acquired by him. Calvert v. Ash, 47 W. Va. 486, 35 S. E. 887; Williamson v. Jones, 43 W. Va. 563, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Hoback v. Miller, 44 W. Va. 635, 29 S. E. 1014; Bank v. Hyer, 46 W. Va. 13, 32 S. E. 1000. The parties had the right to exclude from these proceedings the schoolhouse lot, and the proceedings effectually did so. The record does not disclose whether all the judgments were satisfied out of the land sold. The rule in such cases is that the lands of a judgment debtor shall be sold in the inverse order of their alienation. Hence it would have been error to have sold the schoolhouse lot, first conveyed, if the other lands of the judgment debtors subsequently aliened and decreed to be sold were sufficient to satisfy the liens. McClaskey v. O'Brien, 16 W. Va. 791; Payne v. Webb, 23 W. Va. 558; McClung v. Beirne, 10 Leigh (Va.) 394, 34 Am. Dec. 739.

Was the plaintiff competent to sue? This is the important and only other question fairly arising upon the record. The plaintiff was created into a corporation by the name of the "Board of Education of Flatwoods District" by an act of the Legislature (chapter 134, p. 294, Acts 1901) entitled "An act to establish the Independent School District of Flatwoods," which became effective 90 days from passage. It provided that, in the event the majority of the votes cast at an election to be held on the fourth Tuesday in May following should be in favor thereof, "the town of Shaverville and Flatwoods and territory adjacent" (described by metes and bounds) should, after the result of the election should be ascertained and declared, constitute the "Independent School District of Flatwoods"; that the board of education, consisting of three members elected by the qualified voters resident therein, should be a corporation, and should be vested with the same rights, exercise the same powers, perform the same duties, and be governed by the same laws, as boards of education elsewhere in the county, except in so far as changed by the provisions of the act, with power to sue and be sued, plead and be impleaded, contract, purchase, hold, and grant estate real and personal, etc.; that the election to be held to determine whether said independent district should be established should be superintended and the result thereof ascertained and declared by election officers appointed by the county court, the election laws of the state to control the election so far as applicable. The act in question was offered in evidence in its entirety, although, being public law it is one of which the courts of the state would take judicial notice. Bank v. Willis, 7 W. Va. 31; Hart v. Railroad Co., 6 W. Va. 336; Bank v. Machir, 18 W. Va. 271; Hays v. Bank, 9 Grat. (Va.) 127; Stribling v. Bank, 5 Rand. (Va.) 132; Mason v. Bank, 12 Leigh (Va.) 84, 87.

It is not denied that this was a valid act of the Legislature, or that, subject to the condition upon which it was to become effective, it created into an independent school district the territory therein described. But it claimed that, on account of alleged irregularities in the election, this public corporation never took life; that the conditions of its existence were never fulfilled; that it was incompetent to sue, or to assume and hold possession of the property sued for; and hence that as a matter of law possession cannot be said to have been unlawfully taken or withheld from it. The record shows that on March 6, 1901, the county court, by an order entered, directed that the special election provided for by the act should be held at two schoolhouses within the proposed district; one in Salt Lick district, near Cold Spring, at which those resident in Salt Lick district should be entitled to vote on the question, and the other on the Rhea farm in Flatwoods, at which those resident in Holly district should be entitled to vote. The order also appointed officers to conduct the election, with power to ascertain and declare the result. By a subsequent order of July 9, 1901, it appearing that the election had been held, and the result thereof ascertained, as provided by law and the former order of the court, and that said independent district had been legally established, the county court declared said independent school district of Flatwoods established as provided in said act. Following this election, a board of education was elected as prescribed by the act, who entered upon the discharge of its duties, made levies, established schools, and employed teachers, and continued to exercise the functions of a corporation up to the time of the institution of this suit. The act of the Legislature does not show what part or parts of either of the magisterial districts in said county were covered by the territory described. The proceedings of the county court would indicate that only the districts of Salt Lick and Holly were affected, inasmuch as polling places for voters were established only in those districts. Oral evidence on the trial, however, tends to show that the territory included covered also a part of Otter district, but the extent thereof does not appear; that voters from all three districts voted at the election, a few from Otter district.

So far as the record shows, the state has not, nor has any other person ever before, questioned the corporate existence and capacity of the plaintiff. The defendant relies strongly upon the provisions of section 10, art. 12, of the Constitution, which provides that: "No independent school district or organization shall hereafter be created, except with the consent of the school district or districts out of which the same is to be created, expressed by a majority of the voters voting on the question." It is claimed that this provision was disregarded, not by the act of the Legislature, but by the county court

and election officers; that the election should have been held in each of the districts affected, at each of the voting places established for general elections; and that the election held at the two voting places within the boundaries of the independent district was not a compliance with the constitutional provision and the election laws of the state. In our opinion, the provision of the Constitution referred to and the general law do contemplate that the election in the several districts affected should be held at all the voting precincts established for general elections. But it is evident that the county court directing the election in question, and the election officers, did not so construe the law.

Did the irregularity in the election invalidate the same, and render the effort to complete the incorporation abortive? As an original proposition, in any proceeding directly attacking the same, we might be forced to hold the incorporation void; but this is not such a proceeding. Here the incorporation was collaterally attacked by a third person, in a suit to defeat the recovery of possession of public property in possession and control of the plaintiff, and we are not bound by the same rules as in direct proceedings to annul or take away corporate rights. The record convinces us that there was a bona fide effort to comply with the law and to effectuate the incorporation, and the people affected thereby seem to have acquiesced therein, having elected a board of education, which has exercised all the functions pertaining to the corporation, so as to create a de facto, if not de jure, corporation. A corporation de jure is one whose right to exercise a corporate function would prove invulnerable if assailed by the state in a quo warranto proceeding; a corporation de facto, one where there is a charter or some law under which a corporation with the powers assumed might lawfully be created, and a user of the rights claimed to be conferred by such charter or law, or where there has been a bona fide attempt to organize a corporation under the charter or an enabling statute. 10 Cyc. 252, and authorities cited. To establish the existence of a de facto corporation, a charter or law authorizing the existence of the corporation must be shown, and user under such authority. 10 Cyc. 256, note 26, and authorities cited. In Snider v. Troy, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887, the court holds that a corporation de facto exists "when, from irregularity or defect in its organization or constitution, or from some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by law; or, in other words, when there is an organization with color of law and an exercise of corporate rights and franchises." As a general rule, such corporate existence cannot be litigated in actions between private individuals, nor between private individuals and the assumed corporation. 10 Cyc. 256, note 27, and authorities cited. In 1 Thomp. on Corp. § 503, it is said, in reference to a de facto corporation, that if it appears to be acting under color of law, and is recognized by the state as such, such a question should be raised by the state itself by quo warranto or other direct proceeding, and that the rule would not be different if the constitution itself prescribed the manner of incorporation. Even in such case, proof that the corporation was acting as such under legislative sanction would be sufficient evidence of rights, except as against the state, and private persons could not enter upon any question of the irregularity. Where a corporation exists de facto, it may exercise the powers assumed, and the question of its having a right to exercise them will be deemed one which can be raised only by the state. 10 Cyc. 334; Clark & Marshall on Priv. Corp. §§ 80, 81, and cases cited. In 1 Beach on Pub. Corp. § 76, the author says: "When the inquiry into the corporate existence of a municipality is merely collateral, only that the municipality exists de facto need be proved." In this state causes of forfeiture of corporate franchises and actual expiration thereof by operation of law will not abate a suit by or against such corporation, or be cause for dismissal. Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227; Railroad Co. v. Supervisors, 3 W. Va. 319; Moore v. Schoppert, 22 W. Va. 282.

These authorities, and the conclusion we have reached with respect to the title of the defendant, require us to reverse the judgment of the circuit court and award the plaintiff a new trial.

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(62 W. Va. 451)

## HOLLEN v. CRIM et al.

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907.)

1. ERROR, WRIT OF—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Refusal to strike out, at the time it is offered, objectionable evidence, is not reversible error, if such evidence is subsequently stricken out upon a motion to exclude the plaintiff's evidence.

2. SAME.

In a trial before a jury, admission in evidence of collateral facts, or those incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, does not constitute prejudicial error, although such facts, if relevant, would be inadmissible, under section 23, c. 130, Code 1899 [Code 1906, § 3945], as relating to personal conversations or communications with a deceased person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4154, 4155.]

3. WITNESSES — CROSS-EXAMINATION AS TO COLLATERAL MATTERS.

Responses by witnesses to questions on cross-examination not relating to any subject as to which the witness had been interrogated in chief, nor to any matter concealed or tend-

ing to contradict, explain, or modify any facts testified to, or to rebut or modify some inference which might otherwise be drawn from matters testified to by the witness, rendering the cross-examination proper or pertinent, and which responses are collateral to the real issue, are binding on the party on whose behalf the cross-examination is conducted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1098.]

4. SAME—TESTIMONY OF PARTIES OR PERSONS INTERESTED AGAINST A DECEDENT.

Section 23, c. 130, Code 1899 [Code 1906, § 3945], does not prohibit a son of the plaintiff, not a party to the suit nor interested in the event thereof in respect to his property rights, from testifying on behalf of the plaintiff as to personal conversations or communications with a deceased person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 601.]

5. EVIDENCE—RELEVANCY.

Evidence wholly irrelevant and collateral is inadmissible, as tending to draw away the minds of the jury from the point in issue and mislead them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 123.]

6. ERROR, WRIT OF—REVIEW—VERDICT.

The verdict of a jury, depending on the weight of oral testimony and the credibility of witnesses, will not be disturbed unless there has been a plain miscarriage of justice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3928.]

(Syllabus by the Court.)

Error to Circuit Court, Barbour County.

Action by Levi T. Hollen to recover the amount of a note as for money had and received for his use against E. H. Crim and M. Peck, executors of J. N. B. Crim, deceased. Judgment for plaintiff, and defendants bring error. Affirmed.

M. Peck, for plaintiffs in error. Wm. T. George, for defendant in error.

MILLER, J. June 15, 1894, M. N. O'Brien made a note to Levi T. Hollen at six months for $198. April 26, 1897, Hollen delivered this note to J. N. B. Crim, whose receipt therefor concluded "to collect if I can." At the time he received this note, Crim had pending a chancery suit against O'Brien and others to subject land to the payment of sundry judgments recovered by him, aggregating a large amount. The land of O'Brien involved consisted of a tract of 645 acres and a tract of 150 acres, the latter then subject to the lien of a deed of trust in favor of another creditor for about $1,100. The sale took place February 16, 1898, pursuant to decree of May 28, 1897, and was confirmed by decree entered February 23, 1898; Crim having become the purchaser of the larger tract at $3,250, and one Hall of the other at $1,030. There was evidence that these lands were actually worth from $12 to $15 per acre. Shortly after Crim's death, January 11, 1905, the plaintiff demanded of his executors this note. It not being produced, Hollen on September 5, 1905, brought suit before a justice against the executors to recover the amount of the note as for money had and received for his use. The justice decided the case in favor of the executors, and Hollen appealed to the circuit court, wherein the case was tried before a jury, resulting in a verdict and judgment in favor of the plaintiff for $198, with interest and costs, and the executors have brought the case here upon a writ of error. The errors assigned relate to admission and rejection of evidence, and to the refusal of the court to set aside the verdict and grant a new trial.

On the trial before the jury, the contention of the plaintiff was that Crim had collected the note, or, if not, had power to do so, but suffered it to remain in his hands until barred by the statute of limitations. At the time of the trial in the circuit court, the note had been found by his executors among some old papers belonging to Crim, and was admitted in evidence. In support of his claim that Crim had collected the note, the plaintiff proved by Joseph O'Brien, a brother of M. N. O'Brien, and by his son, Robert Hollen, who worked for the O'Briens, that Joseph O'Brien had delivered to Crim some 300,000 or 400,000 feet of lumber, and of the proceeds he left in Crim's hands something over $200 to the credit of his brother, M. N. O'Brien, to be applied upon some debts of the latter, but that, as no settlement had been had between Joseph and Crim, the matter was left in that condition at the time of Crim's death. Robert Hollen testified to a conversation with Crim after he received the lumber, in which Crim stated that this lumber was better than anticipated, that the O'Brien note was all right, and that he thought he would be able to collect it. Joseph O'Brien, and other witnesses, also, testified that at the time Crim purchased the land of M. N. O'Brien at the judicial sale thereof he did so under a secret arrangement with him and M. N. O'Brien that it should be bought in by Crim for their benefit; that in the interest of this purchase others were deterred by them from bidding on the land; that afterwards M. N. O'Brien, in order to get Crim to release his claim to the land, offered to repay Crim all he owed him. The evidence showed that M. N. O'Brien had remained in continuous possession of the land so purchased by Crim, farming and improving it and paying all taxes. There was much other evidence offered by the plaintiff relating to the subject, but the above were the main points covered. The defendants relied upon the production of the note as evidence of nonpayment, and the fact, testified to by Melville Peck, one of the executors, that Crim was a business man and kept account of his daily collections, whose books would most likely show payment of the note, if made. The executors made no attempt to show what application had been made of the proceeds of the lumber, or that they had been applied differently than claimed by the plaintiff, or that the $200 had been, or should be, applied otherwise than on the note.

M. N. O'Brien testified on behalf of the plaintiff as follows: "Q. Did you ever pay this note to Mr. Hollen? Ans. No, sir. Q. Did you ever pay it to any other person? Ans. Yes, sir." The court overruled the defendants' objection to the last question and answer, but subsequently, upon the motion to exclude all the plaintiff's evidence, did strike out this testimony of payment. But it is nevertheless insisted that the answer was equivalent to a statement by O'Brien that he had paid the note to Crim—prohibited by section 23, c. 130, Code 1899 [Code 1906, § 3945]—and that it was reversible error for the court to refuse to strike it out in the first instance. We know of no rule of law controlling the court as to time in its ruling upon the admissibility of evidence. Much must necessarily be left to the discretion of the trial judge in such matters. Any error the court may have committed in the first instance was certainly cured by striking out the objectionable matter on the motion to exclude the plaintiff's evidence.

On cross-examination, M. N. O'Brien was asked: "Wasn't your property all sold from you in 1897? Ans. I sold and gave all of it to Mr. Crim and never got any credit for it, and he held the other in his possession in trust." The refusal to strike out this answer is made the subject of the second bill of exceptions. Was this action of the court error? It is claimed this answer related to a personal transaction or communication between the witness and the decedent, Crim, which the witness, being interested in the result of the suit, is precluded by section 23, c. 130, Code 1899, from giving in evidence. Plaintiff claims that, the debt being barred by the statute of limitations, the witness could not be said to be so interested, and, not being a party to the suit, was not precluded. It has been held that one discharged in bankruptcy is relieved from the inhibition of the statute, for it may then be said he does not testify in his own favor. Reynolds v. Callaway, 31 Grat. 436. But we cannot say from any rule or precedent found that this case has any application to the statute of limitations. The statute of limitations is a personal plea, which may or may not be interposed; or the debt may be revived by a new promise. We do not think, however, this question fairly arises. The question to which the answer was given did not relate to any subject as to which the witness had been interrogated in chief, nor to any matter that could be said to have been concealed, or to facts really tending to contradict, explain, or modify any facts testified to, or to rebut or modify some inference which might otherwise be drawn from the matters testified to by the witness which would render the cross-examination proper or pertinent. 2 Elliott on Ev. § 973. The theory of the defendants' counsel in propounding the question, no doubt, was that, if the witness answered (as he anticipated) that his real estate had all been sold (as was subsequently shown in evidence), it would tend to contradict the witness' claim of payment; but we do not see how this evidence would have contradicted the main fact relied upon—delivery of the lumber in payment of the note. The fact of the delivery of the lumber to Crim was not denied, nor its application otherwise explained. In our opinion the matter covered by the question and answer should be treated as collateral to the real issue, and, having been brought out by the defendants on cross-examination, they are bound by the answer. 1 Greenleaf on Ev. §§ 52, 448, 449; Whitelaw v. Whitelaw, 96 Va. 712, 32 S. E. 458; Watts v. State, 5 W. Va. 532; Corder v. Talbott, 14 W. Va. 277. The question propounded was not confined to real estate. The witness in his answer evidently had in mind the lumber delivered to his credit, and also the arrangement with Crim to buy in his real estate at the sale thereof and hold it for him in trust; and, with this view, we are not prepared to say that the answer was not responsive to the question. The defendants' counsel did not ask the witness for explanation, nor attempt to affect the answer by further cross-examination, but promptly dismissed the witness, and has made the action of the court on his motion to strike out a subject of error for which he asks this court to reverse the judgment below. We are of opinion that the court did not err to the prejudice of the defendants in overruling his motion.

Robert Hollen, a son of and witness for plaintiff, was asked in chief, "Mr. Hollen, did you ever have any conversation with Mr. J. N. B. Crim, in his lifetime, about a note that he had gotten from your father, L. T. Hollen, upon M. N. O'Brien?" and answered, "Yes, sir." And he was thereafter permitted to testify respecting conversations and communications between him and the deceased. This action of the court was made the subject of the third bill of exceptions. We do not understand this point is seriously urged in the argument of counsel in this court. The suggestion is that Hollen, because the son of the plaintiff, was an incompetent witness against the decedent's estate as a person interested in the event of the suit. He was not a party to the suit, and we think his testimony was competent. He was not interested in the result of the suit in any sense that would preclude his testimony.

Bill of exceptions No. 5 relates to the action of the court below in excluding from the evidence a deed of trust of April 20, 1885, from the plaintiff to Melville Peck, trustee, to secure to J. N. B. Crim the payment of a note for $300, and a release thereof by Crim of November 29, 1900. It is stated that the purpose of introducing this evidence was to show that the plaintiff was indebted to Crim between the date of the deed and the date of the release, and to

have the jury infer therefrom that Crim took the note on account of that particular indebtedness, and not (as the receipt expressed it) for collection. The offer of this evidence was not accompanied by any oral testimony tending to show that the indebtedness secured was paid by the transfer of the note. In our opinion the evidence was wholly irrelevant and collateral, and would have tended to draw away the minds of the jury from the point in issue and mislead them. Such evidence is improper and should not be received. Whitelaw v. Whitelaw, supra; 1 Greenleaf on Ev. § 52; Watts v. State, supra; Hartman v. Evans, 38 W. Va. 669, 18 S. E. 810; Repass v. Richmond, 99 Va. 508, 39 S. E. 160.

Bills of exception 4 and 6, the latter containing a certificate of the evidence, relate to the action of the court in overruling the motion to strike out the plaintiff's evidence, and overruling the motion to set aside the verdict and grant a new trial. The first motion was equivalent to a demurrer to the plaintiff's evidence, and, from what has already been said in reference to the evidence, we think it was properly overruled. We are of opinion that the second motion was also properly denied. It is unnecessary to cite the many decisions of this court governing in such cases.

The case was peculiarly one for the jury, and, as no errors prejudicial to the rights of the defendants appear to us from the record, we are of opinion to affirm the judgment of the circuit court.

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(62 W. Va. 417)

## McCRAW v. BOWER et al.

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907.)

APPEAL—REVIEW—EVIDENCE.

The finding of the circuit court as to facts in issue, unless against the plain preponderance of the evidence, is conclusive upon this court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928–3943.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wyoming County.

Bill by M. Perry McCraw against R. Lee Bower and others. Decree for defendants, and plaintiff appeals. Affirmed.

Brown, Jackson & Knight, Col. Childers, and Gilmore & Worrell, for appellant. M. F. Matheny, for appellees.

McWHORTER, J. This was a bill filed in the circuit court of Wyoming county by M. P. McCraw against R. Lee Bower and Sallie J. Bower to establish a resulting trust in favor of plaintiff in an undivided one-half interest in two certain lots of land in the town of Pierpont, in said county, each containing one-half of one acre. The bill alleges that sometime prior to the ——— day of ———, 1902, plaintiff and defendant R. Lee Bower entered into an oral contract to purchase and become joint owners of one acre of land in said town of Pierpont, being part of a certain tract or tracts of land then owned by L. T. Stimson and Julia R. Stimson, his wife; that in pursuance of said agreement they did purchase two tracts or parcels, containing in the aggregate one acre, the first, containing one-half acre, adjoining lot No. 11 and lot No. 17 on one side and L. T. Stimson on the opposite side, and also adjoining the location of the main line of the Deepwater Railway Company, and the other containing a like quantity adjoining lot No. 37 in said town, owned by E. Moran, and also adjoining the location of the Chesapeake & Ohio Railway Company's main line, which lots are each marked "R. L. Bower" on a plat of said town of Pierpont filed with plaintiff's bill as an exhibit; that plaintiff, in consideration of one undivided half interest in said two lots, paid to said L. T. Stimson and Julia R. Stimson the sum of $50, being the one-half of the purchase price of said two parcels of land; that at the time of the purchase the defendant R. Lee Bower made no payment on account of said land, and no deed or title bond was taken for the said land; that afterwards, on the 30th of January, 1903, and after the said purchase money of $100 was fully paid, said Stimson and wife, at the instance and request of said Bower, conveyed to him the said land, which conveyance with special warranty said Bower accepted, all of which was without the knowledge or consent of plaintiff; that defendant Bower, while admitting and conceding the facts as stated, although often requested thereto, failed and refused to make plaintiff a deed for his one undivided interest in said land; that plaintiff and defendant were joint owners, each holding an undivided one-half interest in said land, and that the defendant holds one undivided interest therein in trust for plaintiff—and prayed that plaintiff be decreed to be the owner of such undivided interest, and that defendant be required to convey such interest to plaintiff with special warranty, and for general relief. Plaintiff afterwards filed his amended bill, making Sallie J. Bower, wife of defendant Bower, a codefendant therein, reciting and realleging the allegations of the original bill, and by way of amendment alleging that since the filing of the original bill, on the 4th of March, 1903, at the instance and request of R. Lee Bower, said Stimson and wife made another and second deed for the said two parcels of land to said R. Lee Bower and Sallie J. Bower, his wife, which deed was duly and legally executed, acknowledged, and delivered to them, and on the 10th day of March, 1903, was duly recorded in the county court clerk's office of Wyoming county, a copy thereof being exhibited with the amended bill; that the same was accepted by the defendant Sallie J. Bower with full knowledge of paintiff's rights and interests in and

to the said two tracts of land—and praying that the defendant to the original bill be required to answer the amended bill, and that defendant Sallie J. Bower be required to answer the original bill, and also the amended bill, and prayed for such relief against both defendants and each of them as was prayed for in the original bill.

On the 6th day of March, 1903, the plaintiff, McCraw, filed his petition in said cause, praying for an injunction restraining said Bower from conveying any part of the said land to Joseph Mace, or to any other person or persons or from disposing of or in any way incumbering said parcels of land, or either of them, except as to the one undivided half interest therein, until the rights of the parties should be adjudicated in the cause, which injunction was accordingly granted. The defendants R. Lee Bower and Sallie J. Bower on the 25th of June, 1903, filed their joint demurrer, and on the 26th day of June, 1903, the defendant R. Lee Bower filed his separate demurrer and answer to the bill, amended bill, and petition of plaintiff for injunction, denying all the material allegations of the bill, denying emphatically that he purchased the lots jointly with said McCraw, or that McCraw has any interest whatever in said lots. He avers that on the 21st of July, 1902, when he went to close the deal with Stimson, he only had about $60 of cash at the time, and, being uncertain whether said Stimson would require more, he borrowed from Greeley McCraw an additional $50 to use if it became necessary; that Stimson agreed to make the cash payment $50, which respondent paid out of his own money, and did not use one cent of McCraw's money, which he had borrowed to be used towards paying for the lots; that he had offered to return or pay to Greeley McCraw the $50 so borrowed, with its interest, but that he had refused to accept it, and made tender of the same with his answer; that after the purchase of said lots he heard that the McCraws were claiming a part interest in his purchase; that he approached McCraw in the presence of witnesses to know about the rumor, when McCraw denied having any interest in the land, or ever having claimed any interest, and was only telling it to aggravate Stimson; that respondent and his codefendant were joint owners of three lots in the town of Pierpont, which they purchased at the price of $165, and that only one of them was the lot purchased on the 21st of June, 1902; and denied ever having admitted that plaintiff had any interest in the property, or that he ever agreed to convey him any interest therein.

Depositions were taken and filed in the cause, both by the plaintiff and the defendant, and the cause was heard on the 29th day of June, 1904, upon the bill and amended bill and exhibits, process duly served upon the defendants, upon the injunction awarded the plaintiff, the demurrer and separate answer of defendant R. Lee Bower, replications thereto, and upon the depositions of both parties taken and filed in the cause, whereupon, in consideration of all which, the court was of opinion, and so decreed, that the plaintiff was not entitled to the relief prayed for in his bill and amended bill, and dismissed the same, and dissolved the injunction, and decreed costs to the defendants, from which decree the plaintiff appealed, and says the decree was contrary to the evidence and the law.

The only question involved in this case is one of fact: Whether or not the purchase from Stimson of the two one-half acre lots was a purchase made by Bower for himself and the plaintiff in equal and undivided proportions, and was paid for with the money of both parties. It was not, as contended by counsel for appellees, an oral contract for the sale and purchase of real estate. Was the $50 placed in the hands of the defendant by Greeley McCray, acting as agent for plaintiff, to be applied by defendant on the price of said land for the plaintiff, or was it money loaned by the plaintiff by Greeley, his agent, to the defendant? If the former is proven, the resulting trust in favor of plaintiff is established. On the other hand, if plaintiff has failed to sustain the allegations of his bill, the $50 which Greeley McCraw, acting for his father, let the defendant have, is simply a loan, and plaintiff has no interest in the land purchased. The evidence is directly conflicting; McCraw testifying that the money was placed in the hands of defendant Bower for the purchase of the lots for plaintiff and defendant jointly, and the defendant testifying exactly to the contrary—that it was a loan by plaintiff to defendant. Witnesses testify on behalf of plaintiff that defendant said on various occasions that the land was purchased by him for the parties jointly. This is denied by defendant, and he has witnesses who testify that McCraw had on various occasions disclaimed any ownership in the land or interest in the purchase of it.

I am unable to see that there is any great or decided preponderance of the evidence either the one way or the other, and the judge who heard the case has decided that under the evidence in the cause the plaintiff has failed to sustain the allegations of his bill, and in such case it has been many times held by this court that a finding so made by a judge of the circuit court will not be disturbed; it not appearing that his decision was clearly wrong. In Wolfe v. Bank, 54 W. Va. 689, 47 S. E. 243, it is held: "A decree of the circuit court determining questions of fact, unless plainly wrong, will not be disturbed." And in Weaver v. Akin, 48 W. Va. 456, 37 S. E. 600: "The finding of the circuit court as to facts in issue, unless against the plain preponderance of the evidence, is conclusive upon this court." See, also, McIntosh v. Oil Co., 47 W. Va. 832, 35 S. E. 860;

Camden v. Dewing, 47 W. Va. 310, 34 S. E. 911, 81 Am. St. Rep. 797; Whipkey v. Nicholas, 47 W. Va. 35, 34 S. E. 751; Spurgin v. Spurgin, 47 W. Va. 38, 34 S. E. 750; Yoke v. Shay, 47 W. Va. 40, 34 S. E. 748; Smith v. Yoke, 27 W. Va. 639; Cox v. Investment Co., 61 W. Va. 291, 56 S. E. 494. "An appellate court will not reverse the judgment of an inferior court, unless error affirmatively appear upon the face of the record, and such error will not be presumed; all the presumptions being in favor of the correctness of the judgment." Shrewsbury v. Miller, 10 W. Va. 115.

We see no reason for reversing the decree of the circuit court, and therefore the same is affirmed.

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(62 W. Va. 428)

## GINN & CO. v. SCHOOL BOOK BOARD OF BERKELEY COUNTY et al.

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907.)

SCHOOLS AND SCHOOL DISTRICTS—CONTRACTS—RENEWAL.

A publisher of school books, having a contract with a school book board for furnishing school books, cannot compel such board to continue or renew his contract for five years after its expiration on the ground that the board has changed books without a sufficient vote.

(Syllabus by the Court.)

Application by Ginn & Co. for writ of mandamus to the school book board of Berkeley county and others. Writ denied.

Herbert Fitzpatrick and Bowman & Byrer, for petitioners. Ira E. Robinson and Faulkner, Walker & Woods, for respondents.

BRANNON, J. Under the school book law (Code 1899, c. 45, § 57a8 [Ann. Code 1906, § 1654]), Ginn & Co. had a contract with the school board of Berkeley county for furnishing certain books for use in the free schools of that county, dated February 24, 1902, and expiring July 1, 1907. Among the books to be furnished by Ginn & Co. under that contract is a work called "Hezen's Grade Speller." As required by section 57a6, before the expiration of the contract the school board met to select books to be used for the five years succeeding the expiration of the contract. By a vote of six members a book called "Farr's Physical Geography" was adopted in place of Appleton's Physical Geography, which was then in use. Next the board, by a vote of only five members, adopted a book called "Hunt's Progressive Speller" in place of Hezen's Grade Speller. Ginn & Co. offered to renew their said contract for the succeeding five years; but the school board refused to renew the contract, and Ginn & Co. ask of this court a mandamus to compel the school board to do so. A mandamus nisi has been awarded, and the school board has entered a motion to quash it.

Under such motion to quash, the question arises: Does the mandamus nisi show good ground for a mandamus? Section 57a6, c. 45, says: "It shall be the duty of the board to meet at least three months before the expiration of any such contract, and adopt one text-book, or a series of text-books, on each subject contracted for." It is argued that this imposes a "duty" to adopt books. So it does; that is, a duty to adopt the books to be used, but not a duty to select any particular publisher. Section 57a7 says that "no book or series of books already contracted for under the act shall be changed for another or different book or series except by the affirmative vote of five members of the board. * * * And not more than one book or one series of books on one subject shall be changed in any one year, except by the affirmative vote of six members." It is argued that, as one book was changed by a vote of six members, the other, changing Hezen's Speller, by only five, the latter change is utterly void, and is no change at all, and that it was the duty of the board to renew the old contract for furnishing Hezen's Speller, just as if no change at all had been made, and mandamus lies to enforce the duty. Waiving the question whether the language means that, when one book has been changed, only the additional changes must have six votes, say that the board could not make a second change by five votes. The question then comes: Has a book publisher any right to compel the renewal of his contract? A plaintiff in the action of mandamus must, as in other cases, have a vested legal right to be enforced. An alternative mandamus is a declaration, and must show title. Fisher v. Charleston, 17 W. Va. 596; State v. County Court, 47 W. Va. 672, 35 S. E. 959; Milliner v. Harrison, 32 Grat. (Va.) 422; 19 Am. & Eng. Ency. L. 725. Now, Ginn & Co.'s contract was at an end. The board, as a party capable of contracting, had a right to refuse to contract again with Ginn & Co., unless the statute confers on them a vested right to have that contract made for their benefit. Was it the purpose of the statute to confer on book publishers a right to have a renewal of a contract under such circumstances? Or was it the purpose to provide only for the public interest? We think the latter was the object of the lawmakers.

When the statute says no change of books shall be made, except by a vote of six, it means, as it says, no change of books, and does not prohibit a change of contractors. In section 57a8 it is provided that "after the adoption of any text-books the board shall contract with the publishers proposing the same." We think that it is not the purpose of this clause to bind the board to contract with any particular publisher, but that its only aim is to say that after selection the board shall make a contract to guarantee a supply of books, and that a contract of certain character defined in that section. Its second object is to cautiously provide the terms of the contract in the interest of the people.

This is why this clause was inserted. It is entirely reasonable to say that among many provisions for obtaining books, giving minute details of procedure, there should and would be a direction to make a contract; but that is the only design of the clause quoted. Its design is not to give any particular publisher a legal right to a contract. Suppose several publishers propose the same books. Cannot the board select the one to be contracted with? Section 57a4 says that in the selection of books the board must "procure the best possible terms for exchange and introduction and for the regular supply of the books for a term of five years." Section 57a3 says the board must have reference to books and terms in selection. This speaks a discretion in the board of selection of publishers. Suppose no change in books. Must the board continue to contract with the same publishers? How long? This would give such publisher a monopoly, whereas the public interest would require that a construction be given the statute which would vest in this important board a discretion as to the publishers. The public interest is uppermost. The construction contended for by Ginn & Co. would demand a renewal of the contract at the same prices, though others might offer lower prices. The provision requiring six votes for more than one change of books was to prevent frequent and extensive changes, entailing on the public outlay for new books; and its object was not to subserve the ends of the publishers, but solely in the interest of the public. The school board has, and ought to have, a right to contract with any publisher it may choose.

The statute does not compel the publisher to contract. The board has no hold on the publisher until after a contract; nor has he any hold on the board until after a contract is consummated. The statute makes no promise to the publisher to contract. Where is the mutuality of the obligation on both parties? Where the clause denying the board power to choose the publisher? It requires clear words to do this. "A bidder, on proposal issued by the city for estimates, acquires no legal right or cause of action to enforce which a mandamus will be issued, until the contract has been made with him." People v. Croton Aqueduct, 26 Barb. (N. Y.) 240. "To entitle a party to this remedy, there must be a clear legal right. Accordingly, a bidder on proposals for estimates has no ground for a mandamus, as he has no cause of action and no clear legal right until a contract is made with him and approved by the common council." Spelling on Extraordinary Remedies, § 1441. In Welch v. Board of Supervisors, 23 Iowa, 199, the court says, on page 204 of 23 Iowa: "Now, suppose plaintiff's was the only newspaper of the county; could he by mandamus compel the treasurers, sheriffs, and all executors to make the required publications in his columns? There can be but one answer to such an inquiry. These officers might be guilty of a very great neglect of duty, might be responsible in damages to one aggrieved by such neglect. They might suffer in public estimation and be held responsible before the people. But the plaintiff would have no such interest or right in the exercise of these duties as to compel publication." In State v. Fond du Lac, 24 Wis. 683, it is said: "But, without deciding upon this point, we think the application was properly denied, for the reason that, where proposals are made and bids put in, in the usual manner in letting contracts for public works, the lowest bidder has no such fixed, absolute right that he is entitled to a mandamus to compel the letting of the contract to him after his bid has been in fact rejected and the contract awarded to another. The statutory provision requiring the contract in such cases to be let to the lowest bidder is designed for the benefit and protection of the public, and not for the bidder. And, whatever remedy the public may have, the lowest bidder whose bid has been rejected has no absolute right to a writ compelling the execution of a contract with him, after one has in fact been let to another."

We do not discuss the question of how far mandamus lies, as a general rule, to enforce the making of a contract, because we think that the case hangs on the statute. If it be construed to vest a right in Ginn & Co. to have the existing contract prolonged for five years, mandamus might lie; but clearly, if it does not confer such right, they cannot maintain the writ.

We dismiss the alternative writ, and refuse a peremptory mandamus.

POFFENBARGER, J. (concurring). I concur in the refusal of the writ, but I do so on the ground that the book in question has been legally displaced, not that the publisher would have no right of renewal of the contract if it had not been so displaced. In my opinion, the hypothesis of the alternative writ, namely, that the book has not been legally displaced, is unsustained, and what the plaintiff's status would be, if it had not been, I do not feel called upon to say. However, I doubt the want of legal right to renewal when a book has not been displaced, and no publisher, other than the one with whom it was contracted, can furnish it, and the use of a text-book on the subject of which the book treats has not been dispensed with. He contracted under a statute saying there should be no displacement of his book, except in a prescribed manner, which implies that the use thereof shall continue, if any book on the subject is used, and that, if no other person can furnish the book, he may do so. Does this not impliedly say the contract carried with it, as a part thereof, an option of renewal, analogous to a privilege of purchase as part of a contract of lease? The public is fully protected by the power of the board to displace the book, if the price

is exorbitant or there is any other cause for getting rid of the contractor.

But, as I have said, this book was legally displaced. Only two changes were made, one by five votes and the other by six. It is immaterial that the six-vote change was made first. It does violence to the mere letter of the statute, but not to its meaning and spirit. Having the power to make one change by five votes and another by six, the order of time in which the changes are made cannot possibly signify anything in a practical sense. Had the vote respecting plaintiff's book been taken first, it would have been displaced, and on the next vote the other would have gone out by six votes, in strict conformity with the letter of the statute. To say that, because the order of voting on the two propositions was reversed, only one change of books was effected, is to limit the powers of the board by nothing more than a mere dry technicality.

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(62 W. Va. 422)

## STARN v. HUFFMAN et al.

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907.)

1. MINES AND MINERALS—LEASES — CANCELLATION.

A lease of a coal vein for mining for 1 year and as long thereafter as the lessee may continue to mine it; the lessor to receive 10 cents per ton for all coal mined, payable at the end of each 30 days, and mining to begin the next day. After the lapse of 2 years and 3 months, no mining having been done, equity will cancel the lease at the suit of the lessor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 189.]

2. SAME.

Principles upon which equity will cancel mining leases for failure to operate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 189.]

3. PARTIES—WHO MAY BE MADE.

A mere statement in an answer that other persons are interested in the property involved, without proof of their interest, their rights not being affected by the decree, will not be ground of reversal. Where one is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, § 36.]

(Syllabus by the Court.)

Appeal from Circuit Court, Marion County.

Bill by James Starn against Samuel S. Huffman and others. Decree for complainant, and defendants appeal. Affirmed.

E. F. Morgan and U. N. Arnett, Jr., for appellants. B. F. Ramage, for appellee.

BRANNON, J. James Starn made a lease to Samuel S. Huffman of the Pittsburgh vein of coal in a tract of 12 acres of land for one year and as much longer as Huffman should continue to operate the mine, which lease provided that the lessee should pay the lessor 10 cents per ton for all coal mined, and that the lessee should "begin mining said coal on or before December 19, 1902, and pay for said coal every 30 days." The lease dates December 18, 1902. Huffman assigned the lease to James F. Cook and John P. Hart. Starn brought a chancery suit in the Marion county circuit court March 23, 1905, to cancel said lease for failure to mine as required by it, and to clear and quiet the title of Starn to said coal, and a decree was made canceling the lease; and the defendants appeal.

The defendants filed an answer, but introduced no evidence to support it, or to meet the plaintiff's evidence. No mining whatever was done under the lease. This default calls for a rescission of the lease. So far as the lessor is concerned, the benefit to him would come only from the 10 cents per ton of coal. There was no other inducement for his execution of the lease. The very nature of the contract speaks this fact. The lessee knew it. The very letter of the lease demanded a beginning of mining next day. This shows that promptness was designed by the parties—not a day to be lost. The contract ran out in a year. Two years and three months went by without a particle of work by the lessee. Here is a total failure of consideration as to the lessor. Shall the lease stand to tie up the land and prevent its owner from the use of the coal and let the lessee hold it up for speculation? The very requirement to begin mining the next day, and the very nature of the purpose of the contract, show that time is the essence of the contract. It was remarked in Urpman v. Lowther Oil Co., 53 W. Va. 505, 44 S. E. 435, 97 Am. St. Rep. 1027, that, "under some circumstances of delay or fraudulent evasion of duty of development, equity will cancel an oil lease, as development is regarded as the real intent of the lessor, even if there be no express clause of forfeiture. Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220; Blue Stone Coal Co. v. Bell, 38 W. Va. 297, 18 S. E. 493; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; Bryan on Petro. & Gas, § 182, citing Gas Co. v. George, 161 Pa. 47, 28 Atl. 1004; Elk Fork Oil Co. v. Jennings (C. C.) 84 Fed. 839." The authorities there cited give support to the statement there made upon this practically important subject. In mining leases, providing in favor of the lessor a share of the product or a tonnage of ore or other product, even where there is no covenant to begin work within a certain time, there is an implied covenant to begin in a time reasonable, because the compensation in contemplation of both parties otherwise fails. Bryan on Petro. § 215; Snyder on Mines, § 1180.

In Shenandoah Land Co. v. Hise, 92 Va. 238, 23 S. E. 303, there was a lease for mining all minerals, with no time fixed for commencement, and no express covenant to mine, and no forfeiture clause. It was contended that the agreement was not revocable. The

court said: "The record shows that no consideration passed from Nicholas to Sheffer when the agreement was made, and therefore the real consideration moving Sheffer to enter into the agreement was the one-fourth of the profits of the minerals to be mined from this land. Nicholas might never have taken any minerals from the land, and in that event, if this agreement is held to be a conveyance of the minerals therein, it would be to hold that there had been a sale of the minerals without a consideration. It is true that there is no covenant in the agreement on the part of Nicholas to mine the minerals; but, to give effect to the agreement, it must be held that the acceptance of it by Nicholas amounted to an agreement on his part to mine the minerals to be found on the property, and within a reasonable time; otherwise, the agreement might prove entirely fruitless to Sheffer and those claiming under him. Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 766; Grub v. Bayard, 2 Wall. Jr. (U. S.) 81, Fed. Cas. No. 5,849. It has been maintained as elementary law, by decisions of this court, as well as by courts of other states, that an agreement to do something other than to pay money, no time being expressed, means a promise to do it within a reasonable time. Cowan v. Radford Iron Co., 83 Va. 547, 3 S. E. 120; Warren v. Wheeler, 8 Metc. (Mass.) 97; Atwood v. Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; Ryan v. Hall, 13 Metc. (Mass.) 520; Thompson v. Ketcham, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332; Barry v. Ranson, 12 N. Y. 462; Young v. Ellis, 91 Va. 297, 21 S. E. 480. Judge Lacy, in delivering the opinion of this court, construing the contract under consideration in the case of Cowan v. Radford Iron Co., supra, says: 'Regard should be had to the intention of the parties, and such intention should be given effect. To arrive at this intention, regard is to be had to the situation of the parties, the subject-matter of the agreement, and the object which the parties had in view at the time and intended to accomplish. A construction should be avoided, if it can be done consistently with the tenor of the agreement, which would be unreasonable or unequal, and that construction which is most obviously just is to be favored, as most in accordance with the presumed intention of the parties.'" The court upheld the jurisdiction in equity to cancel the lease. Maxwell v. Todd, 112 N. C. 677, Syl. point 1, 16 S. E. 926, is as follows: "Where a mining lease provides for the payment to lessors of a part of the net proceeds of minerals taken from the land, but contains no stipulation for a forfeiture through failure to open and work the mines, the law will construe the contract as if such a stipulation had been expressly written therein, and will adjudge such lease to be forfeited if within a reasonable time the lessee fails to carry out the purpose of the lease." In Island Coal Co. v. Combs, 152 Ind. 579, 53 N. E. 452, it is held that where a coal lease is an agreement to pay a royalty dependent on the amount of coal mined, in the absence of a provision to the contrary, the lessee impliedly obligates himself to begin mining within a reasonable time. So it is distinctly held, as to a coal lease, in Bluestone Co. v. Bell, 38 W. Va. 297, 18 S. E. 729.

If such is the law where the lease does not fix a time for beginning mining, how much stronger for cancellation is a case where the lease fixes a time, as in this case? Courts look at the nature of the contract, to see whether time fixed is of the essence, as surely it must be regarded in the present case. "There is no equitable jurisdiction to make a new contract which the parties have not made." Hammond on Contracts, 883. Time will be regarded of the essence of the contract, where the benefit to accrue from the consideration materially depends on strict performance. 9 Cyc. 606, and note. I call special attention to the opinion by Judge McWhorter in Crawford v. Ritchey, 43 W. Va. 258, 27 S. E. 223: "An oil or gas lease cannot be held for merely speculative purposes. 'No lease of land for a rent for a return to the landlord out of the land which passes can be construed to enable the tenant merely to hold the lease for purposes of speculation, without doing and performing therewith what the lease contemplated. Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landlord. A man buying and paying for land may do with it as he likes—work it or let it lie idle. But a tenant, to whom land passes for a specified purpose, has no such discretion. He must perform what he stipulated to do.'" Thornton on Oil and Gas, § 128, citing Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285. 2 Snyder on Mines, § 1179, says: "The duration of the tenancy, notwithstanding some specified fixed period, as hereafter shown, is limited to actual operations. Whence it follows that the duty to commence and to test and bore for oil or gas, whether imposed as a covenant or expressed as a condition, generally operates as the latter, and the failure to test and work promptly avoids the lease at the option of the lessor." It is true, as stated in section 1181, that more diligence is required in oil and gas leases than leases for other minerals, yet the same general principles prevail. The cases above cited were coal leases.

As to oil and gas leases the greatest strictness prevails as to time of development. The Circuit Court of Appeals, in Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320, holds as follows: "By a course of decision in West Virginia which has established a rule of property it is settled that an oil and gas lease, in which the sole compensation to the lessor is a share of the product, is not a grant of property in the oil or in the land until oil is actually produced, but merely the right of possession for the purpose of exploration and development; and there is always an implied

if not an express, covenant for diligent search and operation. A different rule of construction obtained as to oil and gas leases from that applied to ordinary leases or to other mining leases, and, owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly in favor of the lessor. Where an oil and gas lease, by which the lessor is to be compensated solely by a share of the product, contains a proviso requiring the lessee to make and complete a well on the property within a specified time, such proviso and the time of its performance are of the essence of the contract, and it constitutes a condition precedent to the vesting of any estate in the lessee, without regard to the grammatical construction of the instrument. When the lessee makes no attempt to comply with such provision, and evidences no intention to do so, at the expiration of the term stipulated the lease becomes forfeitable at the option of the lessor, although by its terms it is for a definite term of years; and, being in possession, the exercise of such option is sufficiently evident by the lessor's execution of a new lease to another party."

So much without regard to any element of fraud or misrepresentation; but the bill charges and the evidence shows that Huffman fraudulently represented to Starn that Huffman and unnamed associates had the means and intended to mine and transport the coal, and fraudulently agreed to begin mining the next day, and had means to do so, and would mine the coal to exhaustion, and would pay Starn his royalty, and that it would be "an immediate profit" to Starn, and that he, believing that Huffman had money and machinery to so mine, made the lease. There was a total failure to make good the promises and assurances on faith of which the lease was made.

For error it is suggested that Thomas D. Brook and Andrew Hart should have been made parties. The answer states that the defendant assigned to them an undivided interest in the lease. The evidence to sustain the statement is not in the case. No evidence was given to sustain it. It does not appear that these parties had any interest. If they have, it is not affected. How does it injure the defendant that these persons were not parties? If the plaintiff chose to take a decree without their presence, it does not lie in the mouths of the defendants to allege this fact for error. Why did they not prove the fact in the court below? As Justice Bradley says: "When he is not interested in the controversy between the immediate litigants, but has an interest which may be conveniently settled in the suit, and thereby preclude future litigation, he may be a party or not at the option of the complainant." Justice Bradley said that, if the court could do justice to the parties before it without injury to another, the court could decree without the absent party. This is found in Barton, Chy. Prac. 143, and Williams v. Bankhead, 19 Wall. (U. S.) 563, 22 L. Ed. 184. There was no proof of any interest in these absent parties, and we said in Smith v. Cornelius, 41 W. Va. 60, 23 S. E. 599, 30 L. R. A. 747, that until it appear that there is an assignment the assignee need not be made a party.

We affirm the decree of the circuit court.

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(62 W. Va. 457)

## RITCHIE COUNTY BANK v. BEE.

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907.)

1. BILLS AND NOTES—ACTION ON RENEWAL NOTE—PLEADING—AMENDMENT.

In an action upon a renewal note, unless accepted in absolute payment of the original by express agreement, the plaintiff may of right, upon the filing of a plea of non est factum by the defendant, accept such plea and so amend the pleadings as to set up the original note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1575–1583.]

2. APPEAL—REVIEW.

If in such case the plaintiff does not elect to accept the plea and so amend his pleadings, but proceeds to trial, he will be regarded as having refused to amend when opportunity was offered; and this court will not reverse the judgment below upon the issue joined on such plea, and remand the case for a new trial on amended pleadings to be filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4617–4619.]

3. JUDGMENT—RES JUDICATA.

The verdict and judgment in such case will not preclude the plaintiff from recovery in any subsequent action by him on the note of which the one first sued on was given in renewal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1260–1268.]

4. BILLS AND NOTES—UNAUTHORIZED SIGNATURE—RATIFICATION.

Mere silence by one whose name is purported to be signed to a note, but who has in fact never signed the same, after receiving notice of protest thereof, will not amount to ratification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 77, 78.]

5. SAME—PLEA—NON EST FACTUM—EVIDENCE.

In order to entitle the plaintiff to recover on a note, upon an issue of non est factum, it is incumbent upon him to prove either that the defendant signed the note, or that his name was signed thereto by some person duly authorized, or that, having knowledge of the fact that his name was so signed and of all material facts, he subsequently ratified the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1596–1602.]

(Syllabus by the Court.)

Error to Circuit Court, Ritchie County.

Action by the Ritchie County Bank against Rebecca J. Bee and another. Judgment for the named defendant, and plaintiff brings error. Affirmed.

See 55 S. E. 380.

Freer & Robinson, for plaintiff in error. S. A. Powell, Duty & Fidler, and Homer Adams, for defendant in error.

MILLER, P. The justice in whose court this suit originated summoned E. L. Bee and

R. J. Bee, his wife, to answer the complaint of the Ritchie County Bank "in a civil action for the recovery of money due on note and protest fees, in which the plaintiff will demand judgment for $205.44, with interest and costs according to law." Besides the general denial of the plaintiff's action, R. J. Bee filed a verified plea "that she did not sign said note for $204, sued on by the said plaintiff in this action; that the name 'R. J. Bee,' signed to said note and purporting to be her signature, is not her handwriting; and that the said name 'R. J. Bee,' signed to said note and purporting to be her signature, was not written by her, nor by any person by her duly authorized or directed, nor with her knowledge or consent." There were no other pleadings. The justice gave judgment in favor of the plaintiff for $240.16, with interest and costs. R. J. Bee alone appealed to, and the case was tried de novo in, the circuit court, without additional pleadings, oral or written, so far as the record shows. The verdict was for the defendant, and from the judgment thereon the bank brings error. Neither the summons nor the plea of defendant described the note. On the trial in the circuit court the following was the only note offered in evidence: "Harrisville, W. Va., May 2, 1902. Four months after date, for value received, we promise to pay to the order of Fox & Meredith two hundred and four dollars, negotiable and payable at the Ritchie County Bank, of Harrisville, West Virginia. E. L. Bee and R. J. Bee." Counsel and witnesses on both sides referred to this note as the one sued on; but it was clearly shown that it had been accepted as a second renewal of a note of September 1, 1901, for the same amount, without notice of any defect in the execution thereof. R. J. Bee admitted execution of the original note. The bank claims, and it is not controverted, that it purchased the original note before maturity without notice of any equities as between the original parties. It does not clearly appear what disposition was made by the bank of the original note on its accepting the first or the last renewal. The bank contends it was entitled to verdict and judgment, supported either by the original or the renewal note. This presents a preliminary question involving the state of the pleadings and also the judgment refusing a new trial, which is the first error assigned.

Chapter 50, Code 1906, is a code of practice prescribed for proceedings before justices. While no particular forms are required, section 50 prescribes what the pleadings shall be, and stricter adherence in practice to that section would save courts and litigants a great amount of trouble and expense. The pleadings prescribed are simple and easily understood, consisting of a complaint by the plaintiff and the answer of the defendant. They may be oral or in writing. If oral, the substance of them is required to be entered by the justice in his docket; if in writing, they are to be filed by him and reference made to them in his docket. The statute requires the complaint to state in a plain and direct manner the facts constituting the cause of action, and, if more than one cause of action be stated therein, that each shall be separately stated and numbered. The answer of the defendant may contain a denial of the complaint or some part thereof, or facts constituting a defense or counterclaim. Each party may except to a pleading of his adversary when not sufficiently explicit to be understood, or if it contains no cause of action or defense. If the exception is well founded, the justice shall order the pleadings to be amended. If the party refuses to amend, the defective pleading shall be disregarded. Paragraph 8 of the same section provides that "in an action or defense founded upon an account, note or other writing for the payment of money it shall be sufficient for the party to deliver the account, note or other writing to the justice, and to state that there is due to him thereon from the adverse party a specific sum, which he claims to recover or set-off in the action." Section 51 provides that "when judgment is rendered the justice shall endorse upon such instrument the title of the suit and the amount allowed in the judgment to the plaintiff or defendant on account of the same, * * * and no suit or suits shall thereafter be instituted between the same parties, or those claiming under them, for the matter so adjudged and decided." The docket of the justice fails to show even that the action was founded upon a note, and does not show that any note was filed with the justice; nor does it appear in the record that any indorsement thereon of the title of the suit and the amount allowed in the judgment was made. With no certainty, therefore, can we treat the note as a pleading; it not being referred to in the docket or other paper filed. Paragraph 9 of section 50 says that "a variance between the proof on the trial and the allegations of a pleading shall be disregarded as immaterial, unless the justice shall be satisfied that the adverse party has been misled to his prejudice thereby." Paragraph 10 says that "the pleadings may be amended at any time before the trial, or during the trial, when by such amendment substantial justice will be promoted." The liberality of construction heretofore given these provisions of the statute would seem to require that we treat the summons, the justice's docket, and the note offered in evidence, and referred to as the one sued upon, as constituting the complaint of the plaintiff; and, as the parties went to trial upon this state of pleading, we must consider the case as presented. In White v. Emblem, 43 W. Va. 819, 28 S. E. 761, it was held not reversible error that there was no plea or issue in an action before a justice, either in the justice's court or on appeal, where there was a full trial as upon plea and issue. See, also, O'Connor

v. Dils, 43 W. Va. 54, 26 S. E. 354; Simpkins v. White, 43 W. Va. 125, 27 S. E. 361; Weimer v. Rector, 43 W. Va. 735, 28 S. E. 716; Meighen v. Williams, 50 W. Va. 65, 40 S. E. 332; Vandervort v. Fouse, 30 W. Va. 326, 4 S. E. 660.

Treating the pleadings as sufficient, can we reverse the judgment of the court denying a new trial? Though there was some evidence that the renewal note was signed and delivered to the payee by E. L. Bee in the presence of R. J. Bee, yet there was no evidence that she actually signed the paper or authorized it to be signed. There is evidence that she positively refused to sign the note, and never afterwards ratified the same; and she says that, subsequently and after the maturity of the note sued on, when in conversation with the bank officer, she supposed it was the original note to which reference was made. Upon this conflict of evidence, we cannot say there was error in the judgment of the court refusing a new trial.

It is claimed that acceptance of a renewal note is not payment of the original without express agreement to that effect. The authorities so hold. See Dunlap v. Shanklin, 10 W. Va. 662; Feamster v. Withrow, 12 W. Va. 611; Bantz v. Basnett, 12 W. Va. 772; Bank v. Good, 21 W. Va. 455; Hess v. Dille, 23 W. Va. 90; Bank v. Handley, 48 W. Va. 690, 37 S. E. 536. And if fraud has been practiced the giving of the renewal note would not be treated as payment of the original, even in case of express agreement. Bank v. Good, supra, and cases cited. As the defense in this case was that the defendant never executed the note sued on, as to her it could not be treated as in discharge of the original paper. Upon filing her plea, we think the plaintiff was entitled to accept the plea and amend the pleadings, setting up the original note. The cause of action would have been the same. But the plaintiff did not elect to amend; and, although perhaps there was sufficient evidence to support the suit upon the original note, yet as to that paper no issue was tendered to the defendant, and she has not had her day in court thereon. In Bank v. Day, 105 Ky. 219, 48 S. W. 983, it is held that the plaintiff in an action on a note may, by amended petition, confess a plea of non est factum, and set up an original note, as renewal of which the note originally sued on was accepted in ignorance of the fact that it was a forgery. In Stratton v. McMakin, 84 Ky. 641, 4 Am. St. Rep. 215, it was held that the payee of a note, after being defeated in a suit upon the renewal note on a plea of non est factum, might bring another suit upon the original indebtedness. In Bank v. Gaines, 87 Ky. 602, 9 S. W. 396, issue was joined upon the plea of non est factum in an action upon a renewal note, and no attempt made by the pleadings to rely upon the former indebtedness, and it was held that the plaintiff could not recover; but the right to amend the complaint after a plea of non est factum, and set up the original note, was also affirmed. In Bank v. Cash (Ky.) 44 S. W. 381, the plaintiff, after plea denying the execution of a renewal note, tendered an amended petition, but, instead of abandoning the original cause of action and declaring upon the original note, affirmed the allegations of the petition. It did not confess the truth of the plea and declare upon the original liability, and the court refused to allow the amended petition to be filed, and this action of the court was affirmed, although the appellate court recognized the right of the plaintiff, by amended petition confessing the truth of the answer, to declare upon the original note. See, also, Carter v. Bank (Ky.) 16 S. W. 79; Bowman v. Humphrey (Ky.) 37 S. W. 150. In Lithographic Co. v. Wagner, 177 Mass. 404, 58 N. E. 1020, it is held proper to allow an amendment by adding a count on a judgment obtained in another state on the same account for which the action was brought, since the technical change of the claim to res adjudicata did not prevent its being the cause for which the action was intended to be brought. We think these decisions prescribe the proper rule of practice in such cases. All that the law requires is that the identity of the cause of action be preserved. Kuhn v. Brownfield, 34 W. Va. 254, 12 S. E. 519, 11 L. R. A. 700.

Seeing that the plaintiff could have accepted the defendant's plea and set up by amendment the original note, which it neglected to do, has this court the power to now, by reversing the judgment of the circuit court, afford it the right of election? In equity causes, at least, where the pleadings or the evidence are so defective that the court is unable to decide the real question in controversy, it becomes the duty of the court, before proceeding to hear and finally pass upon it, to cause such defects to be removed; and, if the inferior court fails to discharge this duty, the appellate court will, for that reason alone, reverse and remand the cause. In Blue v. Campbell, 57 W. Va. 34, 36, 49 S. E. 909, and Lamb v. Laughlin, 25 W. Va. 300, it was ruled that where the court doubts the right of the plaintiff to relief on the case stated in the bill, and a good cause for relief appears by the proofs, this court will reverse the decree and give the plaintiff leave to amend his bill. While doubting the right to relief as stated, all the judges agreed that the evidence tended strongly to show a state of facts which would have entitled the plaintiff to recover upon a different theory. The decree was therefore reversed, and the cause remanded, with leave to amend the bill as indicated. In Doonan v. Glynn, 26 W. Va. 225, 228, the court below, upon bill, answer, and replication, dismissed the bill. Upon appeal the court was of opinion that the plaintiff, having failed to prove the allegations of his bill, so as to entitle him to the relief prayed, was not in a situation to demand a

decree in his favor, but that, inasmuch as the proof showed he had a cause of action of a similar nature to that alleged in his bill, and such as he might have made available by proper amendments, the lower court should not have dismissed his bill without giving him an opportunity to amend. In Gilchrist v. Oil Co., 21 W. Va. 115, 45 Am. Rep. 555, a suit in equity upon a foreign attachment based upon a personal judgment rendered in New York, this court reversed the decree of the lower court in favor of the plaintiff, holding that, by the construction placed by the New York courts upon the statute of that state, the court pronouncing a judgment there acquired no jurisdiction over or power to render judgment in personam against a foreign corporation, and that such judgment was void, and the decree of the circuit court was accordingly reversed; but, seeing that the judgment in New York was founded upon a certain bill of exchange, the cause was remanded, with leave to the plaintiff to amend his bill, setting up the original cause of action. The jurisdiction in equity in that case was founded solely on attachment. Another case in which this rule was applied is Van Winkle v. Blackford, 33 W. Va. 573, 588, 11 S. E. 26, where, although the plaintiff was given the option to amend, and declined, and the bill was dismissed, yet, because the decree was regarded as erroneous in not overruling the demurrer on the merits and sustaining it for want of parties, and so stating on the face of the decree, it was reversed, with leave to the plaintiff to amend his bill. In Rigg v. Parsons, 29 W. Va. 522, 2 S. E. 81, it was held that, if judgment be given for the defendant on demurrer to the declaration without leave to the plaintiff to amend, if the defect appears to be amendable, it will be reversed, but if the record shows leave was given to amend, and the plaintiff declined to do so, the judgment will be affirmed; and it is there said: "Neither can we order the circuit court to compel the plaintiff to amend. All that can be done by either this or the circuit court is to grant leave to amend, and, if the plaintiff refuses to amend, then the only order or judgment the court can enter is one dismissing the action."

The true reason for the rule of practice so announced, justifying this court in reversing a decree or judgment, and, upon remanding the case, giving leave to correct the pleadings and proof, is, it seems to us, that, in order that justice may be done, opportunity should be given the parties to perfect a case which seems justified by the facts and without which no proper decree or judgment can be pronounced, and that the parties may not be concluded, in the same or some subsequent suit, by the plea of former adjudication or the like, from proper redress or relief in the premises. The rule does not seem to us to be intended for a case like the one at bar, where, upon the tender of a plea of non est factum, the plaintiff had the election to accept the plea as true, and to amend and rely upon the original cause of action, and did not do so. The correct rule, we think, is stated in the Kentucky case of Bank v. Cash, supra: That the plaintiff is not entitled to judgment, and must be regarded as having elected to stand on the case as made by the pleadings, and as having refused to amend when opportunity was offered. This conclusion would preclude reversal on the first ground relied upon.

The giving and refusing of instructions are also assigned as error. The plaintiff requested 14 instructions, of which the third, fourth, fifth, sixth, seventh, ninth, tenth, and fourteenth were refused, and we think rightly. The third is based upon the erroneous proposition that, because the defendant, upon receiving notice of protest of the note sued on, remained silent with respect to her claim, her silence amounted in law to a ratification. The fourth proceeded upon the erroneous theory that the husband was the agent of the defendant wife, and that, upon the same theory as the third, as, after receiving notice of the existence of the note, she did not disavow it within a reasonable time, she became bound by the law of ratification. The fifth has no application, even if it correctly propounds the law. The other instructions of plaintiff refused are some of them doubtful law, and are certainly inapplicable. It would serve no good purpose to discuss them at length, and we see no error in the action of the court thereon. Besides, the other instructions given for the plaintiff fully covered the facts proven and its theory of the case.

The giving of instructions 1 and 2 for the defendant is also assigned as error. The first we think correctly propounded the law upon her theory of the case, namely, that, in order to recover, it was incumbent upon the plaintiff to prove either that the defendant signed the note, that her name was signed thereto by some person duly authorized, or that, having knowledge of the fact that her name was so signed and of all material facts, she subsequently ratified the same. The second instruction propounded a familiar rule of law—that, in order to recover on the ground of subsequent ratification, the plaintiff must prove that, after being possessed of all material facts and circumstances surrounding the execution of the note, the defendant ratified the same as her act. We see no error in these instructions. Thompson v. Murphy, 60 W. Va. 42, 53 S. E. 908.

We therefore affirm the judgment of the circuit court, but without prejudice to the plaintiff in a new action upon the original note.

(3 Ga. App. 26)

BRYAN v. STATE. (No. 783.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

1. CRIMINAL LAW—WRIT OF ERROR—RIGHT OF PROSECUTION TO REVIEW.

The Court of Appeals is without jurisdiction to consider the grounds of a motion to dismiss a bill of exceptions in a criminal case, which is predicated upon alleged errors of the trial judge antecedent to its final decision upon a motion for new trial.

(a) The adjudication of alleged errors in a criminal case, adverse to the state, would be in effect the consideration of a cross-bill of exceptions, which the state is not permitted to file.

(b) Such errors cannot properly be reviewed by a motion to dismiss, for the reason that such a motion must be addressed to some defect in form or procedure inherent in the bill of exceptions itself, and relates back no further than the inception of the proceedings to obtain a writ of error, to wit, the presentation of a bill of exceptions.

(c) The third ground of the motion to dismiss is not sustained by the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2599–2614.]

2. SAME—REVIEW—EVIDENCE—SUFFICIENCY.

The verdict was supported by the evidence, no error of law is assigned, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from City Court of Ashburn; W. A. Hawkins, Judge.

Louis Bryan was convicted of cheating and swindling, and he brings error, and the solicitor of the city court, wherein defendant was convicted, moves to dismiss the bill of exceptions. Motion to dismiss overruled, and judgment affirmed.

Z. Bass, for plaintiff in error. J. A. Comer, Sol., for the State.

RUSSELL, J. The solicitor of the city court of Ashburn has filed a motion to dismiss the bill of exceptions. The motion contains three grounds: (1) That there was no rule nisi issued on the motion for new trial, and that a motion to dismiss was made by the solicitor in the lower court at the proper time; (2) that the solicitor of the city court has never been served with a copy of the motion and order for new trial and with a rule nisi in said case, nor has he waived or acknowledged such service. It appears from the record that the judge failed to sign the rule nisi, and in explanation thereof he entered upon the motion a note stating that the rule nisi was presented to him at the proper time and that failure to sign was his fault, and not that of counsel for movant. The judge, however, did sign an order immediately following the usual rule nisi—an order stating that a motion for new trial had been made, and allowing time for the completion of the brief of the evidence, and providing for the hearing of the motion at a future date. On the day set for the hearing the solicitor moved to dismiss the motion, upon the same grounds as are now made the basis of the motion to dismiss the writ of error in this court, and the court overruled the solicitor's motion. It also appears, from the affidavit of the defendant's counsel, that he served the solicitor of the city court with a copy of the motion for new trial.

1. The refusal of the trial judge to dismiss the motion for new trial, whether right or wrong, affords no reason for dismissing the bill of exceptions in this case, and these grounds of the motion to dismiss the bill of exceptions cannot be considered.

(a) They are, in effect, exceptions in the nature of a cross-bill to errors alleged to have been committed against the state; and as there is no provision of law by which the state can prefer a bill of exceptions, these rulings are not reviewable, especially not by motion to dismiss the main bill of exceptions. We are not prepared to hold that the judge ruled incorrectly in either instance, for we think that the rule nisi, prepared for the signature of the judge and preceding the order signed by him, in which he states that the grounds of the motion are approved, may well be considered as part and parcel of one and the same paper, and therefore that it was in effect signed by him; and, if this be true, service by a copy of the motion as it then stood would have been sufficient service. It is not necessary, however, to pass upon this, because we are without jurisdiction to consider assignments of error in a bill of exceptions brought in behalf of the state, and any ruling upon the judgments of the trial court referred to in the motion to dismiss would be, in effect, a decision on a cross-bill of exceptions, or at least a review of the rulings of the lower court on the state's motion and complaint.

(b) Moreover, such errors cannot properly be reviewed by a motion to dismiss, for the reason that such a motion must be addressed to some defect in form or procedure inherent in the bill of exceptions itself, and relates back no further than the inception of the proceedings to obtain a writ of error, to wit, the presentation of a bill of exceptions.

(c) The third ground of the motion to dismiss is not well taken, in that it appears that the bill of exceptions was filed with the clerk of the city court within 15 days from the date it was approved by the judge and served upon the solicitor. The bill of exceptions was certified September 12, 1907, and served the same day, and was filed September 27, 1907. The motion to dismiss the bill of exceptions is therefore overruled.

2. The plaintiff in error was properly convicted of the offense of cheating and swindling, and there was no error in overruling the motion for new trial. While there was some conflict in the evidence, the testimony in behalf of the state, if believed by the jury, clearly established false representations on the part of the defendant, which were acted upon by the prosecutor, who was thereby deceived and defrauded. The contention of counsel for plaintiff in error in

his brief is that the defects of the horse he bought were patent, and that the prosecutor had full knowledge of these defects before he exchanged his mule and $50 in cash for the defendant's blind horse. Counsel for plaintiff in error relies upon the headnote decision in Rainey v. State, 94 Ga. 599, 19 S. E. 892. The facts in that case were distinguished in the decision from those in Tatum v. State, 58 Ga. 408, and the decision was based largely upon the particular facts developed by the evidence, and especially the fact that the defects were actually discovered by the prosecutor before the trade was concluded. The present case is controlled by the decision in the Tatum Case, supra, because the jury have the right to conclude from the evidence in this case that the blindness of the animal represented by the accused as being sound was neither apparent nor discoverable by ordinary casual inspection. The prosecutor also had the right to rely upon the statements made at the time by the defendant as to the qualities of the horse and his own inexperience and ignorance, and it was for the jury to determine how much these statements in regard to past transactions were relied upon by the prosecutor, and whether they tended to prevent a close inspection.

This case upon its facts is a stronger case against the defendant than the cases of Tatum v. State, supra, Ryan v. State, 104 Ga. 78, 30 S. E. 678; Crawford v. State, 117 Ga. 247, 43 S. E. 762, Jones v. State, 99 Ga. 46, 25 S. E. 617, or Parks v. State, 94 Ga. 601, 20 S. E. 430, in all of which cases judgments of guilty were approved by the Supreme Court. It can subserve no good purpose to discuss at length the principles involved in the offense of cheating and swindling, as defined in Pen. Code 1895, § 670, or to note the application of those principles to the facts as shown by the state in this case, for the reason that the principles of law are well settled and amply fortified by numerous authorities, and the evidence in this record is apposite to the law.

Judgment affirmed.

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(2 Ga. App. 764)

## JARRELL v. AMERICAN PIPE BENDING MACH. CO. (No. 466.)

(Court of Appeals of Georgia. Nov. 11, 1907.)

MASTER AND SERVANT—INJURY TO SERVANT—PETITION.

The petition, while setting forth a transaction apparently actionable, did not set it forth with sufficient certainty; hence the court did not err in dismissing the action upon timely special demurrer pointing out the deficiencies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 821, 834.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by D. B. Jarrell, by next friend, against the American Pipe Bending Machine Company. From an order sustaining special demurrer, plaintiff brings error. Affirmed, with directions.

Wm. H. Withers and Thos. L. Bishop, for plaintiff in error. Smith, Hammond & Smith, for defendant in error.

POWELL, J. Jarrell brought suit against the American Pipe Bending Machine Company. At the first term to the petition a demurrer containing the general ground of no cause of action and several special grounds was filed. To meet the demurrer a series of amendments were filed by the plaintiff. The substance of the petition and of the additions made to it by the amendments is as follows; the matter inserted by the amendments being indicated by inclosure in parenthesis: (1) Defendant is a corporation, etc. (2) Petitioner is a minor of the age of 14 years and was in the employ of the defendant. Defendant knew that he had no experience (petitioner informed defendant that he was without experience), and knowingly put him to work on a very dangerous machine without warning him of the danger of operating said machine (by the foreman in charge of the works of the defendant company). (3) On March 24, 1906, petitioner was at work upon a machine which had been assigned to him (by the foreman in charge of defendant's works, who directed him how to run the machine, instructing him that if the drill should stop for any cause he was to throw the lever with his left hand and stop the machine, or it would break the machinery, and petitioner was following the instructions given him at the time his hand was injured), and not knowing of its dangerous character attempted to stop the machine, as he had been directed to do, when his left hand was thrown violently and suddenly from the lever into the cogs of the machine, cutting off his forefinger from his left hand, bruising and mashing his left hand, making him a cripple for life. (4) Petitioner was in the place assigned to him (to wit, to work on a large steam drill, drilling holes in the heads of boiler heads), and in the discharge of his duties and without fault on his part, and the defendants were negligent: First, in putting said minor to work on a dangerous machine without giving him warning of the danger; second, the defendants were negligent in not providing a safe place for the child to work; third, the defendants were negligent in having a boy of his youth and size to work on that machine (petitioner being a small boy for his age), defendant knowing that it required more strength than petitioner (possessed) to throw the lever and hold the drill at the same time. (5) Petitioner was disfigured, suffered great pain, is permanently injured, etc. The court sustained the demurrer on both the general and the special grounds. This judgment is assigned as error.

We think that the petition is sufficient to withstand general demurrer. As to the special grounds it occurs to us that the best way to dispose of them is to take them up seriatim and decide them as if they were a series of questions propounded to us. In the cases of Cedartown Cotton & Export Co. v. Miles, 2 Ga. App. 79, 58 S. E. 289, and Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 S. E. 524, we discussed at some length the allegations necessary to a perfect suit by a servant against the master for personal injuries. In this opinion, reference will be frequently made to these two cases, and for brevity they will be cited as the Miles Case, and the Helms Case, respectively.

Should the demurrer to the above petition have been sustained: (1) Because the same contains no allegations of fact showing that the danger complained of was unknown to the servant? No. Lack of actual knowledge may be stated directly and without elaboration. Miles Case. (2) Because the same contains no allegations of fact showing that the danger complained of was known or ought to have been known by the defendant? No. Miles Case; Helms Case. (3) Because the same contains no allegations of fact showing that the plaintiff did not have means of knowing of the danger complained of equal to those of the master? No. The inexperience and youthfulness of the servant, as opposed to the knowledge always imputed to the master as to the nature of his instrumentalities, make a prima facie case of inequality of means of knowledge. (4) Because the same does not contain any allegations of fact showing that the servant could not have known of the danger complained of by the exercise of ordinary care? Yes. In the light of the insufficient and meager description of the machine and of the dangerous element in it, this demurrer is well taken. Miles Case. (5) Because, so far as the allegations of plaintiff's petition show, plaintiff had sufficient capacity to be sensible of danger, and the power to avoid it? No. In the form in which the ground of demurrer is stated, it is "speaking."

(6) Should the demurrer to the following portion of paragraph 2 of the petition, to wit: "Defendant knew that he [plaintiff] had no experience"—have been sustained: (a) Because there are no allegations of fact supporting the conclusion so pleaded? No. Total lack of experience is a fact which may be stated directly, just as total lack of knowledge may be. (b) Because there are no allegations showing what agents or servants of defendant whose knowledge was binding on it had the knowledge alleged? No. The amendment avoided this ground. (c) Because the expression "had no experience" is too vague and indefinite to permit or require defendant to join issue thereon, and in what particular plaintiff had no experience, or with reference to what kind and character of work, or machinery, or labor, is in no manner made plain? Yes. The allegations, as against this special demurrer, should have gone forward and have shown in what particular the plaintiff was inexperienced. As stated, it is too indefinite in this respect.

(7) Should the demurrer to the following portion of paragraph 2 of the petition, to wit: "On a very dangerous machine"—have been sustained: (a) Because the same is a mere conclusion, unsupported by any allegations of fact, and how and why and in what particular said machine was "very dangerous" is not set forth, what danger complained of is not stated, and no allegations of fact are made which throw any light on what is meant by said expression "very dangerous"? Yes. See the Miles Case for a discussion of the particularity with which the nature of the machine and the dangerous element in it must be set forth. (b) Because what and where said machine was and was located is not shown? No.

(8) Should the demurrer to the following portion of paragraph 2 of the petition, to wit: "Without warning him of the danger of operating the machine"—have been sustained: (a) Because there are no allegations setting forth what warning should have been given plaintiff by defendant? Yes. (b) Because there are no allegations setting forth what danger is referred to, and its nature and character? No; except so far as it makes the point that the nature and character of the danger is not alleged explicitly.

(9) Should the demurrer to the following portion of paragraph 3 of the petition. to wit: "Plaintiff not knowing of its dangerous character"—have been sustained: (a) Because there are no facts alleged supporting the conclusion so pleaded? No. (b) Because there are no facts alleged which show why plaintiff did not know of such dangerous character of the machinery? No. (c) Because there are no facts alleged which show that plaintiff did not have means of knowing such alleged danger equal to those of the master? No. (d) Because there are no facts alleged showing that the plaintiff could not have known of such alleged danger by the exercise of ordinary care? Yes.

(10) Should the demurrer to the following portion of paragraph 3 of the petition, to wit: "Attempted to stop the machine as he had been directed to do"—have been sustained: (a) Because there are no facts set forth supporting the conclusion therein pleaded? No. (b) Because there are no facts set forth showing what action plaintiff took in attempting to stop the machine? Yes. (c) Because there are no facts alleged which show what he had been directed to do? No. (d) Because there are no facts alleged showing how or in what manner he had been directed to stop the machine? No. (e) Because there are no facts showing who directed him to stop the machine and when? As to who

directed, no; as to when, yes. The averment of a time as to every traversable fact may be compelled by special demurrer. Mandeville Mills v. Dale, 2 Ga. App. —, 58 S. E. 1060.

(11) Should the demurrer to the following portion of paragraph 3 of the petition, to wit: "His left hand was thrown violently and suddenly from the lever into the cogs of the machine"—have been sustained: (a) Because there are no facts supporting the conclusion pleaded? No. (b) Because there are no facts alleged explaining how or why his hand was violently thrown from the lever? Yes. Miles Case. (c) Because there are no facts alleged showing that plaintiff could not have avoided such occurrence by the exercise of ordinary care? No. The plaintiff need not anticipate and plead an avoidance to an affirmative defense.

(12) Should the demurrer to the following portion of paragraph 4 of the petition, to wit: "[Plaintiff] was in the place assigned to him"—have been sustained: (a) Because there are no facts supporting the conclusion so pleaded? No. (b) Because the place referred to is not stated? No. (c) Because there are no facts showing what agent or servant of the defendant so assigned plaintiff to this place? No. (d) Because no facts are set forth which support the allegations that he was so assigned? No.

(13) Should the demurrer to the following portion of paragraph 4 of the petition, to wit: "In the discharge of his duties"—have been sustained, because the same is a statement merely of a conclusion without any facts supporting same? No.

(14) Should the demurrer to the following portion of the petition, to wit: "Without fault on his part"—have been sustained, because the same is supported by no allegations of fact and is a mere conclusion? No.

(15) Should the demurrer to the following portion of paragraph 4 of the petition, to wit: "Defendants were negligent in putting said minor at work on a dangerous machine without giving him warning of the danger"—have been sustained: (a) Because the same embodies mere conclusions, without any allegations of fact supporting same? No. (b) Because neither therein nor elsewhere does it appear what warning should have been given or what danger should have been apprehended, or that said danger materialized in the injury complained of? No.

(16) Should the demurrer to the following portion of paragraph 4 of the petition, to wit: "Defendants were negligent in not providing a safe place for the child to work"—have been sustained: (a) Because the same is unsupported by any allegations of fact and is a mere conclusion, there are no facts alleged showing wherein the defendants were negligent, there are no facts alleged showing that it did not provide a safe place to work, and there are no facts alleged showing that the plaintiff was a child; but, on the contrary, a person over 14 years of age is not a child? No.

(17) Should the demurrer to the following portion of paragraph 4 of the petition, to wit: "Defendants were negligent in having a boy of his youth and size at work on that machine"—have been sustained: (a) Because the same embraces mere conclusions, unsupported by any allegations of fact? No. (b) Because the same is not sound as a matter of law, it is not negligence per se to employ a youth over 14 years of age, and there are no facts set forth whatever supporting the conclusion alleged that defendants were negligent in having plaintiff to work as alleged, wherein defendants were negligent is not shown or supported by any allegations of fact, how or wherein defendants were negligent because of plaintiff's size is in no manner shown by plaintiff's pleadings no allegations are made which show that plaintiff did not know of his own youth and size, or that he did not know of any danger in engaging in work for defendant as stated, nor are any facts alleged showing that plaintiff did not know, or by the exercise of ordinary care could not know, of any and all dangers attendant upon his engaging in such work, being of the age and size which plaintiff was, and what plaintiff's size was, does not appear? No. In regard to the five last grounds, it may be said that, where a petition has set forth the particulars of a transaction with definiteness, the conclusions of negligence on which the pleader relies may be stated in general terms. These grounds fall, of course, by the sustaining of demurrers to the prior allegations on which they are based; but in themselves they are not the subject of demurrer on the grounds stated.

If the defendant in this case had filed no special demurrers, the petition would have supported a verdict. The court, as we have held, properly sustained many of the special demurrers. To affirm the judgment generally, since a general demurrer was sustained, would operate as a res adjudicata, barring a subsequent suit on the same cause of action. Judgments based upon mere deficiencies of statement should not operate to preclude substantial rights, as judgments upon the merits of the transaction should. Frequently, in cases where we have found that the cause of action was not stated with sufficient certainty, we have affirmed the trial courts in sustaining demurrers, but, by direction, gave leave to amend. In the present case we are not willing to go that far, because the plaintiff was given full opportunity of amendment before the judgment of dismissal was entered. While he availed himself of this privilege, he left several glaring deficiencies in his petition. So that, instead of affirming with leave to amend, we affirm the judgment, with direction that the dismissal shall not operate as a res adjudicata upon the merits.

Judgment affirmed, with direction.

(2 Ga. App. 845)

## DUNN v. WESTERN UNION TELEGRAPH CO. et al. (No. 532.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

1. WRIT OF ERROR—REVIEW—JUDGMENT.

When the trial court has dismissed an action upon both special and general demurrers, and this court finds that the special demurrer has been properly sustained but that the petition sets out a cause of action, the judgment will be affirmed, with such direction as the discretion of this court may see fit to impose in the interests of justice.

2. TELEGRAPHS — PUBLIC SERVICE CORPORATIONS — DUTY TO PUBLIC — TORTS OF EMPLOYÉS.

Every public service company owes to such members of the general public as have occasion to transact with it the business it is accustomed to perform the duty of affording them safe and decent access to the office or other place where such transactions are to be had. It must see that those members of the public who come to the usual and appointed place to deal with it are accorded respectful treatment. A breach of this duty, whereby injury results to a person lawfully and properly attempting to deal with it, is actionable.

(a) A telegraph company is a public service corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 3, 4, 16.]

(b) If a person enters a telegraph office with the intention of delivering a message for transmission, and, without provocation, the agent in charge of the office, orders him out and insults and humiliates him by abusive language, a cause of action against the telegraph company arises in favor of such person.

3. DAMAGES—WANTON WRONG—MENTAL SUFFERING.

While mental suffering, unaccompanied by injury to purse or person, affords no basis for an action predicated upon wrongful acts, merely negligent, yet such damages may be recovered in those cases where the plaintiff has suffered at the hands of the defendant a wanton, voluntary, or intentional wrong the natural result of which is the causation of mental suffering and wounded feelings.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by J. B. Dunn against the Western Union Telegraph Company and others. Judgment for defendants, and plaintiff brings error. Affirmed, with directions.

M. B. Eubanks and W. B. Mebane, for plaintiff in error. Geo. H. Fearons, McHenry & Porter, Geo. A. H. Harris & Son, and Shumate & Maddox, for defendants in error.

POWELL, J. Dunn brought his action against the Western Union Telegraph Company and the Southern Railway Company by a petition which, omitting formal parts, is substantially as follows: Defendants are, the one a telegraph company, the other a railway company, doing business in Floyd county, and by their acts done in said county have injured the plaintiff in the sum of $1,000, for that "on August 18, 1906, the petitioner and one Walter Jeffries went to the office of the said Western Union Telegraph Company at said Lindale, which said office is in the depot of the said Southern Railway Company at said Lindale, said office of the said Western Union Telegraph Company being the usual place for the reception and sending of telegraph messages at said Lindale, for the purpose of delivering and having sent a message for two minor and orphan children by the names of Yeager; said message being for the uncle of said children, and announcing the death of said children's mother, and requesting that their uncle come and bury their dead mother. After arriving at said depot of the said Southern Railway Company and office of said Western Union Telegraph Company, petitioner informed the agent in charge of said office and depot of his desire to send a message to Yeager, the aforesaid uncle of said Yeager children, for the said Yeager children announcing the death of their mother. Petitioner had a right to be in said depot and at said office, and it was the duty of defendants to allow petitioner to remain in said depot and at said telegraph office to transact his said business, and until he had transacted his business. While in said depot and at said office, and before petitioner had transacted his business, or before petitioner had had time to transact said business, the agent in charge of said office and depot willfully, wantonly, malignantly, maliciously, and illegally evicted petitioner from the office of the said Western Union Telegraph Company and the depot of the said Southern Railway Company. In evicting the petitioner as aforesaid by the agent aforesaid, said agent was brutal, inhuman, and insulting, in that said agent told petitioner, when he tried to get said agent to send said message, to "Go to hell with your God damn message." Petitioner then told said agent that his message was one of necessity, and begged said agent to receive and send same, whereupon said agent said: "God damn you, get out from here. Leave, God damn you; git." Whereupon petitioner, fearing bodily harm, immediately left said depot and office, and said agent did not receive said message. The conduct of the said agent was wanton, willful, malicious, and illegal, and, being done by said agent so willfully and wantonly, entitles petitioner to punitive damages, for which he sues. By amendment the petition further alleges that "the telegraph office of the Western Union Telegraph Company at said Lindale was located in the depot and office of the Southern Railway Company, and the agent in charge of said depot was also the agent of said telegraph company, and the acts hereinafter complained of were committed at the time and place where said agent was the agent of both defendants. The said Yeager children had no father, their mother had just been killed by lightning, and it was at the request of these children that plaintiff went to said office to send the telegram as herein set out."

By separate demurrers the defendants raised the following points: "That there is a misjoinder of defendants, the business of the

defendant Western Union Telegraph Company being altogether different from and independent of the business of the Southern Railway Company. That the allegations of the fifth paragraph are vague and indefinite, in that it is not alleged whether it was the purpose of the defendant, or of Walter Jeffries, to deliver and have sent said message; nor is there any allegation that said petitioner and said Jeffries, or either of them, were connected with, had any interest in, or were requested to send, any such message, nor by what authority said petitioner or said Jeffries represented or pretended to said agent for transmission; nor is there is no allegation that any telegram was ever written out on any blank of defendant, or any other paper writing, and tendered to said agent for transmission; nor is there any allegation that the regular charges of such transmission were ever offered or tendered said agent. That there is no allegation at what hour of the day of August 13, 1906, petitioner went into the office of the defendant for the purpose alleged. That no cause of action is set forth. That petitioner seeks damages for injury to his feelings, and indignities offered to the plaintiff by defendant agent, and nowhere alleges any loss of time, personal injury, or pecuniary loss of any kind. That no action for injury to feelings, insult, or personal indignities can be maintained, unless there is alleged in connection with such acts and conduct some pecuniary loss, as loss of time, personal injury, or other ground of actual injury for which a recovery can be had. That there can be no punitive damages recovered in the case, for the reason that no actual injury is shown, as loss of time, loss of money, personal injury, or some other injury for which pecuniary compensation can be had. That the only recovery sought in this case is for alleged injury to the plaintiff's feelings, and any recovery therefor must in its nature be punitive, and such damages cannot be recovered, when not accompanied by some pecuniary loss, as loss of time, increased expenses, personal injury, or some other circumstances or fact which would entitle plaintiff to compensation under the law. That the petition shows that two parties are sued in this case for separate and distinct causes of action, and that said parties cannot be sued jointly in the said case. In the one the cause of action alleged against the Western Union Telegraph Company is for a failure to send a message through its agent at Lindale. The cause of action against the Southern Railway Company is for misconduct of its agent in ejecting from its depot at Lindale the plaintiff, who had gone into said depot for the purpose of sending a message by the Western Union Telegraph Company. That the petition shows on its face that the defendant was not at the railroad office for the purpose of transacting any business with the Southern Railway Company, and that whatever the man in charge did was done as the agent of the Western Union Telegraph Company, and that in what he did he in no way represented the railroad company, and that the railroad company is not responsible for any act of the man at its depot in connection with the matter complained of in the petition." Both demurrers were sustained, and the plaintiff brings error. In this court the plaintiff in error concedes that the Southern Railway Company was not a proper party to the suit.

1. For the conceded misjoinder, the judgment of the lower court will be affirmed; but since this is not a matter going to the merits of the transaction, and since the general demurrer of the telegraph company was also sustained, it will be necessary for us to look further into the case, that such direction may be given as will be proper under the circumstances. Civ. Code 1895, § 5498, par. 2. See, also, Jarrell v. American Pipe Bending Machine Co., 2 Ga. App.——, 59 S. E. 186.

2. The grave question remaining in the case is whether the petition sets forth a cause of action against the telegraph company. The gist of the action is not the failure or refusal of the telegraph company to transmit a message tendered to it, but the alleged disrespectful, humiliating, and insulting treatment by its agent of a member of the general public, lawfully in its office on business with the company. The contention is that the entire damage alleged is such as affects only the feelings of the plaintiff, and that damages for mental suffering cannot be recovered, unless there is a concomitant injury to person or purse. The further contention is made that no breach of duty to the plaintiff is shown. We will dispose of these contentions in inverse order.

A telegraph company is a private corporation performing a public duty; and whether it is a common carrier, a bailee, or a person engaged in business sui generis, is immaterial. It is a public-service company, one engaged in a business of such nature as to clearly distinguish it from those purely private persons and corporations who may conduct their own business in their own way. All such corporations, on account of the interest which the public has in the manner in which their business is conducted, as well as on account of the special franchises enjoyed by them, must observe certain rules of dealing with the public. These rules, and the corresponding duties which are implied from the nature of the calling, are not always declared by specific statute, but are frequently enforced by the courts as a part of the general law or of the common law. "Upon each person, in every position he occupies, peculiar duties are imposed, each demanding its discharge with an emphasis accentuated or modified by the attendant circumstances." Ray, Negligence (Imposed Duties, Personal), § 1. "One of the great requirements which the government demands of every institution

impressed with a public interest, and one which is thrown over every citizen as a great and protective shield, is the duty to act impartially with all. They are under obligations to extend their facilities to all persons, on equal terms, who are willing to comply with their reasonable regulations, and to make such compensation as is exacted for others in like circumstances." Jones, Telegraph and Telephone Companies, § 236.

From this principle, universally recognized, springs the corollary that all such persons, natural and artificial, shall afford to such members of the public as have occasion to transact with them business of the nature they are holding themselves out as being accustomed to do safe and decent access to the places opened up for the transaction of the business in question. This safety does not mean mere physical safety, nor this decency mere absence of obscenity; but by the employment of the expression "safe and decent access" it is intended to connote also the notion of freedom from abuse, humiliation, insult, and other unbecoming and disrespectful treatment. A member of the public is not to be deterred from transacting or offering to transact the business which the law compels a telegraph company to accept impartially from every person by reason of the fact that he cannot enter the public office without being subjected to insult or personal affront. A violation of this duty has occurred whenever a person entering the telegraph office for the purpose of sending a message has been met with disrespectful or insulting treatment at the hands of the company's agents. It is immaterial that the person thus injured had no personal interest in the message, or that he was the mere agent of another; for there is no such requirement as that persons desiring to transact business with public utility corporations shall do so in person. The fact that the right of respectful treatment, while attempting to do business with a public service company, follows as the natural sequence from the right to be served impartially and at all reasonable times, seems to render the citation of authority as to the existence of this right of respectful treatment unnecessary. We do, however, call attention to the Georgia cases of Gasway v. Atlanta & West Point R. Co., 58 Ga. 216, 221, and Georgia R. Co. v. Richmond, 98 Ga. 495, 502, 25 S. E. 565. It will be noted that, while these were actions against carriers, in neither case did the liability depend upon the fact that the plaintiff was a passenger. In Gasway's Case he was attempting to check baggage as agent for his wife. In Richmond's Case he had called at the passenger station to see about certain trunks, and the court in deciding the case, took pains to call attention to the fact that the relation of carrier and passenger did not exist at that time. We might multiply citation of precedents, but these are sufficient.

3. The telegraph company, therefore, violated its duty towards the plaintiff, in that it did not afford him safe and decent access to its office. The plaintiff suffered the injury of humiliation and wounded feelings. Is it a case of damnum absque injuria, because no injury to purse or person also ensued? That damages for mental suffering are compensatory in character can hardly be open to question. "Wounding a man's feelings is as much actual damage as breaking his limbs. The difference is that one is internal and the other external; the one mental, the other physical." Head v. Ga. Pac. R. Co., 79 Ga. 358, 360, 7 S. E. 217, 218, 11 Am. St. Rep 434; Smith v. Overby, 30 Ga. 241, 248. Such damages may in the very nature of things be just as proximately and naturally the consequence of the defendant's wrong as any other damage; so that there is no legitimate objection to their allowance for any lack of this element. Of course, there may be cases where mental suffering is not a proximate and natural result of an injury; but this is true as to any other form of damage. Nor can it be justly said that an allowance for mental suffering is any more speculative or conjectural than damages for physical pain and suffering. Those cases which preclude recovery of damages for mental suffering, when no other injury is shown, cannot fairly rest on any of these grounds, but must be based upon the theory presented by Allen, J., in the case of Spade v. Lynn, etc., R., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, that the rule is purely arbitrary, though actually existent in certain classes of cases. See, also, Homans v. Boston Elevated Ry. Co., 180 Mass. 456, 62 N. E. 737, 57 L. R. A. 291, 91 Am. St. Rep. 324, wherein the court, through Holmes, J., says that the rule, being arbitrary, is not to be extended.

This arbitrary rule is generally applied only to those cases where the injury is the result of mere neglect. The leading case of Chapman v. Western Union Tel. Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183, as well as the cases which have followed it, puts this state in line with those that hold that, in actions on account of wrongs merely negligent, mental suffering unaccompanied by other injury cannot be the basis of a recovery. Those courts, however, who assert this doctrine even most strenuously, do not extend its application to those intentional injuries of which insult, humiliation, and mental suffering are the natural consequences. As Allen, J., in the Spade Case, supra, says: "It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown or is reasonably to be inferred." By this distinction there can be seen between the case of Chapman v. Telegraph Company, supra, and that of Cole v. Railway Company, 102 Ga. 474, 31 S. E. 107, a clear, logical discrimination. The holding in the Cole Case is undoubtedly the law, and is unequivocally supported by authority. There a railway

conductor intentionally and wantonly insulted a passenger, not by using slanderous language to him, as the court intimates in the opinion (for the language was not per se slanderous, and there were no allegations stating it to be so for any special reason), but by using to him insulting and humiliating language. The whole injury was to the plaintiff's feelings. The court says that case is distinguishable from the Chapman Case; and it is, not because the plaintiff in the Cole Case was slandered, but because that was an action upon a malicious and intentional tort, the other upon a merely negligent, though wrongful, omission. See Watson on Damages, § 399; Burdick, Law of Torts, 101; Wilkinson v. Downtown, [1897] 2 Q. B. 57 (wherein a recovery was upheld in favor of a wife for mental shock on account of defendant's falsely and maliciously telling her that her husband had been seriously wounded); Rice v. Rice, 104 Mich. 371, 62 N. W. 833 (where a recovery by a wife for mental suffering occasioned by the alienation of her husband's affections was held proper, though no financial loss in the matter of support was shown). See, also, Barbee v. Reese, 60 Miss. 906; Conklin v. Thompson, 29 Barb. (N. Y.) 218.

As against the telegraph company the petition sets out a cause of action. We do not think the special demurrer is well founded, so far as it calls for the hour at which the alleged wrong occurred. Therefore the judgment is affirmed, with direction that the dismissal may be avoided and the case reinstated, provided the plaintiff, within 20 days from the time the remittitur of this court is filed in the office of the clerk of the trial court, shall file an amendment striking the Southern Railway Company as party defendant.

Judgment affirmed, with direction.

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(2 Ga. App. 853)

JEFFRIES v. WESTERN UNION TELEGRAPH CO. et al. (No. 533.)

(Court of Appeals of Georgia. Nov. 14. 1907.)

TELEGRAPHS — PUBLIC SERVICE — CORPORATIONS.

This case is controlled by the case of Dunn v. Western Union Telegraph Company (this day decided) 59 S. E. 189.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by Walter Jeffries against the Western Union Telegraph Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

M. B. Eubanks and W. B. Mebane, for plaintiff in error. Geo. H. Fearons, McHenry & Porter, Geo. A. H. Harris & Son, and Shumate & Maddox, for defendants in error.

POWELL, J. Judgment affirmed, with direction.

(3 Ga. App. 26)

EDWARDS v. STATE. (No. 776.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—ADVANCES.

This case is controlled by Mulkey v. State, 1 Ga. App. 521, 57 S. E. 1022.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Will Edwards was convicted of crime, and brings error. Reversed.

Turner & Lawson, for plaintiff in error. Watts Powell, Sol., for the State.

POWELL, J. Judgment reversed.

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(3 Ga. App. 20)

JOHNSON v. STATE. (No. 763.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

FALSE PRETENSES—ELEMENTS OF OFFENSE.

Upon the authority of Glenn v. State, 123 Ga. 585, 51 S. E. 605, Wilson v. State, 124 Ga. 22, 52 S. E. 82, McCoy v. State, 124 Ga. 218, 52 S. E. 434, Taylor v. State, 124 Ga. 798, 53 S. E. 320, Mulkey v. State, 1 Ga. App. 521, 57 S. E. 1022, and Patterson v. State, 1 Ga. App. 782, 58 S. E. 284, the verdict must be set aside as being contrary to the law and without evidence to support it.

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peeples, Judge.

Henry Johnson was convicted of obtaining goods under false pretenses, and brings error. Reversed.

W. R. Smith and R. A. Hendricks, for plaintiff in error. J. H. Gary, Sol., for the State.

POWELL, J. Judgment reversed.

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(3 Ga. App. 34)

FISH v. STATE. (No. 799.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

HOMICIDE—INSTRUCTIONS.

Under the evidence and the statement of the defendant, it was proper that the court should submit to the jury instructions upon the offense of voluntary manslaughter, and the conviction of that offense is not entirely unsupported.

(Syllabus by the Court.)

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Henry Fish was convicted of crime, and brings error. Affirmed.

W. D. Sheffield, for plaintiff in error. J. A. Laing, Sol. Gen., for the State.

POWELL, J. Judgment affirmed.

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(3 Ga. App. 20)

BARGE v. STATE. (No. 770.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

CRIMINAL LAW—TRIAL—REMARKS OF JUDGE.

For the trial judge to state in the hearing of the jury on the trial of a criminal case that

if the defendant did not put in any evidence he would direct a verdict against the defendant is manifest error, and imperatively requires the grant of a new trial, however conclusive the evidence establishing guilt. Pen. Code 1895, § 1032.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2182.]

(Syllabus by the Court.)

Error from Superior Court, Douglas County; Price Edwards, Judge.

Charley Barge was convicted of crime, and brings error. Reversed.

J. S. James, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

HILL, C. J. Judgment reversed.

(3 Ga. App. 29)

PYLES v. STATE. (No. 789.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

CRIMINAL LAW—APPEAL—REVIEW.

One witness testified positively to facts and circumstances which proved guilt. Six witnesses contradicted this one witness as to the facts and as to the existence of some of the circumstances. The jury, in the exercise of its right, believed the testimony of the one witness, and the trial judge approved the verdict. This court cannot interfere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3084.]

(Syllabus by the Court.)

Error from City Court of Polk County; F. A. Irwin, Judge.

W. B. Pyles was convicted of crime, and brings error. Affirmed.

Mundy & Mundy, for plaintiff in error. P. R. Turner, Sol., for the State.

HILL, C. J. Judgment affirmed.

(2 Ga. App. 339)

FARMERS' & TRADERS' BANK v. EUBANKS. (No. 467.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

1. HUSBAND AND WIFE—LIABILITY OF WIFE—CONTRACT OF SURETYSHIP.

While a wife cannot legally make a contract of suretyship or assume the debt of her husband, yet where she has given a negotiable note payable to her husband's order and intended to be used as surety for or in payment of his debt, and it has been transferred to a bona fide purchaser for value, before maturity, and without notice, it is valid, and binds her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 227.]

2. SAME.

In a conflict between the rights of a married woman and the rights of a bona fide holder of a negotiable instrument, the one whose voluntary acts furnish the opportunity for deception and fraud should suffer any consequent loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 227.]

3. SAME.

The law which is made for the protection of married women will not permit or tolerate in its beneficiaries an abuse of its beneficent purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 227.]

4. SAME.

The fact that a negotiable note of the wife is made payable to the husband does not of itself import invalidity, because apparently made without the approval of the superior court of the wife's domicile. Where such note does not involve a sale of the separate estate of the wife to the husband, it is valid without such approval.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 227.]

5. SAME—ACTION AGAINST WIFE ON NOTE—PRESUMPTIONS AND BURDEN OF PROOF.

Where a married woman gives her individual negotiable note, the presumption of law is that she gave it on her own contract and for value, and when sued thereon the burden is on her to show that the note falls within some of the restrictions on her right to contract, and that the holder of the note had notice of its invalidity when he took it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 844.]

6. SAME—DIRECTION OF VERDICT.

The evidence in this case was in conflict on the vital and controlling question of notice, and the direction of a verdict for the defendant was error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 850.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Farmers' & Traders' Bank against Mary J. Eubanks. Judgment for defendant, and plaintiff brings error. Reversed.

Candler, Thomson & Hirsch, for plaintiff in error. E. V. Carter, for defendant in error.

HILL, C. J. The Farmers' & Traders' Bank sued Mary J. Eubanks on a promissory note made by her to her husband, which he had indorsed and transferred to the bank before maturity as collateral security for a loan made to him by said bank. The defendant filed an answer, in which she averred that the note was without consideration, and that the bank received the note with knowledge that the same was executed by her as a contract of suretyship or in assumption of a debt which her husband owed said bank, and that for these reasons the note was void as to her and not binding on her separate estate. On the conclusion of the evidence the court directed a verdict for the defendant, and the bank assigns error.

The evidence in the record is brief, consisting of the note, the testimony of the husband of the defendant, and that of the cashier of the plaintiff. According to the testimony of the husband, he wanted to borrow some money from the bank, and, thinking that he could not get it on his own note, he got his wife to make the note sued on. This note he gave to the bank as collateral security for a loan made by the bank to him on his individual note for the same amount as the collateral note of his wife. At the time of the transaction he told the cashier of the bank that his wife did not in fact owe the note to

him which she had made at his request, and had received therefor no consideration whatever. He also testified that his wife did not receive any part of the money loaned to him by the bank on his note, with her note as collateral; that he owed the bank some money, and wanted to get more, and, in order to get it, tendered his wife's note to the bank. The wife knew, at the time she made the note to her husband, that his purpose was to use it with the bank to borrow money, and she voluntarily signed the same. His wife did not owe him anything for mules and fertilizers used on her farm at the time she made the note, and the note was not given to him in payment therefor. The cashier testified that the note was indorsed by Eubanks to the bank before maturity; that he brought the note to the bank, and said he wanted to get $500 on his note, and put this note up as collateral. "I said: 'Mr. Eubanks, this is your wife's note, and under the law of Georgia she could not loan you money. It is entirely worthless, unless it is for a bona fide transaction.' He replied that it was for a bona fide transaction, and that 'she owed him this money for mules that he had purchased for her, or paid for, for her, that she was using on her farm.'" None of the money loaned to Eubanks on his note, with this note as collateral, was paid to his wife; but it was all placed to his credit. The cashier knew at the time he loaned the money to Eubanks that the maker of the note taken as collateral was his wife.

Does this evidence, with all reasonable deductions and inferences therefrom, demand the verdict directed for the defendant? In this state there are three restrictions upon the rights of a married woman as to her separate property: (1) She cannot bind her separate estate by any contract of suretyship. (2) She cannot assume the debts of her husband, and her estate is not liable for them. Civ. Code 1895, § 2488. This last restriction is embodied in the Constitution of the state. Civ. Code 1895, § 5790. (3) No contract of sale of a wife as to her separate estate, with her husband or her trustee, shall be valid, unless the same is allowed by order of the superior court of the county of her domicile. Civ. Code 1895, § 2490. With these exceptions, the wife is a feme sole and can do as she pleases with her own. These restrictions were designed to protect the wife against the "kicks and kisses" of her husband, her conjugal leanings, the importunities of her husband's creditors, and the pliant nature of feminine character. This law, however, has been construed by the Supreme Court from the beginning in tender regard to the rights and equities of innocent persons. The words "absolutely void," as characterizing the prohibited contracts of married women, have been declared to mean voidable at the election of the wife (Jones v. Harrell, 110 Ga. 373, 35 S. E. 690; Perkins v. Rowland, 69 Ga. 664), and not "voidable" when they come in conflict with the rights and equities of bona fide holders and purchasers for value (Perkins v. Rowland, 69 Ga. 661; Howard v. Simpkins, 70 Ga. 322; Venable v. Lippold, 102 Ga. 208, 29 S. E. 181; Sutton v. Aiken, 62 Ga. 742). The bank claims to be a bona fide holder for value. It claims to have taken the note as collateral without any notice, actual or constructive, that it was invalid. On the contrary, its cashier, with whom alone the transaction was had, was informed by the husband that the note was made to him in consideration of mules and fertilizers "purchased for her or paid for, for her, that she was using on her farm," and that the transaction between him and his wife was in every respect bona fide.

The question, under this evidence, is: Can a married woman set up this defense to a holder of negotiable security who takes it bona fide, for value, without notice of invalidity, and before due? In the cases above cited, as well as in many others, the Supreme Court has ruled that, while a wife cannot make a contract of suretyship or legally assume a debt of her husband, yet when she has given a negotiable note for his debt, and it has been transferred to a bona fide holder for value, before due, and without notice, it is valid, and binds her. In other words, the wife's rights must be construed with reference to the rights of the bona fide holder. In protecting her the law does not permit her, either by herself or by her husband, to perpetrate a fraud on the innocent, and will not tolerate in its beneficiary an abuse of its beneficent purpose. In the language of Mr. Justice Bleckley, in Sutton v. Aiken, supra: "Looking to the collateral doctrines of the law, that ought to be considered in connection with restrictive legislation which we are now construing, the great doctrine of protection to innocent purchasers presents itself. Bona fide purchasers for value and without notice are generally recognized as occupying a very high stand in courts, both of law and equity. * * * Were a married woman incapable in law of conveying her property at all, all the world would be bound to take notice of her disability. But such is not her incapacity. On the contrary, her general power over her own is as ample as if she were a man. She can buy and sell with perfect freedom, from or to the whole world, except her husband or trustee, so that she does it for her own benefit. * * * If, trusting to the document she has signed, sealed, and delivered, any person should be honestly misled by it, why should she not abide the consequences? * * * Our conclusion is that a conveyance amenable to section 1783 of the Code (now Civ. Code 1895, § 2488) is 'absolutely void' as between the maker and all persons affected with notice, but that a subsequent bona fide purchaser for value, and without notice, is protected." This language was used in reference to a deed executed by the wife to her separate property,

but is is equally applicable to a negotiable note executed by her. Indeed, we think that the exigencies of commercial transactions require that innocent purchasers of negotiable instruments before due should have the strongest protection, and, where no infirmity appears on their face, every presumption should be invoked in favor of the validity of such instruments and the title of the holder.

The Code of Georgia, in asserting the principle of law, so firmly imbedded in jurisprudence, that a bona fide purchaser of a negotiable instrument for a consideration before maturity is protected, limits the defenses that can be set up by the maker, acceptor, or indorser, as against the rights of such holder, to only the three of non est factum, gambling, or immoral and illegal consideration, and fraud in its procurement. Civ. Code 1895, § 3694. Neither of these is set up in this case. It is admitted that the plaintiff bank obtained the note for a consideration before maturity. Unless the note carries upon its face sufficient indicia of fraud or illegality to put the bank on notice, the law presumes that it is a bona fide purchaser. Civ. Code 1895, § 3696. "The holder of a note as collateral security for a debt stands upon the same footing as the purchaser." Civ. Code 1895, § 3697. Was knowledge of the fact that the wife executed the note sufficient notice in law to the bank? By the common law a married woman could not make a note, and in some of the states she is prohibited from making promissory notes payable to her husband. "In this state the right of a married woman to make a contract is the general rule, her disability is the exception, and therefore, where the paper purports to contain a contract which a married woman would have a right to make, an innocent purchaser would be protected against any plea setting up the disability of the maker on account of the contract being within some of the exceptions provided by law. And this would be true, even though the holder knew at the time he acquired the note that the maker was a married woman." Hager v. National German-American Bank, 105 Ga. 122, 31 S. E. 143.

Does the fact that the note of the wife was payable to the husband import notice of any invalidity or infirmity? The only law in the state which restrains a wife from making a contract for her own benefit with her husband is contained in section 2490 of the Civil Code of 1895: "No contract of sale of a wife as to her separate estate with her husband or her trustee shall be valid, unless the same is allowed by order of the superior court of the county of her domicile." The right to contract generally for her own benefit is conferred upon a married woman by the act of 1886. She has the same rights as a man, except as to contracts of suretyship and contracts which assume the payment of the husband's debt. Civ. Code 1895, § 2490, restricts the general right of a married woman to make contracts, and should not be extended by construction beyond the clear and manifest purpose of the statute. The express terms of the section apply only to contracts of sales by the wife to her husband of her separate estate; but the purpose of the act is to protect the wife in every transaction between her husband and herself which involves a transfer of separate estate to him. If there is danger to the interest of the wife in conveying her separate estate to her husband, the same danger exists to the wife in buying property from the husband and transferring in payment her separate estate. Every transaction, therefore, between husband and wife, which amounts to a sale and which involves a transfer of her separate estate, falls within the spirit of the law as expressed in section 2490, and requires, as a condition of validity, the approval of the superior court of the wife's domicile.

It is true that the Supreme Court has in many cases treated as valid a sale by the husband to the wife when there was no order of the superior court allowing the sale; but in none of the cases was the question directly made. In Webb v. Harris, 124 Ga. 733, 53 S. E. 251, Mr. Justice Cobb uses the following language: "If land of the husband be conveyed to the wife for a consideration, the consideration, whatever it be, money, property, or chose in action, is the separate estate of the wife. Hence it follows that in every case of sale between husband and wife there must, in order to render the transaction valid and complete as between them, be an order of the superior court approving the transaction, at least so far as the wife's property involved is concerned." While this language in the particular case was dictum of the learned jurist, we think it so correctly interprets the statute that we adopt it as persuasive and convincing authority. There are, however, some money transactions between husband and wife which do not involve a sale or transfer of her separate estate; as, for illustration, when the husband loans to the wife his money and takes her note to repay the loan, with legal interest, or when the husband buys for the wife property, using his own money, and takes from the wife her note to repay him the money so expended in her behalf. These transactions do not involve a transfer of her separate estate to him and are valid without any order or approval by the superior court.

In the present case the cashier of the plaintiff testified that the husband told him, when he tendered his wife's note to the bank as collateral security, that the consideration of said note to his wife was "mules that he had purchased for her, and paid for, for her, that she was using on her farm." If this statement was the truth, the note was valid in the hands of the husband, and was binding on the wife, without any order or approv-

al by the court. There being transactions, therefore, between husband and wife, where her note payable to him would be entirely valid without the approval of the court, a negotiable note by the wife to the husband would not import any invalidity, and one who took such note for a valuable consideration would not be bound to inquire first if the transaction of which the note was a part was approved by the court. The presumption would be in favor of the note, and its validity would depend upon the facts of the particular transaction. In our opinion, a negotiable note executed by the wife to the husband as payee is presumptively valid, and whoever takes it before maturity, for value, and without notice of invalidity or equities, is protected in his title, except as to those defenses allowed by section 3694 of the Civil Code of 1895. In the present case the wife executed her note payable to the order of her husband, and delivered it to him. The note then became his property, and he pledged it to the bank to secure a present loan made to him. The note on its face contained no indicia of fraud, illegality, or defect. There was nothing to put the bank on inquiry. If, however, the husband, at the time he negotiated the note, informed the cashier that the note was in fact without any consideration, and was made by his wife simply for the purpose of being used by him as collateral security for a loan from the bank to him, then the note was a contract of suretyship by the wife, and the eventual assumption by her of his debt; and the bank, having notice of these facts, was not a bona fide holder and would not be protected. If, on the contrary, no statement was made to the bank by the husband at all as to the consideration of the note at the time he pledged it for the loan, or if he stated that the note was valid and was in consideration of property which he had bought for his wife and which she then had in her possession, the bank would be a bona fide holder and entitled to be protected as such. The evidence was in conflict as to these facts, and the case should have been submitted to the jury.

Judgment reversed.

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(3 Ga. App. 13)

## SESSIONS v. STATE. (No. 688.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

1. CRIMINAL LAW—CONVICTION—MOTION IN ARREST—"COUNTERFEIT."

Where, in an indictment containing more than one count, a defendant waives his right by timely demurrer to attack a defective count, and goes to trial waiving this defect, the judgment finding him guilty will not be arrested upon motion. The conviction will be presumed to be based upon the good count.

(a) The evidence cannot be considered on a motion in arrest of judgment. The motion deals solely with the record.

(b) The word "counterfeit," as used in section 247, Pen. Code 1895, has a broader meaning than that which appertains to it in common parlance. It includes, not only an imitation of a genuine original, but any paper which purports to be a genuine original.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2445, 2475, 2476.

For other definitions, see Words and Phrases, vol. 2, pp. 1650–1651.]

2. FALSE PRETENSES—WHAT CONSTITUTE.

To constitute the offense charged in section 247, Pen. Code 1895 (obtaining goods, etc., on a false writing), it is essential that it be proved that the writing alleged to be false was made in some other person's name, or a fictitious name; and the omission so to instruct the jury was error.

3. FORGERY—EVIDENCE.

Considering the testimony in the light of the admission of the Solicitor General, a conviction of the defendant was not authorized by the evidence, and a new trial should have been granted.

(Syllabus by the Court.)

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Will Sessions was convicted of forgery, and brings error. Reversed.

H. A. Wilkinson, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and J. B. Ridley, for the State.

RUSSELL, J. Will Sessions was indicted by the grand jury of Terrell county. The indictment contains two counts. The first charges forgery, and the second charges the offense of obtaining goods on a false writing. The state elected to proceed on the second count in the indictment. That count is as follows: "And the jurors aforesaid, in the name and behalf of the citizens of Georgia, further charge and accuse the said Will Sessions with having committed the offense of felony, for that the said Will Sessions, in the county aforesaid, on the 17th day of January, 1906, did then and there designedly, by color of a false and counterfeit writing in words as follows, to wit: 'Mr. Brown: Let Will Sessions have what he wants in plow tools, and I will see to him paying you when he gets through with me. Jeter'—obtain from D. W. Brown plow tools of the value of $2.05, with intent to defraud the said D. W. Brown, contrary to the laws of said state, the good order, peace, and dignity thereof." Section 247 of the Penal Code of 1895, under which this count is brought, is as follows: "If any person shall designedly, by color of any counterfeit letter or writing, made in any other person's name, or fictitious name, obtain from any person money, or other valuable thing, with intent to defraud any person, mercantile house, body corporate, or company of the same, he shall be punished by imprisonment and labor in the penitentiary for not less than two nor longer than seven years."

After the defendant was convicted, he moved in arrest of judgment, upon the ground that the indictment under which he was convicted alleged and set forth no crime against the laws of the state of Georgia, for the reason that the indictment does

not allege that the counterfeit writing was made in any other person's name, or a fictitious name, or that the name of any person was signed to the alleged writing, or that the signature was the name of any other person, or a fictitious name. The court overruled the motion in arrest of judgment. Thereafter the defendant moved for a new trial, which was refused. Two questions are presented by the record: (1) Did the court err in overruling the motion in arrest of judgment? If so, this would be conclusive of the case. (2) And, if the court did not err in overruling the motion in arrest of judgment, is the verdict contrary to law?

1. We think the court ruled correctly in overruling the motion in arrest of judgment. There are two counts in the indictment, one good on its face and one defective. The defendant by a timely demurrer could have reached the defect in the second count of the indictment and have availed himself of it. He preferred to waive this right. He went to trial upon the indictment (which, while it contained a defective count upon which he was tried, also contained one good count), and was convicted. The motion in arrest of judgment deals solely with the record. The court cannot look to the evidence to determine the merits of this motion. Nothing can be considered, except the record and the verdict. In passing upon the motion in arrest of judgment, therefore, the court had before it an indictment in which there was one perfect count and a verdict finding the defendant guilty. The court had to presume that the evidence adduced was sufficient to support the first count of the indictment; and, this being true, there was no merit in the motion. That one count in an indictment containing more than one count is bad is no ground for arresting the judgment. The verdict is presumed to have been found upon the good count. Bulloch v. State, 10 Ga. 48; Frain v. State, 40 Ga. 529; United States v. The Pirates, 5 Wheat. (U. S.) 184, 5 L. Ed. 64.

The second exception in the bill of exceptions assigns error on the overruling of the motion for new trial. It is insisted that the court erred in failing to charge the jury that the counterfeit order must be made in some other person's name, or a fictitious name, and that it is essential to the completion of the offense defined in section 247 of the Penal Code of 1895 that there shall be an original paper which the accused is guilty of counterfeiting; that there can be no counterfeit unless there is an original. The writer, considering the rulings quoted in Words and Phrases Judicially Defined, vol. 2, p. 1650, and especially the ruling in State v. Calvin, R. M. Charlton, 151 (before we had carefully analyzed it), as well as the fact that the numerous sections in our Penal Code would seem to provide for all possible species or cases of forgery, was at first inclined to the view that, in order to distinguish the offense from that of forgery, and to authorize a conviction under section 247 of the Penal Code of 1895, there must be shown to have been an original which was imitated. It is said by the Supreme Court of Alabama in Thirman v. Matthews, 1 Stew. 384: "In common parlance a counterfeit is a likeness or resemblance intended to deceive and to be taken for that which is original and genuine." The Supreme Court of Maine, in State v. McKenzie, 42 Me. 394, defined "counterfeit" as follows: "The word 'counterfeit' means to make in imitation something else, with a view to defraud by passing the false copy for genuine or original." In U. S. v. Barrett (D. C.) 111 Fed. 372, a counterfeit was defined to be "an instrument falsely made in similitude of a genuine instrument." In the Calvin Case, above cited, it was held that the use of the word "counterfeit" ex vi termini imported an imitation, likeness, or resemblance, an "imitation of or purporting to be" a genuine original. Upon further consideration and investigation we are convinced that the word "counterfeit," as used in section 247, has a broader significance. If this be not true, the section would be of no effect in any case where the paper used with intent to defraud was made in the name of a fictitious person. If the person purporting to make the counterfeit letter or writing was fictitious, there could never be a genuine original. The word "counterfeit," as used in section 247 of the Penal Code of 1895, evidently refers, not only to an imitation of a genuine original, but to any paper which purports to be a genuine original, whether made in a real person's name or in a fictitious name. A careful study of the question, and especially of the Calvin Case, supra, convinces us that this is the Georgia definition properly applicable to the word "counterfeit" in this section, whatever may be the definition in other jurisdictions.

2. It is further insisted that the court erred in charging the jury as follows: "If you believe from the evidence, and beyond a reasonable doubt, that the defendant, Will Sessions, in Terrell county, on or about the day alleged in the bill of indictment, delivered to D. W. Brown the order or instrument set out and described in this count of the indictment, and if you further believe beyond a reasonable doubt that said order was a counterfeit, and that the defendant delivered the same to Brown for the purpose of obtaining from him the articles alleged in the bill of indictment, and that he obtained the same from Brown, and it was with the intent to defraud D. W. Brown—if you believe that beyond a reasonable doubt, then you will be authorized to convict him under this bill of indictment"—the error, as insisted, consisting in omitting to charge the jury that the counterfeit must have been made in some other person's name or a fictitious name. The defendant was on trial, at the election of the state, for obtaining goods on

a false writing. The defendant, as was his privilege, waived his right to be tried on a good indictment, by declining to demur. Any defendant can do this at his peril. It amounts to saying: "I will consider the indictment as setting forth the offense in form and substance. Prove me guilty if you can." But the waiver of proper pleadings does not include a waiver of proper and sufficient proof to authorize conviction of the offense with which the defendant stands charged in the accusation whose defects of form or substance he is content to waive. Nor does it dispense with any of the essentials of a legal trial, except the matter waived. Suppose I am arraigned on an indictment purporting to be for carrying a concealed weapon, in which it is alleged that at a stated time and within the jurisdiction of the court I unlawfully carried a pistol. This would charge no offense. I have the right to demur or to move to quash the indictment. I can waive this at my option. Suppose that the indictment also contains a count for carrying the pistol to a public gathering, which count is perhaps good in form and substance. If I waive my right to demur and should be convicted on the indictment, I cannot move in arrest of judgment, because I will be presumed to have been convicted of carrying the pistol to a public gathering. But I still have the right to waive my demurrer. And, having waived it, if upon the trial the state voluntarily abandons the charge of carrying the pistol to a public gathering, my waiver will extend just as far as it did before to the defects in the pleadings, and no further. I am then on trial on an accusation which I admit properly charges me with carrying a pistol concealed. But by my plea of not guilty I deny my guilt, and it is incumbent on the state to prove my guilt of that offense just as much as if the indictment were in fact perfect. The jury, in such a case, would have to be instructed that they must be satisfied that I carried the pistol concealed before I could be found guilty.

We think, therefore, that the fact that the defendant waived his right to demur (for both counts of the present indictment are demurrable) extended no further than to waive his right to be tried upon a perfect indictment. The law applicable to the offense of which he stood accused (even if the charge in the accusation was fatally defective) should have been as correctly submitted to the jury, and the evidence should have shown his guilt as satisfactorily and fully, as if all counts in the indictment were perfect. Otherwise, if one requisite could be dispensed with, so could another and another, until the defendant's mere waiver of a defect in the pleadings would amount to a plea of guilty. The charge delivered was, therefore, error, in that the jury were not instructed more fully what kind of counterfeit the defendant must have been shown to have used with intent to defraud, and especially in that the jury were not charged that the evidence must show that the counterfeit order was made in some other person's name, definitely pointed out in the evidence, or a fictitious name, likewise disclosed. It is as essential to the completeness of the offense defined in section 247 that the writing used to obtain money or other thing of value should be shown to be in the name of another person, either a real person, or, if the name signed be fictitious, that that fact be made to appear, as that the instrumentality employed to defraud should be in writing at all, and that the jury should be so instructed. The offense is obtaining goods, etc., on a false writing. The defendant, by not demurring to the omission in the indictment, waived his right to be informed in whose name the writing he was charged with using was made, and whether the person was real or fictitious; but he still had the right, under his plea of not guilty, to have the offense for which the state had elected to try him correctly defined and its essentials stated to the jury.

3. We think, too, that the court erred in not granting a new trial because the verdict is without evidence to support it, and therefore contrary to law. As we have already ruled, the court cannot, in passing upon the motion in arrest of judgment, refer to or consider the evidence. But upon the judge's consideration of the motion for new trial, the case is different. If the question of the sufficiency of the evidence is presented by the motion, it is his duty to compare the evidence adduced with the allegations of the indictment, and determine whether the guilt of the accused has been established to his satisfaction. But this is by no means all of his duty. The trial judge is charged with a responsibility of completely reviewing the whole case, which is lodged with no other power in this state. He is empowered to exercise a discretion which is not within the jurisdiction of the Supreme Court or of the Court of Appeals. He can review the verdict of the jury, and, considering every phase of the testimony, testing its reasonableness or unreasonableness, and even applying his own opinion and knowledge as to the credibility of the witnesses to their testimony, see whether justice has in fact been done by the rendition of the proper verdict upon the evidence submitted; and, if he is satisfied that injustice has been done, he has the power to order a new trial. Courts for the correction of errors have no such power, and hence, if a verdict has any evidence to support it, the approval of the trial judge is an indorsement of the truth of the testimony in support of the verdict, which places the credibility of such testimony beyond question. But, as we stated above, this is not the whole duty of the trial judge upon review of the case on motion for new trial. He has the whole trial under review, and knows everything

which has transpired in the presence of the court during the investigation.

In this case the state elected to try the defendant on a defective count in the indictment, after the close of the evidence. This was tantamount to an admission in judicio by the state that the defendant was not guilty of forgery as charged in the first count. After conviction, under numerous decisions, the presumption arose that the defendant had been convicted on the good count. The election of the state to try the defendant on the count for obtaining goods on a false writing amounted to an admission in judicio that the state had failed to sustain the charge of forgery; and the evidence in the record does not prove that the defendant forged the paper in question. There being no evidence to authorize a conviction for forgery (that is, upon the only good count in the indictment), and, to the contrary, an admission by the state that the defendant was not guilty of that offense, the verdict was, for want of evidence, contrary to law, and a new trial should have been granted.

Judgment reversed.

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(3 Ga. App. 1)

## SEABOARD AIR LINE RY. v. SMITH.

(No. 543.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

1. WRIT OF ERROR—ASSIGNMENT OF ERRORS.

Where exceptions pendente lite have been filed to interlocutory rulings, the better practice is to assign error on them in the bill of exceptions. However this is not exclusive, for the error may be assigned in this court at any time before the argument is begun.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3043–3048.]

2. CARRIERS — EXPULSION OF PASSENGER — PETITION—VERDICT—DEMURRER.

The court erred in overruling the special demurrer to one of the counts to the petition.

(a) A general verdict cannot be sustained, when there are two counts in the petition, one good and one bad, and the court has erroneously, over protest by demurrer, submitted the bad count, as well as the good one, to the consideration of the jury.

(b) An erroneous refusal to sustain a valid special demurrer vitiates the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 777–781½.]

3. CARRIERS — EXPULSION OF PASSENGERS — LIABILITY.

Where a passenger, after being put off a train at or near a station, walks down the track of the railroad three or four miles, and is there struck by another train, without fault or negligence on the part of the crew in charge of the latter train, the railway company is not responsible for the homicide, although the passenger was drunk at the time he was put off the train. Even if the crew who put him off were in any wise negligent in so doing, such negligence cannot be considered the proximate cause of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1483–1487.]

(Syllabus by the Court.)

Error from City Court of Reidsville; C. L. Morgan, Judge.

Action by Mary Smith against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Reversed.

Tom Eason, J. J. Bull, and Kelly & Smith, for plaintiff in error. L. C. Harrell, Hines & Jordan, and W. T. Burkhalter, for defendant in error.

POWELL, J. Mary Smith sued the Seaboard Air Line Railway for the homicide of her unmarried and childless son, Hamp Smith, who supported her. In her original petition she alleged that the deceased was a passenger on a train of the defendant company from Savannah to Claxton, Ga.; that he was asleep when Claxton was reached, and was carried beyond his station; that the conductor, when he discovered his presence, aroused the deceased, carried him to the rear end of the coach, and threw him off, while the train was going rapidly, whereby the deceased came to his death. This was alleged to have taken place between Manassas and Collins. By a new count, filed in amendment of her petition, plaintiff alleged that her son was a passenger on defendant's train from Savannah to Claxton; that he was drunk and asleep when he reached Claxton, and was carried to Collins; that at Collins the conductor and the porter took her son, who was so drunk that he could not take care of himself, to the rear end of the rear coach of a long excursion train, there put him off in his drunken and helpless condition at night, some distance from the station, on or near the track of the defendant, left him there without calling anybody's attention, and he wandered off down the track of the defendant and was killed by another train of the defendant. This last-mentioned fact is alleged in the ninth paragraph of the amendment in the following language: "And [he], in said drunken and helpless condition, wandered off down the track of the defendant, towards the town of Manassas, when between the fifty-seventh and fifty-eighth mile posts on said railway of defendant said Hamp Smith * * * was run over and killed by another train of the defendant." To the petition as amended the defendant demurred generally, and to the allegation just quoted specially, because it is too vague and indefinite and not sufficient, in that the distance from the fifty-seventh and fifty-eighth mile posts, where the homicide is alleged to have occurred, to Collins, does not appear; also that it does not appear how far this place was from Claxton. To the overruling of the demurrer exceptions pendente lite were filed. The trial resulted in a verdict for the plaintiff in the sum of $4,000. The defendant moved for a new trial, and to the overruling of this motion brings error. While error is not assigned in the bill of exceptions upon the exceptions pendente lite, still these exceptions were specified and brought up as a part of the record, and error was assigned in the brief filed before argument was begun

in this court. Since we have concluded that the court erred in overruling the demurrer, it will not be necessary to make any report of the evidence or of the grounds of the motion for a new trial.

1. The point is made that the rulings of the trial judge upon the demurrer cannot be considered, because, while exceptions pendente lite were filed and were transmitted with the record, no assignment of error thereon appears in the bill of exceptions. The plaintiff in error did, however, assign error thereon in his brief filed before the argument was begun in this court. While the better practice is to assign error upon the exceptions pendente lite in the bill of exceptions, or, if this is not done, to assign it by a separate paper filed with the record prior to the call of the case for argument, yet there is no rule forbidding that this assignment of error shall be made in the brief of counsel. This practice is not a good one, for various manifest reasons; but the precedent of the Supreme Court has been to allow it.

2. The court should have sustained the special demurrer to the ninth paragraph of the petition as amended, on the ground that the distance from the place where the deceased was put off the train to the place where he was killed is not shown. While, of course, rulings on demurrers are to be considered entirely apart from the evidence adduced upon the trial, still the fact that this special demurrer was not captious or ill-founded is made manifest by the result which was afterwards reached on the trial. If to meet this demurrer the plaintiff had amended by alleging the truth, as it finally appeared, that the distance from Collins, where the deceased was put off the train, to the point where he was run over by the second train and killed, was between three and four miles, the second count should have been stricken, on the ground that no cause of action was therein set out. We will now merely announce this general conclusion that the statement of this distance would have negatived liability on the part of the defendant, and will discuss the reasons further on in the opinion.

There was some slight evidence, perhaps enough, to prevent this court's interference with the verdict on the ground that it is contrary to the evidence, and yet hardly enough for us to believe that any intelligent jury would have found, or the honest trial judge would have approved, a verdict thereon tending to sustain the theory of the first count—that the agents of the railway company deliberately hurled the deceased from the train as it was going at full speed, thereby causing his death; also, there was evidence which, if the distance which the deceased walked down the track after he was put off be considered as immaterial, would have sustained the theory of the second count, as it is alleged, and upon this count the verdict in all probability was rendered by the jury and approved by the trial judge. So that the failure of the court to sustain the special demurrer was, as it developed, peculiarly harmful to the defendant; for the verdict being general may be presumed in legal contemplation to be founded upon either of the counts. Substantially the same state of things arose in the case of Sutton v. State, 122 Ga. 158, 160, 50 S. E. 60, wherein the court says: "The general rule is that, where there are several counts in an indictment, a general verdict of guilty is valid if there be one good count, though the others are defective; the presumption being that the verdict was rendered on the good count, and not on the defective ones. This general rule does not apply, however, when there are two counts in an indictment, one good and the other fatally defective, and where a demurrer to the defective count has been improperly overruled. In such a case a general verdict of guilty cannot be sustained, since it is impossible to know on which count it was rendered; and, if rendered on both, the verdict of necessity must be illegal. 22 Enc. Pl. & Prac. 843, 844; McMurtry v. State, 38 Tex. Cr. R. 521, 43 S. W. 1010; Avirett v. State, 76 Md. 510, 25 Atl. 676, 987; People v. Turner, 113 Cal. 278, 45 Pac. 331. As the accused, in the present case, was forced to trial on both counts in the indictment, on the bad as well as on the good, the trial was illegal, and it is not necessary for the court to pass on the various rulings made during the trial of which complaints were made in the motion for a new trial." For the reason given in the language just quoted, as well as for the reason that it has been the uniform ruling in our courts that the erroneous refusal to sustain a special demurrer vitiates the whole trial, it follows that the judgment must be reversed, and that it is unnecessary and in fact unwarranted that this court should consider further assignments of error. Cagle v. Shepard, 1 Ga. App. 192, 57 S. E. 946; Warren v. Powell, 122 Ga. 4, 49 S. E. 730; Western Union Telegraph Co. v. Griffith, 111 Ga. 656 (3), 36 S. W. 859; Mayor of Eastman v. Cameron, 111 Ga. 113, 36 S. E. 462.

3. However, we deem it apposite to the ruling made that we should discuss at some further length the law on which it is based. The negligence of the defendant, according to the second count of the petition, consisted "in expelling said Hamp Smith from said train at night and in the dark, and leaving him upon or near the track of the defendant company, in his then drunk and helpless condition; in leaving him upon or near the track of said defendant, in said drunken and helpless condition, without any one to take care of and guard him, without calling the attention of any one to him in his said helpless and drunken condition, and thus permitting him to wander off and on its track, and not taking said Hamp Smith to its station and waiting room at said town of Col

lins." There is no allegation or contention that the crew of the second train, the one that actually struck and killed him, were in any wise negligent; nor is there any allegation that the place where the deceased was put off was unsafe or dangerous, further than may be inferred from the general allegation that it was adjacent to a railway track. Now negligence, to be actionable, must be the proximate cause of the injury. This is axiomatic. If a passenger or a trespasser is put or thrown off a train in a helpless condition, whether the helplessness be the result of drunkenness, accident, or sickness, and in this helpless condition is left by the train crew in a dangerous place, and the condition of his helplessness and the nature of the danger are such that by reason of the one he will not likely avoid the other, and, as a result of thus being exposed, he, as a natural consequence, without the intervention of other conscious and efficient agencies, encounters the danger and is injured, the negligence in so leaving and exposing him is the proximate cause of the injury. Macon, Dublin & Savanah R. Co. v. Moore, 125 Ga. 810, 54 S. E. 700; Southern Railway Co. v. Webb, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109; Central R. Co. v. Thompson, 76 Ga. 770; South Carolina R. Co. v. Nix, 68 Ga. 573 (8). But a man, although to some extent drunk, who is able to walk for three or four miles, is not helpless as against the only danger which this petition shows to have existed—that of being run over by a subsequent train that he might happen to meet after going that distance. As was said by Mr. Justice Samuel Lumpkin in the case of Georgia Southern & Fla. R. Co. v. George, 92 Ga. 766, 19 S. E. 815: "This case is entirely unlike those where a man who is helpless from drunkenness, or other cause, is left in a situation where he is likely to be injured, should he remain, or, in attempting to leave the point where he was ejected, would be subjected to danger. The homicide of the deceased did not occur at the place of ejection, or because of such ejection, but at another time and place, and under circumstances sufficiently remote, we think, to make it impossible, with any degree of fairness, to refer his death to the first wrong inflicted upon him by the company, if, indeed, his expulsion from the train was any wrong at all."

While the evidence makes this fact appear much clearer than the pleadings do, yet the second count of the petition, as it would have read, had it been amended by setting out the distance between the place of expulsion and the injury, leaves no reasonable doubt that the plaintiff's son was responsible for his own death. If the deceased was not so drunk as to be helpless, as to be no longer capable of volition and of exercising the necessary motion to get off the track, he was within the purview of the rule announced in Southwestern R. Co. v. Hankerson, 61 Ga. 115: "If one voluntarily becomes drunk, and consequently falls down, or lies down, in a state of insensibility on a railroad track, so that he is injured by a passing train, he cannot recover for injuries so received, even though there may have been contributory negligence on the part of employés of the road." See, also, King v. Central R. Co., 107 Ga. 757, 33 S. E. 839; Parish v. Railroad Co., 102 Ga. 290, 29 S. E. 715, 40 L. R. A. 364; Berry v. Northwestern R. Co., 72 Ga. 139; Southwestern R. Co. v. Johnson, 60 Ga. 668. In the Glass Case, 60 Ga. 442, a recovery was upheld where the deceased was put off a train drunk, and, after he had walked a mile and a half, was so struck by another train; but the court sustained the recovery expressly on account of proof that the second crew was negligent. While the petition in the case at bar, in general terms, alleges that the defendant was negligent in leaving the deceased near the track without any one to take care of him or to guard him, and without calling the attention of any one to him, thereby "permitting him to wander off and onto its track" and in "not taking said Hamp Smith to its station and waiting room at said town of Collins," yet it can easily be seen that none of these things charged to be negligent were in fact a breach of duty to him. As was said by Chief Justice Jackson in the case of Central Railroad v. Thompson, 76 Ga. 778: "Undoubtedly it is the duty of a railroad company so to fix its station or depot that a passenger, who gets off at the depot or place to alight, may get off the car without danger; and it is also its duty to fix such a way of exit from the depot over its right of way that the passenger may go away from the place he is invited to get on and off at without danger to life or limb; but it is not its duty to see him safe and secure in his exit from the track and over its right of way. The cars are often gone, with the officers and agents of the company aboard, before the passenger leaves the spot where he was landed at the depot, and who is to use this extraordinary diligence to see him clear over the right of way, safe and secure on his route home? Not the conductor, for he is gone. Not the agent at the station, for it is not in the line of his business. Must the company employ some one to accompany him, or watch him as he leaves the depot, and until he is over the right of way? We think not. The obligation of the company is to furnish the way—an easy and safe way out of the car by steps onto the landing at the depot, and a safe road or path thence over its track and right of way at the depot—and there its obligation ceases in these respects. The passenger must himself step off on the convenient arrangement for his egress out of the car and over the road prepared for that exit. It is not bound to insure him a safe exit, but to insure him only a safe way for him to use for an exit."

Let the judgment be reversed.

(3 Ga. App. 7)

## CLOUD v. SCARBOROUGH. (No. 633.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

1. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—GROUNDS—ACTS OF CREDITOR.

The acts of a creditor which, under the provision of Civ. Code 1895, § 2972, will effect a discharge of a surety, are of three distinct and independent classes. Each class is of a different nature, and neither class is necessarily related to the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 135–140.]

2. SAME—PROOF OF LOSS BY SURETY—NECESSITY.

It is only when the discharge of a surety is claimed upon the ground that the act of the creditor has injured him that proof of loss on the part of the surety is required, and in some such cases it might not be necessary. Proof of a loss by the surety is not required, where his discharge is dependent upon an act of the creditor which has increased his risk, nor where it is claimed that the act of the creditor has operated to discharge the surety by exposing him to greater liability.

3. SAME—FAILURE TO RECORD MORTGAGE.

Failure to record a contemporaneous mortgage given to secure an indebtedness evidenced by a promissory note, for the payment of which one is surety, discharges the surety. Such failure of the principal to perform a duty to the surety is "an act of omission" which increases the surety's risk, and no actual loss by the surety need be shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 263.]

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action in a justice's court by W. H. Scarborough against Emma Cloud. From a judgment for plaintiff in the superior court on appeal from the justice's court, defendant brings error. Reversed.

W. H. Scarborough sued Miss Emma Cloud in a justice's court on a promissory note. The case was appealed to the superior court of Sumter county, and came on for a trial in its regular order June 4, 1907. The defendant filed a plea setting up that T. B. Powell was the true maker of the note sued upon, and that she signed the same as surety, and that both of the notes sued upon were secured by mortgages on personal property and that said mortgages were not recorded by the plaintiff. No point was made as to the sufficiency of the pleadings of either the plaintiff or the defendant. The following facts were agreed upon by the counsel: That T. B. Powell, the principal maker of the notes was dead when the plaintiff's suit was instituted against the defendant; that the defendant signed the notes as surety, and received no part of the consideration of the notes; that each of the notes sued upon was secured by mortgage on personal property, and that the mortgage had never been recorded. It was further agreed that the cause should be submitted for decision by the presiding judge without a jury, and that the only question involved was whether the failure of the plaintiff to record the mortgages was such an act of the creditor as would discharge the defendant. The judge of the superior court rendered judgment in favor of the plaintiff against the defendant for the amount of the notes, together with interest, and this judgment is assigned as error.

Ellis, Webb & Ellis, for plaintiff in error. Blalock & Cobb, for defendant in error.

RUSSELL, J. (after stating the facts as above). The question presented by this record is whether the surety on a promissory note secured by mortgage is released and discharged by failure to record the mortgage; and, furthermore, is the surety released by failure to record the mortgage, irrespective of any proof of loss on his part? To both questions we answer unqualifiedly, "Yes." Whatever may be the rulings upon these questions in other jurisdictions, there can be no doubt as to the decision in this state. Our Code section upon this subject is of judicial origin, being merely the adoption and incorporation into the Code, by legislative approval, of the principles previously asserted in Brown v. Ex'rs of Riggins, 3 Ga. 412, and Jones v. Whitehead, 4 Ga. 401. This section of the Civil Code of 1895 (section 2972) declares that "any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk, or exposes him to greater liability, will discharge him. A mere failure by the creditor to sue as soon as the law allows, or negligence to prosecute with vigor his legal remedies, unless for a consideration, will not release the surety." It will be noted, from the language employed, that the act which will discharge the surety need not include and partake of the same nature of detriment to the surety. It need not be shown that the act of the creditor, relied upon as a discharge, not only injured the surety, but also increased his risk and exposed him to greater liability. On the contrary, the acts which may effect the discharge of the surety are divided into three distinct classes, not necessarily related to or affecting each other; and proof of any act coming within either class—either an act which injures the surety, or an act of the creditor which increases his risk, or an act which exposes the surety to a greater liability—will discharge the surety. It is only when the act complained of falls in the first class—when it is claimed that the surety has been injured—that proof of loss is necessary. Loss or proof of loss, is not essential, to discharge a surety, either in a case where the act of the creditor increases the risk of the surety, or where he seeks to be released because the act of the creditor has exposed him to greater liability.

The distinction between the first ground of discharge and the other two is apparent, because the injury naturally refers to something in the past from which the injury resulted.

This distinction has been recognized by the numerous decisions in which it has been held that proof of actual loss was not necessary to be shown in order to effect the discharge of the surety. In each of these cases the act was one by which the risk of the surety was increased or he was exposed to greater liability. The identity or distinction between the class of acts which increase the surety's risk and those which expose him to greater liability is not so marked nor as readily apparent. But it is possible to conceive of many cases in which the independent identity of each may be recognized. The retaining of usury by the creditor without the knowledge or consent of the surety, by which the security of the homestead, afforded by the principal debtor, is forfeited, falls within the class of acts by a creditor by which the surety is released because his risk is increased. The release of a surety by an act of the creditor falls in the class of acts by which the surety is exposed to greater liability, because the release of one surety would deprive the other surety of his right to have a contribution in the event the principal failed to discharge the obligation. As it was admitted in the agreed statement of facts that the plaintiff in error was only a surety, and that the mortgage security taken contemporaneously with the notes had not been recorded, we think the court erred in rendering judgment against the defendant. She was released by the failure of the creditor to record the mortgage in a reasonable time, whereby her risk was increased. The mortgage was pro tanto a security in her behalf, and the duty devolved on the creditor, not only to see that the security was not destroyed, but also to have a care it was not endangered.

The decision of this case is necessarily controlled by the judgment of the Supreme Court in Toomer v. Dickerson, 37 Ga. 428. The Toomer Case is squarely in point on the only issue involved in this case, as it was the only one in that. Chief Justice Warner, delivering the opinion of the court, says (page 438): "Is this failure to record his mortgage in obedience to the requirement of the law such an act of omission on the part of the creditor as increased the risk of the security or exposed him to greater liability? The language of the Code is, 'any act of the creditor,' which may as well be an act of omission as any other act, whereby the risk of the security is increased or exposes him to greater liability. An act of omission on the part of the creditor, when the law requires him to act, may be quite as potent for mischief to the security as an act of commission. The question to be answered is: Did this act of omission on the part of the creditor, in not doing what the law required him to do, increase the risk of the security, or expose him to greater liability? When we take into consideration the fact that, if the security had been compelled to pay this debt to the creditor, he would have been entitled to the benefit of the mortgage lien upon his principal's property, in short, to have been subrogated to all the creditor's rights and securities held by him against the principal debtor, we shall then readily discover to what extent his risk has been increased, and to what extent he has been exposed to greater liability by the failure of the creditor to record his mortgage as required by law. By the creditor's act of omission to record his mortgage, his lien upon the principal debtor's property (to which his security would have been entitled, to reimburse himself in the event of the payment of the debt by him) will be postponed to all other liens created or obtained against that property, or purchases made from his principal debtor prior to the actual record of the mortgage. But it was insisted, in the argument of this case, that the security had suffered no injury from the failure of the creditor to record the mortgage. Upon that point the record is silent. The security has shown that by the act of the creditor his risk has been increased, and that he has been exposed to greater liability, which is sufficient, prima facie at least, to discharge him. The plaintiff has not attempted to show by any evidence in the record that he was not in fact injured in consequence of his increased risk and exposure to greater liability. We know nothing upon that point in the case, except what the record discloses. The record discloses the fact that in consequence of the failure to record the mortgage, as required by law, the risk of the security was increased, and that he has been exposed to greater liability; at least, such is necessarily the legal effect, from the facts proved in the record. It is not unreasonable to suppose that he may have been mainly induced to become the security for the payment of the debt in view of the fact that the mortgage had been executed by his principal to the plaintiff to secure its payment. If it was now an open question in this court, which it is not, in the opinion of the majority of the court, we should be extremely unwilling to establish the rule that a creditor holding a mortgage upon the property of his principal debtor to secure its payment should be permitted to omit or neglect to perform his duty as required by law, whereby, in consequence of such omission or negligence of duty required by law, the risk of the security is increased or exposed to greater liability, and yet that such creditor should be allowed, under such circumstances, to hold the security liable for the payment of the debt. For the creditor to remain passive when there is no law requiring him to act is one thing, but to remain passive when the law enjoins upon him a duty to be performed in regard to matters in which the security for the payment of his debt has an interest is another and different thing. The creditor should not be allowed, simply because he has ample personal security for the payment of his debt, to remain passive and negligent in the per-

formance of his duties enjoined by law, so as to increase the risk of such security, or to expose him to greater liability."

Counsel for the defendant in error cites Marshall v. Dixon, 82 Ga. 435, 9 S. E. 167, as authority to sustain the decision of the court below; but nothing more is decided therein than that a surety is not relieved from payment of the balance of a note secured by mortgage, remaining unpaid after the creditor has applied the whole of the mortgaged property (at more than its market value) on the note. The reason for this decision is stated to be that the surety got every advantage he could derive from subrogation, and that "not only was the expense of foreclosing the mortgage saved to him, but he got credit for more than the value of the horse." And the court then cites, in support of the proposition that the extinction of securities (instead of the right of subrogation) "operates a discharge only pro tanto—that is, to the extent of their value"—Barrow v. Shields, 13 La. Ann. 57; Provan v. Percy, 11 La. Ann. 179; Neff's Appeal, 9 Watts & S. 36; Everly v. Rice, 20 Pa. 297; Brandt, Sur. § 370; Lewis v. Armstrong, 80 Ga. 402, 7 S. E. 114. The rulings in Griffeth v. Moss, 94 Ga. 199, 21 S. E. 463, and Montgomery v. Martin, 94 Ga. 219, 21 S. E. 513 (though both are cases where mortgages had been given by the principal debtor to secure the debt for which the surety was liable), do not touch the question now presented to us. In the first the only point decided was that sureties were discharged pro tanto, to the extent of the value of the property mortgaged, in a case where the creditor instructed the sheriff not to levy upon the mortgaged property, and it was afterwards, by the mortgagor, placed beyond the reach of a levy. In the second case it was held that where a mortgagee, without the consent of the surety, applies the mortgaged property, or its proceeds, to a debt due him other than that for the payment of which the surety is bound, the surety is likewise released, to the amount thus misapplied by the creditor. If the mortgages involved in these cases were not recorded, the point was not raised. The decision in the case last cited was clearly right, both on principle and authority. The surety could not claim that his risk had been in any wise increased, when the evidence showed, without any contradiction, that the effect of the creditor's acceptance of the mortgaged property in partial payment of the debt had been to diminish the surety's liability, because the creditor allowed considerably more for the property than its market value. The decision in Gay v. Mott, 43 Ga. 253, has no application to the issue in the present case, and the ruling in Palmer v. Melson, 76 Ga. 803, and in Janes v. Penny, 76 Ga. 796, cited by counsel for defendant in error, are not in point.

Neither the rule that exposure to greater liability will discharge a surety, nor the rule that the surety has made out a prima facie case and has shifted the burden upon the creditor by showing an act of the creditor which exposed the surety to greater liability, is in conflict with the rule in Ward v. McLamb, 118 Ga. 811, 45 S. E. 688, Montgomery v. Martin, 94 Ga. 219, 21 S. E. 513, Marshall v. Dixon, 82 Ga. 435, 9 S. E. 167, and Lewis v. Armstrong, 80 Ga. 402 (2), 7 S. E. 114; for the rule laid down in these four decisions, to the effect that the surety is discharged only pro tanto, is a holding to the effect that, where there has been exposure to greater risk, the surety has been discharged. To illustrate this contention: The debt might be for $200, and the value of the personal property covered by mortgage to secure the payment of that debt $100. It necessarily follows that no act of the creditor that would cause the actual loss of this mortgaged property of the value of $100, or expose it to loss, could expose the surety to greater liability as to the whole of the $200, or as to more than the $100, the payment of which the actual value of the property secures, and which $100 would be extinguished by subjecting the mortgaged property to the payment of the debt. As a matter of fact, in such a case there is no security as to the other $100, and hence no act of the creditor, exposing the mortgaged proprety to loss by failure to have the mortgage recorded, or otherwise, can operate to increase the risk of the surety, except pro tanto.

Judgment reversed.

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(3 Ga. App. 21)

## PARKER v. STATE. (No. 775.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

1. CRIMINAL LAW—TRIAL—REMARKS OF COURT—ARGUMENT OF COUNSEL.

It is the duty of the judge to stop an improper argument, but in doing so it is not proper to express any opinion as to what has or has not been proven in the case. The court has no right to interrupt arguments of counsel properly supported by the evidence and by legitimate inference from the testimony. Where defendant's only defense relies upon disproving or discrediting the testimony in behalf of the state adduced against him, his counsel can legitimately discuss the conduct and motive of a witness, himself under indictment for the same offense, who has "turned state's evidence," and argue that his credibility is affected by such conduct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1523, 1670.]

2. SAME—MISTRIAL.

Where counsel has been needlessly interrupted by the court, and the expression and conduct of the court naturally and necessarily tended to impress the jury with the fact that a certain witness, upon whose testimony alone the guilt or innocence of the accused depended, should be believed, and the statement of the defendant should be discredited, a motion for mistrial, properly made, should be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1523.]

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

S. L. Parker was convicted of gaming, and brings error. Reversed.

Sam L. Olive, for plaintiff in error. Thos. J. Brown, Sol., for the State.

RUSSELL, J. The plaintiff in error was indicted for gaming. The only material testimony in behalf of the state was delivered by one Rucker, who was a codefendant. His testimony, if believed, authorized the conclusion that the defendant on trial was guilty. His testimony was that the defendant played and bet for money, and continued to do so after Sam Oglesby and Freeman Jones got there. He testified, moreover, that he was one of the defendants charged, jointly with Parker and others, with gaming; that he had never been tried, and that nothing had ever been said about trying him; that he had no attorney to represent him; that he worked on the place of the brother of the solicitor; that he did not know whether he would get off lighter for testifying against the others, or not; and that nobody had ever even asked him what he new about the case. Two other witnesses introduced in behalf of the state, Oglesby and Jones, who were mentioned by the witness Parker, testified that they did not see the defendant doing anything, and that, if Parker was playing, they did not see him, and could not say for certain whether he did or not. The defendant, in his statement to the jury, said: "I was down there where the defendants were gambling, watching them. I did not play or bet myself. Wilborn Rucker was gambling, and is just swearing all this on me to get off lighter himself." The foregoing was all of the material testimony submitted to the jury, and the statement of the defendant in full. It is readily to be seen that, if the testimony of Rucker was believed by the jury to be the truth, the defendant was guilty. If it was untrue, the state failed to prove his guilt, and the defendant's defense was absolutely dependent upon discrediting the testimony of the witness Rucker, already weakened by the fact that the two witnesses introduced in behalf of the state (who, he had testified, were present when the defendant on trial was gambling) had refused to corroborate him, and, on the contrary, had agreed in their testimony partly with the statement of the defendant that, while he was present, he was only watching the gaming. In the state of the record, it was perfectly legitimate for the defendant's counsel to attack the veracity of the only real witness in behalf of the state, and, in doing this, to analyze his conduct, expose his motive, and thereby submit to the jury the issue whether such motive should affect his testimony and weaken its force. The motive of the witness is always subject-matter of investigation and of legitimate comment. In a criminal case, if the motive be controlling, it may be sufficient to create a reasonable doubt.

Counsel for defendant, in commenting on the testimony of Rucker, was making the following argument to the jury, as certified to by the presiding judge: "This witness is undoubtedly testifying with hope of getting off with a light fine, or without any punishment. He is a joint defendant, and has never been tried. He tells you that nothing has been said about trying him; that he has no attorney to represent him. He works on the place of the brother of the solicitor, and is furnishing the sole evidence upon which this defendant could be convicted. He is trying to convict the other defendant in order to save himself. You know, gentlemen of the jury, that he has been promised a lighter fine for testifying in this case." At this point in the argument of defendant's counsel, the court interrupted the argument, by saying to counsel, in the hearing of the jury: "Mr. Olive, that argument is improper, and will not be allowed. There is no evidence to support it, and it is a reflection on the court. No defendant in this court has ever received a lighter penalty on account of being a witness for the state, nor ever will." Exception is taken to the above language of the court, upon the ground that the argument being made was not improper, and that facts and circumstances brought out by the testimony, together with the defendant's statement, fully justified the argument in question; that the interruption of the court was improper, and was in effect telling the jury that the witness was not testifying in the hope of benefiting himself, and that his credibility as a witness should not be affected thereby. It is further insisted that the statement by the court, that "there is no evidence to support it and it is a reflection upon the court," was an expression as to what had or had not been proved, and was error. And in the motion for a new trial it is further contended that the court, to all intents and purposes, constituted itself a witness to disprove the conclusion drawn and argued by movant's counsel, and that the statement by the court that the argument was improper was, in effect, telling the jury that they should disregard the theory that the witness was swearing falsely for personal interest.

It is with the greatest reluctance and with the gravest sense of responsibility that a court of review will control the conduct of a trial judge in the administration and exercise of the high duties which devolve upon him. We are well aware of the wellnigh universal truth that these judges endeavor, without favor or affection and in the fear of God only, to discharge their trusts. The frequent recurrence of circumstances tending to disturb their equanimity and the nature of the office is a matter of which this court can take judicial notice; and it is essential to the orderly administration of the law and to the perpetuation of justice and

civil liberty that the trial judges should be treated with all the respect due to their exalted office and commensurate to the manner in which these duties are performed. While counsel, in his discharge of his duties to his client, is a peer of the judge upon the bench, and may try to do anything necessary and proper for the protection of his client's rights, provided it be done in that courteous and respectful manner due to the dignity of the court, and while, on the other hand, the court has the power and the duty of enforcing proper respect and of dealing summarily with any infraction of its rules or with any violation of that respect due it, still we see nothing in the remarks of the counsel in this case which can be construed as a reflection upon the court. If counsel had been guilty of contempt of court, the court would have been authorized to punish for that contempt, within the statutory limits accorded to his discretion. The statement of counsel that "you know that he has been promised a lighter fine for testifying in this case" would require an extremely strained construction to involve the judge—a construction which, so far as our observation and experience goes, as well as our conception of the office of judge, would not, without more, have been authorized. According to our conception of the office of judge, neither his duties, his opinion, nor (if he be an upright and impartial judge) his inclinations, lead him into any contact with the witnesses in the case, or afford him any knowledge whatever of any facts involved in the preparation of the case for trial. He neither knows nor cares for anything in the case, except as it is presented to him by the pleadings, evidence, and argument of counsel, and such motions as may be addressed to him in his official capacity and in open court. The statement made in the argument of counsel that a witness had been promised a lighter penalty can by no construction involve the judge of the court. To so presume would be to assume that the judge was not impartial in the case, and that he had been assisting in the preparation of the case. It is common practice (and we cannot say but that it is in some cases in the interest of justice) to refuse to prosecute one of several offenders in order to effect the conviction of other defendants, who might otherwise escape their just deserts. This is within the power of the prosecuting attorney, and this action may be taken by him in the conduct of his duties without the knowledge of the judge; and while he cannot dispose of the case, either by nolle prosequi or otherwise, without the consent of the judge, the judge has no power to force the solicitor to try the case. Upon complaint made, he might appoint a solicitor pro tem.; but this would be the extent of his power. No matter how a defendant may have been induced to become a witness in behalf of the state against his codefendants, the fact that he has turned state's evidence is always a legitimate matter of comment, as affecting his credibility. Counsel for the defendant had the right to comment, in this case, upon the admission of the witness that he was a defendant, that he lived on the farm of the brother of the solicitor, that he had not thought it necessary to procure counsel to defend him, and that he never told any one what he would testify, and yet, in spite of all this, he did not know whether his case would go lighter with him or not. The stress of the case was on this witness. The defendant's only hope to escape conviction, by restoring the mantle of presumed innocence which this witness' testimony had torn away from him, was by satisfying the jury that the testimony of the witness was either false or extremely doubtful. The argument of counsel was legitimate and proper, and should not have been interrupted by the court.

The exception that the judge's interruption and language amounted to an expression of opinion upon the evidence is also well founded, and under the mandatory terms of Civ. Code 1895, § 4334, absolutely demanded a new trial. That the acts of a judge, taken with his sayings, can amount to an expression of opinion was definitely decided in Burke v. State, 66 Ga. 159, as well as in Durham v. State, 2 Ga. App. ——, 58 S. E. 555. In the Burke Case, where a judge, in the presence of the jury, ordered the arrest of some of the defendant's witnesses, and the arrest was made in the presence of the jury, Judge Crawford said: "The influence and power of a just and upright judge over the minds of jurors in his court, jointly trying with himself the guilt or innocence of a party charged with crime, is scarcely to be estimated. Indeed, in all cases, to their credit be it spoken, they listen with attention to his utterances, and endeavor to follow what they conceive to be his views of the justice of the particular cause before them. Hence our law provides that if a judge, during the progress of a case, or in his charge to the jury, shall express or intimate his opinion as to what has or has not been proved, or as to the guilt of the accused, then a new trial shall be granted. We think that the arrest of witnesses who had just testified for the defendant, under the circumstances stated in the bill of exceptions, and which are testified to be true by the judge, is such an expression of opinion, not only as to what had been proved, but also as to the guilt of the accused, as to bring this case within the meaning of section 3248 [now section 4334] of the Code, and therefore we are required to grant a new trial." The jury had the right to believe the defendant's statement in preference to the sworn testimony. The defendant had said that Rucker was swearing all this to get off lighter himself. The statement of the learned and upright judge of the city court completely annihilated and obliterated this statement.

2. The fifth ground of the amended motion for a new trial complains that the court erred in overruling the defendant's motion for a mistrial. This motion was made immediately after the interruption by the court which has been quoted above, and after the court had accepted the explanation of defendant's counsel and his disclaimer of any intention to reflect upon the court, but after the judge had adhered to his former ruling that the argument being made was improper. From what we have stated above, it is manifest that the interruption by the court and the language used were improper and highly prejudicial to the defendant, and were such an expression of opinion on the part of the court as deprived the defendant of his right to an impartial and legal trial. Consequently the court erred in not awarding a mistrial, and in not granting a new trial because of his refusal to withdraw the case from the jury upon the defendant's motion.

Judgment reversed.

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(3 Ga. App. 30)

## ARRINGTON v. STATE. (No. 793.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

1. KIDNAPPING—INDICTMENT—SUFFICIENCY.

In an indictment for inveigling children, under Pen. Code 1895, § 110, where it is alleged that the defendant "did fraudulently, maliciously and forcibly lead, take, and carry away, and did entice and decoy away one Marshall Adams, a boy child under the age of 18 years, from his parents and against the will of his parents," it is unnecessary to state the names of the parents of the child said to have been kidnapped, or the name of the father.

2. SAME—ELEMENTS OF OFFENSE.

The offense charged in section 110 of the Penal Code 1895, is complete if it be shown that the accused fraudulently decoyed or enticed away a child under the age of 18 years, against the will of both of his parents, and without the consent of either of such parents, even though it be not shown that the accused either forcibly or maliciously did lead, take, or carry away the child in question. It is sufficient, to authorize conviction of this offense, if it be shown that the child in question was decoyed or enticed away from parental control without the consent of the parent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Kidnapping, §§ 1–3.]

3. SAME—SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; H. M. Holden, Judge.

J. E. Arrington was convicted of kidnapping, and he brings error. Affirmed.

R. N. Hardeman and Jas. N. Hines, for plaintiff in error. Alfred Herrington, Sol. Gen., for the State.

RUSSELL, J. The plaintiff in error was convicted of the offense of kidnapping. Three errors are assigned: The overruling of a demurrer; a portion of the charge of the court; and that the verdict was contrary to law, because unsupported by the evidence.

1. There was no error in overruling the demurrer, which was based on the ground that the indictment did not set out the names of the parents of the boy alleged to have been kidnapped, nor distinctly allege that the boy was enticed and decoyed away against the will of his father, and that the name of his father is not set out in the indictment. Section 110 of the Penal Code of 1895, as was held in Gravett v. State, 74 Ga. 195, provides for two cases; one where the child kidnapped had a parent or guardian, and the other where it had neither. In the former case, if the child is forcibly, maliciously, and fraudulently led, taken, or carried away, or is enticed away against the will or without the consent of the parent or guardian, irrespective of that of the child, this alone would complete the offense. "The purpose of the statute is two-fold. Its object is to protect not only the rights of parents and guardians, but also those of children." By this indictment it is plainly shown that the child in question did not belong to the class who have neither parent nor guardian, but that he had living parents. The offense is charged in the terms and language of the Code, and so plainly that the nature of the offense can be easily understood by the jury. This is all the law requires. "The law does not require the evidence to be set out in the indictment." Dowd v. State, 74 Ga. 15. In Pruitt v. State, 102 Ga. 688, 29 S. E. 437, it is true, the indictment gave the names of the parents and alleged that the abduction was without their consent. In that case it was held that it was unnecessary to negative the consent of the guardian, or to allege that there was no guardian, by reason of the fact that the father was stated to be in life, and therefore the legal presumption was that the control of the child had not passed from the guardian to the father. The rule for determining the validity of an indictment, as held by Judge Bleckley in Newman v. State, 63 Ga. 534, is: "If all the facts which the indictment charges can be admitted, and still the accused be innocent, the indictment is bad; but if, taking the facts alleged as premises, the guilt of the accused follows as a legal conclusion, the indictment is good." By demurrer the defendant admitted that the boy, Marshall Adams, whom he was alleged to have inveigled away, had living parents, and the court judicially knew that these could consist of but two persons. It was alleged that he was enticed and decoyed away against the will of these parents; and, while it would have been sufficient to have alleged that he was enticed and decoyed away against the will of the father, the inclusion of the father in the term "parents" in no wise affects the validity of the indictment. As the boy could have but two parents, the defendant was as well advised as to their identity as if the names had been given. The

statement that the inveigling was against the will of his parents was sufficient, as stated above, because the term "parents" necessarily included the father. The use of the word "parents" only imposed upon the state the additional burden of proving that the abduction was against the will of the mother as well as of the father.

2. The charge to which exception was taken is as follows: "I charge you that if the defendant did not forcibly or maliciously or fraudulently lead, take, and carry away Marshall Adams from his parents in this county, against the will of both of them, and without the consent of either of them, and did not fraudulently decoy or entice away Marshall Adams from his parents in this county, against the will of both of them, and without the consent of either of them, he could not be convicted of any offense, and should be acquitted." There is no sufficient assignment of error in the record to enable us to discover the specific error complained of, inasmuch as the court seems to have charged the jury exactly what the plaintiff in error insists should have been charged. But in no view of the case is there any error in the portion of the charge to which exception is taken, and which we have quoted above.

3. It is insisted that the verdict of guilty is not authorized by the evidence. The testimony in behalf of the state shows that when the defendant first approached the boy, Marshall Adams, one afternoon, and asked him how he would like to go off and take a trip somewhere, the boy told him he did not care anything about going. The defendant told him, if he would go with him, he would pay all of his expenses, railroad fare, etc., and give him anything in the world he wanted. The defendant kept on after the boy about going until night, and the boy still insisted that he did not care to go. The next morning the defendant went early to the boy's home and repeated his promises of the evening before, and "overpersuaded him," so that at last the boy told him he would go, and he went with the defendant. There was evidence in the case which would have authorized the acquittal of the defendant; but, as the truth of the transaction is for the determination of the jury, the only question presented to us is whether the testimony for the state authorized a conviction. The offense defined in section 110 of the Penal Code of 1895 can be committed in several different ways. It can not only be subdivided in the manner to which we have already referred, as being applicable to, or with reference to, children who have neither parent nor guardian, as well as to those who have one or the other, but the offense can be committed in either event either by forcibly or maliciously or fraudulently leading, taking, or carrying away a child under the age of 18 years, or by decoying or enticing away such child. Where a child is forcibly or maliciously taken or carried away, the crime is complete, if it be against the will or without the consent of the parent or guardian or of the child itself. Where the child is fraudulently decoyed or enticed away, and has either parent or guardian who is entitled to his legal custody and control, the offense is complete if the decoying or enticing from such parent or guardian be without the consent or against the will of such parent or guardian. If a child be fraudulently decoyed or enticed away from its parent without the consent or against the will of the parent, it is not necessary to show that either force or malice entered into the transaction. The parental control has been wrongfully attacked and abrogated, though the child may have been willing to go away, without the necessity for the use of force, and where the accused had no ill will whatever against either parent or child. The evidence in this case, it is true, showed no force and no malice; but we think it authorized the conclusion on the part of the jury that this young boy of 15 years of age (if his testimony was true) was decoyed and enticed away from his parents against their will and without their consent. The word "decoy," as defined by Webster, means "to lead into danger by artifice; to allure into a net or snare; to entrap; to ensnare; to allure; to entice." As it is used in the Code section with the word "entice," its meaning there is, of course, qualified by, and partakes of, the meaning of that word. But if the conviction had to depend upon the word "decoy" alone, we should still think that the conviction was authorized, if the defendant carried the boy away without the consent and against the will of his parents, and substituted his control for that of the parents, for the boy's tender years would most likely lead him into danger, lure him into snares, and entrap him in the meshes of vice and crime when deprived of that parental care, tenderness, and oversight, which the laws of God and man provide for his protection, and the only hand authorized to control the child has been paralyzed by the artifice of the defendant. There can be no question that such a picture as was drawn by the defendant, of having all his expenses paid, getting anything in the world he wanted, would come within the definition of the word "entice." "Entice" means to draw on, by exciting hope and desire; to allure; to attract. Nothing could be more alluring to the minds of some boys 15 years of age than the hope of taking a free trip to sections with regard to which their curiosity has been aroused, and of gratifying their desire to have a good time, in preference to sharing the cares, ofttimes monotonous, which burden them at home. Certainly the law was meant to cover such cases as this, and, while the penalty for such an infraction of the statute should be much milder than for such a crime as Gravett's Case, still that is a matter of judicial discretion, not legally reviewable unless the statutory penalty be exceeded.

Judgment affirmed.

(3 Ga. App. 34)

## J. H. CARTER & CO. v. SOUTHERN RY. CO.

## SOUTHERN RY. CO. v. J. H. CARTER & CO.

(Nos. 463, 464.)

(Court of Appeals of Georgia. Nov. 14, 1907.)

1. DISCOVERY—PRODUCTION OF DOCUMENTS—DISCRETION OF COURT.

The refusal of the court to enter judgment by default against the plaintiff, for failure to produce documents required by notice served on behalf of the defendant, was not an abuse of discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Discovery, § 139.]

2. CARRIERS—CARRIAGE OF GOODS—CONSTRUCTION OF CONTRACT—LAW OF WHAT STATE TO GOVERN.

A contract of carriage, though made in a foreign state, is not necessarily governed, in matters of construction and effect, by the laws of that state, where the contract is to be partly performed in this state. This is especially true as to requirements which are to be wholly performed in this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 220.]

3. SAME—CONTRACTS LIMITING LIABILITY.

A pass entitling a shipper to transportation without payment of fare is a good consideration to support a special contract made by him with the carrier, limiting the latter's common-law liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 643, 644.]

4. SAME—ACTIONS FOR LOSS OR INJURY—PRESUMPTIONS AND BURDEN OF PROOF.

If a carrier relies upon a special contract to vary his common-law liability, the burden is on him to show that any damage which occurred was within the exception, and also that it was not occasioned by his negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 722–725.]

5. SAME—NOTICE OF DAMAGE—WAIVER.

Where a contract of shipment requires the owner or shipper to give notice in writing of any damage to the shipment before it is unloaded, such stipulation may be waived. If the carrier's agent, without objection to the form of the notice, receives and acts upon an oral notice, a waiver of the requirement as to its being in writing results.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 711.]

6. SAME.

The court erred in directing a verdict.

(Syllabus by the Court.)

Error from City Court of Baxley; J. H. Thomas, Judge.

Action by J. H. Carter & Co. against the Southern Railway Company. Judgment for defendant, and plaintiffs bring error, and defendant assigns a cross-bill. Judgment on the main bill reversed, on the cross-bill affirmed.

V. E. Padgett, for plaintiffs. De Lacy & Bishop, Parker & Moore, and Lomar Rucker, for defendant.

RUSSELL, J. This case is before us on a main bill and a cross-bill of exceptions. J. H. Carter & Co. brought an action against the Southern Railway Company for damages to live stock while in transit. After all of the evidence had been submitted, the court, upon motion of defendant's counsel, directed a verdict in favor of the defendant. The plaintiffs moved for a new trial, and now except to the refusal of that motion. The defendant, having properly filed its exceptions pendente lite, excepts, by cross-bill, to the refusal of the court to grant an order peremptorily requiring the plaintiffs or their attorney to produce in court, to be used as evidence by the defendant, certain contracts between the parties, and assigns error upon the refusal of the court to grant a judgment as by default, in favor of the defendant, upon the failure of plaintiffs and their attorney to produce said contract. If the defendant's contention as set forth in the cross-bill is well taken, it will be determinative of the whole case, and for that reason we will first pass upon the cross-bill.

It appears, from the record, that at the June term, 1906, of the city court of Baxley, the present case being then on trial, and a part of the evidence having been introduced, it was brought to the attention of the court that V. E. Padgett, Esq., plaintiffs' attorney, had in his possession, and in court, certain live stock contracts relating to the shipment which was the basis of the suit, to wit, a special live stock contract executed at Ft. Worth, Tex., February 10, 1906, between the Missouri, Kansas & Texas Railway Company and the Ft. Worth Horse & Mule Company, shippers, for the shipment of one car of 30 horses to J. H. Carter & Co., Baxley, Ga., upon certain terms and conditions in said contract set forth; also, a live stock contract executed at Shreveport, February 13, 1906, between the Vicksburg, Shreveport & Pacific Railway and J. H. Carter & Co., shippers, for the shipment of one car, said to contain 30 horses, from Shreveport to Vicksburg, consigned to J. H. Carter & Co., Baxley, Ga.; also, a live stock contract executed at Vicksburg, February 14, 1906, between the Vicksburg, Shreveport & Pacific Railway Company and J. H. Carter & Co., shippers, for transportation of one car, said to contain 30 head of horses, from Vicksburg to Meridian, consigned to J. H. Carter & Co. at Baxley, Ga. Upon the admission of plaintiffs' attorney that he had the said contracts in court, and upon his refusal to produce the same upon the verbal request of defendant's attorney, for the purpose of being used in evidence, the court required the attorney for plaintiffs to produce said contracts instanter, and they were so produced, upon the oral motion of defendant's attorney, who stated in his place that they were material to the issue. Defendant then tendered the contracts in evidence. Plaintiffs' counsel objected to the admission of the contracts in evidence, upon the ground that they were not authorized by the pleadings, whereupon the defendant amended its plea and set up said con-

tracts. The trial of the case was at this point arrested, and the case was withdrawn from the jury and continued, upon plaintiffs' motion. The contracts were returned to plaintiffs' attorney, and were left in his custody. A few days thereafter the defendant's attorney gave the plaintiffs notice in writing to produce said contracts at the next succeeding term of court, and thereafter until the final disposition of the case, which notice was served upon the attorney for the plaintiffs on June 11, 1906. At the August term, 1906, the defendant's attorney called for a response to the notice to produce, and both an oral and a written response thereto was made. The three persons composing the partnership of J. H. Carter & Co. each testified that the papers in question were not in their custody, and that they knew nothing of them. Mr. Padgett, the attorney for the plaintiffs, stated that he considered the contracts not material to the contentions in the case, and that he had turned them over to his stenographer, who had destroyed them. He further testified: "When the court forced me to produce these papers at a former trial, I understood that he had no power to do so if I had not had them in the courtroom. And I made up my mind then, as I was being treated unfairly, if I ever got hold of them again that I would destroy them, and that the defendant should never get them in its possession again. They were destroyed in my office, not without my consent. I will say, further, that at the trial Mr. Luke White swore that these papers were not contracts under which this stock was shipped, but were given him as a mere pass to come there on, and therefore I did not think them material to the case, so had them destroyed."

The written response of the plaintiffs to the notice to produce was as follows: "Now comes the plaintiffs, in answer to a motion to produce, served upon them, and attach the shipping contract or bill of lading called for in the first paragraph of said motion. Further answering said notice, the plaintiffs say that the other two instruments therein mentioned and described are not in their possession, power, custody, or control, and plaintiffs further say that there was no such valid contract as referred to therein, and if such was in existence it is not now in their power, custody, or control. * * * Nor have they been since the service of said notice." On the hearing had on the notice to produce and the answer thereto, the defendant's attorney stated, in his place, that the papers called for, and which were not produced, were not in the custody, power, or control of the defendant, or of defendant's attorney, but they are now, or have been, in the power, possession, custody, or control of the plaintiffs or their attorney, and that they are material to the case, and moved the court for a judgment in favor of the defendant as by default. Upon this oral motion being overruled, and after the court had required the verbal response to the notice to produce, to which we have referred before, the defendant, by its attorneys, filed a written motion for a peremptory order requiring the plaintiffs or their attorney to produce instanter the contracts executed at Shreveport and Vicksburg, respectively, to be used as evidence, by the defendant in said case, and, upon a refusal or failure to so produce the same in response to said order, defendant moved the court to enter a judgment as by default against the plaintiffs and in favor of the defendant. The refusal of the court to grant this motion is the ruling to which exception is taken by the cross-bill of exceptions.

We might think that the court erred in refusing the peremptory order requiring the production of the contracts, under the circumstances disclosed by the record, and yet we might not be prepared to reverse a judgment either granting or refusing such a peremptory order. An important exercise of discretion on the part of the trial judge is necessary, and it is only when this discretion is abused that it should be controlled by the reviewing court. Of course, as we have already ruled in Central of Ga. Ry. Co. v. Lewis, 2 Ga. App. ——, 58 S. E. 674, the court could not order a judgment by default until there had been a peremptory order of the court requiring a production of the contracts in question.

Defendant's counsel seem to rely upon the action of the judge at the previous term of the court as a substitute for this peremptory order. It is true that the court required the plaintiffs' counsel instanter to produce the papers in question at the June term, but they were afterwards returned to plaintiffs' counsel, and, according to the undisputed testimony, destroyed prior to the service of the notice to produce. Whether the conduct of plaintiffs' counsel, as insisted by attorneys for the defendant, be reprehensible or not, is immaterial, upon the consideration of the effect of the notice to produce. If, basing his judgment upon the fact that the papers were not in existence at the time of the service of the notice to produce, or, for any other reason, the court, in the exercise of a sound discretion, declined to grant the peremptory order, there could be no judgment rendered under the terms of Civ. Code 1895, § 5250; and the motion, as offered by defendant's counsel, that a judgment be directed, was perhaps not sufficiently technical. The only judgment that could be rendered against the plaintiffs, under the rule, would be as in case of nonsuit. The judgment, "as in case of judgment by default," is applicable only to judgments against the defendant. We think that the court might have attached plaintiffs' counsel for contempt of court, for destroying the papers, if it appeared from the record that they had already been admitted in evidence on the previous trial of the case. But this does not appear from the cross-bill of exceptions. It seems that, when the papers were tendered by defendant's counsel

after the court had required their production, plaintiffs' counsel properly objected that they were not authorized by the pleadings, and that counsel for the defendant, either because he recognized the justness of the objection, or because the court sustained it (the record is silent upon the subject), proceeded to amend the defendant's answer to meet the objection, by setting up the contracts as a defense. If this surmise is correct, the papers were really never in evidence. In any event, it plainly appears that the papers in question were destroyed before the service of the notice to produce, and, no matter how the court might properly deal with the plaintiffs' attorney as for contempt of court, he was not required to punish the plaintiffs themselves by the penalty of nonsuit, when it plainly appeared that each of the plaintiffs was ignorant both of the notice to produce and of the destruction of the papers. We therefore see no error in refusing the peremptory order; and, as stated above, without the peremptory order the court could not enter the judgment sought by the defendant. The judgment upon the cross-bill is therefore affirmed.

Plaintiffs in error, in their main bill of exceptions, by complaint specially urged in their motion for new trial, except specially to the admission in evidence of the original live stock contract entered into between the Missouri, Kansas & Texas Railway Company and the Ft. Worth Horse & Mule Company: First, because said contract had been proven to be without a consideration and nudum pactum; second, because the stipulations and agreements therein contained are null and void; third, because the special stipulations contained therein with reference to notice, etc., to be given by the plaintiffs to the defendant, are not binding; fourth, because said contract is in violation of the laws of Texas and against the public policy of that state.

We do not think that any of these objections are well taken. It is settled that, where an action is brought against a carrier for damages dependent upon either statutory or common-law liability, the defendant may plead a special contract in its defense. All of the objections urged by plaintiffs' counsel to the admissibility of the contract depended upon extraneous evidence, and therefore raised a series of issuable facts. The objections made might properly have been addressed to the effect of the contract, but could not possibly bear upon its admissibility. With reference to the first objection, there was no conflict in the evidence nor any proof, as claimed by plaintiffs' counsel, that the contract was without consideration, and therefore nudum pactum. The contract declares that the carrier is conveying the shipment at a reduced rate of freight, and we find no evidence in the record which disputes this. The contract, also, states that the agent of the shipper is to be provided with free transportation from Ft. Worth, Tex., to Baxley, Ga., and the evidence of one of the plaintiffs fully corroborates this statement. The second objection could well have been overruled, because it sets out no specific ground of objection, so as to enable the court to rule upon it. The third objection, under the decision in Southern Ry. Co. v. Adams, 115 Ga. 705, 42 S. E. 85, was without point. To have determined the fourth objection in favor of the plaintiffs in error, the court would have had to give to the laws of Texas an extraterritorial force not only not authorized by the Constitution of the United States, but repugnant to article 1, § 8, par. 3, of that instrument. Civ. Code 1895, § 5974. See, also, Central of Ga. Ry. Co. v. Murphey, 196 U. S. 198, 25 Sup. Ct. 218, 49 L. Ed. 444. The contract was to be performed in this state, as well as in the state of Texas, and, though a contract of carriage is made in a foreign state, it is not necessarily governed, in matters of construction and effect, by the laws of that state, where the contract is to be partly performed in this state and in a number of other states. And this is especially true as to requirements of the contract which are to be wholly performed in this state.

The second special ground of the plaintiffs' motion for new trial complains of the admission of the contract made between Vicksburg, Shreveport & Pacific Railway and J. H. Carter & Co. The objections to this contract, urged by plaintiffs' counsel, and which were overruled by the court, were: "(1) Because the same is irrelevant and inadmissible, because it has not been shown that the Southern Railway Company, the defendant, had any connection with said contract, or knew of its existence, until after the filing of this suit, and that the defendant never transported this property under this contract, or had any connection whatever with the contract. And no consideration is shown upon which to base a new contract. (2) Because it is not shown that the railway company accepted this stock under this contract, or delivered it under this contract; and upon the further ground that it is a copy of a contract, and not the original, the court holding the original had been accounted for by the evidence as set out in the brief. (3) Because the defendant, under the evidence, accepted transportation and delivered said stock under the original contract, made at Ft. Worth, Tex., between the Ft. Worth Horse & Mule Company and the Missouri, Kansas & Texas Railway Company."

We think that the first objection could have been properly overruled upon the ground that the contract between the Missouri, Kansas & Texas Railway Company and the Ft. Worth Horse & Mule Company previously introduced, applied by its very terms to any connecting carrier who transported the shipment over any part of the route between Ft. Worth and Baxley, and it was undisputed that the shipment reached Baxley by the Southern Railway Company's line, and the latter company would be presumed, in the ordinary

course of such shipment, to be familiar with the terms and conditions of the contract of shipment. The consideration of the contract was supplied by the free pass accepted by the agent of the shipper, if by nothing else. What we have said disposes of all of the second objection to the admissibility of the contract, except that it was further objected that it was a copy contract. There was certainly no error in admitting it upon that ground, for the plaintiffs' counsel had admitted that he had destroyed the original. We can hardly imagine a case in which the loss of the original could be more thoroughly accounted for. The third objection was properly overruled, because it does not appear in the evidence under what contract the defendant company accepted or transported the stock in question, or that it was not under the contract thus objected to. There is no merit whatever in the first three grounds of the plaintiffs' motion for new trial.

We think, however, that the fourth ground is meritorious, and that the court erred in directing a verdict for the defendant, for the reason that the evidence raised issues of fact which the jury alone could determine. It is true that the plaintiffs could not recover for damages resulting from failure to feed and water the stock, or for carrying them overtime without food and water and rest, in violation of the United States statute upon that subject, because it appears, without contradiction, that the plaintiffs authorized the carrier to proceed without watering and feeding the stock. But the plaintiffs' petition alleged that some of the stock were bruised, wounded, and otherwise damaged in transportation. This could not have been the result of lack of food or water, but depended upon the manner of running the train. The allegations of the petitioner upon this subject were perhaps demurrable, but no complaint is made upon that subject. It may be assumed therefore that the plaintiffs had a right to recover for injuries received other than those due to lack of food and water, and that the burden of proof was upon the railway company to show that the injuries proved to have been received by the stock were not due to its negligence.

While the contract provides that the claim for damages shall be preceded by a notice in writing, given prior to the unloading of the stock, setting forth the injuries claimed and the amount of the claim, still it was expressly held in Hill v. Telegraph Co., 85 Ga. 430, 11 S. E. 874, 21 Am. St. Rep. 166, that this requirement or stipulation of the contract may be waived. In that case it was held that the oral promise of the agent of the telegraph company to look into the claim, and his subsequent refusal to pay, upon the ground that the company was not to blame, was a sufficient waiver that the demand should be in writing. And we think, in this case, the fact, which as it appeared from the evidence, that the agent of the Southern Railway Company not only went in company with the plaintiffs' attorney to make an examination as to the justness of the plaintiffs' claim, but also entered upon the freight bill a memorandum that one horse was badly scratched and bruised, might be a sufficient waiver of the stipulation in the contract that the claim should be presented in writing. The purpose of the written notice is to advise the carrier and inform him of the nature of the demand against him. Such a stipulation of the written contract may be waived, and if the carrier's agent, without objection to the form of the notice, receives and acts upon an oral notice, a waiver of the requirement as to its being in writing results. The evidence upon this subject should at least have been submitted to the jury, for them to determine whether or not the carrier had waived this stipulation of the contract. In Central R. Co. v. Pickett, 87 Ga. 737, 13 S. E. 750, it was held that no railroad company can legally contract against liability for injuries caused by its own negligence, and a similar notice to that relied upon by the defendant company in this case was held unnecessary, partly upon the ground that the defendant had actual knowledge of the injury. According to some of the testimony, the defendant in this case, through its agent at Baxley, had this knowledge and a fair opportunity for making a complete examination, before the stock was intermingled. Two questions (omitting other probable issues) in the case should have been considered by the jury: Whether the horses were injured, so far as wounds, cuts, and bruises are concerned, by the negligence of the defendant company; and whether the company waived the requirement that the claim for damages should have been presented to it in writing. If the jury found either of these issues in favor of the defendant, the plaintiffs could not recover; but, if the jury found both of these issues in favor of the plaintiffs, they would be entitled to recover such an amount as the evidence might justify. We think, therefore, that the court erred in directing a verdict.

Judgment, on the main bill of exceptions, reversed; on cross-bill, affirmed.

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(129 Ga. 435)

## REDMAN BROS. v. MAYS.

(Supreme Court of Georgia. Nov. 13, 1907.)

SPECIFIC PERFORMANCE—EVIDENCE.

Where specific performance is sought for the enforcement of a parol contract for the sale of lands, such contract and the terms thereof should be established so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement; and the evidence in this case, in clearness, strength, and precision, failing entirely to measure up to this standard, the court did not err in setting aside the verdict for the plaintiff and granting a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 887–889.]

(Syllabus by the Court.)

Error from Superior Court, Butts County; R. J. Reagan, Judge.

Action by Redman Bros. against R. W. Mays. Verdict for plaintiffs. From an order granting a new trial, plaintiffs bring error. Affirmed.

Redman Bros. brought an action against Mays and alleged the following facts: During the year 1897 plaintiffs purchased from Barnes & Sanders one engine and sawmill, together with a tract of land 50 yards square on which to erect and maintain a gin house and yard. Petitioners allege that they have paid Barnes & Sanders the purchase price of said land and machinery, viz., the sum of $300; that Barnes & Sanders have failed to make and deliver to petitioners a deed to said property, though often requested by petitioner to do so; that petitioners have erected improvements on said land of the value of $450; that in October, 1899, said Barnes & Sanders executed and delivered to one G. P. Sanders, a brother of the said Sanders of the firm of Barnes & Sanders, a deed to the above-mentioned property, and in October, 1903, said G. P. Sanders conveyed said property to defendant, Mays. Plaintiff alleges that said G. P. Sanders and said Mays accepted said deeds "with full notice of plaintiffs' equities in said land, plaintiffs being continuously in possession thereof, and that said deeds were executed and accepted with full knowledge of all the facts, and for the sole purpose of defrauding your petitioners, and that said Mays, G. P. Sanders, and Barnes & Sanders conspired and colluded to defraud your petitioners out of said premises." It is also alleged that during the spring of 1905 defendant, Mays, entered upon said land and removed all of the buildings erected there by petitioners. Wherefore petitioners prayed that they "have judgment against said Mays for the premises in dispute," and that they have judgment for damages sustained by reason of the removal of said buildings by the defendant. The defendant in his answer denied the material averments of the petition, and alleged that he is the lawful owner of the premises in dispute under the said deeds from Barnes & Sanders to G. P. Sanders, and from G. P. Sanders to the defendant. The case was regularly submitted to a jury, and a verdict was returned in favor of the plaintiffs. The defendant moved for a new trial upon numerous grounds. The court sustained the motion, and ordered that a new trial be granted. This was the second grant of a new trial. The plaintiffs, Redman Bros., excepted.

O. L. Redman and O. M. Duke, for plaintiffs in error. Ray & Ray, H. M. Fletcher, and Jno. R. L. Smith, for defendant in error.

BECK, J. (after stating the facts as above). 1. In the case of Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258, it is said: "A parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement. It is a serious matter to substitute a parol sale of real estate for a deed." In the case of Dwight v. Jones, 115 Ga. 744, 42 S. E. 48, it is said that the rule just announced above is well settled. See, also, 26 Am. Eng. Ency. of Law (2d Ed.) 130. The evidence in this case fails entirely to measure up to this standard of strength and clearness. In the petition as originally filed it will be observed that plaintiffs alleged a contract for the purchase of a lot of land described as follows: "A sufficient amount of land to erect a gin house and yard there around—said premises being situated at Stack, Ga., in Butts Co., and bounded north by lands of J. A. Dodson, east by the Hoard estate, south by public road leading from Dempsey's Ferry to Jackson, Ga., west by road leading from said gin house to Macedonia Colored Church; said land being the land upon which said firm of Redman Bros. erected and operated a public gin during the years 1897, 1898, and 1899; said land containing 40 yards square." Subsequently by way of amendment they alleged "that the tract of land described in original petition is more fully described as follows: Bounded on the north by lands now owned by J. A. Dodson, east and south by lands of R. W. Mays, and west by road leading from public road to negro church—and that said tract or parcel of land contains 50 yards fronting road to negro church, and running back east 40 yards, being 50x40 yards, and that, wherever it appears on original declaration 40 yards square, it be made to read 50 yards square." Giving effect to the last averment in the amendment, it would seem that the plaintiffs were seeking to recover a lot 50 yards square; and, inasmuch as the verdict was for the premises in dispute, the jury must have intended to find that the plaintiffs were entitled to a decree for the specific performance of a contract of sale of a lot of land of those dimensions. That finding is without evidence to support it, as will be seen from an examination of the testimony relating to the terms of the contract, the interest bought, and the dimensions and description of the lot alleged to have been purchased. The testimony upon these points being in substance as follows:

T. E. Redman testified: "I owned jointly with Barnes & Sanders some machinery (sawmill and outfit). I owned one-third, and they owned two-thirds. * * * We decided to move to Starks on their own one-acre lot, to put up a ginnery. * * * I remarked to Charlie (Sanders, of the firm of Barnes & Sanders), 'You know I have got no deed to that lot we are going to erect this ginnery on,' and Charlie remarked, 'That is all right, you will own one-third interest in it'; and (being brothers-in-law) I had the ut-

most confidence in him. * * * He then sold out to J. C. Redman (the other member of the firm of Redman Bros.) with the same understanding, that the land was to go with the machinery. * * * When they [Barnes & Sanders] were preparing to lay the foundations of that building (a warehouse), they had us to come out there. * * * They wanted to know if that would give us room enough for that gin house lot, and we told them it would. * * * I don't remember whether we stepped it or not. * * * I never did step the width of it until this suit was brought. I stepped it from the negro church road back to the warehouse. It was 40 steps from the negro church to the warehouse. It was about 45 or 50 feet across. We bought the entire width of the lot running up to that warehouse. I knew we bought enough land for them to put up that house (gin house 24x36 feet, with boiler room 24x24 feet, and seed room 14x16 feet). I did not know how much we bought from them by actual measurements. I think I did swear last February we bought 40 yards square. I stepped it. I knew it was 40 yards—40 steps. I stepped it from that warehouse back to the road leading to the negro church, and, as to the exact width of that lot, we were to have the entire width of it, but we never did measure it. I did swear positively in February we bought 40 yards square. I only stepped it. When it comes to actual measurement, I never did know. I bought this land we are talking about in May, 1897. I bought it from C. W. Sanders. My brother John bought their two-thirds interest. * * * They sold brother John their two-thirds interest. The machinery was all on the land. We paid them $350 for this property; that is, brother John, his part was $350. That included the machinery, the two-thirds interest, the land and all. I made the trade in May, 1897. There was no one present but Charlie Sanders. I did not buy any land at that time. He told me I would own one-third interest in it, just the same as he and Homer (Barnes). We paid Barnes & Sanders $415, including the land and the two-thirds interest. We did not have any understanding when we made the trade as to when we were to pay this money. The purchase price was $350. The reason we paid $415, we had gone ahead paying these different items, and I found we had paid more than we had promised to pay, and after doing that I went to Charlie and Homer (Barnes & Sanders) and asked them for the deed. * * * It was the understanding between Barnes & Sanders and ourselves that this amount would go in payment of that gin house and the land around there." J. C. Redman testified: "I purchased some machinery from Barnes & Sanders; * * * also some land, the west end of the storehouse lot of Barnes & Sanders. T. E. Redman also owned an interest in said machinery. I bought the west end of the storehouse lot at Stark, Ga., 40 yards square. Redman Bros. purchased from Barnes & Sanders the land described in the interrogatories (this description does not appear anywhere in the record). The purchase price was $350." L. F. Redman testified that in August, 1899, he heard Tom Redman demand, and Barnes & Sanders promise to make, "a deed to the property on which they (Redman Bros.) had built a gin"; the land referred to being the land "upon which the gin of Redman Bros. was built in the rear of the store of Barnes & Sanders." C. L. Redman testified that Barnes & Sanders promised to make a deed in favor of Redman Bros. "to that land out there"; also, "I was there when these premises were measured from the road up to the warehouse. Charlie Sanders discussed with Mr. Redman if that would give them plenty of room. That is the reason he measured it, in order to get it off the gin house lot."

Sufficient cause for the grant of a new trial being found in the general grounds of the motion, we have not thought it necessary to decide the specific assignments of error, assuming that, if there were errors in the charge of the court and the admission of evidence, the court will correct such errors upon the next trial, in case the same questions should then be raised.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 518)

## PETERSON et al. v. LAMBERT HOISTING ENGINE CO.

(Supreme Court of Georgia. Nov. 15, 1907.)

INJUNCTION—RECEIVER.

Under the pleadings and facts in this case, as disclosed by the record, the court committed no error in granting the injunction and appointing a receiver.

(Syllabus by the Court.)

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action by the Lambert Hoisting Engine Company against W. F. Peterson and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Pottle & Glessner, for plaintiffs in error. Pope & Bennet and Park & Collins, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 522)

## HARRIS v. CLEGHORN.

(Supreme Court of Georgia. Nov. 15, 1907.)

WRIT OF ERROR—REVIEW.

The amended grounds of the motion for new trial were not approved by the court. The original grounds complained of no error of law. The evidence was sufficient to support the verdict.

(Syllabus by the Court.)

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action between A. D. Harris and D. J. Cleghorn. From the judgment, Harris brings error. Affirmed.

W. W. Stark, for plaintiff in error. P. Cooley and Shackelford & Shackelford, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 434)

## COSTELLO et al. v. KENSINGTON IRON & COAL CO.

(Supreme Court of Georgia. Nov. 12, 1907.)

INJUNCTION—MINING ORE.

Under the pleadings and evidence there was no abuse of discretion in enjoining both plaintiff and defendant from mining or removing ore from the land involved in the controversy.

(Syllabus by the Court.)

Error from Superior Court, Walker County; Moses Wright, Judge.

Action between Frank Costello and others and the Kensington Iron & Coal Company. From the judgment Costello and others bring error. Affirmed.

R. M. McGlenn and Payne & Payne, for plaintiffs in error. McHenry & Porter, for defendant in error.

LUMPKIN, J. Judgment affirmed.

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(129 Ga. 532)

## VAN DYKE v. MENLO FRUIT CO.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. MASTER AND SERVANT—ASSUMPTION OF RISK—KNOWLEDGE BY SERVANT.

Where a servant sought to recover damages from his employer on account of a physical injury resulting to him while engaged in loading logs on a wagon, and it was alleged that the master was negligent in having the loading done where the grass and weeds were dense, and likely to trip the feet of the plaintiff and cause him to fall under the log which was being loaded, and that rough round "skids" were used in loading, but it appeared that this condition was fully known to the plaintiff, and that he had equal opportunity with the master for knowing it, but voluntarily assumed the risk, the petition was demurrable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 584.]

2. SAME—FELLOW SERVANTS—WHO ARE.

Although in such a suit another employé of the same master was called a manager, yet where the only duty which he was shown to have to perform was to help the plaintiff to load logs on a wagon, and it was alleged that he was so engaged at the time of the injury, his action in this regard was that of a fellow servant. Moore v. Dublin Cotton Mills, 127 Ga. 610 (4), 56 S. E. 839.

3. SAME—PETITION—SUFFICIENCY.

An allegation that the master was "bound to place a competent person to assist plaintiff with said log," but without showing any failure in such alleged duty, or injury resulting from such a failure, sets forth no cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 835, 836.]

(Syllabus by the Court.)

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Action by W. L. Van Dyke against the Menlo Fruit Company, for personal injuries. Judgment for defendant, and plaintiff brings error. Affirmed.

C. D. Rivers, for plaintiff in error. Taylor & Jolly, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 558)

## SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. SMITH.

(Supreme Court of Georgia. Nov. 15, 1907.)

EVIDENCE—PAROL EVIDENCE—WRITTEN CONTRACT.

While a mere receipt for money is always subject to explanation by parol, still, if a paper in the form of a receipt is really a contract between the parties and the stipulations agreed upon are sufficiently set forth therein, such paper is subject to the same rules as govern ordinary contracts in writing, and parol evidence is not admissible to contradict or vary the terms or stipulations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1831.]

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; B. L. Rawlings, Judge.

Action by Le Roy Smith against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiff. Defendant brings error. Reversed.

Smith sued the telephone company for damages resulting from the company having cut a wire fence around his premises at the time its line was being constructed. The defendant pleaded a release, which was as follows: "Right of Way. J. W. Deam. $20. Received of Southern Bell Telephone & Telegraph Company twenty $^{00}/_{100}$ dollars, in consideration of which I hereby grant unto said company, its successors and assigns, the right, privilege, and authority to construct, operate, and maintain its lines of telephone and telegraph, including the necessary poles and fixtures, upon and over the property which I own, or in which I have an interest in the ——— of ———, county of Jefferson, and state of Georgia, and along the roads, streets, or highways adjoining the said property. Said sum is received in full payment for said right, and the right to trim and cut trees along said line necessary to keep the wires cleared at least 25 feet, and the further right to erect the necessary guy and brace poles, and attach to trees the necessary guy wires. Said sum received as full payment for damage to timber and premises in

construction and maintenance of line. Witness my hand and seal this 5th day of January, A. D. 1903, at Bartow, Ga. [Signed] Le Roy Smith [L. S.], Landowner. Witness: [Signed] J. W. Deam." The court over objection permitted the plaintiff to testify that at the time this release was signed he did not know that his fence had been damaged, and the release was intended to cover only the damage to timber caused by the construction. It appears from the evidence that the damage to the fence was complete at the time that the release was signed. There is no evidence that any one representing the company concealed this fact from the plaintiff, and nothing to indicate that fraud or misplaced confidence brought about the signing of the receipt. It appears that the plaintiff and the agent of the company, in estimating the damages to the timber, went over the line of the defendant into the field of the plaintiff; but the plaintiff did not know at the time that the fence had been injured.

Hunt Chipley, Osborne & Lawrence, and C. N. Ramsey, for plaintiff in error. Cain & Hardeman, for defendant in error.

ATKINSON, J. (after stating the facts as above). This case depends upon whether the paper signed by the plaintiff was a mere receipt for money or a contract between the parties containing stipulations binding upon the signer. If it were a mere receipt, parol evidence was admissible. If it was a contract, parol evidence was not admissible to vary any of the terms of the writing. Omitting those portions of the paper not material to the present discussion, the paper would read as follows: "Received of Southern Bell Telephone & Telegraph Company $20, in consideration of which I hereby grant unto said company, its successors and assigns, the right, privilege, and authority to construct, operate, and maintain its line of telephone and telegraph, including the necessary poles and fixtures, upon and over the property which I own. * * * Such sum received as full payment for damage to timber and premises in construction and maintenance of line." In consideration of the payment of $20, the plaintiff agreed that the defendant should have the right to construct its line over his property, and the amount stated was to cover both the right to construct and all damages to the premises incident to the construction. The paper is more than a receipt for money. It is certainly a release for all damages that had been done at the time that the paper was signed. The evidence showed that at this time the plaintiff did not know of the damage to his fence, but did know of the damage to his timber. There is no evidence that the plaintiff was fraudulently induced to sign the receipt, or that there was any misplaced confidence, and his ignorance as to the full measure of his damages was not due to any act on the part of the defendant. He is bound by the release signed by him under the evidence in the case. Until this release has been canceled or reformed, it is a bar to his right to recover. See, in this connection, Jossey v. Ga. So. Ry. Co., 109 Ga. 439, 34 S. E. 664.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 560)

## PERRY v. BRITT-CARSON SHOE CO.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. HOMESTEAD—WAIVER IN FIRM NOTE.
A waiver of homestead and exemption, contained in a note signed by one partner, in the partnership name, is effectual as against the separate property of the partner signing the note.

2. BANKRUPTCY—WAIVER OF EXEMPTION—REMEDY OF CREDITOR.
The rulings in Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150, are controlling upon the other issues involved in this case, and the court committed no error in granting the injunction as prayed.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by the Britt-Carson Shoe Company against O. L. Perry. Judgment for plaintiff. Defendant brings error. Affirmed.

Turner & Perry, a partnership, being indebted to the Britt-Carson Shoe Company for merchandise in the sum of $500, made and executed to said shoe company two promissory notes for $250 each, containing waivers of their rights to homestead and exemption under the Constitution and laws of Georgia and of the United States. These notes were signed by Perry, one of the partners, in the name of the partnership, Turner & Perry. Subsequently Turner & Perry were, upon the application of certain creditors, adjudicated bankrupt by the proper court of bankruptcy. It appears from the agreed statement of facts that the indebtedness of said firm was $5,200, and its assets amounted to $2,298. It was also agreed that said $2,298 was all the assets of the said Turner & Perry, as a firm or as individuals, except the amounts which were set apart as an exemption to said parties out of their individual property. Certain property of the value of $1,400, consisting of an undivided one-half interest in 344 acres of land, belonging to said Perry individually, was set apart to him as an exemption by the court of bankruptcy. The property set apart to Turner as an exemption consisted in household and kitchen furniture and a buggy, of the total value of $250. The Britt-Carson Shoe Company did not prove its claim in bankruptcy, but, after the exemption to Perry had been set apart, filed in the superior court an equitable petition against Perry, in which it alleged the facts stated above, and prayed a judgment in rem against the property set apart to Perry as an exemption, and also prayed that Perry be enjoined from selling, incumbering, or otherwise disposing of said

property until a judgment for the amount of the indebtedness on said notes could be obtained. To this petition defendant demurred on the grounds that there is no cause of action set forth in plaintiff's petition; that the plaintiffs do not show by their petition that the defendant, Perry, has ever waived the right to claim homestead or exemption out of his individual property; and that the plaintiffs have no right to proceed against the individual property of this defendant until they have first exhausted their rights and remedies against the assets of the partnership. The court granted the injunction restraining Perry from selling, incumbering, or otherwise disposing of the undivided one-half interest in the 344 acres of land, which had been set apart to him as an exemption, until the further order of the court. Perry excepted.

Geo. Y. Harrell, for plaintiff in error. Slade & Swift and T. T. James, for defendant in error.

BECK, J. (after stating the facts as above). The notes held by the plaintiff were signed by one of the partners, Perry, in the name of the partnership, Turner & Perry; and it is contended by counsel for plaintiff in error that the waiver contained in the notes will not prevent the members of the firm from claiming an exemption out of their individual property. As applied to Turner, this contention seems to be well taken. "One partner cannot waive the other's right to take a homestead out of the individual property of the latter." Giles v. Vandiver, 91 Ga. 192, 17 S. E. 115. But as to Perry, who signed the notes in the firm name, another rule prevails. A case involving this same point was adjudicated by the Supreme Court of Alabama, where it was held that, "the note containing such waiver being signed by one partner in the partnership name, without authority of his copartner, the waiver was effectual against him and his individual property, though it does not bind his copartner." See, also, in this connection, Lippman v. Anniston Nat. Bank, 120 Ala. 123, 24 South. 581, 74 Am. St. Rep. 28; 22 Am. Eng. Ency. of Law (2d Ed.) 158; 18 Cyc. 1452.

The plaintiff did not prove its claim in the court of bankruptcy, and it is admitted in the agreed statement of facts that the indebtedness of the firm of Turner & Perry greatly exceeds its assets, which are being administered by the court of bankruptcy. There is no partnership property, therefore, against which the plaintiff can proceed either in law or in equity. This, then, gives the plaintiff a right to rely upon the separate property of the partners for the payment of their notes. Code 1895, § 2627. The defendant, Perry, one of the partners, has $1,400 worth of property set apart to him, as an exemption, out of his separate property; and, as we have seen above, he has waived that exemption as against the payment of these notes. This being established, the rulings in Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150, are controlling in the present case; and we therefore hold that the court committed no error in granting the injunction as prayed.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 502)

## GEORGIA R. & BANKING CO. et al. v. TOWN OF DECATUR.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. WRIT OF ERROR—RECORD—QUESTIONS PRESENTED FOR REVIEW—ADMISSIBILITY OF EVIDENCE—NECESSITY OF SETTING FORTH.

A ground of a motion for a new trial, based upon the exclusion of evidence, will not be considered when the evidence excluded is not set forth, either literally or in substance, in such ground nor attached as an exhibit, properly identified, to the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2905.]

2. SAME.

Exceptions to a ruling excluding evidence in mass should specify those portions of the evidence alleged to have been erroneously excluded; otherwise the ruling will not constitute reversible error, if any part of the evidence repelled was inadmissible, though other portions of it may have been admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1621.]

3. EMINENT DOMAIN — EVIDENCE — SUFFICIENCY.

The verdict was authorized by the evidence.

4. SAME — DELEGATION OF POWER — TO MUNICIPALITY.

In section 7 of the act of December 19, 1893 (Acts 1893, p. 208), amending the charter of the town of Decatur, it is provided that the town shall have full power to open, lay out, and widen streets in said town. Provision is also made for the assessment of damages sustained by owners of lots fronting on the streets opened, laid out, or changed, in consequence of the exercise of that power by the town; and further provision is made that the mayor and council may decline to accept any property assessed for public purposes, whenever, in their opinion, the award is too high. *Held*, that it was the plain legislative intent to grant to the town the power to exercise the right of eminent domain, and to condemn property for the purposes indicated in said section of the amendment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 30–32.]

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Condemnation proceedings by the town of Decatur against the Georgia Railroad & Banking Company and the Louisville & Nashville Railroad Company. From the judgment on appeal to the superior court by town of Decatur from the award made by the assessors, the railroad companies bring error. Affirmed.

The town of Decatur instituted condemnation proceedings against the Georgia Railroad & Banking Company and the Louisville & Nashville Railroad Company, as provided in section 4657 et seq. of the Civil Code of

1895, for the purpose of opening a new street in and for said town across the track and right of way of said railroad companies. The plaintiff, the town of Decatur, entered an appeal to the superior court to the award made by the assessors in said proceedings. On the trial of the case in the superior court, the jury returned a verdict in favor of the defendant railroad companies for $10. The said defendants moved for a new trial, which motion was overruled, and they excepted.

Jos. B. & Bryan Cumming and Milton A. Candler, for plaintiffs in error. Green, Tilson & McKinney, for defendant in error.

BECK, J. (after stating the facts as above). 1. The first, second, and third grounds of the amended motion for new trial assign error upon the rulings of the court whereby the testimony of certain witnesses was excluded. The first and second grounds are as follows: "The court erred in excluding the testimony of W. H. Robinson, a witness for the defendants, as to the cost to the defendants of constructing the crossing over the right of way of the railroad with one railroad track thereon, and the cost to the defendant of maintaining the same." And: "The court erred in excluding the testimony of the same witness as to the cost of constructing a crossing over the said right of way, should it be occupied by all the tracks for which it afforded space, and the annual cost to defendants of maintaining such crossing." Under repeated rulings of this court, these grounds will not be considered. They are incomplete, in that they do not contain the evidence literally or in substance that was excluded in themselves, nor is it attached thereto as an exhibit. And this court will not undertake to examine the brief of evidence to ascertain what might have been the testimony of the witness Robinson. In fact, the excluded testimony should find no place in the brief of evidence. In order to enable this court to pass intelligently upon the question of the admissibility of the testimony of the witness Robinson, if he testified, and his evidence was then excluded, the testimony should have been incorporated in the ground of the motion assigning error upon its exclusion, or attached thereto as an exhibit. As they stand at present, neither of these grounds assist the court in determining either the competency or the materiality of the evidence alleged to have been repelled. Tompkins v. Compton, 97 Ga. 375, 23 S. E. 839; Russell v. Mohr-Weil Lumber Co., 115 Ga. 35, 41 S. E. 275. "A ground of a motion for new trial, complaining of the admission or rejection of evidence, will not be considered unless it is complete in itself, requiring no reference to other parts of the record to render it intelligible." Baxter v. Camp, 126 Ga. 354, 54 S. E. 1036.

2. The third ground of the amended motion complains that the court erred in excluding the testimony of Thomas Scott, a witness for the defendants, as to the expense of providing a watchman and other safeguards for the proposed crossing; a copy of the excluded testimony being attached to the motion. The exhibit referred to in this ground of the motion for new trial consists of numerous interrogatories propounded to the witness Thomas Scott, and his answers thereto. The exception to the exclusion of this testimony seems to be a general exception to the ruling out of a mass of testimony; and, if our construction of the exception is correct, the court will not be reversed for excluding this testimony offered in mass, if it appears that any portion of it was inadmissible. Ray v. Camp, 110 Ga. 818, 36 S. E. 242. And that a part of this evidence was properly excluded will appear from a consideration of the witness' answer to the fifth direct interrogatory, which is as follows: "The elements of damage both present and reasonably prospective consist of: (a) Taking from the railroad a valuable part of its right of way; (b) by depriving it of an essential part of its right of way; (c) it entails upon the railroad additional expense in running of its trains across the said proposed street; (d) it entails upon the railroad a very large expense for the services of watching day and night to guard the passage of trains across the proposed street; (e) the expense, in the course of time, of providing what are termed 'safety appliances' and other safeguards; (f) the opening of said proposed street will entail upon the railroad greater expense in parking trains of cars on its right of way, because the trains will always have to be kept open between the boundaries of said street, and because all the trains will have to be recoupled before they can be moved, both of which operations are expensive in themselves. Taking all the foregoing into consideration, and without attempting to mention every contingency under which the opening of said street will burden the railroad with expense, I estimate the aggregate damage to the Georgia Railroad at the sum of $21,600." Certainly that portion of his answer included in divisions "d" and "e" was inadmissible, being vague and indefinite, and consisting largely of the mere conclusions of the witness, instead of giving the facts upon which his opinion was based, so that the jury might form their own opinions and estimates. And if the exception be treated as one specially directed to the exclusion of the testimony relating "to the expense of providing watchmen and other safeguards for the proposed crossing," it will be observed that this was embraced in the very portion of the answers which we have held to be incompetent and inadmissible. And the remaining grounds of the motion for new trial contain merely a repetition of the assignments of error which were properly made in the pendente lite bill of exceptions, and this will be considered later.

3. Of the motion for new trial, there re-

mains to be considered the general grounds contained in the original motion. The jury returned a verdict in favor of the defendant railroad corporation for nominal damages. We have searched through the record for evidence that would have required a finding for a larger amount, but have failed to discover it. If there was any evidence requiring the finding of a larger sum, it must have been in those portions of the testimony excluded, and, as to the exclusion of that testimony, as we have seen above, no proper exception was made so as to bring the correctness of the exception under review.

4. Only the first of the contentions made in the pendente lite bill of exceptions is here for our decision; it being stated in the brief of counsel for plaintiff in error that the second contention was not insisted upon. The question raised by the first contention is as to whether or not the town of Decatur had the power to condemn property or an easement therein for the opening of new streets; plaintiffs in error contending that the town had no such power. The argument of counsel for plaintiff in error in support of this contention is an application of the general principle that the exercise of the right of eminent domain must be expressly granted in clear and unequivocal language. In the case of Georgia R. R. Co. v. Union Point, 119 Ga. 809, 47 S. E. 183, it was said: "It has been decided by this court that power granted to a municipal corporation to lay out and open streets, where there is no grant of power to take or damage private property for the purpose or to make compensation therefor, does not enable the municipality to lay out and open a street over the land and track of a chartered railroad company without the consent of the company"—citing and quoting a number of decisions from this and other states, among them the case of Boston & Lowell Railroad Corporation v. Salem & Lowell Railroad Co., 2 Gray (Mass.) 36, where it was held: "It must appear that the government intended to exercise this high sovereign right, by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the act that they recognize the right of property, and mean to respect it; and under our Constitution the act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner." And in the case of Brunswick & Western R. R. Co. v. Waycross, 94 Ga. 102, 21 S. E. 145, it was held that: "A municipal corporation has no more right than any other corporation to condemn property and provide the mode of assessing compensation therefor, unless authority to do so is granted by the Legislature in express terms or by necessary implication. Such authority cannot be implied from the grant of power to lay out and open streets. In the absence of any further provision authorizing the municipal authorities to condemn property for that purpose, the presumption is that the Legislature intended that the necessary property should be acquired by contract."

It must be observed that the town of Union Point depended, as entitling it to exercise the right of eminent domain, upon that provision in its charter authorizing the mayor and council of the town to require any railroad running through the town to make such crossings as may be needed for the public convenience, "and to establish and lay out new streets as public necessity requires." And the town of Waycross based its contention that it was vested with power to exercise the right of eminent domain upon the legislative grant in its charter to lay out and open streets. The soundness of the conclusions reached in the two cases just cited will scarcely be questioned. The conclusion in each was reached by the application of well-established principles to the facts of the two cases. As was said by Chief Justice Shaw in Boston & Lowell Railroad v. Salem & Lowell Railroad, supra: "In general, therefore, when an act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the Legislature to exercise the right of eminent domain, but simply to confer a right to do the act, or to exercise the power given, on first obtaining the consent of those thus affected."

But a comparison of the provisions in the charter of the town of Decatur with the provisions in the charter of the towns of Union Point and Waycross relatively to that subject will demonstrate that they are not analogous. The act of the Legislature approved December 19, 1893 (Acts 1893, p. 206), amending the charter of the town of Decatur, provides that: "The mayor and council of said town shall have full power and authority to open, lay out, to widen, straighten, or otherwise change streets, alleys and squares in said town of Decatur. Whenever the said mayor and council shall exercise the power above delegated, they shall appoint two freeholders, and the owners of said lots fronting on said streets, alleys or squares shall, on five days' notice, appoint two freeholders, who shall proceed to assess the damages sustained, or advantages derived by the owner or owners of said lots, in consequence of the opening, widening, straightening or otherwise changing said streets, alleys or squares, and in case said assessors cannot agree, they shall elect a fifth freeholder, * * * and a finding of a majority shall stand as the award; but either party shall have the right to enter appeal to the superior court of Dekalb county within ten days of the rendition of said award; provided, that said mayor and council shall have the right to decline to accept any property assessed for public purposes, as above provided, whenever in the opinion of

said mayor and council the price fixed, or award made, is too high or unreasonable."

In the section of the charter quoted, we find both the power to open streets and provision made for the assessment of damages sustained in consequence of the exercise of that power. What other conclusion can be reached from the grant of power to open streets and the provision for the assessment of damages sustained in consequence of such opening, than that there was a manifest legislative intent to confer the power to condemn property or easements therein? It will not do to say that: "Here is no provision for 'taking' any land and paying for the land so taken. Provision is made only for damages and benefits. And damages and benefits to whom? Not to persons whose lands have been taken, but for 'the owners of lots fronting on said streets, alleys or squares.'" If this section of the charter had gone no further than to provide for the opening of streets and the assessment of damages sustained in consequence thereof, such a contention might have been sound; but, in connection with the provision for the assessment of damages, we find the further provision that the "mayor and council shall have the right to decline to accept any property assessed for public purposes, as above provided, whenever in the opinion of said mayor and council the price fixed, or award made, is too high and unreasonable." Reading this last provision in connection with what precedes it in the extract from the charter quoted, it seems to us that the conclusion is unavoidable that there was a plain legislative intent to grant the power to the town to exercise the right of eminent domain, and that there is left no doubt or uncertainty respecting such intent. By a general law enacted in 1894, the mode of procedure in condemning private property for public use has been prescribed. But this regulation of the manner of proceeding does not alter the argument as to the legislative intent from the charter provisions when granted in 1893, as above set forth.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 552)

## ATLANTIC & B. RY. CO. v. KIRKLAND et al.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. PLEADING—PETITION—SUFFICIENCY.
The demurrer to the petition was properly overruled.

2. SAME—ANSWER—SUFFICIENCY.
It was error to strike so much of the answer as specifically denied the allegations of the petition and that portion which set up that petitioners had, by laches, lost the right to an injunction, if any, they originally had.

3. SAME.
The verdict should not have been directed, but the issues made by the specific denials in the answer of the allegations of the petition, and by the plea of laches, should have been submitted to a jury.

(Syllabus by the Court.)

Error from Superior Court, Ware County; T. A. Parker, Judge.

Equitable petition by David Kirkland and others against the Atlantic & Birmingham Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed.

David Kirkland and a number of other individuals and firms brought an equitable petition against the Atlantic & Birmingham Railway Company, to enjoin the defendant from tearing up and abandoning the section of its line of road from the station of Guysie to the town of Nicholls. The substance of the petition was as follows: Kirkland and the other persons are citizens, property owners, taxpayers, and business men, and firms of Nicholls, respectively, conducting manufacturing, mercantile, and divers other kinds of business in said town, to and from which town they receive and ship all the merchandise, supplies, lumber, naval stores, and material handled by them in their respective lines of business. Defendant is a domestic railroad corporation, with its residence and principal office in the city of Waycross, Ware county. About the year 1901, or 1902, the Brunswick & Birmingham Railroad Company owned and operated a line of railroad from Brunswick to Nicholls. At that time this line and the Waycross line of defendant united at Nicholls, making it a junctional point. Subsequently, defendant purchased the property and franchises of the Brunswick & Birmingham Railroad Company, thereby becoming vested with the powers and privileges, and being charged with the duties and the obligations, of that company; and since said purchase defendant has regularly operated the line from Brunswick to Nicholls, making a junction there with its line from Waycross to Montezuma. Defendant now avows its purpose to abandon that part of its Brunswick line between Nicholls and Guysie, which are about 6½ miles apart; to discontinue the junction at Nicholls, and establish in lieu thereof a junction at Sessoms, to which point it is now constructing a line from Guysie. Nicholls is an incorporated town, and no consent has been given by its corporate authorities, or by any one having power so to do, that any change in defendant's line be made within the limits of the town. Nicholls is commercially important, with a population of about 1,000, and is a shipping point for large quantities of naval stores, lumber, and farm products, and has developed rapidly since it has been the junction of the two lines of road of the defendant, and many valuable improvements have been made by petitioners and others upon the faith that it was the junctional point; and should defendant be permitted to abandon its line from Guysie to Nicholls, and discontinue the junction at the latter town, its commercial interests and that of petitioners would be injuriously affected. Sessoms, the proposed new junction, is of no commercial importance. Defendant

has erected there depot and warehouse facilities superior to those at Nicholls, and has purchased a large tract of land, of several hundred acres, with the purpose to build up a rival town, at the expense of the growth and development of Nicholls, and to its irreparable injury. The articles bought, sold, and manufactured by petitioners are, for the most part, shipped to and from Brunswick, and a direct line from Nicholls to Brunswick is of incalculable advantage to petitioners and to the town of their residence. The proposed abandonment of defendant's line between Guysie and Nicholls would place petitioners about three miles from the new junction at Sessoms, and they will, by such change, suffer great expense, delay, damage, and annoyance. If the defendant be not enjoined, special injury and damage will be suffered by petitioners, in their businesses and property rights, and investments in the town of Nicholls will be greatly injured, by reason of the deterioration in value of their property and the lessening of profits in their businesses. The Brunswick & Birmingham Railroad Company, when it originally elected to locate its line from Guysie to Nicholls, exhausted its charter as to the location of its line, and defendant, its successor, now has no authority to construct and operate a line from Guysie to Sessoms.

On the line between Guysie and Nicholls there are two stations, Dedge and Rigdon. The proposed change will unlawfully deprive both of these places of railroad facilities. The territory between Nicholls and Guysie is thickly settled, and the people therein trade at Nicholls. Some 30 or 40 families reside at the station of Dedge, and there is a large turpentine distillery in operation there. If the line between Guysie and Nicholls is torn up, it is probable that the trade of the intervening territory would go elsewhere, and Nicholls would suffer loss thereby. The Brunswick line is operated as a separate division between Nicholls and Brunswick, and Nicholls is not only a junctional, but practically a terminal, point, in so far as the Brunswick division is concerned; the passenger trains from Brunswick going no further than Nicholls, and making connections there with trains from Waycross and Montezuma. A freight train is operated exclusively between Brunswick and Nicholls. Because of this arrangement, train crews and employés of the road reside in or lay over at Nicholls, between runs, or when off duty, and a revenue is derived from these people by business men, hotels, boarding houses, etc., that would be lost with the removal of the junctional or terminal point from Nicholls. Should defendant abandon the road between Guysie and Nicholls, and substitute the proposed line between Guysie and Sessoms, petitioners are informed and believe that defendant will then operate the line between Sessoms and Brunswick as a separate division, necessitating the changing of cars at Sessoms, and would not operate through trains, freight and passenger, both from Brunswick to Montezuma and beyond, and from Waycross to Montezuma and beyond, thus leaving Nicholls with one line leading from Waycross to Montezuma, and thus causing delays and pecuniary loss to petitioners and other citizens of Nicholls, on account of the transferring of freight and passengers at Sessoms. Many people board and leave the trains at Nicholls, transact business, and spend their money, who would not do so after the proposed change. Ample space for railroad yards can be obtained in Nicholls. If the line between Guysie and Nicholls is not now in suitable condition, it can readily be put in such condition without injury to Nicholls. If to do so should require any cut within the limits of the town, petitioners and the town authorities agree that it should be made. Petitioners had no notice that the line from Guysie to Nicholls was to be abandoned, and the junction at Nicholls changed, until within a few weeks prior to the filing of this petition. They did know that defendant was building a line from Sessoms to Guysie, which was a lawful undertaking, but they did not know that defendant would attempt to do an unlawful thing by abandoning entirely the present line from Nicholls to Guysie, and the junctional point at Nicholls.

The prayer was to enjoin defendant from tearing up, removing, or otherwise abandoning the line from Guysie to Nicholls, and from abandoning or discontinuing the junction at the latter town, and for general relief and process. The judge granted a temporary restraining order. The defendant filed a demurrer and answer, and petitioners filed a demurrer to the answer. The demurrer to the petition was on the following grounds: (a) The facts alleged do not authorize an injunction; (b) none of the petitioners has such an interest in the subject-matter as will authorize the maintenance of the petition; (c) if defendant is seeking to violate its charter, the state, and not petitioners, is the proper party to apply for an injunction; (d) it is not alleged that petitioners will suffer special injury, differing in kind, from what the public would suffer by reason of the contemplated change in defendant's road; (e) the alleged facts would not justify a finding that either petitioners or the town of Nicholls would be damaged by the change.

Every paragraph of the petition, except the first and second, was specially demurred to, because the allegations were too general, were mere conclusions of the pleader, etc. In its answer the defendant denied practically all the material allegations of the petition. Among other things, it denied that it was its purpose to remove or abandon any portion of its tracks within the corporate limits of Nicholls, but alleged, on the contrary, its intention to continue the use of all of its tracks within the town in their present condition;

the same to be used in giving its citizens such facilities as may be profitable and desirable. It denied further that valuable improvements had been made by petitioners, or other citizens of the town of Nicholls, by reason of the fact that such town was an alleged junctional or terminal point; and set up in its answer that the property of the town would not be impaired in value if both the Brunswick and Waycross lines should run into the town over the same track between Sessoms and Nicholls for the distance of three miles. Defendant also denied that any interest of petitioners or of any citizen of Nicholls would in any way be impaired or damaged, if defendant should abandon and tear up its track between Guysie and Nicholls, and alleged, on the contrary, that the operation of its through trains to Birmingham over the Brunswick and Waycross lines, uniting at Sessoms, and using the same line for the short distance between that point and Nicholls, would give to the petitioners and all citizens of Nicholls all of the benefits from both lines, just as if they entered Nicholls as separate lines. Defendant further denied that petitioners or the town of Nicholls would suffer by the loss of trade, or otherwise, if the contemplated change of its road should be made; and also denied that defendant had purchased an extensive tract of land at Sessoms with the purpose to build up a rival town there at the expense of Nicholls. The answer set up the affirmative defense that, by reason of the laches of the petitioners in not applying for an injunction while the work of making the change by defendant in its line was openly in progress for a period of about a year, and until after large expenditures of money had been made by defendant in connection therewith, all of which was within the knowledge of petitioners, they had therefore lost the right, if any, they originally had, to obtain the injunction sought. Grounds of the demurrer of the petitioners to the answer were in substance: (a) It sets forth no reason in law or equity why an injunction should not be granted; (b) no such reason was set forth in that portion of the answer wherein it is claimed defendant had a right to tear up and abandon the portion of the line in question because of its bad physical condition, the consequent difficulty of operating it, and the expense necessary to put it in good condition.

On the interlocutory hearing, the court refused to grant a temporary injunction. Plaintiffs excepted and brought the case to this court, in order that such ruling might be reviewed. This court affirmed the judgment of the trial judge. On the trial of the case in term, the court below overruled the demurrer to the petition, struck the answer, on demurrer thereto, and directed a verdict that defendant be permanently enjoined as prayed for. Defendant sued out a bill of exceptions, assigning error upon each of these rulings.

Rosser & Brandon, Crovatt & Whitfield, and J. L. Sweat, for plaintiff in error. Chas. T. Roan, F. Willis Dart, Leon A. Wilson, and Myers & Parks, for defendants in error.

FISH, C. J. (after stating the facts as above). 1. The petition set forth a cause of action. The allegations thereof were sufficiently specific, and therefore the court did not err in overruling the demurrer thereto. "Where a railroad company, to which has been given the power to choose its particular route between designated termini, has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority." Brown v. Atlantic & Birmingham Ry. Co., 126 Ga. 248, 55 S. E. 24. The defendant, as the successor to the original company, locating and constructing the line of road between Guysie and Nicholls, some 6½ miles at length, could not, at its mere volition, tear up that section of the road and relocate the same at a different place, although the portion of the road sought to be taken up and relocated lay outside the limits of the town or city. Id. And if petitioners, as they allege, would suffer special damages, not merely as members of the public, but by reason of their residences and the location of their businesses, and investments, and shipments made by them, an action would lie in their names to prevent the tearing up and removal of the road. Id.

2. It is clear, we think, that the court erred in striking so much of the defendant's answer as specifically denied the allegations of the petition, for, even though the petition set forth a cause of action, petitioners could not recover, without proof, if the answer denied the petition, as the burden would then be upon them to prove the case alleged. Neither should that portion of the answer have been stricken which set up an affirmative defense, to the effect that petitioners had, by their laches, lost the right, if any, they originally had for an injunction. A party is not entitled to an injunction when, with full knowledge of his rights, he has been guilty of delay and laches in asserting them, and has negligently allowed large expenditures to be made by another party on whom great injury would be inflicted by the grant of the injunction. Holt v. Parsons, 118 Ga. 895, 45 S. E. 690; City of Elberton v. Pearle Cotton Mills, 123 Ga. 1, 50 S. E. 977.

The case should have been submitted to a jury for the determination of the issues made by the specific denials in the answer to the allegations in the petition, and by the affirmative defense set up in the answer. When this case was formerly before this court (126 Ga. 246, 55 S. E. 23), the judgment affirming the refusal of an interlocutory injunction was based upon the ground that the decision of the trial judge did not rest alone upon questions of law, but also depended

upon certain material issues of fact, on which issues there was conflicting evidence.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 434)

## MORRIS v. STATE.

(Supreme Court of Georgia. Nov. 13, 1907.)

1. CRIMINAL LAW—WRIT OF ERROR—RECORD—QUESTIONS PRESENTED FOR REVIEW—ADMISSIBILITY OF EVIDENCE—NECESSITY OF SETTING FORTH EVIDENCE EXCLUDED.

An assignment of error upon the rejection of evidence is not well made, unless the evidence rejected be set out, either literally or in substance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2932.]

2. SAME—INSTRUCTIONS—NECESSITY OF SETTING FORTH INSTRUCTIONS REFUSED.

A ground of a motion for a new trial, based on the refusal of the court to instruct the jury in accordance with a timely written request, cannot be considered when the request is not set out in the motion, nor attached thereto as an exhibit and properly identified.

3. HOMICIDE—SUFFICIENCY OF EVIDENCE.

The evidence amply warranted the verdict, and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Jones County; H. G. Lewis, Judge.

Will Morris was convicted of murder, and he brings error. Affirmed.

J. C. Barron and E. L. Dumas, Jr., for plaintiff in error. Jos. E. Pottle, Sol. Gen., Johnson & Johnson, and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. Will Morris was convicted of murder for the killing of his father. He made a motion for a new trial, which was overruled, and he excepted.

1. The original motion for a new trial contained only the usual general grounds. The first ground of the amendment to the motion was: "Because the court erred in not allowing the witness Hattie Morris to testify as to why she left her father's house (who was the deceased) and went to her brother's house (who is the defendant)." It does not appear here, or elsewhere, in the motion for a new trial, nor by an exhibit attached thereto, what the testimony of the witness would have been, had she been permitted to testify. It follows, under repeated rulings of this court, that the assignment of error presents no question for adjudication. See citation of cases in 14 Michie's Enc. Dig. Ga. Reports, 410, 411.

2. The second ground in this amendment was: "Because the court erred in refusing to give in charge to the jury the following written request of the defendant's counsel to charge on the question of the defendant's character, the same having been requested at the proper time and being a pertinent legal charge, especially to the facts in said case, and not having been substantially given anywhere in said charge." No request to charge is set out in the motion for a new trial, or referred to therein, otherwise than in the above-quoted language. Immediately following this ground of the motion are the names of counsel for the movant. Then follows the judge's approval of the grounds of the motion. Next comes an order by the judge fixing a date in vacation for the hearing of the motion, and allowing until the hearing for the filing of the brief of evidence and amendment to the motion. Then comes an order by the judge, on the date set for the hearing, overruling the motion and refusing a new trial. Immediately after this there is what purports to be "request to charge by defendant's counsel in the case of State v. Will Morris," below which is the word "Refused"; but such paper bears no marks of identification or filing. Under such circumstances, it is clear that no request to charge on the subject indicated in the motion for a new trial can be considered by this court. The request, in order to be considered, should have been set out in the motion, or made a part thereof by an exhibit attached thereto and properly identified.

3. The evidence fully warranted the verdict, and the court did not err in refusing a new trial.

Judgment affirmed.

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(129 Ga. 522)

## CORNELIA PLANING MILL CO. v. WILCOX.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. HUSBAND AND WIFE—ACTION AGAINST WIFE—EVIDENCE—ADMISSIBILITY.

The court properly rejected the testimony of a witness to the effect that "he [witness] found the property was in her [defendant's] name."

2. EVIDENCE—HEARSAY EVIDENCE—ADMISSIBILITY.

Hearsay evidence is not admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1185.]

3. WRIT OF ERROR—RECORD—QUESTIONS PRESENTED FOR REVIEW—ADMISSIBILITY OF RECORD.

"Alleged error in rejecting a record offered in evidence cannot be considered, unless the record is either set forth or so described as to enable this court to determine whether or not it was pertinent and material." McElhannon v. State, 99 Ga. 672, 26 S. E. 501.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 2905.]

4. SAME.

"An assignment of error in excluding evidence must, to entitle it to consideration, on its face disclose, either literally or in substance, what that evidence was." Russell v. Mohr-Well Lumber Co., 115 Ga. 35, 41 S. E. 275.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 3012.]

5. HUSBAND AND WIFE—ACTION AGAINST WIFE—SUFFICIENCY OF EVIDENCE.

This being an action against a married woman for labor and materials alleged to have been furnished to her through her husband as her agent, and there being no evidence, either direct or circumstantial, to show the existence of the alleged agency, there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by the Cornelia Planing Mill Company against Mrs. I. R. Wilcox, for labor and materials. Judgment for defendant, and plaintiff brings error. Affirmed.

The Cornelia Planing Mill Company, plaintiff, brought an action against Mrs. I. R. Wilcox, and alleged that said defendant was indebted to the plaintiff in the sum of $266.12 on an account; "that said account is for material furnished her, and for work done on material for her in the erection of a certain house * * * located on a certain lot of land [in the town of Mt. Airy] whereon Mrs. I. R. Wilcox now resides, and is in possession of." Wherefore plaintiff prays judgment against Mrs. I. R. Wilcox for said amount, and that plaintiff "have a judgment setting up a special lien on said real estate." The defendant denied each and every allegation in the petition. Boling, a witness for the plaintiff, testified in part as follows: "I made the sale myself [referring to the account sued on]. I sold the lumber to Mr. M. C. Wilcox. I charged it to M. C. Wilcox on the books. I made him statement of the lumber. I charged it to Mrs. I. R. Wilcox [defendant] when I made the final statement. I changed it from M. C. Wilcox to Mrs. I. R. Wilcox when I filed a lien against the property. The trade was made with M. C. Wilcox, sold to M. C. Wilcox, and charged to M. C. Wilcox. I delivered the lumber to his hauler, Mr. Keller. I didn't deliver it to the house at Mt. Airy. I only delivered it to a party that came after the lumber. Mr. Keller was one of them. He was the man I delivered it to at the mill." In answer to the question, "I will ask you if you knew Mrs. I. R. Wilcox in the premises, if she had anything to do with it as far as you know?" Witness replied, "Not as I know of." Keller, a witness for the plaintiff, testified as follows: "I remember Col. Wilcox buying some lumber from the Cornelia Planing Mill Company. I helped haul it. I worked most of the lumber on the house [referred to in plaintiff's petition]. I saw Mrs. I. R. Wilcox around the building a great deal of the time. Sometimes she would say she wanted a window placed at such a place, or steps at such a place. She saw me bringing in this lumber. Mrs. I. R. Wilcox didn't have anything to do with my employment as I know of." The plaintiff introduced a deed showing that the title to the lot on which the said house was located was in the defendant, Mrs. I. R. Wilcox. The plaintiff introduced no further testimony, and the court sustained a motion for nonsuit. Plaintiff excepted. The bill of exceptions contains various assignments of error upon the exclusion of evidence, and complains of the ruling of the court granting said nonsuit.

J. C. Edwards, for plaintiff in error. J. B. Jones and J. J. Bowden, for defendant in error.

BECK, J. (after stating the facts as above). 1. Error is assigned upon the ruling of the court in refusing to permit a witness for the plaintiff to testify that "he [witness] found the property was in her [defendant's] name." Even if this were not secondary evidence, it does not appear from what source the witness derived this information. Standing alone, the evidence shows upon its face that it was merely a conclusion of the witness, based upon information the verity of which does not appear. The witness should have stated the facts and allowed the jury to find in whose name the property was. So far as the record discloses, the witness' so-called knowledge of the ownership of the property was derived entirely from hearsay, and the court did not err in rejecting this testimony. Lamar v. Pearre, 90 Ga. 377, 17 S. E. 92.

2. The other portions of the testimony of the same witness, the exclusion of which is complained of in the next assignment of error, show affirmatively that the witness was testifying from hearsay: "Witness D. N. Boling further swore that he found out that M. C. Wilcox was acting [as agent] for Mrs. I. R. Wilcox, and that he got his information from his attorney," and when he "found out that M. C. Wilcox was acting for her [defendant], he changed it [the account] to her name." There was no error in rejecting this testimony. Civ. Code 1895, § 5175.

3. Complaint is also made in the bill of exceptions of the refusal of the court to permit plaintiff to introduce in evidence "a suit and fi. fa. of the Patillo Lumber Co. v. I. R. Wilcox and M. C. Wilcox, as the agent of I. R. Wilcox, for the purpose of showing that M. C. Wilcox acted as agent for his wife, I. R. Wilcox," and "the proceedings in a case of W. D. Hill Lumber Co. v. I. R. Wilcox, original summons, plea, judgment, fi. fa., and all the entries thereon, for the purpose of proving that M. C. Wilcox acted as agent for his wife, I. R. Wilcox." The records thus offered and rejected are not set forth in the bill of exceptions nor attached thereto as an exhibit, and the above is not a sufficient description to enable this court to determine whether said records were pertinent and material. McElhannon v. State, 99 Ga. 672, 26 S. E. 501.

4. The next exception, to wit: "W. D. Hill was sworn as a witness, whose evidence appears in the brief of evidence in this case. * * * The court ruled out W. D. Hill's evidence, to which ruling plaintiff excepted" —is not a sufficient assignment of error, and raises no question for decision. Tompkins v. Compton, 97 Ga. 375, 23 S. E. 839; Russell v. Mohr-Weil Lumber Co., 115 Ga. 35, 41 S. E. 275; Sayer v. Brown, 119 Ga. 539, 46 S. E. 649.

5. The only question that remains to be decided is whether the court erred in granting a nonsuit. It is contended by plaintiff's counsel that there are sufficient circumstances in the case to authorize the inference that

M. C. Wilcox acted as agent for his wife, the defendant, in purchasing the lumber from the plaintiff. In the case of Akers v. Kirke, 91 Ga. 590, 18 S. E. 366, it was said: "Where all the consideration of a debt reaches a wife as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required to charge her." See, also, Pinkston v. Cedar Hill Nursery Co., 123 Ga. 302, 51 S. E. 387. But in the case of Blount & Morel v. Dugger, 115 Ga. 109, 41 S. E. 270, it was held that "the mere fact that the wife may be the owner of a tract of land upon which a house is erected out of materials furnished solely on the credit of her husband will not render her liable for the value of such materials, nor authorize a judgment against her for the same, on the theory that she was the concealed principal of her husband, where there is no evidence that he was in any way acting as her agent when he purchased the materials." An examination of the record in the case just cited discloses that the defendant, Mrs. Dugger, "called to see the house every day while it was being built, * * * and has enjoyed the benefits and profits of it ever since." See, in this latter connection, the case of Hightower v. Walker, 97 Ga. 748, 25 S. E. 386.

The only evidence in the present case to connect Mrs. Wilcox with the sale of the lumber was the fact that she owned the lot upon which the house was built, and that she was at the house during part of the time that the work was being done, and directed some slight changes to be made. Plaintiff did not testify that he extended the credit to Mr. Wilcox on the faith of the latter owning the house, nor was it contended that Mr. Wilcox led the plaintiff to believe that he owned the property. The lumber was delivered at plaintiff's mill to a servant of Mr. Wilcox, and, so far as the evidence discloses, nothing was said as to how or where it should be used. It also appears from the plaintiff's evidence that the person employed to build the house was the employé, not of Mrs. Wilcox, the defendant, but of Mr. Wilcox. Admitting all the facts proved and all reasonable deductions from them, we do not think that there was any evidence, either direct or circumstantial, to show the husband's agency in contracting the debt with the plaintiff, and the court did not err in granting a nonsuit. See, in this connection, Reaves v. Meredeth, 123 Ga. 444, 51 S. E. 391.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 497)

## HAWKINS v. TANNER.

(Supreme Court of Georgia. Nov. 14, 1907.)

1. WRIT OF ERROR—REVIEW—BRIEF OF EVIDENCE—NECESSITY.

It not appearing, either from the transcript of the record or by a recital in the bill of exceptions, that a brief of the evidence has ever been approved by the trial judge, and there being no suggestion that there is such a brief of file in the office of the clerk of the trial court, this court cannot pass upon those assignments of error which depend for determination upon the evidence, and must, therefore, assume that the rulings upon which such assignments are made were correct. Price v. Price, 122 Ga. 321, 50 S. E. 91; Stansell v. Merchants' Bank, 123 Ga. 278, 51 S. E. 321.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 2618–2620.]

2. LANDLORD AND TENANT—RELATIONSHIP.

A charge that "the relation of landlord and tenant exists where one person occupies the land or premises of another in subordination of the other's title and with his consent, express or implied," states a correct general rule. 18 Am. & Eng. Enc. L. (2d Ed.) 164, 165; Sharpe v. Mathews, 123 Ga. 794, 797, 51 S. E. 706. In the present case the court, in addition to giving this general rule, fully and correctly instructed the jury as to how the relation of landlord and tenant arises, and what is necessary to constitute such relation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 1, 17.]

3. WRIT OF ERROR—REVIEW.

The evidence warranted the verdict.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

Action between W. L. Hawkins and J. W. Tanner. From the judgment, Hawkins brings error. Affirmed.

W. B. Sloan, for plaintiff in error. G. H. Prior and F. M. Johnson, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 417)

## TABOR v. MACON RY. & LIGHT CO.

(Supreme Court of Georgia. Nov. 12, 1907.)

1. TRIAL—INSTRUCTIONS—NECESSITY FOR REQUESTS.

The charge of the court, when considered in its entirety, embraced the general principles of law applicable to the facts of the case; and the extracts upon which error was assigned were not erroneous for any reason set forth in the assignments of error. If any amplification of the general principles which the charge contained had been desired, they should have been made the subject of appropriate and timely written requests.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 628, 647, 648.]

2. WRIT OF ERROR—REVIEW.

The evidence authorized the verdict, and no sufficient reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by J. H. Tabor against the Macon Railway & Light Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. C. Jordan, for plaintiff in error. R. Ellis and Richard Curd, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., who did not preside.

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(129 Ga. 450)

## NIPPER v. NIPPER.

(Supreme Court of Georgia. Nov. 13, 1907.)

1. HUSBAND AND WIFE—ACTIONS FOR SEPARATE MAINTENANCE—TEMPORARY ALLOWANCE.

Under the pleadings and evidence, there was no abuse of discretion on the part of the court in awarding temporary alimony and attorney's fees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 1084.]

2. SAME.

This case differs from Vinson v. Vinson, 94 Ga. 492, 19 S. E. 898. There the wife voluntarily and without cause abandoned the husband and refused to live with him; and the husband was in debt, and destitute of property or credit, and, unaided by her, his earnings were small, and not more than sufficient to obtain a bare living for himself.

3. SAME—NATURE OF PROCEEDING.

A petition for temporary alimony pending a divorce suit or a suit for permanent alimony is in the nature of an ancillary proceeding, and does not require the issuance and service of a new process returnable to another term of court. Upon it the presiding judge issues an order nisi, which is served and under which the hearing is had.

4. SAME.

Where an application for temporary alimony was coupled with an application for a writ of ne exeat, if the prayer suggested a condition for a bond to be required of the defendant which was not in accordance with law, this would not invalidate the application for temporary alimony or cause a reversal of the judgment granting it.

5. SAME.

The question brought to this court by the bill of exceptions has reference alone to the ruling of the presiding judge in granting alimony and attorney's fees.

(Syllabus by the Court.)

Error from Superior Court, Turner County; W. N. Spence, Judge.

Action by Bettie Nipper against Henry J. Nipper for permanent alimony, wherein plaintiff applied for temporary alimony and asked that process issue requiring defendant to appear at the next term of the superior court and that a writ of ne exeat issue. From a judgment for temporary alimony and attorney's fees, defendant brings error. Affirmed.

J. A. Comer and Payton & Hay, for plaintiff in error. Hill & Royal, T. R. Perry, and Jas. H. Pate, for defendant in error.

LUMPKIN, J. Bettie Nipper applied to the judge of the superior court for the grant of temporary alimony to be paid by her husband, Henry J. Nipper, alleging that they were living separately and that she had filed a suit for permanent alimony. In addition to praying that alimony be awarded her, she also prayed that process issue requiring the defendant to appear at the next term of the superior court. In the same petition she asked that the writ of ne exeat issue against her husband. On the hearing the presiding judge awarded alimony and attorney's fees to the wife, and defendant excepted.

While the evidence was conflicting, there was enough to authorize the judgment. Counsel for the plaintiff in error relied on the case of Vinson v. Vinson, 94 Ga. 492, 19 S. E. 898; but it differs widely from the one at bar. There the wife voluntarily and without cause abandoned the husband and refused to live with him, leaving him in debt and destitute of property or credit. Here, according to the evidence on behalf of the plaintiff, she was very badly treated. Her husband refused to live with her, and in his defense to the petition sought to justify his conduct by making untrue allegations of the most offensive character. He offered to have her return to him. But the judge doubtless thought that this offer was not bona fide, but was made merely for the purpose of defending the suit, or that, in any event, she would not be required to live with him again after his previous conduct and the nature of his defense to her suit. Under the evidence as to the ability of the husband to earn money, we cannot say that the sum awarded evidenced an abuse of discretion.

The petition prayed that a rule nisi issue calling on the defendant to show cause why temporary alimony should not be awarded, and also contained a prayer that process issue requiring the defendant to appear at the next term of the superior court. Objection was taken to this. An application for temporary alimony is a proceeding ancillary to an action for divorce or a suit for permanent alimony. If temporary alimony is awarded, it continues until the final hearing. Such a proceeding is not a separate and independent suit, requiring process to be issued calling on the defendant to appear at the next regular term of court. The presiding judge sets the application for a hearing by order, and the defendant is called on to show cause why temporary alimony should not be granted. It was alleged that suit had been brought for permanent alimony. The prayer for process, therefore, was mere surplusage. But praying for unnecessary process furnishes no reason for denying proper temporary alimony. In the same petition application was made to have the writ of ne exeat issued. There was a prayer that defendant be required to give bond, with a condition which appears not to have been that provided by law. The judgment brought before us now by the writ of error is the granting of the temporary alimony and attorney's fees. If there was any mistake in the prayer as to the writ of ne exeat, it in no way affected the question of alimony. Upon a consideration of the case before us, we cannot say that there was error.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 522)

## WHITE et al. v. NORTH GEORGIA ELECTRIC CO. et al.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. EQUITY—JOINDER OF CAUSES—MULTIFARIOUSNESS.

This case is controlled by the decision in White v. North Georgia Electric Co. (June 15, 1907) 55 S. E. 33, where it was held that the petition was multifarious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 341, 342.]

2. SAME.

The grounds of equity sought to be set up by the petition are so interwoven that it is impracticable to determine whether there is any equity in any part of the multifarious allegations, dissociated from the rest; and no ruling is made on that point.

(Syllabus by the Court.)

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

Action by the North Georgia Electric Company and others against S. B. White and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Broun & Randolph, Spencer R. Atkinson, J. J. Bowden, and R. E. A. Hamby, for plaintiffs in error. H. H. Dean, for defendants in error.

LUMPKIN, J. Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 518)

## HENDLEY v. ADAMS.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. COURTS—SUPREME COURT—JURISDICTION.

Where a writ of habeas corpus was sued out before the ordinary, and his decision was carried to the superior court by certiorari, a writ of error to the decision of the judge of the superior court thereon was properly made returnable to the Supreme Court, and the jurisdiction to pass on such a case was in this court, not in the Court of Appeals.

2. HABEAS CORPUS—CUSTODY OF CHILD.

Under the evidence there was no error in overruling and dismissing the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Petition by J. A. Adams for writ of habeas corpus against L. S. Hendley. From a judgment of the superior court overruling a certiorari to the ordinary, respondent brings error. Affirmed.

J. A. Adams petitioned the ordinary of Bibb county for the writ of habeas corpus in order to recover possession of his minor child, a little boy, alleged to be unlawfully held by Mrs. L. S. Hendley, petitioner's mother-in-law; his wife being dead. On the return of the writ, after hearing evidence, the ordinary awarded the custody of the child to the petitioner. The respondent carried the case to the superior court by writ of certiorari. Upon the hearing, the presiding judge overruled the certiorari, and a bill of exceptions was filed.

Hardeman & Jones, for plaintiff in error. R. D. Feagan, for defendant in error.

LUMPKIN, J. (after stating the facts as above). 1. The writ of error directed the clerk of the superior court to transmit the record to this court, and the case was accordingly docketed here. The question has been raised as to whether the Supreme Court had jurisdiction to retain and hear the case, or should transmit it to the Court of Appeals. We hold that it was properly brought to this court, and that the jurisdiction is here. The amendment to the Constitution ratified in 1906 declared that: "The Supreme Court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors in law and equity, from the superior courts in all civil cases, whether legal or equitable, originating therein, or carried thereto from the court of ordinary," etc. Jurisdiction was conferred upon the Court of Appeals "for the trial and correction of errors in law and equity from the superior courts in all cases in which such jurisdiction is not conferred by this Constitution on the Supreme Court," etc. The evident purpose of the constitutional amendment was to create a Court of Appeals, and to provide for a division of business between the Supreme Court and that court, and that, in so far as civil matters were concerned, the Supreme Court should review cases originating in the superior courts and in the court of ordinary. Was this a civil case carried to the superior court from the court of ordinary, within the meaning of the Constitution? No little confusion has arisen in regard to habeas corpus cases because of the peculiarity of the procedure, and because the terms appropriate to ordinary cases have not been found exactly appropriate in dealing with such proceedings. Sometimes cases of this character have been spoken of as criminal or civil, according to whether the person restrained of his liberty was held under a criminal charge or not; but this is inaccurate. A person brought before a court by writ of habeas corpus is not tried on any charge against him, the state is no party, and no sentence can be pronounced against him. While for some purposes such descriptive terms may be permissible, in the accurate use of language, a proceeding of this kind is not a criminal case. If the present case should be termed a criminal one, who shall rank as the person accused of a crime and convicted in the trial court? Shall it be the father, who applied for the writ, or his mother-in-law, who had the custody of the child and claimed the right to keep him? Or shall it be the child? If the judgment below should be affirmed, no penalty would be enforced against any defendant, but the right of the father to the custody of his child would be determined. Such a proceeding is not a criminal case within the meaning of the Constitution.

If this is to be classified with civil cases

within the purview of the constitutional amendment referred to, is it a case which was carried to the superior court from the court of ordinary within the intent and meaning of those words as there used? The confusion already mentioned arising from the inapplicability of terms suited to ordinary litigation to a habeas corpus proceeding gives rise to this question. It has sometimes been said that the judge of the superior court, or of a city court, or the ordinary, when hearing a habeas corpus case, is not exactly the superior court or city court or court of ordinary, but is a sort of special court, which has now and then been termed "a habeas corpus court." Without discussing the cases in which language of this character has been used, or the correctness of the decisions made in them in view of the questions actually involved, it may be suggested that the law of this state has created no court known as "a habeas corpus court." It has conferred upon the judges of certain courts power to issue the writ and hear the case, but it has erected no distinct tribunal or set of tribunals for that purpose. If the ordinary, who is the judge of the court of ordinary, when hearing a habeas corpus case, is not to be treated as acting as the ordinary, it would seem that the same rule would apply to a judge of the superior court under like circumstances. If the judgment of the latter in a proceeding of this character is not the judgment of a judge of the superior court, but of some special kind of tribunal, how is his judgment to be reviewed by this court at all? In Moore v. Ferrell, 1 Ga. 6, a motion was made to dismiss a writ of error on the ground that exception was taken to the order of the judge of the superior court, dissolving an injunction at chambers, and that the Supreme Court possessed no jurisdiction over decisions made by judges of the superior court in vacation, because the act creating this court declared that "all causes of a criminal or civil nature, for alleged errors in any decision, sentence, judgment or decree of any superior court," might be carried up by bill of exceptions. But the motion was overruled. The point was practically determined in the case of Barranger v. Baum, 103 Ga. 465, 469, 30 S. E. 524, 68 Am. St. Rep. 113. It was there held that "a writ of error will lie direct to this court from the decision of the judge of the city court of Richmond county in a habeas corpus case." The Constitution at that time declared that: "The Supreme Court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors from the superior courts, and from the city courts of Atlanta and Savannah, and such other like courts as may be hereafter established in other cities." In order to hold that a writ of error would lie from a decision of the judge of a city court to this court in a habeas corpus case, it was necessary to hold that the decision of the presiding judge in such a case was the action of the city court within the meaning of that provision of the Constitution.

If the law is clear, inconvenience cannot change it; but, if the question before us were doubtful, a different ruling from that now made would involve much confusion and uncertainty as to writs of error in habeas corpus cases. Sometimes they would be treated as civil cases, and sometimes as criminal cases. Sometimes they would go from the superior court (in cases arising there or first heard by the ordinary) to the Court of Appeals, and sometimes come to this court. We do not think that it was the intention of this amendment to produce such a result.

2. On a careful consideration of the evidence, it appears that there was enough to authorize the judgment of the ordinary and that of the judge of the superior court sustaining it.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 508)

## WHITE v. SIKES.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. SPECIFIC PERFORMANCE—RELIEF AWARDED—EFFECT OF PRAYER FOR.

A petition, which contains a prayer for specific performance and general relief, will not, under the clause for general relief, authorize the grant of any relief which is not germane to the prayer for specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 411.]

2. INFANTS—EXECUTORY CONTRACT FOR SALE OF LAND—VALIDITY—DISAFFIRMANCE.

An executory contract for the sale of land by an infant is voidable at his election upon his attainment of majority.

(a) The rule existing under section 3650 of the Civil Code of 1895, which authorizes an infant to make a binding contract in connection with the business in which he may be engaged, by permission of his parent or guardian, as an adult, is not applicable to a single transaction for the sale of land.

(b) Where an infant enters into an executory contract for the sale of land, and receives the purchase price, and expends the same, and, after his attainment of majority, has neither the money nor other property in which the same may have been invested, the mere fact of his omission, upon arriving at majority, to tender back the purchase money, will not amount to a ratification of the contract nor prevent an election to disaffirm the sale.

(c) A declaration, in a suit for specific performance of a contract for the sale of land, which shows affirmatively that the contract was made and the purchase price paid while the defendant was a minor, and that the defendant, before attaining majority, had expended the money in such way as that he did not have the money or any property in which the money may have been invested, after arriving at majority, is subject to general demurrer upon the ground that the declaration shows upon its face such facts as would defeat the plaintiff's right to specific performance of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 151.]

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Specific performance by R. K. White against J. C. Sikes. Judgment for defendant, and plaintiff brings error. Affirmed.

This was a petition praying for the specific performance of a contract for the sale of land, which the judge dismissed upon oral motion upon the ground that no cause of action was set forth. It appears from the petition that Victoria E. Sikes was the owner of a tract of land which she conveyed to her minor son, James Clifford Sikes, the defendant in the present case. The deed is in the ordinary form of a conveyance in fee simple with warranty, except that, immediately following the name of the grantee in the granting clause, appear these words: "Except privilege of control and management until such time as he may be made competent by law, said property for the time being to be managed and controlled by the said Victoria E. Sikes." While the defendant was still a minor, with his mother, he approached White, the plaintiff, and a request was made by them of White that he purchase the land in order that the defendant might use the purchase money to educate himself as a dental surgeon. The purchase price of the land was agreed upon, which was at the rate of $3 per acre; the acreage to be determined by a survey, which was afterwards made, and the exact acreage found to be 367 acres. The defendant and his mother united in a bond for titles. Delivered to the plaintiff, and accompanying this bond for titles, was a written statement by the mother that the defendant would be of full age on a named date, which was about nine months after the date of the transaction, and that he was then a free trader, doing business in his own name, and that she was unable to furnish him with the money necessary to finish his professional education, and a sale of the land was necessary for that purpose. The petition charges that, with the consent of the mother, the defendant collected the purchase money of the land and appropriated it to the payment of his expenses while in attendance upon a dental college. On the very day that the defendant arrived at age, he wrote the plaintiff a letter, in which he refused to make a deed in compliance with the bond, giving as his reason that he was a minor at the time that the bond was executed, and it is alleged that he still refuses to make the deed. It is also alleged that the purchase price of the land was reasonable and was the full value of the land at the time of the sale. The plaintiff averred his willingness to do and perform any and all acts that equity and good conscience required him to do, and he prays a decree that the defendant be required to execute and deliver a warranty deed in accordance with his bond, and for general relief.

J. P. Moore and W. T. Burkhalter, for plaintiff in error. Isaiah Beasley and Jas. K. Hines, for defendant in error.

ATKINSON, J. (after stating the facts as above). The only prayers in the petition are for specific performance and general relief. Hence the only relief that can be granted under this petition would be that connected with the specific prayer. See Sapp v. Williamson (decided July 18, 1907), 58 S. E. 451. It is therefore only to be determined whether, under the allegations of the petition, the plaintiff was entitled to a decree for specific performance of the contract contained in the bond for titles. This was a mere executory contract of the infant. The contracts of an infant are voidable, except for necessaries. Civ. Code 1895, § 3648. If an infant, by permission of his parent or guardian, or by permission of law, engages in any business as an adult, he is bound for all the contracts connected with the business. Civ. Code 1895, § 3650. But a mere single transaction by an infant does not constitute him as one engaged in a business. If an infant, with the consent of a parent, were engaged in the business of buying and selling real estate, and there were no question about the fact that such was his occupation, he would be unquestionably bound by the contracts relating to that business, but that is not this case. The infant was engaged in no business whatever. As far as can be determined from the averments of the petition, he was at home with his mother. He was desirous of obtaining a professional education to fit him for business, but he was at the time engaged in no business. The contract in question was simply one isolated transaction not connected with any occupation or business whatever. Southern Cotton Oil Co. v. Dukes, 121 Ga. 788 (7), 49 S. E. 788.

But it is said that the law declares that, if an infant receives property, or other valuable consideration, and after arrival at age retains possession of such property or enjoys the proceeds of such valuable consideration, this is such a ratification of the contract as will bind him. Civ. Code 1895, § 3648. If an infant makes a contract, either executory or executed, and receives the consideration in whole or in part during his minority, and disposes of the same before his majority, either by losing, expending, or squandering it, this is nothing more than the law anticipates of him, and he will not be required to make any tender of the amount so disposed of before repudiating the contract which he made during his infancy. Southern Cotton Oil Co. v. Dukes, 121 Ga. 788 (5), 49 S. E. 788. But if, upon arrival at majority, he has in his possession either the exact consideration that he received during infancy, or any substantial part of the same, or property which is purchased with such consideration—that is, if he has then anything of a substantial nature into which can be traced the proceeds of the contract made during his infancy—then neither law, equity, nor good conscience will permit him to re-

pudiate his contract and retain that which is the fruits of the contract. But it must appear that the infant, after attaining majority, retains possession and control of something which is tangible, which has become his property as a result of his having used the consideration paid to him under the contract made while he was an infant. If he expends the amount in the purchase of food, and the food is consumed, the principle alluded to would have no application, and so if he used the land in the purchase of an education, which is a thing of value in a sense, but is intangible, the principle would have no application. 2 Warvelle on Vendors (2d Ed.) § 860.

Under the averments of the petition, the infant was not required to make any tender as a condition to his repudiating the contract on his arrival at his majority. It distinctly appears from the averments of the petition that he had none of the money that he had received, for it is alleged that he had expended all of it. There is no allegation that he had in his possession any property which was purchased with the money which had been paid to him. It is true that it is alleged that the money was expended by the infant in taking a course in a dental college, but what he acquired in this way was not property, within the meaning of the rule requiring that he should pay back the value of the property which he had acquired as a result of the contract. It may be that the education thus received would be of value to him, but it is not a thing of value, within the ordinary meaning of that term, and the law does not require him to estimate its value and tender the amount of the estimate thus made. See, in this connection, Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760, 1 L. R. A. (N. S.) 379. Under no view of the case was the plaintiff entitled to a decree for specific performance, and the court did not err in dismissing the case for the reason that no cause of action was set forth.

Judgment affirmed. All the Justices concur.

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(129 Ga. 415)

## CITY OF ATLANTA v. HARPER.

(Supreme Court of Georgia. Nov. 12, 1907.)

1. NEGLIGENCE—"ORDINARY CARE"—DEFINITION.

The definition of "ordinary care," given by the court to the jury, was substantially that stated in the Civil Code.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 6, 7, 372.

For other definitions, see Words and Phrases, vol. 6, pp. 5029–5042; vol. 8, pp. 7739–7740.]

2. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—EVIDENCE.

The evidence warranted the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by I. M. Harper, by her next friend, against the city of Atlanta. Judgment for plaintiff. Defendant brings error. Affirmed.

J. L. Mayson and W. P. Hill, for plaintiff in error. C. D. Hill and Gordon & Branch, for defendant in error.

FISH, C. J. Ina May Harper, 12 years of age, brought an action against the city of Atlanta, by her father, M. R. Harper, as next friend, for damages for personal injuries alleged to have been sustained in falling on one of the city's sidewalks by reason of its defective condition. There was a verdict for the plaintiff; and the case is here on writ of error sued out by the defendant, assigning error upon the overruling of its motion for a new trial.

1. The only error of law alleged to have been committed on the trial was, that the court in charging as to the degree of care the city was required to exercise, instructed the jury as follows: "Ordinary care means that care that a prudent person would exercise under the same or similar circumstances." This definition was in substantial accord with that given of "ordinary diligence," in Civ. Code 1895, § 2898. To same effect is Richmond & Danville R. Co. v. Mitchell, 92 Ga. 77 (2), 18 S. E. 290.

2. The only other points referred to in the brief of counsel for plaintiff in error are that there was a variance between the allegations of the petition and the plaintiff's testimony as to how her injuries were caused; that the evidence showed that the city had no notice, actual or constructive, of the defective condition of the sidewalk; and that the plaintiff knew of its defective condition, and by the use of ordinary care could have avoided the consequences to herself caused by such condition. None of these points was well taken. If there were any inconsistency at all between the allegata and the probata as to how the plaintiff's injuries were caused, it was not sufficient to constitute a substantial variance. There was evidence to authorize a finding, not only that the defects in the sidewalk had existed a sufficient length of time for the agents and officers of the city, by the exercise of ordinary care and diligence, to have known of them, but that the city had actual notice of such defects. And, while it appeared that the plaintiff had notice that the sidewalk was defective, the evidence did not require a finding that she knew the bricks therein were loose and likely to turn, if she stepped upon them while walking along the sidewalk, and throw her into the hole therein, nor that she failed in any respect to exercise such care as her capacity, mental and physical, fitted her, as a child of tender years, for exercising, in the actual circumstances of the occasion and situation under investigation.

It follows that the court did not err in refusing to grant a new trial.

Judgment affirmed. All the Justices concur, except HOLDEN, J., who did not preside.

(129 Ga. 416)

## CITY OF ATLANTA v. HARPER.

(Supreme Court of Georgia. Nov. 12, 1907.)

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS.

This case involves the same transaction as the case of City of Atlanta v. Harper, by Next Friend, 59 S. E. 230, and is controlled in all respects by the decision this day rendered therein.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by M. R. Harper against the city of Atlanta. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Mayson and W. P. Hill, for plaintiff in error. C. D. Hill and Gordon & Branch, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur, except HOLDEN, J., who did not preside.

(129 Ga. 417)

## STEWART v. MARIETTA TRUST & BANKING CO.

(Supreme Court of Georgia. Nov. 12, 1907.)

1. WRIT OF ERROR—JUDGMENT—GENERAL EXCEPTIONS.

Under the rulings in Lyndon v. Georgia Ry. & Electric Co., 129 Ga. —, 58 S. E. 1047, a general assignment of error on the judgment of the court to which the case was submitted without the intervention of a jury, is not sufficient to raise any question of error as to the judgment itself, but is sufficient to give the reviewing court jurisdiction to consider specific assignments of error, sufficiently and properly made, on rulings which preceded the final judgment; and, where there is a general exception to the final judgment, this court will consider specific assignments of error on the antecedent rulings which entered into and affected the final result, and determine whether any error was committed, and, if so, whether it was such as to require a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3025–3027.]

2. SAME—WAIVER OF ASSIGNMENTS OF ERROR—FAILURE TO NOTICE IN BRIEF.

The only assignments of error which are sufficiently and properly made in the bill of exceptions are not referred to in the brief of counsel for the plaintiff in error, and under repeated rulings of this court they will be treated as abandoned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256–4261.]

3. SAME—AMENDMENT OF ASSIGNMENTS OF ERROR.

Assignments of error which are too vague and general to be considered, cannot be made specific by amending the bill of exceptions after it reaches this court. This would be, in effect, permitting the plaintiff in error to raise new points in this court, which he did not raise in his bill of exceptions when it was made up and certified. Winn v. State, 124 Ga. 811, 53 S. E. 318.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3058–3060.]

(Syllabus by the Court.)

Error from Superior Court, Polk County; A. L. Bartlett, Judge.

Action between J. D. Stewart and the Marietta Trust & Banking Company. From the judgment, Stewart brings error. Affirmed.

An issue raised by the interposition of a claim by the Marietta Trust & Banking Co. to the levy of a fi. fa. in favor of Stewart upon certain lands alleged to belong to Camp, defendant in fi. fa., was submitted to the presiding judge without the intervention of a jury. The court rendered a judgment in favor of the claimant, to which the plaintiff in fi. fa. excepted; his exception being in the following words: "The court took the case under consideration, and rendered judgment in said case in favor of the claimant, * * * which judgment plaintiff in fi. fa. now assigns as error."

Jno. J. Gleaton and Gleaton & Gleaton, for plaintiff in error. D. W. Blair, for defendant in error.

BECK, J. (after stating the facts as above). In the bill of exceptions there are to be found several assignments of error upon the admission and rejection of testimony, but none of these assignments of error are argued or insisted upon in the brief of counsel for plaintiff in error, and they are, therefore, treated as abandoned. Hamilton v. Rogers, 126 Ga. 27, 54 S. E. 926.

The argument in the brief relates exclusively to plaintiff's contention that the transfer of a certain bond for titles to the claimant was void, because the transaction was infected with usury. Whether or not that transaction was so infected with usury as to be void is a question which was sought to be raised by an amendment offered to the bill of exceptions, amending the general exception to the court's final judgment and ruling. As ruled in the headnotes, this amendment to the bill of exceptions cannot be considered, and, under previous rulings of this court, the general exception as it stood at the time when the bill of exceptions was certified is too general and defective to raise any question for decision by this court. Smith v. Marshall, 127 Ga. 374, 56 S. E. 416.

Judgment affirmed. All the Justices concur, except HOLDEN, J., who did not preside.

(129 Ga. 570)

## SHEPPARD v. MITCHELL.

(Supreme Court of Georgia. Nov. 15, 1907.)

INJUNCTION—INTERLOCUTORY—DISCRETION OF COURT.

The allegations made in the petition setting forth equities in favor of the plaintiff were de-

nied by the answer of the defendant, and the evidence submitted upon the issue thus made was of such character as to show no abuse of discretion in refusing to grant an interlocutory injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 304.]

(Syllabus by the Court.)

Error from Superior Court, Lee County; Z. A. Littlejohn, Judge.

Action by Lizzie Sheppard against M. L. Mitchell. Judgment for defendant, and plaintiff brings error. Affirmed.

Blalock & Cobb, R. E. Lee, and Hollis Fort, for plaintiff in error. G. W. Warwick, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

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(129 Ga. 532)

## GORDON v. WEST et al.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. FALSE IMPRISONMENT — DEFENSES — VALID PROCESS.

An arrest and imprisonment under valid process furnish no cause of action for false imprisonment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, § 8.]

2. SAME—TIME TO SUE.

Where defendant, in an action of trover, is arrested and imprisoned under bail process ancillary thereto, and is discharged under the provisions of Civ. Code 1895, § 4608, his right of action, if any he has, either for false imprisonment, or for the malicious abuse of process, or for the malicious use of process, accrues, not upon the termination of the action in trover, but at the time of his discharge from imprisonment, and if not brought within two years thereafter is barred by the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Imprisonment, § 84.]

3. SAME.

The petition was properly dismissed upon demurrer.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Andrew Gordon against William J. West. Judgment for defendant, and plaintiff brings error. Pending the case in the Supreme Court, defendant in error died, and the executors of his will, A. S. West and another, were made parties defendant in error. Affirmed.

Henry Walker, for plaintiff in error. M. B. Eubanks, for defendant in error.

FISH, C. J. On April 24, 1906, Andrew Gordon filed a petition against William J. West, the substance whereof, so far as material, briefly stated, was: On January 23, 1903, defendant brought against plaintiff an action of bail trover, and on same date the Southern Banking & Trust Company and M. N. West & Company, each, instituted a similar action against plaintiff; the three suits being for personalty of the same character. The bail process in each case was founded upon an affidavit therefor made by defendant. On January 28, 1903, plaintiff was arrested and lodged in jail under such bail proceedings. On the day of his arrest he filed petitions, in accordance with the statute, for his discharge, but a hearing thereon was not had, by reason of postponements at the instance of counsel for defendant in the present case, until February 4, 1903; plaintiff having been confined in jail in the meantime, when the court granted, in each case, an order as follows: "Upon the call of this case for a hearing of the motion to discharge from custody, without trying same, and by consent of plaintiff, the defendant is discharged from jail on his own recognizance, conditioned as required by statute." On April 28, 1904, the three actions of trover were tried, and a money verdict was rendered in each in favor of the plaintiff therein. In the petition in the present case, damages were laid for lost time, the disgrace and humiliation and ruined clothing, all caused by plaintiff's imprisonment, and for attorney's fees. The petition was demurred to generally and specially. The court granted a general order sustaining the demurrers and dismissing the petition, to which ruling plaintiff excepted. Pending the case in this court, the defendant in error died, and the executors of his will, A. S. West and E. A. Heard, were duly made parties defendant in error. On account of the very loose and general allegations of the petition, it is rather difficult to decide whether the cause of action intended to be set forth therein was false imprisonment, malicious abuse of process, or malicious use of process; or whether the purpose was to make the petition cover all three causes of action. We will not deal with the special demurrers, for the petition was properly dismissed upon general demurrer, even if it properly set forth any one or more of the above-stated causes of action.

1. In the absence of anything appearing to the contrary in the petition, it must be assumed that the bail proceedings under which plaintiff was arrested and imprisoned were regularly sued out and valid, and that therefore the arrest and imprisonment of plaintiff were by lawful process. This being true, plaintiff had no right of action for false imprisonment. Joiner v. Ocean Steamship Co., 86 Ga. 238, 12 S. E. 361; Page v. Citizens' Banking Co., 111 Ga. 73 (7), 36 S. E. 418, 51 L. R. A. 463, 78 Am. St. Rep. 144.

2. If the present suit were based upon any one or more of the causes of action above named, it is apparent from the petition that the action was barred by the statute of limitations, as "actions for injuries done to the person shall be brought within two years after the right of action accrues, except for injuries to the reputation, which shall be brought within one year." Civ. Code 1895, § 3900. It has been held that the words "injuries done to the person," as here used, are not restricted to mere bodily or physical injuries, but comprehend all injuries to the

person, including malicious arrest, false imprisonment, injuries to health, etc. Johnson v. Bradstreet, 87 Ga. 79, 13 S. E. 250; Hutcherson v. Durden, 113 Ga. 987, 39 S. E. 495, 54 L. R. A. 811. In Montague v. Cummings, 119 Ga. 139, 45 S. E. 979, it was held that an action for the malicious abuse of process must be brought within two years after the right of action accrues, and it is a well-recognized rule that to maintain such an action it is necessary that the suit in which such process issued has been terminated. Mullins v. Matthews, 122 Ga. 286, 50 S. E. 101; 13 Enc. Pl. & Prac. 452; 19 Am. & Eng. Enc. L. 632. A different rule applies, however, to an action for the malicious use, without probable cause, of civil process, for it is, in general, essential to the maintenance of such an action that a legal termination of the action complained of should be shown, and that such termination was in favor of the plaintiff in the action for the malicious use of process. Mullins v. Matthews, 122 Ga. 286, 50 S. E. 101; 19 Am. & Eng. Enc. L. 680; 13 Enc. Pl. & Pr. 444. Where, however, the proceeding complained of was merely ancillary to an action, such as an arrest of the body on civil process, it is not necessary to show that the action itself has been ended, but only that the auxiliary proceeding has been terminated in favor of the plaintiff suing for the malicious use of such proceeding. 13 Enc. Pl. & Pr. 448. In Hogg v. Pinckney, 16 S. C. 387, which was an action for damages for malicious arrest, under bail process, for an alleged fraud in contracting a debt, it was held that, "while the plaintiff should allege, in his complaint, that the order of arrest had been vacated before the commencement of his action, it was not necessary that he should also allege that the action itself, in which the arrest was made, had been ended." To the same effect is Ingram v. Root, 51 Hun, 238, 3 N. Y. Supp. 858. See, also, Fortman v. Rottier, 8 Ohio St. 548, 70 Am. Dec. 606; Wood v. Laycock, 60 Ky. 192.

The reason for the rule that an action for malicious use of process does not accrue till the proceeding complained of has terminated in favor of the defendant therein is that the essential elements of such a cause of action and of one for malicious prosecution of a criminal case are the same (Woodley v. Coker, 119 Ga. 226, 46 S. E. 89), and it is settled that no action for malicious prosecution of a criminal proceeding can be maintained till such proceeding has been determined in favor of the accused, for "no man can say of an action still pending that it is false or malicious." Parker v. Langley, 10 Mod. 209. If the accused should be convicted, he could not maintain an action, however malicious the prosecution may have been, for the verdict would be conclusive of probable cause, unless shown to have been procured by fraud; and he cannot sue before the prosecution is terminated, because he may be convicted. Or, differently stated: "The principle which requires the prosecution to have been terminated favorably to the plaintiff, before he can maintain an action therefor, is that while the prosecution is pending undetermined, or when it has been determined adversely to the plaintiff in the action, the want of probable cause therefor cannot be shown in a collateral suit. The proceedings in the prosecution are evidence of their own rectitude until set aside in the due course thereof." Forster v. Orr, 17 Or. 447, 21 Pac. 440. "But," as was said by Scott, J., in Fortman v. Rottier, 8 Ohio St. 548, 70 Am. Dec. 606, "the reason of this rule can only apply to suits in which the prosecutor or plaintiff, in the suit complained of, tenders an issue to the defendant, involving an inquiry into the existence of probable cause. Where the defendant has his day in court upon the trial of this issue, it is but reasonable to require that he shall, by the result of the trial, show the criminal charge to be unsustained by proof, or the alleged cause of action to be invalid, before he shall be permitted to claim, in another suit, that either was malicious and without probable cause. Were the rule otherwise, a recovery might be had for a malicious prosecution, and the plaintiff still be convicted, or have judgment against him, in the former suit. * * * The general principle seems to be that when the termination of the former suit can neither tend to establish nor invalidate the plaintiff's cause of action, it is not necessary to aver such termination."

In the case now before the court, the judicial determination of the suits in trover, to which the bail proceedings were merely ancillary, though adverse to the present plaintiff, could not be proof of probable cause for the suing out and prosecuting the bail proceedings against him, for he would not, on the trial of the trover cases, have his day in court upon that question, as it would not be necessarily involved; the issue there being whether the defendant had converted the personalty of the plaintiff sued for, prior to the institution of the action and within the period of the statute of limitations, and a finding that he had would throw no light on the question as to whether there was probable cause for the bail proceedings. Under the statute (Civ. Code 1895, § 4604), the plaintiff in an action of trover, or his attorney, etc., in order to have bail process issue, must make affidavit that the property sued for is in the possession, custody, or control of the defendant, and that he has reason to apprehend that it has been or will be eloigned or made away with, or will not be forthcoming to answer the judgment, etc., that shall be made in the case. And under section 4608 the only questions raised by the petition of the defendant in the bail trover proceeding for his discharge from imprisonment are: Can he give the security required by law, or produce the property? And, if not, are the reasons for the nonproduction satisfactory? And if, upon the hearing, these questions are decided in

his favor, he shall be discharged upon his own recognizance, conditioned for his appearance to answer the suit. We think it clear, from what has been said, that, if the plaintiff had a cause of action for the malicious use of the bail proceedings, it accrued upon his discharge from imprisonment, and not upon the determination of the trover cases.

3. As we have seen, the present action was not brought within two years from the time plaintiff was discharged from imprisonment, and was therefore barred, whether it was for false imprisonment, the malicious abuse, or the malicious use, of civil process, and hence was properly dismissed upon demurrer.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 473)

## LOUISVILLE & N. RY. CO. v. WARFIELD & LEE.

(Supreme Court of Georgia. Nov. 13, 1907.)

1. CARRIERS — CARRIAGE OF GOODS — ACTIONS FOR INJURY—ALLEGATION OF SPECIFIC ACTS OF NEGLIGENCE—NECESSITY.

In an action instituted by a shipper of goods against a common carrier on account of the civil wrong occasioned to the shipper by reason of the fact that the carrier, having received the shipment in good order, did not transport it safely, but delivered it to the shipper, who was also the consignee, in a damaged condition, particular acts of negligence need not be alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 569, 570.]

2. SAME—NATURE OF LIABILITY.

When a carrier fails to deliver the goods intrusted to his care, or delivers them in a damaged condition, no excuse avails him, unless it was occasioned by the act of God, the public enemy, an inherent vice or natural deterioration of the object carried, or, in case of live stock, the viciousness of the animals, or that he is excused by special contract made with the shipper, by statute, or by negligence of the shipper.

(a) In an action against a carrier for the breach of duty to safely transport, specific allegations of negligence may be treated as surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 481, 486, 569, 570, 929.]

3. SAME.

The petition, as described in the third query of the Court of Appeals, was not open to the special demurrer made thereto.

4. SAME.

So much of the case of Louisville & Nashville Ry. Co. v. Cody, 119 Ga. 371, 46 S. E. 429, as holds that it is necessary for a plaintiff, who elects to bring an action ex delicto against a railroad company for damages arising from a failure on its part to properly perform its duties as a common carrier of live stock, to specifically allege, when called upon to do so by special demurrer, the particular facts upon which he relies in support of his contention that the carrier was negligent touching the transportation of live stock intrusted to its care for shipment, is formally overruled.

(Syllabus by the Court.)

Certified questions from Court of Appeals. Action by Warfield & Lee against the Louisville & Nashville Railway Company for damage to goods in transit. Judgment for plaintiffs, and defendant brings error to the Court of Appeals, which certifies questions to the Supreme Court.

"The Court of Appeals desires the instruction of the Supreme Court as to the following questions of law for the proper decision of the above-stated case, to wit:

"(1) In a case where an action is instituted by the shipper of goods against a common carrier, on account of the civil wrong occasioned to the shipper by reason of the fact that the carrier, having received the shipment in good order, did not transport it safely, but delivered it to the shipper, who was also the consignee, in a damaged condition, is negligence of the carrier a necessary allegation?

"(2) In such a case, is proof of negligence by the plaintiff material or immaterial? And would it be any defense to the carrier to show that it had not been negligent in respect to the shipment? Or does the defendant's liability turn solely upon its ability to show that the damage resulted by act of God, the public enemy, or similar cause? In construing a petition against the carrier in such a case, may an allegation of the carrier's negligence (either general or specific), through which the carrier caused or allowed the damage to occur, and from which the civil wrong involved in the fact that the carrier did not transport the shipment safely (as it was under legal duty to do) arose, be treated as immaterial or rejected as surplusage?

"(3) In such a case, where the plaintiff in his petition alleges the fact of the delivery of the goods to the carrier under such circumstances as to raise the legal duty on the carrier's part to safely transport them, and as to raise the liability on the carrier's part for all damages to them save only such as may be occasioned by act of God or the public enemy; and further alleges a breach of this duty, in that the shipper did not safely transport the goods, but caused or allowed them to receive certain definitely described injuries; and, further, in addition to these allegations, alleges that the injuries to the shipment were caused by the negligent delay of the carrier (the nature of the delay having been specifically set forth) and by the carrier's negligence in failing to properly attend to the shipment (the same consisting of live stock) while the same was in its possession—is a special demurrer by the defendant, on the grounds that the acts of negligence charged against the defendant are not described, that it does not show wherein the defendant failed to properly attend the shipment, or what would have been proper attention thereto by the defendant, properly overruled by the trial court?

"In connection with the last question above stated, counsel for the defendant in error in the case at bar has, in accordance with the rules of this court, expressed a desire to

question for the purpose of review the decisions of the Supreme Court in the case of Louisville & Nashville R. Co. v. Cody, reported in 119 Ga. 371, 46 S. E. 429; and this court, upon a consideration of the question, being of the opinion that the decision should be modified or overruled, in accordance with the rule of court for such cases made and provided, certifies the question together with said request to the Supreme Court."

Hardeman & Jones, for plaintiff in error. Jos. H. Hall and Warren Roberts, for defendant in error.

EVANS, P. J. The questions propounded by the Court of Appeals involve matters of pleading and practice which were considered by this court in the case of L. & N. R. Co. v. Cody, in 119 Ga. 371, 46 S. E. 429. If the ruling in that case be adhered to, we could on its authority give categorical answers. But a motion was made in the Court of Appeals to examine and review that case as bearing on the pleading and practice questions submitted to us, and we are requested by the Court of Appeals to review so much of that decision as relates to the matters certified to us for instruction. In the case of L. & N. R. Co. v. Cody it was held that it is necessary for a plaintiff, who elects to bring an action ex delicto against a railroad company for damages arising from a failure on its part to properly perform its duties as a common carrier of live stock, to specifically allege, when called upon to do so by special demurrer, the particular facts upon which he relies in support of his contention that the carrier was negligent touching the transportation of live stock intrusted to its care for shipment. Is the principle there stated a correct rule of pleading?

At common law a common carrier was bound to convey the goods of any person offering to pay his hire, unless the carriage be already full, or the risks sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey or is not in the habit of conveying. A common carrier was an insurer of the goods intrusted to his care, and was responsible for every injury sustained by them occasioned by any means whatever, except only the act of God and the King's enemies. Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393. For the failure to safely transport and deliver goods an action might be brought against a carrier, either in assumpsit or in case. In assumpsit, the action was for the breach of the contract to carry, and an allegation of the failure to perform was considered a sufficient averment of its breach. When the action was brought in case, it was founded on the breach of the public duty. The duty to receive and safely transport goods was originally implied from the custom of the realm. In the evolution of time, it became incorporated in the common law of England, and an action ex delicto for the breach of duty implied by law was very generally pursued to recover damages for goods lost or damaged while in the possession of the carrier. The main difference between the form of pleading in assumpsit and case was that in the former the liability was based upon a breach of contract, while in the latter it was for a breach of duty. In the forms of pleading approved by Mr. Chitty (2 Chit. Pl. [11 Am. Ed.] *pp. 356 and 652) the allegations of breach of contract and breach of duty were substantially in the same words, and were to the effect that the carrier so negligently conducted himself that through his carelessness the goods intrusted to his care became lost to the plaintiff. In Morse v. Slue, Sir T. Raym. 220, 5 Eng. Rul. Cas. 244, one of the oldest cases where the doctrine was stated that a common carrier was responsible for the safe carriage of goods at all events, except for loss occasioned by the act of God or the public enemy, the declaration, which was in case, alleged that "the carrier so negligently kept the goods that in default of sufficient care the same were totally lost." In Goggs v. Bernard, Lord Raymond, 909, 1 Smith. Lead. Cas. (9th Ed.) 354, the action was on the case, against a gratuitous bailee for goods lost in carriage by the neglect of the bailee, and the negligence of the mandatary was alleged in general terms. In declaring against a mandatary, Mr. Hutchinson says the plaintiff need not allege the particular character or degree of negligence upon which he relies for his recovery, but the allegation of negligence generally is sufficient. 1 Hutchinson, Car. § 34. There seems to be no doubt that at common law, in an action ex delicto, the plaintiff was not required to allege more than general negligence.

The common-law rule as to alleging negligence generally is in force in many of the states. Lachner v. Express Co., 72 Mo. App. 13; Carlisle v. Keokuk, etc., Co., 82 Mo. 40; McFadden v. Mo. Pac. Ry., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; McCauley v. Davidson, 10 Minn. 418 (Gil. 335); Great Western Ry. v. Hawkins, 18 Mich. 427; Peck v. Weeks, 34 Conn. 145; Lang v. Brady, 73 Conn. 707, 49 Atl. 199. The complaint in the last-named case alleged that the defendant is a common carrier; that the plaintiff delivered to him, as such common carrier, certain specified goods, to be carried from A. to B., and there delivered to the plaintiff for hire; that the defendant neglected his duty, in that he did not safely carry and deliver the goods; and that the different articles carried were injured by default of the defendant, to the damage of the plaintiff. The defendant demurred to this complaint because it alleged the several articles specified were injured by default of the defendant, without stating any fact to show in what his default consisted. The court held that, as the action was for a breach of the duty imposed on common carriers, independently of contract, it was not

necessary to allege particular acts of negligence.

There is no statute in this state which requires a plaintiff, in a suit against a common carrier for breach of duty in failing to safely transport goods, to allege particular acts of negligence. There are sound reasons why he should not be required to specify the particular acts of the carrier's negligence which caused the loss or injury to his goods. Where the law imposes an absolute duty, the failure to perform that duty to the damage of another raises a liability, and it would be superfluous to inquire into the causes that interfered with the discharge of the duty, when such causes would not relieve from liability. It is an elementary rule of pleading that the allegation of any fact which is not issuable or jurisdictional is not demanded. When the carrier fails to deliver the goods intrusted to his care, no excuse avails him, unless it was occasioned by the act of God or the public enemies of the state. Civ. Code 1895, § 2264. This was the common-law liability. The carrier may also set up as an excuse for the loss or injury of goods in his care, in case of live stock, the viciousness of the animals (Ga. R. Co. v. Spears, 66 Ga. 485, 42 Am. Rep. 81); in the case of perishable articles, the natural deterioration of the object carried (Forrester v. Ga. R. Co., 92 Ga. 699, 19 S. E. 811), or the inherent vice in the goods, or that he is excused by the special contract made with the shipper (Boaz v. Central R. Co., 87 Ga. 463, 13 S. E. 711), or by statute, or negligence of the shipper. None of these excuses which the law recognizes relate to the degree of care which he must exercise in the performance of his public duty. To illustrate: Suppose the goods are destroyed by a collision of the cars of the carrier. It would be altogether idle to inquire whether the collision was caused by the carrier's negligence, for be he ever so diligent, his diligence would not relieve him from liability, unless he further shows that the loss of the goods is attributable to one of the causes which the law allows as an excuse for nonperformance of his public duty. To require a specific allegation of negligence relating to the circumstances attending the collision would be to introduce in the pleadings a feigned and superfluous issue. Besides, the shipper has no means of knowing the facts relating to the loss of his goods, and it would be hard on him to demand an averment of facts, concerning which, from the very nature of the transaction, he must ordinarily be ignorant.

The rule stated in L. & N. R. Co. v. Cody is a departure from the common law, and it is based upon the four cited cases, none of which was a suit against a carrier for damages arising from the loss or injury of goods delivered to it for transportation. These cases concerned suits where damages were claimed for personal injuries because of the negligence of the carrier. We do not think the two classes of cases are analogous. The duty of a carrier of passengers to safely transport is not absolute. The carrier is bound to use extraordinary diligence to protect the lives and persons of his passengers, but he is not liable for injuries to the person after having used such diligence. Civ. Code 1895, § 2266. So, also, in the case of injuries to employés, and to third persons, the duty is to exercise ordinary care, and when the carrier measures up to this duty he is absolved of liability. Where damages are claimed of a carrier from a failure to exercise the diligence which the law enjoins, the lack of diligence of the carrier is the fundamental ground of the complaint. The authorities cited in the opinion of Mr. Justice Turner only go to the point that, when the gravamen of the complaint is that the injury was caused by the failure of the carrier to exercise proper diligence, the carrier's dereliction in that respect should be sufficiently set forth as to put him on notice of the facts relied on to establish his negligence, in order that he may repel the charge against him. But, where the action is against the carrier for a failure to perform his public duty respecting the transportation of freight, the gravamen of the complaint is the failure to perform such duty, and an allegation that he negligently failed to safely carry the goods, but delivered them in a damaged condition, sufficiently states the breach of duty.

Accordingly, we think that the decision in the Cody Case should be overruled, in so far as it militates with the views herein expressed. We have incorporated in the syllabi answers to the matters about which the Court of Appeals desired instruction. All the Justices concur.

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(129 Ga. 440)

## THOMASON v. THOMPSON et al.

(Supreme Court of Georgia. Nov. 13, 1907.)

1. COURTS—NATURE AND EXTENT OF JURISDICTION—JURISDICTION OF THE PERSON.

Where an execution has been levied on land, and a claim is filed, and the papers are returned to the superior court of the county where the land lies, for trial, that court has jurisdiction of an ancillary petition in aid of the levy, instituted by the plaintiff in execution against a claimant, irrespective of the claimant's residence, as to matters germane to the issue involved in the claim case.

2. JUDGMENT—EQUITABLE RELIEF—FRAUD.

A judgment will not be set aside on the ground that the prevailing party practiced a fraud on the court and the adverse party, by concealing the evidence of his fraud, where the particular fraud, evidence to establish which is alleged to have been concealed, was the issue on trial and there adjudicated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 840.]

3. SAME — CONCLUSIVENESS — MATTERS CONCLUDED.

Where the proceeds of the sale of land under a mortgage fi. fa. are claimed by a common-law judgment of inferior date to the mortgage, and a rule against the sheriff is brought to distribute the money, to which rule both lien creditors are parties, and the validity of the mortgage lien is attacked by appropriate pleadings and the jury renders a verdict sustaining the

validity of the lien, upon which judgment is entered, such judgment will estop the holder of the common-law fi. fa. from attacking the deed by the sheriff to the mortgage creditor as purchaser, for the same alleged cause of invalidity adjudicated in the rule to distribute the money arising from the sale of the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. M. Holden, Judge.

Equitable petition by R. U. Thomason against H. C. Thompson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

R. U. Thomason, as transferee from the executors of P. R. Thomason, of a common-law fi. fa., issued upon a judgment in favor of these executors, against H. E. Thompson, rendered at the September term, 1886, of Greene superior court, brought his equitable petition in the superior court of Greene county, against Swann, sheriff and successor in that office of English, former sheriff, and Noel P. Park, as administrator of H. E. Thompson, residents of Greene county, and Henry C. Thompson and his wife, residents of Fulton county, alleging substantially as follows: On December 3, 1885, William H. and H. E. Thompson, both then of Greene county, but now deceased, executed and delivered to Henry C. Thompson a mortgage to secure a pretended indebtedness of $5,500, covering a tract of land in Greene county. William H. Thompson died testate, bequeathing all his property to Henry E. Thompson, who was nominated his executor. At the September term, 1886, Henry C. Thompson foreclosed this mortgage upon the land; the proceedings being against Henry E. Thompson individually and as executor of William H. Thompson. In November, 1886, the land was sold by English, sheriff, under the mortgage fi. fa. of Thompson, and the common-law fi. fa. of Henderson and Campbell, executors of P. R. Thomason, and bid in by Henry C. Thompson for $2,019, and a sheriff's deed made to him in pursuance of that sale. At the March term, 1887, Campbell and Henderson, as executors, brought a rule against the sheriff requiring him to show cause why the proceeds of this sale should not be paid to them upon their fi. fa. English answered setting up that the fund was claimed by Thompson upon his mortgage fi. fa., whereupon Thompson had himself made a party and claimed the fund. Henderson and Campbell tendered an issue upon the trial of the rule setting up that the mortgage was without consideration upon which Thompson's fi. fa. was based, and was executed for the purpose of defeating their common-law fi. fa., and "that the said Henry C. Thompson, and Wm. H. Thompson and H. E. Thompson, in the giving of said mortgage, colluded and confederated against movants' just claim and right. The common-law fi. fa. of Henderson and Campbell, executors, was upon an indebtedness of Wm. H. and H. E. Thompson, and, the former having died before the suit was brought, it proceeded against H. E. Thompson alone. On the trial of the rule it was agreed that the sole issue to be submitted to the jury was the validity or invalidity of the mortgage, and they returned a verdict in favor of its validity. It is further alleged that this verdict was obtained by a fraud practiced upon the court in the concealment of the material fact that this mortgage was without consideration, and given purely to defeat and defraud creditors, and to defraud petitioner and prevent the collection of the common-law fi. fa., and that the foreclosure, sale, and claim of the proceeds thereof were parts of this fraudulent scheme.

It is charged that when the mortgage was made and delivered to Henry C. Thompson on December 3, 1885, he executed and delivered to H. E. Thompson, one of the mortgagors, the following secret writing: "This is to certify that the mortgage made to me by W. H. Thompson and H. E. Thompson on their land and stock was given simply to keep their creditors from pressing them and was not given for value received. December 3, 1885. [Signed] H. C. Thompson." This paper, at the time of the trial of the rule, was in the hands of H. E. Thompson, and its existence concealed from plaintiffs in the common-law fi. fa., and could not have been discovered by them by the exercise of any kind of diligence. H. E. Thompson continued in possession of the land without paying rent till his death, in 1905, receiving all the rents, issues, and profits therefrom. This secret writing was in the hands of Henry Thompson, a reputed illegitimate son of H. E. Thompson, at the time of the latter's death, having been turned over to him with the injunction to keep it concealed. Knowledge of this writing was obtained from Henry Thompson soon after the death of H. T. Thompson, in 1905, by a promise on the part of petitioner that he would not disturb the possession of Henry Thompson of a part of this land which he claimed his father had given him. Certain letters are set out which it is claimed show admissions on the part of Henry C. Thompson of the fraudulent scheme alleged. Henry C. Thompson secured a loan on the property, which it is stated was only made after he had obtained H. E. Thompson's consent. It is further alleged that Henry C. Thompson, in furtherance of the fraudulent scheme, "has colluded, combined, and confederated with his wife," who is setting up some pretended claim to the land, but that her pretended title, if any she has, was executed to her for the purpose of hindering, delaying, and defrauding petitioner, with knowledge on her part of this purpose. The prayers of the petition are that the judgment in the rule case be set aside; that a decree be rendered fixing a special lien on the land in favor of petitioner to pay his debt; that Thompson and his wife

be enjoined from incumbering or selling the land; that a receiver be appointed to take charge of the land; and for process.

Defendants, Henry C. Thompson and his wife, demurred upon numerous grounds, among others, that the court was without jurisdiction because none of the parties against whom substantial relief is prayed reside in Greene county; that there is a misjoinder of parties plaintiff and defendant, and a misjoinder of parties defendant; that the petition is without equity, and sets forth no cause of action upon which to predicate the relief prayed; that the matter is res adjudicata; that the judgment sought to be set aside has been rendered for more than three years, and this action is barred by the statute of limitations; and that the petition does not sufficiently show that the judgment sought to be enforced is in life. H. C. Thompson and his wife filed separate answers, denying all allegations of fraud, and H. C. Thompson specially denied that he signed the paper relied on by the plaintiffs as ground for the relief prayed against him.

At the hearing petitioner offered an amendment setting up that H. C. Thompson was insolvent, had taken charge of and appropriated certain crops of H. E. Thompson, raised on other lands, since the death of H. E. Thompson, and refused on demand to deliver same to H. E. Thompson's administrator; that plaintiff's fi. fa. had been levied on the land in dispute, and a claim had been interposed by Mrs. Thompson, which claim is now pending in Greene superior court; that Park, administrator of H. E. Thompson, intends to file a suit to recover this land from H. C. Thompson and his wife; that, while H. C. Thompson was the apparent owner of the land, he borrowed certain money from one Northrup; and that James B. Park, as attorney for Northrup is about to file an ejectment suit for the land. It is prayed that these suits be enjoined, and that the mortgage and sheriff's deed be canceled. Another amendment seeks to add a prayer that the mortgage foreclosure judgment be set aside as fraudulent and void. A third amendment alleges that Thompson and his wife are colluding and confederating to prevent petitioner from collecting his debt, and that Mrs. Thompson paid out no money for the land, is not an innocent purchaser, and has never been in possession thereof. The mortgage and note are fully set out. After hearing evidence in support of the various contentions of the parties, the court reserved his decision. On May 10th, one day before the court rendered its judgment, a fourth amendment was offered setting up the revival of the judgment in 1898, and the transfer of the fi. fa. at that time to petitioner. It further alleged the filing to the February term, 1907, of a petition to revive the judgment a second time: "That in order to avoid a multiplicity of suits your petitioner hereby in this proceeding brings suit on said dormant judgment, as provided by law, against Noel B. Park, administrator of the estate of Henry E. Thompson for the amount due on the same." The prayer is for a judgment against this administrator, binding the property described in the petition. The bill of exceptions assigns error upon the court's refusal to allow any of these amendments, and upon his refusal to appoint a receiver, and enjoin the several defendants as prayed.

Foster & Foster and Jas. B. Park, for plaintiff in error. Jno. C. Reed and Saml. H. Sibley, for defendants in error.

EVANS, P. J. (after stating the facts as above). 1. The first ground of the demurrer disputes the jurisdiction of the court, and in discussing its merits we will consider the petition as if all the amendments had been allowed. Many allegations of the proffered amendments referred to subject-matters which bear no relation to the main relief prayed by the plaintiff. The ultimate purpose of the plaintiff is to subject the land in controversy to the lien of his judgment against H. E. Thompson. The first step to enforce the lien of this judgment was to cause the execution issued thereon to be levied on the land, to which levy Mrs. H. C. Thompson interposed her statutory claim. The apparent legal title is in her, and is based on the sheriff's sale, which divested the lien of the plaintiff's judgment, and is fortified by the judgment distributing the proceeds arising from the sale of the land by the sheriff. It is clear that, unless the plaintiff is entitled to set aside the sheriff's deed and the judgment in the money rule case, the title of the claimant must prevail. The filing by the plaintiff of an equitable petition in aid of his levy is a recognition of this fact. It requires but a glance at the allegations and prayers of the petition and amendments to see that the Fulton county defendants, H. C. Thompson and wife, are the only defendants against whom substantial relief is prayed. These defendants demurred to the jurisdiction of the superior court of Greene county because of their residence in Fulton county. The Constitution of this state requires that equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed. Civ. Code 1895, § 5871. Even before this provision was incorporated in the fundamental law, it was held that, in analogy to the rule at law, equity causes must be brought in the county where a defendant resides against whom substantial relief is prayed, but that the rule does not apply to bills ancillary to suits at law; that, in so far as such a bill seeks no relief outside of the suit pending, the county where the suit is pending has jurisdiction, and the constitutional mandate in this respect is to be interpreted in the light of the history of the law on that subject in this state prior to its first appearance in the Constitutions of this state. Carswell v. Macon Mfg. Co., 38 Ga. 403. The con-

stitutional guaranty that a person may not be sued outside of the county of his residence is a personal privilege, which may be waived by him. A defendant may waive the jurisdiction of the court as to his person by appearance and pleading. So a litigant, by instituting a suit in another county, impliedly and necessarily consents that the forum to which he applies for relief may adjudicate all matters between him and his adversary which are germane to the litigation. This principle "rests on the idea that the plaintiff, by voluntarily instituting his suit, gives the court of the county where it is so instituted jurisdiction of his person sufficient to answer all the ends of justice respecting the suit originally instituted. Caswell v. Bunch, 77 Ga. 504. The interposition of a claim is permissive and not compulsory. Walden v. Walden, 128 Ga. 131, 57 S. E. 323. It would be immaterial, so far as venue is concerned, whether the relief of the adversary party be administered through pleadings in the original case, or by ancillary suit. Moore, Marsh & Co. v. Medlock, 101 Ga. 94, 28 S. E. 836. The waiver of jurisdiction as to the nonresident person, however, is limited to relief germane to, and involved in the action which he starts. In the case of Merchants' Bank v. Davis, 3 Ga. 112, an execution owned by persons residing in one county was levied on land in another, and a claim was interposed. It was there held that the superior court of the county where the land lies has jurisdiction over plaintiffs residing out of that county in equity, in consequence of the pendency of the claim, in a proper case made. So, also, when a claim is filed to the levy of a fi. fa., the same right exists in the plaintiff in fi. fa. to file equitable proceedings in support of his levy, and enforce all equities pertaining to his rights as such judgment creditor in the county where the claim is pending. Dawson v. Equitable Mortgage Co., 109 Ga. 389, 34 S. E. 668.

Therefore, if the matters alleged against H. C. Thompson and wife, and the relief prayed against them, be germane to the issue involved in the claim case, the superior court of Greene county has jurisdiction of the present case. The paramount issue in a claim case is whether or not the property levied on is subject to the fi. fa. McLendon v. Shumate, 128 Ga. 526, 57 S. E. 886. The claimant's title is derived from H. C. Thompson, who gets his title from the judgment debtor of the plaintiff. The plaintiff wishes to set aside this title as fraudulent. He could do this by appropriate pleadings in the claim case. If in the claim case, why not by ancillary suit? In either proceeding it would be necessary to make H. C. Thompson a party. But he cannot object to the jurisdiction of the court if he is a necessary party to obtaining the relief against his wife, and the court has jurisdiction as to her so far as the issues in the claim case are involved. We therefore hold that the filing of the claim was such a pending proceeding as conferred jurisdiction on the superior court of Greene county to entertain the petition in aid of the levy of the plaintiff's fi. fa.

2. The ground upon which plaintiff relies to set aside the sheriff's deed to H. C. Thompson is the invalidity of the process under which the land was sold. There is no pretense that any irregularity entered into the various stages of the proceedings which eventuated in the sale. The sale is said to be void solely because the mortgage on which the judgment of foreclosure is founded is without consideration and fraudulent. The plaintiff is held off from an immediate attack on the sheriff's deed by a judgment upon the very issue which plaintiffs in fi. fa. caused to have been made in the rule case to distribute the money arising from the sale of the land by the sheriff. When the land was sold by the sheriff, the executors of Thompson demanded that the proceeds be applied to their fi. fa. Upon the sheriff's refusal to pay over the money to them, they brought a rule against him. The sheriff answered, and H. C. Thompson intervened, and claimed the money on his mortgage fi. fa. The pleadings distinctly and sharply made the issue that the apparent superiority of the mortgage lien must yield to the junior common-law judgment, because the mortgage was without consideration, the parties thereto were uncle and nephew, it was fraudulent, and made for the sole purpose of defeating the lien of plaintiff's judgment. This was the only issue submitted to the jury, and they found in favor of the validity of the mortgage, and judgment was accordingly entered up. This judgment estops the plaintiff from raising for the second time the identical matter therein decided. To avoid any estoppel, plaintiff seeks to set aside this judgment as one procured by perjury and fraud practiced on the court; the fraud alleged being that the mortgagor falsely and fraudulently represented to the court the bona fides of his mortgage, and with the aid of perjured testimony procured an unconscionable advantage.

Fraud is the arch enemy of equity, and a court of equity will relieve against a judgment obtained by imposition. Civ. Code 1895, §§ 4032, 5370. Thus, when a litigant keeps the opposite party from court, equity will relieve against the judgment obtained in his absence. Dodge v. Williams, 107 Ga. 410, 33 S. E. 468; Bigham v. Kistler, 114 Ga. 457, 40 S. E. 303. Or where one party fraudulently induces his adversary to withdraw his defense, the judgment will be set aside. Markham v. Angier, 57 Ga. 43. The fraud in cases of this kind is collateral and extrinsic of the judgment. The great current of authority limits the frauds for which a bill to set aside a judgment between the same parties, rendered by a court of competent jurisdiction, will be sustained, to those matters which are extrinsic and collateral to the matter tried. U. S. v. Throckmorton,

98 U. S. 61, 25 L. Ed. 93; Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 330, 25 Am. St. Rep. 159; Camp v. Ward, 69 Vt. 286, 37 Atl. 747, 60 Am. St. Rep. 929; Friese v. Hummel, 26 Or. 145, 37 Pac. 458, 46 Am. St. Rep. 610; 23 Cyc. 1026, and citations. In the Throckmorton Case, it was said that: "The mischief of retrying every case in which the judgment or decree rendered on false testimony, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

The argument of the plaintiff in error would seem to deny that the principle obtains in Georgia, which is so generally recognized by courts elsewhere, that equity will not set aside a judgment because it was founded on a fraudulent instrument, or perjured testimony, or for any matter which was actually presented and considered in the judgment assailed. The argument is rested solely on one case. Griffin v. Sketoe, 30 Ga. 300. It appears in that case that one Williams brought complaint for land against Sketoe, which resulted in a verdict for the defendant. Williams renewed his ejectment suit, and while it was pending died. Griffin was appointed his administrator, and, to avoid the estoppel of the former judgment, brought an equitable petition to set it aside on the ground of fraud and perjury. The fraud consisted in predicating his defense of seven years' possession under a deed which had been fraudulently antedated, and offering the subscribing witness thereto, who falsely testified that the deed was executed on the date stated in the instrument. The court held that a judgment obtained under these circumstances was fraudulent, and would be annulled. In the course of the discussion, Lyon, J., said, in substance, that the issue in the trial was title to the whole lot; the defendant was in actual possession of a small part of the lot, and relied upon the falsely dated deed to extend that possession to the whole lot; a verdict for the defendant could not have been rendered without the deed, and was therefore dependent on it. As we understand it, this case, at furthest, only decides that a judgment will be set aside when the prevailing party practices a fraud on the court in proving his case by means of a forged or fraudulent document. The principle enunciated may not be in exact accord with the rule on the subject, which prevails in other jurisdictions. But there is a wide distinction between the case at bar and that of Griffin v. Sketoe. In the trial which resulted in the judgment under discussion in the present case, the fraud was distinctly in issue; in fact, was the only issue, squarely made in the pleadings, expressly included in the verdict, and solemnly adjudicated in the judgment. In Griffin v. Sketoe, no issue was made as to the antedating of the deed. The fraud of the prevailing party was not an issue. His fraud consisted in the use of a paper, the crookedness of which he successfully concealed from the court and his adversary. The reason for setting aside the verdict must have been that a new trial should be had so that the integrity of the defendant's deed could be made an issue. We dare say that, if the true date of the deed had been in issue in the former trial, the judgment would not have been set aside, and another trial ordered because of the discovery of new evidence. Even in the case of timely and prompt motions for new trial, our adjudications are numerous, and the statute is plain that a new trial will not be granted because of newly discovered evidence, cumulative and impeaching in its nature. To set aside a verdict and judgment for fraud, where the particular fraud was in issue, because of the discovery of additional evidence to prove it, would deprive a judicial finality—a judgment—of its inherent and distinguishing characteristic. The same reason for annulling a judgment because of the discovery of new evidence to establish the fraud would apply to the unfortunate litigant, who had been unjustly charged with fraud, so as to give him another opportunity to raise anew the issue of fraud on newly discovered evidence of his innocence. Of course, such could not be done. "Interest reipublicæ ut sit finis litium."

But it is said that the newly discovered evidence of the fraud of H. C. Thompson is his written admission, and that on demurrer the genuineness of the paper is confessed. For the purpose of the demurrer, the authenticity of what is called in the brief "the certificate of rascality" is admitted. Wherein does this circumstance affect the rule? The rationale of the rule against reopening an issue rests upon the maxim just quoted, and the other maxim that one should not be twice vexed with the same suit. There may be a complete reply to the writing relied on to establish the fraud. It may be entirely explained away. Its genuineness may be denied. It is but an admission, and, so far as its legal effect goes, it stands in no more favored position than if it was verbal. Suppose the allegation had been that H. C. Thompson had admitted what is contained in the writing in the presence of four or five reputable witnesses. Would the rule be different? We will not therefore extend the case of Griffin v. Sketoe to a case where the newly discovered evidence of the fraud relied on to annul a judgment was the same fraud which was made an issue in the trial which eventuated in the judgment assailed.

We have not adverted to the alleged perjury, because the statute provides that a judgment obtained by perjury shall not be set aside on that account unless the person charged with the perjury has been duly convicted. Civ. Code 1895, § 5366.

We have thus reached the conclusion that the plaintiff is estopped by the judgment in the money rule case from attacking the validity of the mortgage. His case was dependent upon evading the estoppel of this judgment. It is therefore unnecessary to discuss the other features of the case raised by the demurrer or the answers.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 498)

## HALL v. DAVIS.

(Supreme Court of Georgia. Nov. 15, 1907.)

WRIT OF ERROR—PARTIES—AMENDMENT.

In an action of complaint for land, where the plaintiff through mesne conveyances deraigns title from the defendant, and the defendant amends his plea by alleging that the deed under which the plaintiff claims title, by mutual mistake of the parties, was so drawn as to include the land in controversy, which was known by plaintiff and those under whom she claims, and prays that the plaintiff's grantor be made a party, and the deeds be reformed, and when plaintiff's grantor is made a party, and a verdict is rendered for the plaintiff, and the original defendant excepts, *held:* (1) That the plaintiff's grantor is a necessary party and should have been served with a copy of the bill of exceptions; (2) that the bill of exceptions is not amendable by adding such omitted party as a coplaintiff in error; (3) that the writ of error must be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1814, 1835, 1875.]

(Syllabus by the Court.)

Error from Superior Court, Coffee County; L. A. Parker, Judge.

Action by Annie B. Davis against Mark Hall. Judgment for plaintiff, and defendant brings error and moves to dismiss. Writ of error dismissed.

Quincy & McDonald, for plaintiff in error. Wilson, Bennett & Lambdin, C. T. Roan, and F. Willis Dart, for defendant in error.

PER CURIAM. Annie B. Davis brought complaint for land against Mark Hall and obtained a verdict, which was set aside in this Court. Hall v. Davis, 122 Ga. 253, 50 S. E. 106. It appears from a report of that case that the real controversy between the parties related to the identity of the land included in a deed from the defendant, Hall, to one Mrs. Brown, under whom the plaintiff claimed title. It appeared on the former trial that the defendant was permitted to testify, without objection: That he sold a certain parcel of land to Mrs. Brown, and that he and she went on the premises, and he pointed out to her as the western boundary a divisional line previously run by him between his land and the land of the Southern Pine Company. Subsequently to the execution of the deed to Mrs. Brown, the Southern Pine Company had a survey made, and a divisional line run between its land and Hall's land, which line was 92 feet west of the divisional line previously run by Hall, and upon which Mrs. Brown and those claiming under her had erected a fence. That the land in controversy, which was included between the two divisional lines, was never intended to pass under the deed from Hall to Mrs. Brown. The court instructed the jury that the deed from Hall to Mrs. Brown included the premises in dispute, and that the plaintiff, whose mesne conveyances covered the same land, was entitled to a verdict. On exception to this charge, this court held that, when a deed describes land as bounded on one side by land of a third person, the true boundary line, between the land conveyed, and the land of such third person, must be taken as the boundary line, and not a conventional line agreed upon in parol between the parties at the time the deed was executed, if there be a variance between such two lines. It was further said in the opinion that Hall must stand by the terms of his deed, unless it be reformed. A new trial was granted upon another point not necessary to notice. When the case came on for trial for the second time, the defendant, Hall, filed an amendment, in which he set out that the land in controversy, for the reasons above stated, was never intended to be sold, and was not in fact sold by him to Mrs. Brown; that the mistake in the deed was mutual as to both the grantor and grantee at the time of the execution of the deed. This amendment further set out that Mrs. Brown conveyed this land, using the same descriptive terms, to George W. Bennett, who at the time of its purchase had knowledge of the mutual mistake of the parties in describing the land in the first deed; that Bennett always recognized as the true western boundary line the one claimed by the defendant; that no one ever disputed defendant's title until after plaintiff came into possession of the land which was actually sold, as she contends, by virtue of a sale of the property made by her as administratrix of Bennett to George W. Lott, and a conveyance from Lott to her, which was alleged to be only a colorable transaction, with no consideration passing from Lott to the administratrix, nor from her individually to Lott. The amendment further alleged that, even if the plaintiff obtained any title to the land at all, she took the title of Bennett with all of its infirmities, and with the full knowledge of the mistake in the deed. In consideration of the premises, the defendant prayed that the deeds from himself to Mrs. Brown, from Mrs. Brown to Bennett, from Annie B. Bennett, as administratrix of Bennett, to Lott, and the deed from Lott to Annie B. Bennett (now Annie B. Davis), be reformed, so that each shall describe the tract of land as sold by Mark Hall to Mrs. Brown. The court, in response to the prayer in the amendment, passed the following order: "It is ordered by the court that G. W. Lott be, and he is hereby, made a party defendant in the above-stated case." Lott acknowledged service of both the original petition and the answer of the defendant, Mark

Hall. Afterwards the case proceeded to trial and resulted in a verdict for the plaintiff. Mark Hall moved for a new trial, which being refused, he sued out a writ of error complaining of the overruling of his motion for new trial. Annie B. Davis was named as the defendant in the bill of exceptions, and service was made upon her. On the call of the case in this court, she moved to dismiss the writ of error on the ground that G. W. Lott is a necessary party, but is not named as such in the bill of exceptions, and no service had been made upon him. In reply to this motion, Mark Hall moved the court to amend the bill of exceptions by making Lott a party plaintiff in error.

The motion and counter motion involve two propositions. The first is whether Lott is an indispensable party to the writ of error. It appears from the record that Lott conveyed the land in controversy to the plaintiff in the court below by warranty deed. The plaintiff claims title under the deed from Hall to Mrs. Brown, and mesne conveyances from Hall's grantee to herself. Hall is seeking to restrict the quantity of land conveyed by these several conveyances by reforming his own and subsequent deeds so as to exclude therefrom the land in controversy. He cannot defeat the plaintiff's title by showing that it embraces land not intended to be conveyed, unless the deed under which she claims is also reformed. As this deed was made by Lott, he is a necessary party to a proceeding to reform it.

Lott being a necessary party for the relief prayed against him and the plaintiff in the court below, the next proposition is: Can he be made, by amendment, a coplaintiff in error to the bill of exceptions? The general rule is that any party on the same side of the case may be added by amendment to the bill of exceptions as a coplaintiff in error. The test to be applied in determining whether one sought to be introduced by amendment could have been joined with the excepting party as a plaintiff in error is: Were they on the same side of the controversy in the trial court? Western U. Tel. Co. v. Griffith, 111 Ga. 551, 36 S. E. 859. Where several defendants are sued, and there are no cross-pleadings so as to make any of them plaintiffs claiming affirmative relief, the presumption is that their interest is as they are aligned in the record. Baker v. Thompson, 78 Ga. 742, 4 S. E. 107. But where the record shows that the excepting defendant filed an equitable amendment seeking affirmative relief in aid of his plea, and caused a new party to be introduced into the case against whom he prayed equitable relief essential to his defense to the main case, the added party, relatively to the matter which brought him into the case, is not on the same side as the original defendant. His interest is antagonistic to the defendant, and he triumphs in the litigation when the verdict is returned against the defendant. The verdict in favor of the plaintiff is also a finding in his behalf, and he is interested in holding it. If the defendant prosecutes a writ of error to vacate the verdict, he should be made a party defendant and be served with a copy of the bill of exceptions. A case of this kind is very much unlike that of McNulty v. Pruden, 62 Ga. 135. It does not appear in that case that there were any adversary pleadings between the defendants. The conditions in the present case are more analogous to those in the money rule cases, where several parties claim a fund, and it is awarded to some, the unsuccessful claimants who prosecute a writ of error must make the other claimants of the fund parties defendant, and serve them with a copy of the bill of exceptions. Craig v. Webb, 70 Ga. 188; Knox v. McCalla, 70 Ga. 725. The law in its liberality allows a defendant to amend his pleadings and to add a party in a proper case, so that all the rights of the parties may be determined in one proceeding. But when the only relief prayed against the added party is by the defendant, who brings him into the case, he is not aligned in interest with the defendant, although the formal order of the court may declare him a party defendant.

We think that George W. Lott was a necessary party defendant in error, and that he was not identified in interest with the plaintiff in error so as to be joined with him by amendment as a coplaintiff in the bill of exceptions and the writ of error is dismissed.

All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 453)

## McDONALD v. STATE.

(Supreme Court of Georgia. Nov. 13, 1907.)

1. CRIMINAL LAW — INSTRUCTIONS — SUBMISSION OF MATTER NOT SUSTAINED BY EVIDENCE.

In a case where the testimony of all the eyewitnesses to the homicide makes a clear case of murder, and the theory of the accused is that the killing was either in self-defense, or under the fears of a reasonable man that his life was in danger, section 72 and the last clause of section 70 of the Penal Code of 1895 are inapplicable, and a failure to give in charge the law contained therein is not cause for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1980, 1981.]

2. SAME—STATEMENT.

It is not error for the court, upon the trial of a criminal case, in its charge to the jury, to read all of section 1010 of the Penal Code of 1895, except the last sentence thereof, without further commenting upon the law contained in the section. It has been frequently said by this court that such is the better practice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1811.]

3. SAME.

There was no merit in any of the exceptions made to the charge.

4. SAME—WRIT OF ERROR—RECORD.

Affidavits relating to a ground of a motion for a new trial, which are not referred to therein, nor attached to the motion as exhibits, nor filed under order of the judge and made a part

of the record, cannot be considered by this court when transmitted as parts of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2948.]

5. HOMICIDE—MURDER—SUFFICIENCY OF EVIDENCE.

The evidence warranted the verdict.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Gordon McDonald, alias J. B. McDonald, was convicted of murder, and he brings error. Affirmed.

Gordon McDonald, alias J. B. McDonald, was convicted of murder for the killing of Colar Chaney. The case is before this court for review, on a writ of error sued out by the accused, assigning error upon the overruling of his motion for a new trial. According to the testimony for the state, two of whose witnesses claimed to have been eyewitnesses to the tragedy, Colar Chaney, Herschel Burns, Maud Wynne (one of the state's witnesses), and the accused and his wife were peaceably and quietly sitting around the fire in the home of the accused, Chaney and Burns having gone there with the accused and on his invitation, in the forenoon of December 23, 1906, when the accused, who had taken a few drinks of whisky, but did not seem to be drunk, suddenly picked up a hammer and threatened to break down the windows. His wife endeavored to dissuade him from doing this, when he drew a pistol and threatened to shoot Maud Wynne and every one else in the house, whereupon Burns, in a friendly way, begged him not to shoot and to put up his pistol. At this juncture the two women ran from the house in fright, and soon thereafter the three men came out into the front yard, where the accused shot Chaney twice in the breast and once in the neck, and then shot Burns in the forehead, killing them both instantly. Neither Chaney nor Burns were making any effort whatever to harm the accused at the time they were shot, and neither of them had a weapon of any kind in his hand. No weapons were found on the ground about the bodies of the deceased, though search was made therefor soon after they were killed, and no weapon was found upon the person of either of them, except a closed pocketknife in the pocket of Chaney, over which there was a handkerchief. Neither of them endeavored, in any way, to injure the person, property, or habitation of the accused. So much of the statement made by the accused on his trial as is material to the points up for adjudication was as follows: "They [Colar Chaney and Herschel Burns] were both drinking. They came in [into the house of the accused] and both commenced cursing and abusing me, calling me all kinds of low down things, and began throwing the chairs around in the house and otherwise misbehaving. About this time Maud Wynne came in my house. They gave Maud Wynne two or three drinks, and continued cursing and throwing things around in my house. Herschel Burns said, with an oath in his mouth: 'You have ordered Maud Wynne not to come to your house. This is not your house, but my father's house, and she shall come here whenever she gets ready.' I asked them to go out quietly two or three times. They did not notice what I said. I told them if they did not stop I would put them out of my house. About this time, my wife and Maud Wynne jumped up and went up to Mrs. Tony Burns. * * * After they left * * * Colar Chaney [and Herschel Burns?] got in one corner of the house and began talking to one another, and I went to the porch to see how far my wife had gone. * * * While standing upon the porch Mr. Herschel Burns walked up behind me and grabbed me in the collar. I snatched aloose from him and turned to his front. Then he grabbed me in my front collar and he said: 'Gordon McDonald, God damn your soul, there aint anybody afraid of you.' Then he hit me in the left eye with his fist and knocked me down on the ground and jumped on top of me. I saw Colar Chaney come down the steps of my house, opening his knife. I told Herschel Burns to get off of me. He says: 'God damn your soul, I am going to cut your throat.' He pulled out his knife and started to open it, and when he did I pulled out my pistol and raised it above my head and shot it one time, striking Herschel Burns over the left eye. I then reached over with my left hand and threw him off of me and got up. Colar Chaney, when I got up, was in two feet of me with his knife open, swinging it, and saying: 'I am going to cut every gut in you out.' I backed back six or seven steps, and stopped, and told him if he came any further I would kill him. He did not notice what I said, and started towards me. I shot one time. He did not stop. I shot again, and he still kept coming on me. I shot him the third time, and he fell. * * * The reason why I shot at the time I did, it was either to kill or be killed. I shot to save my own life. Herschel Burns was mean, undermining, fussy, and dangerous. Colar Chaney was better natured than Burns, but while drinking I considered him to be dangerous. I regret the necessity of having had to kill these two men in self-defense. Gentlemen of the jury, the reason why I had the pistol was to protect myself. I had become thoroughly frightened from the noises and disturbances around my house at night, and I further knew that my life was in constant danger, and bought the pistol a short time before the difficulty for the express purpose of protecting myself, my wife, and my home."

The defendant introduced witnesses who testified that soon after the shooting one of the defendant's eyes was black and blue, as if from a blow; that his clothing was torn, and there were signs of a struggle in his front yard; and that, on account of intervening cotton stalks, fences, etc., one of the

state's witnesses, who testified that she saw the shooting, could not have seen it from where she said she was at the time. Certain of defendant's witnesses also testified that, on account of the bad reputations of the two witnesses for the state, who claimed to have seen the shooting, they were not worthy of belief. The state introduced witnesses in contradiction of all that defendant's witnesses testified to.

The grounds of the original motion for a new trial were that the verdict was contrary to law, contrary to the evidence, and without evidence to support it. The grounds contained in the amendment to the motion were as follows:

(1) Because the court charged the jury: "The defendant pleads not guilty to the offense alleged or charged against him. He says that under the law he is guilty of no offense. That what he did was justifiable. That, while he shot Colar Chaney, he did so under such circumstances that he was authorized and justified in so doing under the law of the state. That he did so in order to save his own life, and that constitutes the issue. The state claiming, on the one side, that he is guilty of the offense of murder, and he claims that he is guilty of nothing, and if you should find from the evidence in this case that he shot this party under circumstances of justification, then you could not find him guilty. If you find that he shot him under such conditions and circumstances in order to protect his life, then he would be guilty of no offense. On the other hand, if you find under the law and the evidence under the contention of the state that he killed this party, Colar Chaney, without cause, then you would be authorized to find him guilty." The exceptions to this charge were that it limited the defense "to shooting in order to save life," and that it took away from the consideration of the jury the right one has to kill in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either.

(2) Because, after charging the doctrine of reasonable fears, the court instructed the jury: "The sufficiency, however, of the fears, is a question exclusively for the jury, to be passed upon and determined by the jury, and if there be a reasonable doubt as to the defendant acting under such fears or had sufficient reason to feel that it was necessary to kill in order to save his own life, the defendant is entitled to the benefit of the reasonable doubt, and you should give it to him; that is, if you believe, under the evidence in the case, and under the statement of the defendant made, that he killed these parties under such circumstances that he believed his own life was in danger, he does not have to show that beyond a reasonable doubt, but if there is a reasonable doubt as to how he acted he is entitled to the benefit of it, and if you have a doubt about it one way or the other, as to whether it be true or not, you must give it to the defendant." The exceptions to this charge were the same as those made to the charge quoted in the first ground of the amendment to the motion, and, further, that this charge "was in the nature of an expression of opinion upon the evidence in said case, in that the court said 'and under the statement of the defendant that he killed these parties under such circumstances as that he believed that his own life was in danger,' and that the charge tended to impose upon the defendant the necessity of defending himself against the killing of Herschel Burns as well as Colar Chaney, while the defendant was on trial for the killing of Colar Chaney only."

(3) Because the court charged: "Where the defendant sets up as a defense that he acted upon the fears of a reasonable man that his life was in danger at the hands of the deceased, and that he really acted under those fears, and not in a spirit of revenge, the defense does not have to be proved beyond a reasonable doubt," etc. The exceptions were the same as those to the charge set out in the first ground of the amendment to the motion.

(4) Because the court charged: "That threats, accompanied by menaces, though the latter do not amount to an act of assault, may in some instances be sufficient to arouse the fears of a reasonable man that his life is in danger, or that a felony is about to be perpetrated upon him." The exceptions to this charge were those made to the instruction first quoted above, and, further, that this charge was "calculated to mislead the jury, in that it does not clearly define what kind of a felony he may kill his antagonist to prevent."

(5) Because the court charged: "I further charge you that the danger which would justify a killing need not be real, where the slayer was without fault, but only such as would lead a reasonable man to believe in its reality or for apprehending a design to take his life, or to commit a felony upon his person, or for believing the danger imminent, and that such design will be accomplished." The same errors are assigned upon this charge as upon the charge complained of in the first ground of the amendment to the motion, and it is further alleged that "the words 'felony upon his person,' as here used, * * * are too vague and uncertain to present to the consideration of the jury that the defendant could kill to protect his person from great bodily harm amounting to a felony."

(6) Because the court charged: "Now, in this case, if you believe that, at the time of the killing of Chaney by Gordon McDonald, these parties made an assault upon him, or that the conditions surrounding McDonald at that time were such as to cause him to believe that his life was in danger, and that he acted under the influence of those fears, and

you believe that the circumstances were such as would make a man of ordinary courage act to save his own life, and believe that the defendant did so, and did not kill this party through revenge, but killed him to save his own life, if you believe that to be the truth of the case, or if you have a doubt upon the question, it would be your duty to give the prisoner the benefit of the doubt and acquit him." This charge was excepted to on the same grounds as those taken to the charge complained of in the first ground above stated of the motion, and, further, because, "if it was the intention of the court to charge the law of a joint felonious intent and attack, said charge was too vague, indefinite, and uncertain to correctly lead the minds of the jury," and because it tended "to place the defendant upon trial for the killing not only of Colar Chaney, but of Herschel Burns."

(7) Because the court erred in charging: "In every criminal trial, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case." The exception was that the charge was not sufficiently full, in that the jury were not informed that they might "believe it in part, or disbelieve it in part."

(8) "Because the court further erred, in this, that he did not give in charge to the jury section 72 of the Penal Code of 1895 of the state of Georgia."

(9) Because the court further erred, in that, "while it gave in charge section 70 of the Penal Code of Georgia of 1895, it so restricted, confined, and narrowed its application as to confine defendant's defense to one portion only of said section; that is to say, that he might kill another only to protect his life."

(10) A new trial should be granted because of certain specified newly discovered evidence.

T. C. Taylor, D. R. Pearce, and Olin J. Wimberly for plaintiff in error. W. L. & Warren Grice, E. D. Graham, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. (after stating the facts as above). 1. There was no merit in the first ground of the amendment to the motion for a new trial. The court, in stating the contention of the accused, informed the jury that the accused claimed that he was justified in shooting Colar Chaney, that he did so in order to save his own life, and instructed them that, if he shot to protect his own life, he would be guilty of no offense. The court merely repeated, in substance, the defense set up by the accused in his statement on the trial, viz.: That he had to kill, or be killed; that he shot to save his own life—that he had to kill the two men in self-defense. Moreover, the court gave in charge section 70 of the Penal Code of 1895, defining justifiable homicide, a part of the definition there given being the killing of a human being "in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either," omitting the last clause of the section in reference to the killing of one who attempts, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting some person therein. The court also fully instructed the jury as to what constitutes a felony. The accused was not really entitled to any instruction as to his right to slay one who might be attempting, by violence or surprise, to commit a felony upon his habitation or property, as there was absolutely no evidence in the case to authorize such an instruction, and as we have seen, the only felony claimed by the accused in his statement in the trial, to have been attempted upon him, was an attempt by the two persons killed to take his life. Nix v. State, 120 Ga. 162, 47 S. E. 516.

2. We have just dealt with one of the exceptions to the charge set out in the second ground of the amendment to the motion. The court did not in this charge express an opinion upon the evidence, but merely referred to the statement of the accused that he killed the two persons under circumstances which authorized him to believe that his own life was in danger. Nor did the language here used by the court tend to impose upon the accused the necessity of defending himself for the killing of Burns.

3. The portion of the charge set out in the third ground of the amendment is not subject to the exception taken to it. As we have said in the first division of this opinion, the only defense set up by the accused in his statement to the jury was that he shot in order to protect his own life, and there was no evidence tending to sustain any other defense. The court did instruct the jury, in other parts of the charge, as to the right of the accused to defend himself against a felony about to be committed upon his person.

4. One of the assignments of error upon the charge in the fourth ground of the amendment to the motion is also sufficiently dealt with in the first division of this opinion. As we have said, the court fully instructed the jury as to the definition of a felony, and the charge here complained of was not erroneous because it failed to "define what kind of a felony the [accused] may kill his antagonist to prevent." What is here said in this connection sufficiently deals with the exceptions to the part of the charge complained of in the fifth ground of the amendment to the motion for a new trial.

5. In that part of the charge excepted to in the sixth ground of the amendment, the court merely applied the doctrine of reasonable fears to that theory of defense set up by the accused in his statement to the jury; and the language of the charge is not sus-

ceptible of the construction that it was "the intention of the court to charge the law of a joint felonious intent and attack," further than applicable to the statement of the accused that the two persons killed were, at the time, attempting to take his life. Neither did the charge here complained of tend to place the defendant upon trial for the killing of Burns, as well as Chaney.

6. The court gave in charge to the jury the section of the Penal Code in reference to the right of the accused, in the trial of a criminal case, to make a statement to the jury. This court has frequently held that this is a sufficient instruction in that respect, and really preferable to an elaborate explanation of the section.

7. In the eighth ground of the amendment to the motion, complaint was made of the failure of the court to give in charge section 72 of the Penal Code of 1895, which reads as follows: "If after persuasion, remonstrances, or other gentle measures used, a forcible attack and invasion on the property or habitation of another can not be prevented, it shall be justifiable homicide to kill the person so forcibly attacking and invading the property or habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that a serious injury was intended, or might accrue to the person, property, or family of the person killing." There was no evidence that made the provisions of this section applicable to the case, nor was there in the statement of the accused anything which made them pertinent.

8. What we have said in dealing with the first ground of the amendment to the motion sufficiently disposes of the ninth ground, wherein it is complained that the court, while charging the provisions of section 70 of the Penal Code of 1895, restricted their application to the right to kill another to protect one's own life.

9. The tenth ground related to certain alleged newly discovered evidence, which is briefly referred to in that ground of the motion. There is, however, no reference in that ground, or elsewhere in the motion, to any affidavits in support of this tenth ground. Immediately following the motion in the record, we find what purport to be copies of a number of affidavits, in each of which there is a recital that it is to be used upon the motion for a new trial in this case. None of them appears to have been filed under order of court, and made part of the record, identified, or attached, in any way, to the motion or made a part thereof, and therefore none of them can be considered by this court in passing upon the ground of the motion based upon alleged newly discovered evidence. Glover v. State, 128 Ga. 1, 57 S. E. 101.

11. There was ample evidence to authorize the verdict, which was approved by the trial judge, and this court cannot say that he abused his discretion in refusing to grant a new trial.

Judgment affirmed. All the justices concur.

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(129 Ga. 419)

## THOMAS v. STATE.

(Supreme Court of Georgia. Nov. 12, 1907.)

1. HOMICIDE—TRIAL—INSTRUCTIONS — SUFFICIENCY.

The charge was adapted to the evidence, and impartially stated the contentions of both the state and the accused.

2. CRIMINAL LAW — TRIAL — RECEPTION OF EVIDENCE—DISCRETION OF COURT.

"Where the court provisionally admits evidence on the promise of the Solicitor General that he will subsequently connect the same and show its relevancy, it is not incumbent on the judge, of his own motion, to determine whether such promise has been kept and to exclude the testimony, without a request to that effect by the defendant."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1612.]

3. SAME—ARGUMENT OF COUNSEL.

The state's counsel should not refer to the prevalence of crime in other parts of the county in his argument. The remarks here complained of were irrelevant, but afford no ground for a new trial, as no objection was made to the statement, and no ruling of the court was invoked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1668; vol. 15, Criminal Law, § 2645.]

4. SAME—INSTRUCTIONS—REASONABLE DOUBT.

An explicit and comprehensive charge on the subject of reasonable doubt, wherein the jury are instructed, in effect, that if, after considering the entire case, they should have a reasonable doubt of the defendant's guilt, it is their duty to acquit, sufficiently informs the jury that the burden is on the state to prove the defendant's guilt.

(a) A statement in such a charge that the reasonable doubt of the law is one that grows out of the evidence is not erroneous because of the exclusion of any inference that such a doubt may arise from the want of evidence, or conflict in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1847, 1921.]

5. SAME—FLIGHT.

There being evidence of flight to avoid arrest, it was not error to charge the jury: "Flight is a circumstance when it is proven; and the jury must consider that just like they would any other fact, and determine what was the cause of the flight. Because a man fled from the scene of the homicide is not a conclusive reason that he is guilty under the law; but when flight is proven the jury must take that circumstance of flight, and consider it under the same rules that they would consider any other piece of evidence in the case. In considering it, determine why he fled, if it has been proven that he fled. Was it from conscious guilt in shooting the man, or was it from fear, or was it from some other cause, some cause other than conscious guilt of having committed a crime? That is for you to determine; and, when you have determined that, then you will give to that circumstance, if it has been proven, of flight, just the weight you think it ought to have in determining this case. The mere circumstance that the man fled, when taken by itself, is not sufficient to convict; but, added to other sufficient circumstances, the jury will give it just such weight, when it has been proven, as they think it ought to

have and bear in relation to the other circumstances which have been proven in the case."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1761.]

6. SAME—PUNISHMENT.

A charge, in a capital case, that: "It is within the province and power of the jury, if they should find the defendant guilty, and if they believe that it ought to be so done, or if they wish it so done, to recommend that he be punished by imprisonment in the penitentiary for life. There is no rule of law by which you are to be guided in making a recommendation of that character. It is entirely a matter for your determination"—is not open to the criticism that it was calculated to prejudice the jury and prevent them from recommending that the prisoner be punished by imprisonment for life.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1935.]

7. SAME — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

A new trial will not be granted because of alleged newly discovered evidence, cumulative and impeaching in character, and especially so where neither movant nor his counsel submit affidavits showing their ignorance of such testimony at the time of trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2328.]

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. A. Little, Judge.

Bud Thomas was convicted of murder without a recommendation, and he brings error. Affirmed.

W. H. McCrory and H. V. Hargett, for plaintiff in error. S. P. Gilbert, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

EVANS, P. J. Bud Thomas was indicted for the murder of Prince Hollis, was convicted without a recommendation, made a motion for a new trial, which was refused, and he brings error to this court.

The case as made out by the state was that, on the night previous to the homicide, the door of the house where the deceased lived had been broken down. The next morning the deceased approached one Reese and accused him of breaking it down. The accused then interposed, and said to Prince Hollis: "You say that Henry Reese broke into your house last night?" The deceased replied: "Yes." The accused then said: "It is a damn lie. It was not him." Thereupon the deceased said: "You are a lie. It was him." The accused instantly drew his pistol from his pocket and presented it at the deceased, who walked off the little bridge, where he was standing at the time of this conversation. The accused told him if he did not come back he would kill him. The deceased turned around in the direction of the store door as if to go into the store. The accused then told him again that if he walked off he would shoot him, and presented his pistol at the deceased, who then called to his son to bring him a gun to defend himself. Henry Reese then caught the accused by the arm, and when he released his hold the accused fired at the deceased, inflicting a mortal wound. As soon as the accused fired the shot he ran away, and while running the son of the deceased fired at him. The sheriff, though he made every attempt to find the accused, was unable to secure his arrest for several months after the homicide. The defendant, in his statement, admitted the homicide, but contended that he was justifiable. He contended that when the deceased charged Reese with breaking into his house he said to the deceased that Reese did not break down the door, but that Reese and the deceased's son had a fuss out in the road, and the son cut Reese; that Reese pursued him; and that his son broke down the door. Thereupon the deceased called the accused a "God damn liar," and said he would kill him, and, before the accused could move, the deceased caught him in the collar with his hand, struck at him with a knife, and cut his coat and shirt, and, as the deceased attempted to raise his hand the second time, the accused jerked loose from his grasp and started to run, being closely pursued by the deceased. Deceased was pressing him so hard that he drew his pistol and fired the fatal shot.

1. The court, in a very full and elaborate charge, instructed the jury on the law of murder, voluntary manslaughter, and justifiable homicide. In his motion for a new trial, the accused complains that the court unduly stressed and emphasized the contentions of the state, and omitted to charge a theory of the defense as presented by the evidence. We have carefully examined both the charge and the evidence, and we do not think that the charge is open to either of these criticisms. There is no complaint that the court committed any error in defining the various grades of homicide, in stating the law of self-defense or defense of one's person.

2. During the course of the cross-examination of one of the defendant's witnesses, it was elicited that, shortly after the homicide, he had gone to Birmingham, and the Solicitor General was interrogating him as to the cause of his visit, and asked him if he had not been before the recorder since his return, and the witness answered that he had. Objection was made by the defendant's counsel to the evidence, on the ground of irrelevancy, whereupon the Solicitor General stated that later on he would show its relevancy by connecting it with other evidence, which he failed to do. On this statement of the Solicitor General, the court provisionally allowed the testimony to remain before the jury, and there was no subsequent motion made by the defendant to exclude it. "Where the court provisionally admits evidence on the promise of the Solicitor General that he will subsequently connect the same and show its relevancy, it is not incumbent upon the judge, of his own motion, to determine whether such promise has been kept, and to exclude the testimony, without a request to that effect by the defendant." Stone v. State, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145.

is going to stop if men are permitted to go about their daily duties carrying concealed weapons, which they use promptly on various degrees of provocation, because they believe that the danger of being punished is very remote. We do not comment on the Lyle trial, because it is probable that the accused will have to face a jury again within a very few days; but we are free to say that there are scores of persons in this state guilty of shedding human blood who would now be in the penitentiary, or would have paid the penalty of their crimes on the scaffold, if absolute justice had been meted out to them. And what is true as to this state is true as to about every other state. It is true, as Solicitor General Bennett says, life is so cheap in this country that it is a difficult matter to get a jury to find a verdict of guilty, even when the evidence of guilt is overwhelming. In Canada the law against murder is enforced vigorously and swiftly. The consequence is: The number of homicides is small in comparison with the number in this country. What is needed is a stirring of the consciences of the people. They must have impressed upon them the sacredness of human life. When they have a proper regard for it, juries will not be swayed by sentiment or seek excuses to avoid their duty."

J. L. Crawley, W. F. Crawley, and L. A. Wilson, for plaintiff in error. Jno. W. Bennett, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

ATKINSON, J. We will deal at once with the fourth ground of the motion for new trial. It is expressly stated in the motion for new trial that the jurors read the paper which contained the editorial complained of. The judge certified the recital of facts to be true. It is thus made affirmatively to appear that the jurors read the paper. It is nowhere stated in so many words that they read the editorial, but there is no explanation by the jurors, nor any counter showing. It was in the paper, and, as we shall see, was of harmful character, and, in the absence of a denial, it will be presumed that the jurors read it. See, in this connection, Thompson & Merrian on Juries, § 395, and citations. The judge no doubt intended to certify that the jurors read the editorial. Had that not been the intention he could simply have certified that the jurors did not read the editorial and would thereby have avoided the question which counsel have argued and which we are called upon to decide. In the absence of denial, we will presume from the recitals in the motion and the judge's certificate that the editorial was in fact read by the jurors. This leads to the inquiry as to whether the fact of reading the article was misconduct upon the part of the jurors, and, if so, whether it was of such character as to require a reversal of the judgment refusing a new trial.

An examination of the editorial will show clearly that it is argumentative in favor of convictions in capital cases such as the one on trial. Either a casual or a most scrutinous reading of the article will lead to that conclusion, and to none other. It was not only argumentative, but almost of coercive character, in that it criticised juries for failure to convict. The charge inferentially made was that the conditions in this country were such that jurors would not convict in murder cases, "even where the evidence of guilt was overwhelming." It was stated that the remedy needed was a "stirring of the consciences of the people." What effect this appeal actually had upon the minds of the jurors it is impossible to say. That it was an irregularity follows from the fact that the article was read by the jurors after they had qualified, without the knowledge or consent of the court or of the defendant or his counsel. It was read after the jurors had been put upon their voire dire. Whether, after reading the article, the jurors would again have said that their minds were perfectly impartial between the state and the accused, or that there was no bias or prejudice resting upon their minds, either for or against the accused, we have no means of knowing. Those questions were not again put to the jurors. It is possible that the minds of the jurors may have been so influenced by the article as to render them unable to answer the statutory questions in such way as to have them competent to try the accused.

Again, treating the article as an address to the jurors, it would be improper for at least two reasons: First, because it was made by one not authorized to participate in the trial in an advisory, or any other way; second, because it was made without the knowledge or consent of the defendant or his counsel, and there was no opportunity to reply. The possible harm to the defendant that could result from an editorial is incalculable. It was well said by Woods, J., in Cartwright v. State, 71 Miss. 82, 14 South. 526: "This method of communicating to and impressing upon the jury, or any member of it, the opinion of others, is open to the same condemnation which would be visited upon oral expressions of opinion touching a defendant injected into the body of the jury by some designing intermeddler. The widely-read and influential daily journal, speaking for, as well as to, the public, reflecting popular sentiment, as well as making it, must be held to be much more powerful in influencing the average man than any expression of opinion by a single, private individual."

It is insisted that the defendant could not have been injured, because the article did not make reference to the particular case on trial. The fact that the case is not specially named does not necessarily deprive the argument for convictions, as contained in the editorial of its injurious effect. The argument made no exceptions and was addressed

to all prosecutions in murder cases which in general terms embraced the case under consideration. The subject of the editorial was of the same class as the subject of the case on trial. The editorial was apparently from a disinterested source, and for that reason may have produced an effect even more harmful to the defendant than if the case had been specially named, for in the latter case the jury might at least have attributed to the writer the interest of a partisan. The whole tendency of the editorial was to play upon the passions and emotions of those who read it and to encourage juries to convict in capital cases. An appeal of that character, whether made by a writer, an orator from the pulpit or an actor upon the stage, may be made with such effect as to influence the mind while acting upon any particular matter, without direct reference thereto. When a juror enters upon the trial of a criminal case, the law contemplates his withdrawal from the public and makes no provision for addresses to him from outside sources for his entertainment or otherwise which are calculated, directly or indirectly, to excite any passions or emotions with respect to the matter upon which he is to sit in judgment. Perfect impartiality in the juror is the object of the law. Anything not legitimately arising out of the trial of the case, which tends to destroy the impartiality of the juror, should be discountenanced. Whether beneficial to the state or to the accused, such things, upon the ground of irrelevancy, should be suppressed and not given the opportunity of influencing the minds or exciting the passions of the jurors. Verdicts should be the result of calm deliberation, founded upon the law and evidence. The accomplishment of that object can never be assured where irrelevant things which tend to destroy the impartiality of the jurors are allowed to creep into the trial.

We know of only three cases which have been before this court where it was argued that a new trial should have been granted upon the ground that the jurors, after having been impaneled, had been permitted to read newspapers. Fogarty v. State, 80 Ga. 450, 5 S. E. 782; Flanegan v. State, 64 Ga. 52; Hunter v. State, 43 Ga. 483 (6). In the two cases first mentioned, this court declined to interfere with the discretion of the trial court in refusing to grant a new trial, because it was not shown that any harm had resulted to the defendant by the reading of the newspaper. In the Fogarty Case, the opinion recites: "The record discloses that the copies of the paper which the jurors were reading contained nothing about the case except the fact that the case was on trial." It was not made to appear in either of those cases, other than as just stated with reference to Fogarty's Case, what the paper contained, and therefore it was not affirmatively shown by the movant, upon whom the burden rested to show error, that anything appeared in the paper which it was improper for the jury to see. Those cases were different from the case under consideration in that respect, because in the present case it was affirmatively shown what the paper contained, and that the article in question was of such character as tended to render the jurors incompetent to serve in the case. In this way it is made affirmatively to appear that harm had been done to the defendant. In the last of the three cases cited (Hunter v. State, 43 Ga. 483), the article contained in the paper was one referring to the case by name as an important case, and severely criticising counsel for the accused because of certain of language employed by counsel in his argument for a change of venue. The paper was read by the jurors in the presence of the court and of counsel for the accused, who, although seeing them reading the paper, made no objection until after the verdict. In dealing with that ground of the motion for new trial, the court, speaking through Chief Justice Lochrane, said: "In relation to a portion of the jury before the completion of the panel reading the Quitman Banner, it appears that this newspaper contained no portion of the testimony, either for or against the prisoner, but contained a diatribe against one of the counsel of the accused for a speech made on a motion to change the venue. It is difficult to draw any line sufficiently well marked to constitute a rule upon this subject, and we can readily appreciate the propriety of keeping the jury, from the moment they are sworn in chief, away from all influences and communications which might, in the most remote degree, influence their verdict; but we are not prepared to say that the reading of a mere newspaper under the circumstances, being known to the counsel of the accused, not excepted to by him, then and there, and transpiring in open court, would constitute a ground of error sufficient to set aside a verdict. On the contrary, we hold that it would not." It will be observed that the court in that case "appreciated the propriety of keeping the jury * * * away from all influences and communications which might in the most remote degree influence their verdict," but placed the ruling refusing to order a new trial mainly upon the proposition that counsel did not move at the proper time. This was in accordance with the rule, which is now better recognized, that, when a party moves for a new trial on the ground of misconduct of a juror, he must aver and show affirmatively that both he and his counsel were ignorant of the misconduct charged until after the verdict. Wynn v. City & Suburban Ry., 91 Ga. 344, 17 S. E. 649; Cogswell v. State, 49 Ga. 103; 12 Enc. Pl. & Pr., 553, 558. While Hunter's Case, supra, did not comply with this rule, Styles, the defendant in the present case, did comply by making the affirmative showing.

There are other cases in which new trials have been ordered upon the ground of misconduct upon the part of the jurors. These

cases do not involve the question of the propriety of the jurors reading newspapers, but the rulings made in them go to the preservation of the purity of jury trials, and the principles announced in them are applicable to the facts in this case. We will deal with some of them. The case of Shaw v. State, 83 Ga. 92, 9 S. E. 768, is where the misconduct complained of consisted in the jury attending a prayer meeting conducted by the prosecutor in the case. Upon arrival the jurors were shown their seats by the prosecutor separate and apart from the remainder of the congregation. The prosecutor led the services and addressed the congregation. Prayers were offered for the court and its officers, but no reference was made to the particular case on trial. There was shouting at the meeting. In passing upon this case, the following was announced in the headnote: "Where misconduct of a juror or of the jury is shown, the presumption is that the defendant has been injured, and the onus is upon the state to remove such presumption by proper proof. While reviewing courts are loath to interfere with the decision of the trial judge that the presumption has been removed, such decision is, in this state, subject to review. The misconduct of the jury and of the officer in charge of them in this case was of such character as to require a new trial." In the course of the opinion, it was said, by Chief Justice Simmons: "There are many things which can be done by individual members of the jury, or by the whole jury, which are susceptible of such clear explanation that the trial judge would be authorized in refusing to set the verdict aside. There are other things, however, which if done by an individual member of the jury, or by the whole jury, are so contrary to the public policy of the state in the procurement of fair and impartial trials for the citizens of the state, as to require that a verdict rendered by such jury be set aside, whether the defendant has been injured thereby or not; and, in our opinion, the case under consideration belongs to this class. The state is jealous of the rights and liberties of its people. When one of its citizens is accused of crime, it throws around him all the safeguards that are possible, in order to procure him a fair and impartial trial. It requires the officer who has charge of the particular jury to swear, in substance, in open court, to take them to the jury room, and there keep them safely, and not to communicate with them himself, or suffer any one else to communicate with them, unless by leave of the court. The law contemplates that, when a jury are selected and sworn to try a citizen for felony, they shall be entirely separated from the world, and that no communication whatever shall be had with them from the beginning of the trial until the verdict is reached, unless by leave of the court. It contemplates that no outside influence shall be brought to bear on the minds of the jury, and that nothing shall occur outside of the trial which shall disturb their minds in any way; that the minds of the jury shall be entirely occupied with the consideration of the case which they are sworn to try."

The case of Smith v. State, 122 Ga. 154, 50 S. E. 62, presents another instance where the judgment of the lower court was reversed because it refused to grant a new trial upon the ground of misconduct upon the part of the jurors. It is unnecessary here to make further reference to the misconduct complained of. In this case it was said: "This court, from the time of its organization to the present time, has striven to protect the purity and impartiality of jury trials, and wherever there have been irregularities, unless fully explained, and the court satisfied that the accused has not been injured, new trials have been granted. Where the misconduct of the officers and jury has been gross, this court and others have held that a new trial should be granted on account of public policy, whether the accused was injured or not."

The case of Obear v. Gray, 68 Ga. 182, presents another case where a new trial was granted because the court refused to set aside a verdict because of improper conduct of the jurors. In this case, Mr. Justice Crawford, speaking for the court, said: "But other and quite as serious complaints are made in reference to allowing the jury to be carried to the public park, a place of great resort, especially on Sundays, and allowing them whilst there to pass about and to separate for some considerable time. Every jury is to be carried to the jury room, or some other private and convenient place, where they are not to be spoken to by the officer having them in charge, or others, unless by leave of the court. To take them, therefore, to a park, which is said to be a place of great public resort, especially on the Sabbath Day, where they are almost sure to hear something said about the case, whether they would or not, is most clearly a violation of the spirit and purpose of the law in withdrawing them from the body of their fellow citizens until they have agreed upon their verdict. We think that this was a good ground upon which to set aside the verdict, unless it was clearly shown that no such things occurred while they were in the presence and hearing of other visitors. It is true that the affidavits offered show everything necessary to purge them, except that it does not appear but that they heard bystanders make remarks about the case. To make the purgation complete this should affirmatively appear. Stix v. Pump, 37 Ga. 332; Blalock v. Phillips, 38 Ga. 216; Daniel v. State, 56 Ga. 653."

We do not deem it necessary to make further reference to any of the cases cited in the several cases to which we have alluded. Under the view we take of the case, the editorial complained of dealt with a subject so relat-

ed to the case on trial as to make its references applicable to that case, and, because of its argumentative character and its tendency, through appeals to the emotions and passions of jurors, to displace the element of impartiality in the minds of the jurors, it was harmful to the accused, in that it tended to deprive him of a fair and impartial trial. He brought himself under the rule by making complaint in the manner and at the time authorized by law, and the judge should have granted a new trial.

As the case must go back for another trial, we will not deal with the assignments of error which relate to the general grounds of the motion.

Judgment reversed. All the Justices concur.

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(129 Ga. 537)

## VENABLE v. BURTON.

(Supreme Court of Georgia. Nov. 14, 1907.)

1. REFORMATION OF INSTRUMENTS—MISTAKE—FRAUD.

Equity has jurisdiction to reform written instruments, where there has been a mistake upon the part of one of the parties, accompanied by fraud upon the part of the other party, just as in cases where there is a mutual mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 80.]

2. SAME—LACHES.

The innocent party to the instrument sought to be reformed, who was ignorant of the fraud of the other party, where such ignorance is excusable, will not, because of the mere lapse of time, be held to be guilty of such laches as not to be entitled to relief in a court of equity, when he moves promptly in the enforcement of his rights after the discovery of the fraud; there being no question as to the rights of third parties, or of innocent purchasers.

3. PLEADING—INCONSISTENT RIGHTS—SPECIAL DEMURRER.

A petition seeking the enforcement of inconsistent rights should, upon special demurrer pointing out such defect, be dismissed, unless the defect is cured by appropriate amendment, so as to meet the objection raised by such demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 576.]

(Syllabus by the Court.)

Error from Superior Court, Forsyth County; Geo. F. Gober, Judge.

Action by A. S. Burton against R. R. Venable. Judgment for plaintiff, and defendant brings error. Reversed.

The petition in this case, brought by Burton against Venable, alleges substantially the following facts: In the year 1873, petitioner secured for said defendant a loan of $100 from one Moore, an uncle of petitioner; "the said Venable offering as security for said loan a deed conveying to said Moore the title to lot of land No. 483, * * * being the lot adjoining said Venable's house lot, on the north side thereof, * * * which lot was well known to petitioner, except the number, which petitioner did not know. Neither did Moore know it." Venable wrote and executed a deed conveying to Moore lot of land No. 425 as security for said loan. It is alleged that Venable never owned lot No. 425, but did own lot No. 483, which was pointed out as the lot to be conveyed by said deed, and that Venable knowingly and fraudulently inserted the number 425 in the deed, instead of 483. Thereafter Moore died, and petitioner, at the request of Venable, paid to the administrator of Moore the amount which Venable owed the latter on said loan, $207.47, and took a deed from said administrator to the land described in the said deed from Venable to Moore; Venable at the same time delivering to petitioner his promissory notes, signed and sealed, for the sum of $207.47. These notes recite that they were given for the purchase money of lot No. 425. Petitioner alleges that he advanced the money to pay the debt owed by Venable to Moore upon the faith of the deed which Venable had executed to Moore to secure said debt, and accepted a transfer of said security believing that said deed contained a true description of the land which had been pointed out by Venable as the land to which he would execute a deed to secure said loan. Petitioner did not discover the fraud practiced by Venable in substituting the number 425 for the true number of said lot, 483, until 1902. Wherefore petitioner prayed that said deeds and notes be reformed by changing the number 425 to 483; that he have judgment on said notes; and that lot No. 483 be sold and the proceeds applied to the payment of said judgment. The petition also contains the further prayer "that petitioner recover lot of land No. 483, with the cost of suit."

Defendant demurred generally and specially to the allegations of the petition. The court overruled the demurrer, and defendant excepted pendente lite. Defendant in his answer admitted that he borrowed the $100 from Moore, and that Burton advanced the money to pay this debt, and that Burton held a deed from the administrator of Moore to the land which had been deeded by defendant to Moore to secure said loan. But defendant denied that he offered to give lot No. 483 as security for said loan. "Defendant did not own lot No. 483, but did own lot No. 525, and the intention was to give No. 525 as security, and by mistake defendant wrote 425, instead of 525." Defendant denied all averments as to fraud upon his part in executing said deed, and alleged usury in the debt which he owed to Burton. Both sides introduced evidence to support their contentions, except that defendant failed to submit any testimony to support the plea of usury set up in his answer. The jury returned a verdict in favor of the plaintiff for the amount represented by the notes, and further found that the deeds and notes be reformed so as to embrace lot No. 483, instead of No. 425, and that "lot No. 483 * * * be sold and

the proceeds applied to the discharge of said notes." The court overruled defendant's motion for a new trial. Defendant excepted and assigned error upon his exceptions pendente lite and the judgment overruling his motion for a new trial.

J. P. Brooke and H. B. Moss, for plaintiff in error. Bell & Wills and H. L. Patterson, for defendant in error.

BECK, J. (after stating the facts as above). 1. The credibility of the evidence for the plaintiff was a question for the jury. Their verdict shows that they accepted it as true, and, in the light of that evidence, the plaintiff was clearly entitled to the relief sought. The contention that, even if the plaintiff's evidence presented the truth of the case, he was necessarily remitted to an action for deceit, and that inasmuch as there was a mistake upon the part of the plaintiff, and not upon the part of the defendant, the suit for a reformation of the deed could not be maintained, is not supported by the established doctrine upon the subject of reformation of instruments, like the one in question, under rulings of this court, and as made in other states. In the case of Wyche v. Green, 26 Ga. 415, it was held that: "The court's charge that a mistake, to be the subject of correction, must be a mistake in which all the parties to the contract participated, was too absolute. If one of the parties to a contract is mistaken in a matter, and the other knows that he is and does not apprise him of it, yet the mistake, though not one on their part, is the subject of correction. The case becomes one in which there is a mistake in one of the parties to the contract and a fraud in the others. Such a case is even more readily the subject of relief, at his instance, than is a case in which there is nothing but a mistake, although that be a mistake extending to all the parties." This doctrine was restated in the case of Shelton v. Ellis, 70 Ga. 297, where the court, speaking through Mr. Justice Hall, said: "There is nothing that we are aware of, either in the Code, or any subsequent decision of this court, modifying the law as here declared. On the other hand, we think there is much confirming the view here taken. Compare with this Code, §§ 3117, 3118 to 3126, both inclusive, and section 3180. The condition upon which relief will be granted or denied must, under the sections of the Code and the cases cited under them, depend in large measure upon the circumstances of each particular case, and upon all the facts developed, which should be passed upon by the jury at the final hearing, and ought not to be too closely scrutinized or evenly balanced in these preliminary proceedings." See, also, 4 Pomeroy's Eq. Jurisprudence, § 1376, and cases there cited.

The argument of counsel for plaintiff in error that this was an attempt by the petitioner to take advantage of a fraud practiced, not upon him, but upon another under whom he claims, is not sustained by the facts of the record. While it is true that, by the substitution of the number 425 for the true number 483, fraud was first practiced in the execution of the deed from Venable to Moore, there was a repetition of that fraud when Venable procured petitioner to take up and pay off his debt to Moore, and to take a deed from Moore's administrator to himself, and the effect of the fraud, originally perpetrated against Moore, was, by a repetition of the fraud upon the part of the defendant and the mistake upon the part of Burton, brought to bear directly upon Burton.

2. Nor was Burton cut off from his right to the remedies sought by laches. He proceeded promptly to enforce his right to the remedy upon the discovery of the fraud which had been practiced. There was nothing in the facts of the case which required the jury to find, or the court to hold, that petitioner was put upon inquiry as to the existence of the fraud. The status of the parties relatively to the land in controversy had remained the same. There is no question here of the intervening rights of third parties, or innocent purchasers. Venable had been indulged for many years in the matter of paying a debt, the validity of which he does not deny. Nor was there anything in the mere delay upon which to base either a hope or belief that his fraudulent action in substituting the wrong number in the deed would not be attacked when the fraud was discovered. A plainer case requiring a court of equity to exercise its power of reforming a paper could scarcely be imagined than this which we have before us. Stockbridge v. Hudson, 107 Mass. 290; Hutson v. Fumas, 31 Iowa, 154; Sable v. Maloney, 48 Wis. 331, 4 N. W. 479; 18 Am. Eng. Ency. of Law (2d Ed.) 100.

3. But although petitioner was plainly entitled to have the instrument in question reformed, and was then entitled to recover either in ejectment, or to recover a judgment for the amount of his debt and have it declared a special lien upon the land, he was not entitled to proceed both for a recovery of the land and to have his debt reduced to judgment and made a special lien. The defect in his proceedings is that apparently he sued to enforce both rights, inconsistent as they are, in the same action. The defendant's special demurrer pointing out this defect put the plaintiff to his election, and the court should have so ruled, and compelled petitioner to abandon either so much of his suit as sought the recovery of the land, or that portion of the proceeding wherein the recovery of a judgment for the amount of his debt was sought. The failure of the court to do this was error, and for this reason the judgment is reversed.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 589)

## HOLMES v. STATE.

(Supreme Court of Georgia. Nov. 16, 1907.)

CRIMINAL LAW—APPEAL—REVIEW.

No ruling or charge of the court pending the trial is complained of, the evidence was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3075.]

(Syllabus by the Court.)

Error from Superior Court, McIntosh County; P. E. Seabrook, Judge.

Lee Holmes was convicted of crime, and brings error. Affirmed.

Chas. M. Tyson, for plaintiff in error. Garrard & Meldrim, N. J. Norman, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

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(129 Ga. 541)

## SASSER v. STATE.

(Supreme Court of Georgia. Nov. 14, 1907.)

1. HOMICIDE—EVIDENCE—ADMISSIBILITY.

A visit of the widow of the deceased to the office of defendant's counsel, after the homicide, without the knowledge, consent, or acquiescence of defendant, on trial for assassinating her husband, is not admissible against defendant to show a contention of the state that she was then in sympathy with him, or that she had with him prior to the homicide illicit relations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 359.]

2. CRIMINAL LAW—WRIT OF ERROR—RECORD—QUESTIONS PRESENTED—ADMISSIBILITY OF EVIDENCE—NECESSITY OF SETTING OUT EVIDENCE.

The second assignment of error in the amendment to the motion for new trial does not set forth sufficient facts to enable this court to determine whether or not the court below committed error.

3. SAME—TRIAL—RECEPTION OF EVIDENCE—DISCRETION OF COURT.

Where the court, over objection, admits evidence, with the statement that he will rule it out unless connected in point of time, and it is not thus connected, although such evidence may be inadmissible, it is not incumbent upon the court, of its own motion, to exclude it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1612.]

4. HOMICIDE—EVIDENCE—ADMISSIBILITY—BAD FEELING OF DECEDENT TOWARD DEFENDANT.

Where a person is on trial for assassinating another, evidence of bad feeling on the part of the deceased toward the defendant, unknown to the defendant prior to the killing, is inadmissible against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 288.]

5. SAME.

Under the evidence in this case, it was error to admit testimony against defendant of differences and quarrels between deceased and his wife about defendant, unknown to defendant prior to the homicide.

6. WITNESSES—CROSS-EXAMINATION TO SHOW PREJUDICE.

The refusal of the court to permit counsel for defendant to ask a witness for the state about a difficulty between him and defendant, to show his ill feeling toward defendant, is not error, unless the witness denies such ill feeling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1192, 1193.]

7. SAME—EXPLANATION OF SILENCE BEFORE TRIAL.

In view of a witness for the state declining to tell others prior to the trial what she testified to on the trial against defendant, brought out on cross-examination, and evidence of her other conduct offered by defendant, it was not error to allow her to testify, as an explanation of her previous conduct, that she was told by another that, if she told what she testified to, defendant would kill her.

8. CRIMINAL LAW—INSTRUCTIONS—EFFECT OF IMPEACHING EVIDENCE—NECESSITY OF REQUEST AS TO.

Where testimony is offered for the purpose of impeaching a witness, it is not error for the court to fail to charge the jury that the evidence offered for the purpose of impeachment should be considered by them solely for that purpose, in the absence of a written request, made at the proper time, for this charge to be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2007.]

9. SAME—EVIDENCE—DECLARATIONS BY ACCUSED.

The defendant, who claimed an alibi on trial for murder of another at night, could not, in support of such defense, prove that about six hours before the killing occurred he invited another to spend the night with him at his home, about three miles from the scene of the homicide. Such a statement to another was a declaration in his own favor, and was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 928.]

10. HOMICIDE—EVIDENCE—ADMISSIBILITY.

Under the facts of this case, evidence that the son of the deceased had spent the night with defendant several months before the homicide was properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 819.]

11. CRIMINAL LAW—EVIDENCE.

Under the evidence, it was not error to exclude testimony that defendant's brother offered his own horse for comparison of tracks with those found near the residence of the deceased after the homicide, and which the state claimed were made by the defendant's horse.

12. SAME—WRIT OF ERROR—RECORD—AFFIDAVITS ON MOTION FOR NEW TRIAL.

"Affidavits relating to a ground of a motion for a new trial, which are referred to therein as being attached to the motion as exhibits, and which are actually so attached, and which were filed with the motion as a part thereof, are a part of the record in the case."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2789.]

13. SAME.

"Affidavits relating to a ground of a motion for a new trial, which are not referred to therein, nor attached to the motion as exhibits, nor filed with the motion as a part thereof, but each separately filed, cannot be considered by this court, when transmitted as a part of the record, even though it appear, from a statement of the judge on each affidavit, that the same was used on the hearing of the motion for a new trial, and each affidavit was actually filed in office."

14. SAME.

"When affidavits used on the hearing of a motion for a new trial are not made a part of the record in the case, either by being embodied in an approved brief of the evidence or otherwise, before the bill of exceptions is certified, the judge has no authority, by an order passed after

the bill of exceptions is certified, to declare such affidavits to be a part of the record. Even if a simple order of the judge would make such affidavits a part of the record, the order must be passed before the bill of exceptions is certified."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2904.]

13. CRIMINAL LAW—NEW TRIAL — DISQUALIFICATION OF JURORS.

When it appears that one juror sworn and impaneled in the trial of a murder case had stated that defendant had killed deceased and ought to be hung; that another juror had made the same statement, and in addition thereto that if he "got on the jury he would hang him or stay there till he perished"; and that another juror had stated that he believed defendant was guilty and if he was on the jury he would hang him—and there is nothing before this court to rebut the charges so made, a new trial must be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2226.]

(Syllabus by the Court.)

Error from Superior Court, Screven County; B. T. Rawlings, Judge.

Sylvester Sasser was convicted of murder, and brings error. Reversed.

P. W. Meldrim and E. K. Overstreet, for plaintiff in error. Hines & Jordan, Twiggs & Oliver, Alfred Herrington, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

HOLDEN, J. Sylvester Sasser was indicted for murder, and was tried, convicted, and sentenced to life imprisonment at the November term, 1906, of Screven superior court. Motion for new trial was duly made during the term, and at the hearing of the motion the judge passed an order overruling the same, to which defendant excepted.

M. L. Parker, while standing in a bedroom of his residence in Screven county, about midnight on the 8th day of April, 1905, was killed by some one on the ground, who fired upon him through a window with a gun loaded with buckshot. On the next day near the premises there were found horse tracks, which the state claimed were made by the horse of the defendant. A negro woman, who was a servant in the home of the deceased at the time of the homicide, testified that she saw the defendant under a tree in the yard of the deceased at about 8 o'clock on the night of the homicide. The state contended that the defendant was criminally intimate with the wife of the deceased. Much evidence was introduced on both sides of the case to show the respective contentions.

In addition to allegations of error in the rulings and charge of the court, several of the grounds of the amendment to the motion for new trial attack the competency of the jurors who tried the case on the grounds that they were not impartial between the state and the accused; that prejudice and bias rested on their minds against him; that, after hearing evidence delivered on the first trial, opinions had been formed and expressed in regard to the guilt of the accused. These grounds of the amended motion complain that one of the jurors, before the trial of the case, stated that "Sasser had killed Parker and ought to be hung"; that another juror prior to the trial had stated "Sylvester Sasser and Mrs. M. L. Parker ought to be stobbed to a stump and burnt, and if I was on the jury I would hang him," and that "Sylvester Sasser ought to be hung and she ought to be burnt"; and that another juror had said prior to the trial: "I believe Sylvester Sasser is guilty. If he is not guilty, who in the hell is guilty? I believe he is guilty, and if I was on the jury I would hang him."

Affidavits of defendant and his counsel that they did not know of these facts before the trial was ended, and affidavits as to the credibility, character, etc., of the witnesses by whom defendant undertook to prove the truth of the grounds, were all attached to the amendment and filed with it as a part of the amendment. Counsel for defendant in error contends that the state made a counter showing, and on the hearing of the motion for new trial furnished the court affidavits denying the truth of these grounds of the amendment; but these affidavits were not attached to the motion, nor were they embodied in the bill of exceptions or attached thereto as exhibits, and no brief of evidence introduced upon the hearing of the motion was approved by the court and filed as a part of the record. After the bill of exceptions was signed, the Solicitor General made an application to the judge under Civ. Code 1895, § 5536, asking that these affidavits be sent up as a part of the record, which application was granted and an order duly passed thereon. Under this order the clerk sent up copies of said affidavits, on which appear entries of filing in the clerk's office. Upon the call of the case in this court, counsel for the state suggested a diminution of the record and averred that the clerk had failed to enter upon said affidavits copies of the entries of the judge identifying each of said affidavits, and asked that copies of these entries of the judge on said affidavits be ordered by this court to be sent up by the clerk. Counsel for defendant in error admitted during the argument of the case in this court that these entries by the trial judge on the affidavits identifying each were made some time after the bill of exceptions was certified.

1. Plaintiff in error contends that the court erred in permitting, over his objections, Mrs. M. L. Parker, the widow of the deceased and a witness for the state, to testify that on Saturday after the homicide she came into town and called at the office of counsel for the defendant. It does not appear that this visit was made at the instance of, or with the knowledge or acquiescence of, the defendant. It is claimed by counsel for the state that this testimony was admissible for the purpose of showing the sympathy of the wid-

ow of the deceased for the defendant, who was charged with his assassination, and that it was further a circumstance to show illicit relations between them prior to the homicide, which is one of the contentions of the state in the case. We do not see how the conduct of the widow of the deceased, after the homicide, in the interest of the defendant and indicating sympathy for him, could be admissible against him; nor do we see how her conduct evincing sympathy for the defendant could be admissible for the purpose of showing illicit relations between them prior to the homicide, when her conduct and acts were not at the instance of defendant, nor with his knowledge or acquiescence. We think the admission of this testimony over the objection of defendant's counsel was error. Under the evidence in this case, the only purpose this testimony could serve was to show sympathy for the defendant on her part, or as a circumstance indicating illicit intercourse between them prior to the homicide. 6 Enc. of Ev. p. 666.

2. The state contended that the deceased, while standing in a room of his residence, was shot through a window by the defendant while standing on the ground. Upon the trial the court permitted Twitty, a witness for the state, to testify to his opinion as to the height of the man who did the shooting. This assignment of error cannot be considered, because it does not appear what was the testimony of the witness upon which he based the opinion sought in the question asked him. The question propounded to the witness was: "Having stated these facts and measurements, * * * what do you say as to the height of the man who did the shooting?" It does not appear from the assignment of error what were the facts referred to in this question as "these facts." Johnson v. Perry, 121 Ga. 68, 48 S. E. 686.

3. Defendant complains, in the third ground of his amended motion for new trial, that the court erred in overruling his objection to the testimony of Leonard Parker, a witness for the state. The only complaint in this assignment of error which the defendant appears to have made is that the court should not have permitted testimony of Leonard Parker as to any disagreements between his father, the deceased, and his mother. It does not appear what this testimony was. The question propounded by the state for the purpose of eliciting testimony in regard to disagreements between his father and mother is stated, but it does not appear what was the answer of the witness to this question. Hence the court cannot rule upon this objection to the testimony, it not appearing in the amendment to the motion what the testimony was. It does not appear in the assignment of error that the witness answered the question, or, if he did answer it, what reply he gave. In this assignment of error, in answer to another question stated, the witness said that his father, the deceased, wanted the defendant away from his house; but it does not appear that any objection was made to this answer. The ruling upon the objections offered was as follows: "According to my view, I will admit it, but I will rule it out unless you will connect it in point of time." Under this ruling of the court the testimony went in; but it does not appear that any motion was subsequently made to rule it out. The court having admitted the testimony, stating at the time that he would rule it out unless the state's counsel connected it in point of time, it was the duty of defendant's counsel to call the attention of the court later on in the progress of the trial to the fact that it was not connected in point of time and ask that it be ruled out. The failure of defendant's counsel to do this, according to the repeated rulings of this court, renders the admission of the testimony and failure of the court of his own motion to rule it out subsequently to its admission, not error of which the defendant's counsel can complain. Stone v. State, 118 Ga. 705, 45 S. E. 630, 98 Am. St. Rep. 145; Cawthon v. State, 119 Ga. 395, 46 S. E. 897; Williams v. State, 123 Ga. 138, 51 S. E. 322; Hix v. Gulley, 124 Ga. 547, 52 S. E. 890.

4. The fourth ground of the amendment to the motion for new trial complains that the court erred in permitting a witness for the state, over objections of defendant's counsel, to testify that there was bad feeling on the part of the deceased toward the defendant. The record of the evidence of this witness shows that, in addition to testifying that the deceased had bad feelings toward defendant, he also testified that the state of feeling between the deceased and the defendant "was not good, and that it was bad, and that bad state of feelings between them had existed for a good while." If the witness' testimony was simply that there was bad feeling on the part of the deceased toward the defendant, uncommunicated to the defendant, such testimony would be inadmissible for two reasons: (1) Simply proving a bad state of feeling on the part of the deceased toward the defendant, unknown to him, could illustrate no issue in this case, where the defendant is charged with killing the deceased without any provocation on the part of the deceased. The bare fact that the deceased entertained bad feelings toward the defendant, when it did not appear that the defendant knew of their existence, could not in any way illustrate the conduct of the defendant under the facts of this case. (2) It would be error, because it is the statement of a conclusion, and not a fact. A witness can state what his own feelings toward another are; but, if an effort is made to get from him what state of feelings another entertains, facts should be stated from which the jury can draw their own conclusion as to the existence of such state of feeling and the nature and extent of it. The court committed error in permitting the witness to testify as to the state of feeling of the deceased toward the defendant, as it was

a conclusion of the witness, which must have been drawn from facts within his knowledge, and those facts should have been stated, instead of stating his conclusion as to what the state of feeling was by reason of such facts. In undertaking to prove bad feeling on the part of the deceased toward the defendant, the facts indicating its existence should be shown, instead of showing the opinion of a third person. But, under the facts of this case, proof of bad feeling of the deceased toward the defendant alone would not be admissible. In order to make it admissible, it would have to be shown that the defendant knew of it. In Wharton on Homicide (3d Ed.) § 596, the rule is stated as follows: "In order to establish a motive for the commission of a crime, however, it is essential that the facts upon which the alleged motive is based shall be within the knowledge of the accused, and evidence as to conduct and acts tending to show motive for a killing is not admissible, where it does not appear that such acts and conduct were brought to the knowledge of the accused." See, also, 6 Enc. of Ev. p. 720, par. "F," and authorities there cited.

5. Counsel for plaintiff in error contends that the court erred in overruling objections to the testimony of a witness for the state to the effect that there had been differences between the deceased and his wife about the defendant. It does not appear from this assignment of error whether or not the defendant knew of these differences and quarrels between the deceased and his wife about him. These differences between the deceased and his wife about the defendant would tend to illustrate the state of mind on the part of the deceased toward the defendant; but testimony in reference to these differences, under the facts of this case, would not be admissible unless the defendant knew of them before the killing. It not appearing from the evidence that he did have such knowledge, it was error to admit evidence against him in regard to them, under the facts in this case. See authorities cited in the preceding paragraph of this opinion.

6. It is complained that the court erred in refusing to admit the testimony of a witness for the state, on cross-examination, that the defendant "hit at him" in a difficulty which had occurred between them. The purpose of this testimony was to show the state of feeling on the part of the witness toward the defendant. Cr. Code 1895, § 1023, provides: "The state of the witness' feelings to the parties, and his relationship, may always be proved for the consideration of the jury." A party cannot prove a difficulty between a witness and a party to the case on trial to show bad feeling on the part of the witness toward him, unless the witness denies that such feeling exists. Whenever the witness denies that such feeling exists, it is proper to permit the witness to be interrogated as to any difficulty or trouble between them, for the purpose of rebutting this denial and showing that such feeling does exist. It does not appear from this assignment of error that the witness had denied having bad feeling toward the defendant. It is true that this language appears in the assignment of error, "The witness having been asked as to the state of his feelings toward the defendant;" but it nowhere appears from the assignment of error what his answer was to this question, and the court cannot consider this assignment of error, complaining that the court refused to permit counsel for defendant to ask the state's witness as to a previous difficulty between him and the defendant, in order to show the witness' state of feelings toward the defendant, because it does not appear that the witness had denied having ill feeling toward the defendant. Patman v. State, 61 Ga. 379; Conyers v. Field, 61 Ga. 258; Bishop v. State, 9 Ga. 121. If a witness admits ill feeling toward a party to a case, he cannot be interrogated as to difficulties between them in order to show bad feeling; but, if a witness denies having ill feeling toward a party to a case, he can be interrogated as to difficulties between him and said party, in order to show his ill feeling toward such party. A witness can be shown to be friendly with and entertain good feeling toward a party to a case, and, should he deny that this is true, evidence is admissible to rebut such denial and show that such state of friendly feeling and intimacy exists. Daniel v. State, 103 Ga. 202, 29 S. E. 767; Purdee v. State, 118 Ga. 798, 45 S. E. 606.

7. Marcella Moore, a witness for the state, testified that she saw the defendant standing under a china berry tree in the yard near the dwelling of the deceased about 8 o'clock on the night of the killing, and that when he saw her he stepped back. The state proved by this witness that the reason she did not tell this before was because the wife of the deceased told her, if she told it, the Sassers would kill her. Counsel for plaintiff in error contends that the court erred in permitting this testimony over his objection. The witness further testified that she told Mr. Ennis that "whatever I knew I was going to tell, and no more than that," and further testifed: "But I didn't tell him what I knowed." She also testified that she told Mr. Ennis: "I didn't want to know nothing until I got down here to tell it." In view of this testimony of the witness as to what she told Mr. Ennis, and in view of the testimony of other witnesses as to what she told them, and of her other conduct as shown by the evidence, it was not error to permit her to testify that the reason she did not tell it before was because Mrs. Parker said that, if she told it, the Sassers would kill her, in order to explain her previous conduct and what she said in conversations with others. Hunter v. State, 43 Ga. 483 (2).

8. Where testimony is offered for the purpose of impeaching a witness, it is not error

for the court to fail to charge the jury that the evidence offered for the purpose of impeachment should be considered by them solely for that purpose, in the absence of a written request made at the proper time for this charge to be given. It is proper for the trial court to give such charge, and inform the jury, either in his general charge or at the time the testimony is admitted, that the impeaching evidence can be considered by them only for the purpose of impeachment; yet it is not error requiring the grant of a new trial if the court fail to do this in the absence of a timely written request. This is true when the court fails to charge the law in regard to the impeachment of witnesses, and it is likewise true when he fails to charge the jury as to the purpose of impeaching testimony. Steed v. State, 123 Ga. 569, 51 S. E. 627; Campbell v. State, 124 Ga. 432, 52 S. E. 914; Cress v. State, 126 Ga. 564, 55 S. E. 491.

9. It was shown from the evidence that the deceased was killed about half-past 12 o'clock on Saturday night, and the defendant sought to prove by Allen Sasser that about sundown on Saturday evening before the killing that night the defendant asked him to stay all night with him. The court sustained the objection to this testimony and ruled it out. This was a declaration of the defendant in his own favor, and the court did right in excluding it.

10. The defendant offered to prove by a witness for the state that Hollis Parker, the son of the deceased, who was a witness for the state, spent the night with the defendant during Christmas, several months before the homicide, and went to a Christmas tree with defendant during that night. The purpose of this testimony was to show the state of feeling between the son of deceased and the defendant. The fact that the son of the deceased, a witness for the state upon the trial, was with the defendant several months before the homicide, could not illustrate any issue in the case, and the court did right in excluding the testimony offered.

11. There was no error in excluding the testimony of a witness for the defendant that Willie Sasser offered to allow the witness to examine his horse and make a comparison with the horse tracks found around the premises of the deceased on the day after the killing. This assignment of error simply and only shows that this offer of Willie Sasser was rejected as evidence. It does not appear when or where the offer was made, or that the offer was refused, or that the witness to whom the offer was made had testified in regard to the tracks of horse claimed to belong to defendant.

12–15. Counsel for plaintiff in error contends that the affidavits furnished by the state in rebuttal of the testimony offered by the defendant in support of the grounds of the motion for new trial attacking the competency of the jurors should not be considered by this court, under the statement of facts in this case. Similar contentions under almost identically the same state of facts have been passed upon by this court in the case of Glover v. State, 128 Ga. 1, 57 S. E. 101, and it was ruled in that case that such affidavits could not be considered by this court in passing upon the question as to whether or not the trial judge committed error in overruling the grounds of the motion attacking the competency of the jurors who tried that case. In the Glover Case, supra, the questions made in this case have been elaborately discussed, and it is useless to go into any extended discussion of them here.

The affidavits offered by the state upon the hearing of the motion for new trial in the present case, and which they wish this court now to consider, were no part of the record of the case. The trial judge, upon an application of the Solicitor General, made within 20 days after the bill of exceptions was served on him, passed an order directing the clerk to send up copies of these affidavits as a part of the record. This action was taken under Civ. Code 1895, § 5536; but this section provides for having sent up parts of the record not ordered up in the certificate of the judge to the main or cross bill of exceptions. These affidavits were no part of the record, and therefore could not be ordered sent up under this section. It follows from what we have stated above that the affidavits offered by the state to rebut the evidence offered by the defendant cannot be considered in determining whether the trial judge erred in overruling the grounds of the motion attacking the competency of the jurors trying the case.

The affidavits offered by the defendant, attached to his motion as exhibits, and filed with his motion as a part thereof, will be considered by this court, as the motion of which they are a part is a part of the record in the case. These affidavits were referred to in the grounds of the amendment to the motion for new trial, attached thereto as exhibits, duly marked with letter, and made and filed as a part of the motion itself. These affidavits, standing before this court uncontradicted, show that three of the jurors on the jury which convicted the defendant, under the repeated rulings of this court, were not competent jurors, and a new trial must of necessity follow.

The judgment of the court below is therefore reversed. All the Justices concur.

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(129 Ga. 479)

## PHINIZY v. BUSH.

(Supreme Court of Georgia. Nov. 14, 1907.)

1. BROKERS — COMPENSATION — PROCURING PURCHASER.

The general rule is that, where an owner of property employs a broker to procure a purchaser, in order to earn his commissions, the broker must procure a purchaser who is able, ready, and willing to buy, and who actually of-

fers to buy, on the terms stipulated by the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 75, 76.]

2. SAME—ACTIONS FOR COMPENSATION—PRESUMPTIONS AND BURDEN OF PROOF.

Under the general rule stated above, ordinarily the burden of showing all the requirements recited is on the broker, in a suit by him for commissions; but, if the customer procured by the broker is accepted by the principal, the burden will be upon the latter to show that such purchaser was not able to comply with the contract, if he relies on that defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 105.]

3. SAME.

Sometimes, under his employment, the broker's duty is not merely to procure a purchaser, but to perform some other agreed service within a reasonable time, or within a limited time. In such cases the general rule as to what is required of him in order to be entitled to commissions is modified accordingly.

4. SALES—OFFER TO SELL—ACCEPTANCE—UNCONDITIONAL.

A contract may be closed by a letter or telegram, and become binding; but, if it is claimed that a seller has become bound by an acceptance of his offer by the buyer, such offer must be accepted unconditionally and without variance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 41.]

5. BROKERS—MODIFICATION OF SELLER'S OFFER—EFFECT.

If a broker undertakes to accede to a modification of the contract contained in the offer of the seller, the latter may repudiate his conduct and decline to be bound, or he may ratify the act of the broker and be bound by the change.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 66.]

6. ACCORD AND SATISFACTION — EXECUTION — NECESSITY.

If a seller has become indebted to his broker for a fixed amount of commissions, an agreement made afterwards to accept less than the amount of the debt in discharge thereof will not operate as an accord and satisfaction of such indebtedness, unless actually executed by the payment of the agreed amount, or the giving of additional security, or the substitution of another debtor, or some other new consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Accord and Satisfaction, § 60.]

7. BROKERS—COMPENSATION.

But if a broker had a limited time within which to effect a sale, and failed to do so within that time, and the principal declined to be bound further by the offer, but subsequently the broker sought to have him again consent to make the sale, and, in order to induce him to do so, agreed to charge less commissions than those contemplated in the original authority, and thus procured the seller to consummate a sale, the commissions of the broker would be determined under the new contract as to them, and not under that originally made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 56.]

8. PRINCIPAL AND AGENT — REPRESENTATION OF PRINCIPAL.

Generally the form in which an agent acts is immaterial. If the principal's name is disclosed, and the agent professes to act for him, it will be held to be the act of the principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 458, 459.]

9. SAME—CREDIT GIVEN TO AGENT.

An agent may expressly contract on his own credit, and be bound, even though his principal be known.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 468.]

10. SAME.

Omitting cases of contracts under seal, negotiable instruments, and those where there is an express declaration in writing of an intention and agreement on the part of an agent to be individually bound, usually where the agent contracts in his own name, but his principal is known, the question as to whether the principal or the agent individually is bound is one of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 721½.]

11. BROKERS—ACTION FOR COMPENSATION—INSTRUCTIONS.

The case was a close one on the evidence, and there were several inaccuracies in the charge which require a new trial.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by W. E. Bush against Leonard Phinizy. Judgment for plaintiff, and defendant brings error. Reversed.

Bush sued Phinizy for commissions as a broker, and recovered a verdict. A new trial was refused, and the defendant excepted. A number of stockholders in the Augusta Railway & Electric Company entered into a pooling arrangement in December, 1902, not to sell their stock for less than 50 cents on the dollar of its par value. The firm of Martin & Bush were designated as trustees to carry out the plan. The firm was dissolved, and Bush alone continued to act. Phinizy had 70 shares of stock covered by the pooling agreement. Martin & Bush had a number of shares. Bush and Phinizy both continued to buy stock until each of them had quite a large number of shares outside of the agreement. Altogether Phinizy had 445 shares. The Augusta-Aiken Railway & Electric Company had purchased a majority of the stock in the Augusta Railway & Electric Company. Jackson was a director in the former company. Bush was a stockbroker. On November 7, 1903, Bush submitted to Phinizy for his examination the following letter:

"November 7, 1903.

"James U. Jackson, Esq., Augusta, Ga.—Dear Sir: I hereby agree to give you the option of purchasing the stock of the Augusta Railway & Electric Company owned by me and represented by me as trustee, amounting to about 1,000 shares at the rate of 50 cents on the dollar for each share of stock of $100 value. This option shall extend six months, from January 1, 1904. This option may be renewed for six months from the date of its expiration upon the payment of $1.75 per share. In the event this option is exercised, there shall be added to the price of 50 cents on the dollar a sum equal to interest at the rate of 7 per cent. per annum on the purchase price of the said stock, and the said interest shall be calculated from

the date of this option up to and including the date upon which it is exercised. There shall be paid for this option the sum of $40,000 first mortgage collateral trust bonds of the Augusta-Aiken Railway & Electric Company. In the event this option is exercised, and the stock paid for, said bonds shall be surrendered and returned to you. In the event this option is not exercised, the bonds shall become the absolute property of the stockholders of the Augusta Railway & Electric Company, whom I represent and whose stock is above referred to. Both the stock and the bonds referred to above shall be deposited in the custody of the Georgia Railroad Bank, or of the Equitable Trust Company, both of this city, as I may elect, to be held in trust for the owners of the stock, on which the option to buy is given.

"Very truly yours, Wm. E. Bush.

"In case any dividend is paid on the Augusta Ry. & Electric Co. stock during the life of option, such dividend shall be held by the trustee and shall be paid over to the purchaser in case the option is exercised.

"W. E. B."

Whereupon Phinizy wrote Bush the following letter:

"Augusta, Georgia, Nov. 7, 1903.

"Mr. W. E. Bush, City—Dear Sir: I authorize you to sell for me 375 shares of the Augusta Railway & Electric Company stock at 50 cents on the dollar, in accordance with a certain letter of even date, written by you to Mr. James U. Jackson. There is to be no attorney fees charged against me on these particular shares of stock. I am to pay for your service in making this trade the same amount per share that the other shareholders will pay you. You are authorized also to sell my 70 shares in pool on same terms, except as to attorney's fees. This authority is good for 30 days only, to expire December 7, 1903.

"Very truly, etc., Leonard Phinizy."

Bush then delivered to Jackson his letter, and also a letter stating that, "in accordance with our conversation of this morning, I beg to advise you that the stock of the Augusta Railway & Electric Company represented by me and referred to in my letter of yesterday is as follows"—setting out the names and numbers of shares held by each owner. Jackson went North to consult his principals, and on November 17th he sent to Bush the following telegram:

"New York, November 17th. Wm. E. Bush, Augusta, Ga. Consider negotiations closed. Meeting of board called for Saturday to ratify same. Keep strictly confidential."

The bonds of the Augusta-Aiken Company were in the hands of trustees in Baltimore. They declined to certify such bonds for the purpose of buying an option, and Bush and Jackson had negotiations with a view to changing the proposed trade so as to sell the stock itself on a credit, with the bonds as collateral security. On November 21, 1903, the board of directors of the Augusta-Aiken Railway & Electric Company passed the following resolution:

"Resolved, that Mr. James U. Jackson, in behalf of the August-Aiken Railway & Electric Company, be authorized to negotiate the purchase of 1,154 shares of the capital stock of the Augusta Railway & Electric Company, represented by Wm. E. Bush, and such additional stock as may be acquired other than that held by the General Electric Company, upon the following terms: $50 per share, payable 12 months from January 2, 1904, for which the company will give its negotiable note, with interest at the rate of 7 per cent. per annum, secured by the collateral trust 5 per cent. bonds of this company at 40 per cent. of the par value of the same."

On November 30, 1903, Bush wrote Jackson the following letter:

"November 30, 1903.

"James U. Jackson, Esq., City—Dear Sir: In accordance with our conversation this afternoon, I beg to advise you that Mr. Leonard Phinizy, who owns 445 shares of the Augusta Railway & Electric Company stock, has positively declined to ratify any trade made for his stock along the line described by us, viz.: That a sale of the stock be made outright to your company. That the company should give its note secured by the stock and certain number of bonds as collateral. Such a trade would be acceptable, not only to me, but to all of the other stockholders whom I represent. I have endeavored to have Mr. Phinizy recede from his opposition, but ineffectually. I enclose you herewith a copy of the letter addressed to me by Mr. Phinizy on November 7th, authorizing me to make you a proposition contained in my letter of even date. As you will note from Mr. Phinizy's letter, I am authorized to make such a trade up to December 7th. In the event you find it possible to consummate the transaction along the line of my letter, I would respectfully suggest that you act very promptly, as my authority from Mr. Phinizy expires 30 days from that date, November 7th, and, in the event we do not trade with him now, I fear that I may not be able to do so later except for cash.

"Very truly yours, Wm. E. Bush."

On December 5, 1903, the board of directors of the Augusta-Aiken Railway & Electric Company took the following action as shown by the minutes: "The proposition of W. E. Bush, for himself and his associates, to sell to the company their holdings in the capital stock of the Augusta Railway & Electric Company was again presented and fully discussed. Upon motion of Mr. Jackson, seconded by Mr. Rutherford, Mr. Jackson was authorized to send a telegram as fol-

lows: 'To Wm. H. Bush: We accept your proposition giving us option for 12 months, with interest at 7 per cent. per annum from date option is signed until payment.'"

On the same day Jackson sent to Bush the telegram above stated. Also during that day Bush telegraphed to Jackson as follows: "Telegram received, and we stand ready to close. When will you be home?" And Jackson replied: "Meet me my office Monday to close details." On the same day Bush testified he wrote to Phinizy, inclosing a copy of the telegram from Jackson and of his reply. As to what transpired after that time the evidence is very conflicting.

Bush's evidence tended to show the following state of facts: He at once had his attorney and Jackson to begin the preparation of a formal contract carrying out the terms of the sale of the option, which would be satisfactory to Phinizy and to the company on the basis of Bush's letter to Jackson of November 7th. Jackson was willing to carry out the contract. Bush stated to Phinizy that the transaction was ready to be closed when they would sign the agreement. He went to Phinizy quite a number of times with memoranda of various kinds embodying the provisions of the trade, but to all of them Phinizy would raise some objection—not to the substance, but to matters of words and expressions. He did not retire from the trade, or express himself as dissatisfied with it, or as refusing to carry it out. On the contrary, he was profuse in his expressions of pleasure at the profits he was going to make. On the 16th of December Jackson was pressing Bush to know when Phinizy would carry out the trade. A memorandum of agreement had been prepared, and Bush took it to Phinizy and asked if the latter would approve it, saying that, if so, he would send it off to the company for signature. Phinizy declined to sign the agreement or to approve it. Bush asked him why, to which he replied, simply, that he would not do so. Bush produced the letters and telegrams, and asked him to state in what particular the contract presented varied from the trade made under his authority; the purpose being to send the contract to the company for execution. He did not dispute the authority, but refused to deliver the 445 shares of stock until Bush agreed to relinquish his compensation. After some discussion, apprehending serious financial loss and liability, on account of his agreement with Jackson, if the trade should not proceed Bush consented to leave the matter of his compensation to the sense of right and justice of Phinizy, and wrote and delivered to him the following letter:

"December 16, 1903.

"Leonard Phinizy, Esq., City—Dear Sir: In the matter of the proposed sale of your Augusta Railway & Electric Company stock, I beg to say that I am willing, so far as your stock is concerned, to leave the matter of my compensation to your sense of right and justice.

"Yours truly, Wm. H. Bush."

After that the contract was signed by Phinizy on December 28th. On January 2, 1904, the board of directors of the Augusta-Aiken Railway & Electric Company passed the following resolution: "Resolved, that the proposed agreement between this company and Leonard Phinizy, for the acquisition of 445 shares of the capital stock of the Augusta Railway & Electric Company, be entered into, and that the president and secretary of this company be, and they are hereby, authorized and directed to execute the said agreement for and on behalf of the company, and to do all other things that are necessary and convenient to carry out the terms and conditions of the same." The agreement was then signed by it, through its officers. In April following, the option was exercised and the stock was bought outright and paid for in cash. The agreement which was signed provided for interest to run from its date; that there should be paid for the option $18,000 in bonds (covering the proportion which Phinizy's shares bore to the entire shares sold); that within 10 days from the execution of the written contract the bonds and stock should be deposited with a named company; that any dividends declared should be paid to Phinizy, but should be treated as a part of the purchase money if the option should be exercised. The owners of stock, other than Phinizy, made a separate agreement for the sale of the stock, and this was also carried out and the stock paid for.

Phinizy contended in brief as follows: He had assisted in the effort to sell his stock, but several efforts to reach an agreement had failed. The authority to make the contract set out in his letter of November 7, 1903, was not carried out within the time limited, but had expired. He neither agreed to continue it nor waived any of the terms of his letter. On the contrary, after the failure of consummation by December 7th, he distinctly informed Bush of his refusal to proceed and of the termination of negotiations. After that time Jackson negotiated with him with a view to making a different trade, but without success. In December 16th, Bush came to him and again sought to negotiate with him in regard to his stock, saying, "I have got a trade now that will stick," and that the trust company had changed their minds and would now release the bonds to secure an option. At the same time he presented for the approval of Phinizy the written agreement which had been prepared. Phinizy demurred, but Bush urged him to "come back into the agreement" and sign the paper. Under the former negotiations he had heard that Bush intended to charge $3.25 on each share, though Phinizy had insisted that a meeting was to be called to fix the compensation. When he was urged to again make an agreement, he declin-

ed to do so until the question of compensation was determined. He told Bush that in no event would he pay more than $1 per share, and that he did not think he should pay anything, as he had himself aided in the efforts to bring about a sale. Bush offered to leave the matter of his compensation to Phinizy's sense of right and justice, and wrote and delivered the letter above quoted. Thereupon, under the terms of this letter, Phinizy agreed to proceed, and afterwards, on December 28th, signed the contract, which was subsequently approved by the directors of the company and signed, and at a still later date carried out by the exercise of the option.

The jury found for the plaintiff the amount sued for, with interest. To a refusal of a new trial the defendant excepted.

Wm. H. Fleming, for plaintiff in error. Lamar & Callaway, for defendant in error.

LUMPKIN, J. (after stating the facts as above). William E. Bush sued Leonard Phinizy for commissions alleged to be due him as a broker for services rendered by him in selling for the defendant 445 shares of stock in the Augusta Railway & Electric Company to the Augusta-Aiken Railway & Electric Company. The jury found in favor of the plaintiff $1,446.25, besides interest. A motion for a new trial was overruled and the defendant excepted. The motion contained numerous grounds, but, under the view we take, it will be unnecessary to discuss them in detail.

1–3. Where an owner of property employs a broker to procure a purchaser, the general rule is that, in order to earn his commission, he must procure a purchaser who is able, ready, and willing to purchase on the terms prescribed by the owner, and offers to do so; and the burden of showing this is on the broker if he sues to recover commissions. Civ. Code 1895, § 3015. If the broker does this, and the sale is not completed solely through the fault of the owner or his inability to make a good title, he is liable for the commissions. Doonan v. Ives & Krouse, 73 Ga. 295; Davis v. Morgan, 96 Ga. 518, 23 S. E. 417. So, also, if the owner interferes and makes the sale himself to the purchaser thus procured. Gresham v. Connally, 114 Ga. 906, 41 S. E. 42. And this is true, even if he makes some modification in the terms. If, however, the customer procured by the broker should be accepted by the principal, the burden would be upon the latter to show that the purchaser was not able to comply with the contract. Davis v. Morgan, 96 Ga. 520, 23 S. E. 417. If the duty of the broker under his employment is not merely to procure a purchaser, but also to do some other act, the broker suing for commissions, after showing his employment, must also show that he performed the obligations undertaken by him, unless performance was prevented by the fault of the principal. 19 Cyc. 278. We omit any discussion of questions of adoption by ratification of acts of an unauthorized person purporting to act as agent, or of intervention by the principal preventing the completion of performance by the broker within the time prescribed according to the contract, because no such questions are presented here. If the thing to be done by the broker, whether procuring a customer or effecting the transaction, is limited to be done in a specified time, he must show that it was done within that time, or that the time was extended or the limitation waived; and if the owner had ceased to be bound, by reason of the terms of his contract, even if he should afterwards sell to the same person with whom negotiations had been had prior to the expiration of the time limited, unless the delay was caused by the negligence, fraud, or default of the owner, this would not give a right to commissions. 19 Cyc. 254, and citations; Emery v. Atlanta Exchange, 88 Ga. 321, 14 S. E. 556.

Under his letter to Jackson dated November 7, 1903, Bush agreed to give Jackson the option of purchasing the stock owned by him and represented by him as trustee at a fixed price. For this option there was to be paid $40,000 in bonds, and if the option was exercised and the stock paid for the bonds should be returned; otherwise, not. Both stock and bonds were to be deposited in the custody of the Georgia Railroad Bank or with the Equitable Security Company, as Bush should elect. Bush was not only to make the offer for acceptance by Jackson, but, if it was accepted, he was to select the depository where the stock and bonds were to be deposited and held together in trust for the owners of the stock. This was an integral part of the contract allowing an option. In the letter from Bush to Jackson no time was specified. Hence a reasonable time might have been contemplated. But Phinizy had not only 70 shares in the "pool," but 375 shares beside. He wrote the letter authorizing Bush to sell all of his shares "in accordance with" the letter to Jackson, and agreed that he would pay for Bush's service in making the trade what the other stockholders should pay; but, not being satisfied to leave the matter of time as in the other letter, he added: "This authority is good for 30 days only, to expire December 7, 1903." The other stockholders agreed to a different character of trade, selling the stock itself, instead of an option; but Phinizy declined to do this, and he was later segregated from them, and the trade proceeded on the original basis as to him. Relatively to him and his stock, the duties incumbent on Bush under the letters referred to above remained, and must have been complied with in the time limited, unless it was extended, or unless compliance was prevented by the fault of Phinizy, in order to bind him to pay commissions.

Bear in mind that this was not a complete sale of his stock, but a contract for an

option. It might be termed a sale of an option. The bonds instead of cash, were to be paid and deposited for the option. If it had been cash to be paid, and the time had been limited, there could be no doubt that it would have been necessary for the cash to have been paid or offered within that time, in order to have bound Phinizy. If an owner of property should say that a purchaser might have an option for a definite time, by paying a given amount in cash by a fixed date, it could not be claimed that the proposed purchaser could merely say that he would agree to take the option, and bind the owner without payment. And if a broker was employed to sell the option by a named day to a purchaser for a cash consideration, he could not say he had earned his commissions by agreeing for a credit, or to extend the time for payment beyond that day, substituting in place of the cash which he was authorized to accept a promise of the other party to pay at some indefinite time, or in a reasonable time. Here the bonds take the place of cash in the illustration. The point is controlled in principle by the decision in Emery v. Atlanta Exchange, 88 Ga. 321, 327, 14 S. E. 556. See, also, Larned v. Wentworth, 114 Ga. 208, 39 S. E. 855. In Emery's Case it was said: "In this case, the true test whether that compensation was earned is this: Was the sale completed within the agreed time; and if not, did the brokers within that time put the seller in a situation where, on failing to make the sale, he would have been liable to a good action by the purchaser for such failure? In other words, the sale would have to occur within the time agreed, or else be postponed beyond that time by the seller's fault. See Hyams v. Miller, 71 Ga. 608. It is plain that the purchaser could not maintain his action without having tendered the purchase money before the option expired." Under the undisputed evidence, the bonds were not put up as payment for the stock, nor was the depository named, so far as disclosed, before December 7th, when the time fixed expired, nor is there any evidence that Phinizy prevented the completion of the trade by that date. Unless Phinizy waived this, or extended the time, Jackson could not have compelled him to proceed by merely agreeing within the time limited that he would take the option and pay for it later; and Bush could not say that he had completed his work and earned his commissions.

4. While a contract may be closed by a letter or telegram, and become binding, yet, before it is a binding trade, there must be a mutual assent of the parties to the same thing in the same sense. If it is claimed that a seller has become bound by the acceptance of his offer by the buyer, the offer must be accepted unequivocally, unconditionally, and without variance. Robinson v. Weller, 81 Ga. 704, 8 S. E. 447. Treating the two letters of November 7th as applying to Phinizy's stock alone, was the telegram of Jackson to Bush, dated December 5th, such an acceptance of the proposition made as sufficed to bind Phinizy? We think there was a variance between the offer and the acceptance. The letter of Bush to Jackson, dated November 7th, provided that, in the event the option should be exercised, there should be added to the price of 50 cents on the dollar of the par value of the stock interest at the rate of 7 per cent. per annum on the purchase price of the stock, "and the said interest shall be calculated from the date of this option up to and including the date upon which it is exercised." What was "the date of this option"? Was it the date of the letter making the offer? Or, if not, what date? Certainly not later than its acceptance. It could hardly be that Phinizy should be bound and liable for commissions on the ground that there was a complete, binding option contract, and yet interest did not run. The parties subsequently drew and signed on December 28th a more formal contract, but there is nothing on the face of the original letter providing for it. The telegram of Jackson, dated December 5th, says that the proposition for an option for 12 months is accepted, "with interest at 7 per cent. per annum from date option is signed until payment." This evidently contemplated, not the date of the telegram, or of the letter of November 7th, but a future date, when some other signing should take place. This was not an acceptance of the offer without a variance or modification. The telegram was not a hasty or careless one. It was shown to have been fully discussed and carefully authorized at a meeting of the board of directors of the electric railway company, for whom Jackson was acting. It also referred to the option accepted as one for 12 months, while strictly it was offered for 6 months, with the right to continue it for 6 months more by making a certain payment. But, as it was stated that "we accept your proposition giving us an option for 12 months," this language could be considered in connection with the proposition, and was not necessarily a variance, except where plainly so.

For the reasons stated, the sending of the telegram by Jackson to Bush on December 5th did not of itself create a contract binding on Phinizy, and therefore did not alone entitle Bush to commissions on the basis of Phinizy's letter to him of November 7th. An owner may agree to a variation or modification of the terms of a proposed contract, and, if he does so, he will be bound by the contract as varied. If the broker undertakes to vary or modify the terms of the offer, the principal may reject the change, and decline to be bound, or he may ratify the change and will then be bound as if he had authorized it. As to what transpired between December 5th and December 16th, the evidence was conflicting—whether Phinizy declared the transaction at an end,

and subsequently was induced to again take up negotiations and proceed under a new agreement from Bush as to his compensation, or whether the modified acceptance was ratified and the trade treated as in force while a formal written contract was being prepared with the concurrence of Phinizy to perfect it. There was some evidence that the trade was spoken of after December 7th by the parties as a proposed agreement and a proposed sale, and this was urged as a circumstance to corroborate the view that the contract was not considered by the parties as binding; but there was conflict as to what took place, and that was for the jury.

5. Phinizy was not bound prior to December 16th, unless he ratified the modifications already referred to, so as to waive completion in the time limited by him in his letter of November 7th, and accept the change as to interest. If he did not do this, he had a right to decline to go forward with the matter, whether or not his doing so would have caused Bush inconvenience or the loss of a sale of his own stock or other stock. He was entitled to stand on his contract, whether it was a liberal one or a strict one. Nor would the mere fact that he may have made a profit on his stock affect the question of whether or not Bush was entitled to commissions.

Again it is said that the final contract signed varied from the primary proposal. It named the date when interest should run according to the telegram of Jackson dated December 5th, and it provided 10 days after signature for depositing the stock and bonds. If Jackson was acting for the electric company, the placing of its name as the purchaser in the formal contract, without objection from Phinizy, would not amount to a novation. There were other minor changes, but they appeared to be in Phinizy's favor. If a person agrees to one contract, he is not bound to sign another varying from the first, unless he assents to the change. This, of course, he can do, and be bound. Gilder v. Davis, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398; 4 Am. & Eng. Encyc. Law (2d Ed.) 974, and citations; note to Walker v. Osgood, 98 Mass. 348, 93 Am. Dec. 175.

6, 7. If Phinizy was already liable to Bush for full commissions, and indebted therefor under his letter of November 7th, an agreement to take less, without any new consideration, would not be binding. Section 3735 of the Civil Code of 1895 provides that "an agreement by a creditor to receive less than the amount of his debt cannot be pleaded as an accord and satisfaction, unless it be actually executed by the payment of the money, or the giving of additional security, or the substitution of another debt or some other new consideration." Davis & Co. v. Morgan, 117 Ga. 504, 43 S. E. 732, 61 L. R. A. 148, 97 Am. St. Rep. 171. This rule has reference to a fixed liability or duty, and would not preclude an accord and satisfaction by securing a doubtful claim, or by an agreement based on a new consideration. Civ. Code 1895, §§ 3732, 3734. If Phinizy had already become bound by the contract for the sale of the option, and had become liable for a definite, fixed commission, and assented to the changes above referred to in the preparation of the formal contract, but refused to sign not on the ground of any objection to the writing as not carrying out the previous contract but merely to compel a waiving or partial remission of commissions already incurred, the agreement of December 16th would be without consideration. Mooney v. Elder, 56 N. Y. 238. And see Fenn v. Ware & Owens, 100 Ga. 563, 28 S. E. 238. But if Phinizy was not already bound and liable for a fixed commission before the agreement of December 16th, and in order to induce him to make a contract Bush agreed to leave the amount of compensation to his determination, such agreement took the place of the original one as to commissions. Its effect is not now before us.

As Jackson, or his principal, agreed to trade with other sellers of stock in a separate and different way, and to deal with Phinizy alone, he could not be held responsible for results of a breach as if on a joint contract. Either it was joint or several as to him. If it was joint, there was no right to turn it into a several contract, except by his consent. If it was not several at the outset, but became so by agreement, then as against him it could not be treated as a joint contract. We think the charge of the court touching the contention of Bush as to possible damages to him from a refusal of Phinizy to consummate the trade, without further explanation as to the rule touching nonliability of an agent acting for his principal, was calculated to make an erroneous impression on the jury, and one which may have had a serious effect upon their verdict. The situation of Bush could be shown in explanation of his conduct; but his mere contention as to the legal effect of a refusal by Phinizy should not have been left to stand, without explanation, where the judge's attention was called to it by requests. The requests themselves, however, in this case, were subject to criticism.

8–11. As to the liability of an agent on contracts entered into in his own name, section 3022 of the Civil Code of 1895, declares: "The form in which the agent acts is immaterial; if the principal's name is disclosed, and the agent professes to act for him, it will be held to be the act of the principal." Section 3039 reads: "Where the agency is known, and the credit is not expressly given to the agent, he is not personally responsible upon the contract. The question to whom the credit is given is a question of fact to be decided by the jury under the circumstances in each case." An agent may expressly contract on his own credit and be bound, even though his principal be known. The declaration of intention and agreement in writing

on the part of the agent to bind himself personally may be so explicit as to admit of no denial by parol. But usually, where the principal is disclosed, the question is one of fact. Cleveland v. Stewart, 3 Ga. 283; Fleming v. Hill, 62 Ga. 751; Nall v. Farmers' Warehouse Co., 95 Ga. 770, 22 S. E. 665; Partridge v. Hollinshead, 105 Ga. 278, 30 S. E. 787; Raleigh & Gaston R. Co. v. Pullman Co., 122 Ga. 700, 50 S. E. 1008. See, also, on this subject, 1 Am. & Eng. Encyc. L. 1118, and citations; 19 Cyc. 302, and citations.

It was also an erroneous statement of the defendant's contention to say that "Mr. Phinizy says that he owes Mr. Bush absolutely nothing." The jury may have been caused to believe that the issue was whether the plaintiff should be paid for his work $3.25 per share or nothing, while the real issue on this feature of the case was whether the measure of his compensation was to be on the basis of the original letters of November 7, 1903, on which the suit was based, or according to the agreement contained in Bush's letter of December 16th. In his answer to the petition the defendant denied that he owed the plaintiff anything under the contract sued on, but stated that he had offered to pay, and was still willing to pay, $1 per share; that this was under the agreement of December 16th, and not the one on which the suit was founded; and that plaintiff was not entitled to recover on such contract. The expression used in the charge that if, within the time limited in Phinizy's letter of November 7th, Bush had sold Phinizy's stock, "and this sale had been consummated and closed, so far as Bush could close the same," he would have earned his commissions, was subject to misinterpretation. It might have led the jury to think that, if Bush had done all he could to close the trade, he was entitled to commissions, whether or not he had succeeded, or had fulfilled the conditions of Phinizy's letter, and whether or not, if he failed, any fault of Phinizy's caused the failure. Our learned brother of the circuit bench probably did not mean this, but the jury may have so understood.

We hardly think that the reference to the sale of the stock, and the consummation by delivery, and payment of the "money" therefor, complained of in the fourteenth ground of the motion, was entirely clear, taken with the context in which it was used. It must be borne in mind that the thing which had to be done within the limit of 30 days was to close the sale or trade for an option and do what was required for that purpose under the terms of the letters of November 7th. The final delivery of the stock itself to the purchaser, if the option were exercised, and the payment of the money therefor, was a matter for later consummation. Doubtless this was what the presiding judge had in view. The case is one of closely contested evidence, and, in view of some inaccuracies in the charge, we think there should be a new trial.

Other grounds of the motion need no further discussion. Except so far as indicated in this opinion, they would not require a new trial.

Judgment reversed. All the Justices concur except HOLDEN, J., not presiding.

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(129 Ga. 526)

WESTERN & A. R. CO. v. TATE et al.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. TRESPASS—ACTION—PARTIES.

When the cause of action alleged is an injury both to the possession and to the estate in fee, affecting all the plaintiffs, though in different degrees, a tenant for life of an undivided part of the land, and the remaindermen, who also own the fee in the balance of the land, may join in an action for the recovery of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 74.]

2. RAILROADS — FIRES — ACTION — INSTRUCTIONS.

The charge on the subject of the duty of a railroad company to exercise ordinary care in keeping its right of way clear of combustible matter was not open to the criticism that it implied a duty to exercise ordinary care in keeping the right of way absolutely clean.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1673–1676, 1734.]

3. TRIAL — INSTRUCTIONS — CREDIBILITY OF WITNESSES.

A charge relating to the credibility of witnesses, in effect that, if any conflicts between witnesses are found, the jury should attempt to reconcile such conflicts without imputing perjury to any witness, but, if unable to do so, then to ascertain the truth "in the light of all the circumstances as detailed from the witness stand, and in the light of human conduct and of reason and common sense," does not withdraw from the consideration of the jury any documentary evidence, and especially so, when the jury is instructed in another portion of the charge to take into consideration all the evidence in the case.

4. EVIDENCE—VALUE—TAXPAYER'S RETURN—ADMISSIONS—INSTRUCTIONS.

The return of a taxpayer, as contained in the tax receiver's digest, may be considered by the jury on the issue of the value of the property therein included, as an admission. Such admission is not conclusive evidence of the value of the property. An instruction which does not in terms state that the jury may consider such return as in the nature of an admission, but that they might consider it as a circumstance of the case, will not require the grant of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651–659.]

5. RAILROADS—FIRES—MEASURE OF DAMAGES.

Where there is a diminution in value of land caused by the negligent firing and destruction of growing timber thereon, the measure of damages is the diminution in the market value. In cases where growing timber, much of which is young and immature, is destroyed by fire as a consequence of a negligent tort, and there is no depreciation in the market value of the land by reason of the destruction of the timber, the measure of damages is the value of the timber destroyed in its then state as attached to the land on which it grew. Both of these principles may be charged in the same case, if the facts are such as to warrant it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1737.]

6. TRIAL—INSTRUCTIONS—REQUESTS.
The failure to give in charge a pertinent instruction not requested in writing will not require a new trial, where the general charge substantially covered the issues in the case.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651–659.]

(Syllabus by the Court.)

Error from Superior Court, Gordon County: A. W. Fite, Judge.

Action by Winnie Tate and others against the Western & Atlantic Railroad Company. From a judgment for plaintiffs, defendant brings error. Affirmed.

Jno. L. Tye, O. N. Starr, and Neel & Peeples, for plaintiff in error. N. A. Morris, F. C. Tate, and F. A. Cantrell, for defendants in error.

EVANS, P. J. This is an action by Winnie Tate, Mary B. Tate, Susan A. Tate, Arthur H. Tate, Caleb R. Tate, Samuel Tate, and Winnie Tate, as next friend of Daniel J., Willie C., and Winnie Tate, against the Western & Atlantic Railroad Company, to recover damages resulting from the firing of the growing timber upon land owned by the petitioners by sparks emitted in the negligent operation of the defendant's train of cars.

1. A new trial is asked "because, as movant insists, the plaintiffs brought and have prosecuted their said action as joint owners of the lands and timber growing thereon, described in the petition in said case; whereas, as movant insists, the evidence introduced on the trial of said case before the jury conclusively established the fact that one of said plaintiffs, to wit, Mrs. Winnie Tate, was and is the owner of a life estate only in the undivided one-ninth of said land and growing timber; the other eight plaintiffs owning the estate in remainder in and to said undivided one-ninth of said land and growing timber, and also the remaining eight-ninths of said land and timber in fee simple." We do not agree to movant's contention that the pleadings necessarily set out that the plaintiff's title is joint. The allegation in the petition respecting their title is "that they are the owners of and are in actual possession of" certain described land. This is an allegation of ownership, but not necessarily that plaintiffs are joint tenants or tenants in common. These plaintiffs have a joint interest in the damage flowing from the alleged injurious act of the defendant, and there is no reason why they may not all have redress in one suit. We have broken away from the abstruse subtleties of common-law pleading, and it is not necessary in our practice to so model the petition as to differentiate whether the action be trespass or on the case. Every action is properly brought in this state which sets forth plainly, fully, and distinctly the plaintiff's cause of action. McNabb v. Lockhart, 18 Ga. 495; Civ. Code 1895, § 4960. These plaintiffs, as owners of the entire fee, allege that they have sustained damage because of the defendant's negligent acts. Where two or more have a joint interest in the damage caused by the destruction of timber by fire through fault of another, they may maintain a joint action for the loss without having jointly the legal title in the timber and the land upon which it is growing. This is upon the theory that when the cause of action alleged is an injury both to the possession and to the estate in fee, affecting both the tenant for life and the remaindermen, though in different degrees, they may join in an action for the recovery of damages. Such joinder cannot possibly hurt the defendant, or deprive it of any defense. A recovery would be a bar to any subsequent action by any of the plaintiffs for the same cause. The defendant is in no way inconvenienced in making its defense, and it is to its benefit that it may adjudicate in one suit its liability to all who have an interest in the freehold. The difficulty of apportioning the damages, in case of a recovery, between the life tenant and the remaindermen, in no wise concerns the defendant, for it will be protected in any event by the judgment. McIntyre v. Westmoreland Coal Co., 118 Pa. 108, 11 Atl. 808; Bach v. N. Y. Elevated R. Co., 60 Hun, 128, 14 N. Y. Supp. 620; Cleveland v. Grand Trunk R. Co., 42 Vt. 449; Gould on Pleading, 188 et seq.

Our attention is called by the plaintiff in error to the case of Wrightsville & Tennille R. Co. v. Holmes, 85 Ga. 668, 11 S. E. 658, as maintaining a contrary doctrine. In that case Holmes and his wife sued for a trespass to land. The proof showed that Holmes purchased the land with his wife's money, but took the title in his own name. Blandford, J., in the opinion, said that, as "it is clearly shown that there is no joint title in Holmes and wife, therefore it would seem, without more, there could be no recovery." The court did not make any positive ruling on the subject, but only said that it seemed that where an action in trespass was jointly brought it would fail if there was no joint title. The petition in that case was construed to have alleged a joint title, and the court was dealing with a variance between the pleading and proof. In the instant case we hold that an allegation that the plaintiffs are the owners of realty does not necessarily imply a joint title, and if the proof shows that each plaintiff has some interest in the whole land, and their combined interests comprise the full fee-simple title, there is no variance with such allegation of ownership. Mrs. Tate's life estate is limited to an undivided one-ninth part of the realty, but, until the particular ninth is segregated from the whole, she is interested in the whole land.

2. The court charged that a railroad company should use ordinary care in keeping its right of way clear of combustible matter, but that the law does not require a railroad com-

pany to keep its right of way absolutely clean; "but if it should use ordinary care to do so, and if it used ordinary care to do so, and leaves still accumulated, the road would not be liable, but if it did not use ordinary care in doing so, and the leaves accumulated and caught on fire from sparks from the engine, then it would be liable, whether the engine was properly equipped or not." The criticism of this charge is that it was calculated to impress the jury that the railroad company was under a duty to exercise ordinary care in keeping its right of way absolutely clean. We think, when the charge in its entirety is considered, that it only amounted to an instruction that the duty imposed by law on the railroad company is to exercise ordinary care in keeping its right of way clear of combustible matter, and not to keep it absolutely clean, and was not calculated to otherwise impress the jury.

3. The charge must not withdraw from the consideration of the jury any evidence which may properly enter into the solution of any issue comprehended in the pleadings. Thus, where one of the parties relies in part on documentary evidence to sustain his contention, the judge should not instruct the jury that the evidence is what the witnesses swear upon the stand. Bowden v. Achor, 95 Ga. 245, 22 S. E. 254; McLean v. Clark, 47 Ga. 26; Myers v. State, 97 Ga. 79, 25 S. E. 252. When an attack for this cause is made on the charge, the excerpt criticised must be considered in its appropriate context. It is frequently impossible for a judge to state an entire legal proposition, with all its qualifications and exceptions, in one clause or one sentence. An isolated excerpt may be erroneous, because of incompleteness of statement, yet its appropriate context may remove the apparent defect. In the present case the court, in charging on the credibility of witnesses, after instructing the jury that, if there were conflicts in the evidence, they should endeavor to reconcile these conflicts, and not impute perjury to any witness, said: "But if, after an honest effort to reconcile the evidence, you are unable to do so, then you should believe that which to you is the most reasonable and credible, that which, as honest, conscientious, upright, intelligent jurors, wanting to do right and render a just verdict, you believe to be the truth of the alleged transaction, viewing them in the light of all the surrounding circumstances as detailed from the witness stand, and in the light of human conduct and of reason and common sense." Plaintiff in error contends that the quoted excerpt had the effect to withdraw from the consideration of the jury certain tax returns of plaintiffs, made before and since the fire, as illustrating the question of damage. We do not think this criticism just, and especially so as the court elsewhere particularly instructed the jury to take into consideration all the evidence from both sides and ascertain the truth.

4. The defendant orally requested the court to charge "upon the subject of the tax books in evidence," which the court did as follows: "There are some tax books introduced in evidence. While you will consider that evidence with the other evidence in the case, and determine for yourselves what the truth is, the fact that a man may give in his taxes one year high and one year low does not necessarily bind him by that fact; but that is a circumstance that you may consider, with the other circumstances in the case." The criticisms of this charge are: (1) That it did not give the jury any definite and intelligible rule on the effect of such evidence; (2) that it minimized the probative force of the evidence; (3) that the court should have instructed the jury that they could consider the tax returns as an admission. The returns appear to have been made by Arthur H. Tate as agent for Mrs. Winnie Tate. Arthur Tate had testified as a witness. The tax returns are in the nature of an admission by the taxpayer of the value of his property. It is not a conclusive admission of the true value of the property returned, but the admission in the return may be considered by the jury in estimating the value of the property. It would have been proper for the judge to have so charged; but, inasmuch as he instructed the jury that such return was a circumstance which they might consider along with the other circumstances in the case, we do not think this slight inaccuracy is sufficiently material to justify the grant of a new trial on this ground.

5. The court charged the jury that, if the value of the land was diminished by the negligent firing and destruction of the timber thereon, the measure of damages was the diminution in the value of the premises resulting from the injury caused by the fire. He also charged that, if there was no diminution in the market value of the land by reason of the burning of the timber, the measure of damages would be the proven value of the timber destroyed by the fire. Plaintiff in error insists that these two principles are contradictory, and tended to confuse the jury as to the rule to govern them on the measure of damages. There was no contradiction in the charges given. Each was applicable to a peculiar phase of the evidence. If the jury should have found from the testimony submitted that the burning of the timber on the land diminished the market value of the land, then the measure of damages was the diminution of the value of the land resulting from the injury caused by the fire. L. & N. R. R. Co. v. Kohlruss, 124 Ga. 250, 52 S. E. 166. On the other hand, if the jury should find that the growing timber was destroyed by the fire as a consequence of the negligent tort of defendant, and there was no depreciation in the market value of the land by reason of the destruction of the timber, the measure of damages in such a case is the value of the timber destroyed in its then

state as attached to the land on which it grew. Central R. R. v. Murray, 93 Ga. 256, 20 S. E. 129. The evidence was conflicting as to the effect of the fire on the market value of the land, and in such a case it is proper for the court to give in charge the measure of damages appropriate to either of these phases of the evidence.

6. Complaint is made that the court failed to charge certain appropriate principles of law. In so far as these were applicable to the case they were covered by the general charge; and if plaintiff in error had desired a more specific instruction with respect to the particular matter, a timely written request for such instruction should have been submitted to the judge.

The verdict was approved by the trial judge, there is evidence to support it, and, as no error of law is shown to have been committed which requires the grant of a new trial, the judgment is affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 611)

ADAMS v. JOHNSON et al.

(Supreme Court of Georgia. Nov. 18, 1907.)

QUIETING TITLE—CLOUD ON TITLE—WILL DEVISING REALTY.

The disposition, in a paper offered for probate as the last will and testament of a decedent, of property which the alleged testator may not own, does not give the superior court, in the exercise of equity powers, jurisdiction to cancel the alleged will as a cloud on the title of one averring himself to be the true owner of part of the property devised, or to enjoin its probate by the nominated executor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 34.]

(Syllabus by the Court.)

Error from Superior Court, Thomas County; R. G. Mitchell, Judge.

Action by Aaron Adams against A. S. Johnson, executor, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Thomas Adams was the owner of certain realty, which, in 1869, was duly set apart as a homestead for himself as head of a family, consisting of his wife, Georgia Adams, and eight minor children. In 1882, he procured an order for the sale of the homestead property and the reinvestment of the proceeds in a certain tract of land. The deed was executed to Georgia Adams, as grantee, and contained the following recitals: "Said tract of land being purchased by the said Georgia Adams with the proceeds from the sale of lands set apart to Thomas and Georgia Adams as a homestead, for themselves and children, the said tract of land to stand in place and stead of land heretofore set apart to Thomas and Georgia Adams as aforesaid." Thomas Adams died on January 6, 1905. In July, 1905, Georgia Adams executed what purports to be her last will and testament, devising all her real estate and personal property to her six daughters, and excluding her sons, Aaron and Thomas, in which will A. S. Johnson was named as executor. Georgia Adams died in November, 1905, and her nominated executor offered her will for probate in solemn form in the court of ordinary. Pending the proceedings for probate, Aaron Adams filed his petition, alleging the foregoing facts; and, further, that the real estate devised, though not specifically described, is the property of his father's estate; that all the children are of age, and the homestead estate has terminated; and that Johnson, the nominated executor, is insolvent. He prays that a receiver be appointed to take charge of the homestead land and personalty, that the executor be enjoined from further proceeding to probate the will of Georgia Adams, and that the alleged will be set aside and canceled as a cloud upon the title of petitioner and the other heirs at law of Thomas Adams. The executor and other heirs of Thomas Adams are made parties. The executor filed a general demurrer, and, to the order of the judge sustaining that demurrer plaintiff excepted.

Theo. Titus, for plaintiff in error. S. A. Roddenberg, for defendants in error.

EVANS, P. J. (after stating the facts as above). The remedy by petition quia timet to remove a cloud on the title was never intended to supplant the usual and proper remedies at law for testing the superiority of two legal titles, where there are no supervening circumstances calling for equitable relief. Two antagonistic titles to a tract of land may usually be settled in an ejectment suit, or statutory complaint for land, and the superiority of the better title finally adjudicated. Even if it be conceded that the effect of the deed of reinvestment of the homestead property to Mrs. Georgia Adams, construed in the light of its recitals, and the proceedings by virtue of which it was executed, did not amount to a divestiture of Thomas Adams' title, the plaintiff's interest would be that of an heir at law of his father; his brothers and sisters being his coheirs. Therefore, admitting, for the purpose of considering the plaintiff's right to the remedies he seeks, the correctness of his contention, he only asserts a legal title to his proportionate part of the property in controversy. He alleges that the defendants are in possession, and presents no reason why he may not try with them, in an ejectment or partition suit, the validity of his alleged title. The rule which denies a plaintiff who is out of possession, and who alleges no necessity for equitable intervention to protect his purely legal title, the equitable remedy of cancellation of an alleged conflicting title to the land in the possession of another, is based on the fact that the legal remedy is inadequate. That the plaintiff in the present case has an adequate legal remedy is apparent.

Again, there is another reason why the plaintiff should not cancel his mother's will. She did not describe any specific property in devising it. The devise is of all her property both real and personal. The will is operative as to all property which she owned at the time of her death. The attempted disposition of property by will which the testator may not own does not give a court of equity jurisdiction to cancel the alleged will before its probate as a cloud on the title of one averring himself to be the true owner. Israel v. Wolf, 100 Ga. 339, 28 S. E. 109. Were the rule otherwise, every will would be subject to cancellation if there was an adverse title asserted to some of the property therein devised or bequeathed. Under Civ. Code 1895, § 4232, the court of ordinary has original, exclusive, and general jurisdiction of the probate of wills. The issue to be decided on an application for probate is devisavit vel non, and does not include any issue as to the validity of the testator's title. Finch v. Finch, 14 Ga. 362. It is the duty of the nominated executor to offer the will for probate, and equity will not enjoin the performance of this duty. Israel v. Wolf, supra.

Judgment affirmed. All the Justices concur.

(129 Ga. 416)

## LYONS v. WINTER.

(Supreme Court of Georgia. Nov. 12, 1907.)

1. BILL OF EXCEPTIONS—SERVICE—NECESSITY OF PERSONAL SERVICE.

The service of a bill of exceptions must be personal, except in those cases where another mode of service is expressly authorized by statute. Anderson v. Albany & Northern Ry. Co., 123 Ga. 318, 51 S. E. 342.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 101.]

2. SAME.

In cases where the opposite party is the state, or the opposite party does not reside in the county, and the attorney for the defendant in error cannot be served personally, on account of his absence from the county of his residence, the statute expressly authorizes service to be made by leaving a copy at the residence of such attorney; but in no case is authority given to make service by leaving a copy at the residence of the defendant in error himself. Civ. Code 1895, § 5547, par. 2.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 101.]

3. SAME—BY WHOM SERVED.

"Service of a bill of exceptions by the plaintiff in error or his attorney, or by any other person, if properly shown by affidavit, is valid." Walter v. Kierstead, 74 Ga. 18. The ruling made in Henderson v. Henderson, 7 Ga. 421, was founded upon the fourth section of the act organizing the Supreme Court, which required the service of a bill of exceptions by sheriff, constable, or attorney of the superior court. This section of the act was changed by the law as now contained in Civ. Code 1895, § 5547.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action between Dora Lyons and L. L. Winter. From the judgment, Dora Lyons brings error. Writ dismissed.

T. S. Lyons, for plaintiff in error. J. S. Reynolds, for defendant in error.

ATKINSON, J. Writ of error dismissed. All the Justices concur, except HOLDEN, J., who did not preside.

(129 Ga. 619)

## COMPTON v. NEWTON et al.

(Supreme Court of Georgia. Nov. 18, 1907.)

1. ADVERSE POSSESSION—TITLE BY PRESCRIPTION.

"A mere squatter on a lot of land, without color of title or claim of right, cannot defeat the title of the true owner by conveying the land to other purchasers, who have full knowledge of the nature and character of the title when they purchase it, although they may have been in possession of it for seven years under such title." Brown v. Wells, 44 Ga. 573.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 492, 496.]

2. INJUNCTION—TRESPASS TO LAND.

The verdict was unauthorized by the evidence and must be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 278.]

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action by J. C. Compton against D. C. Newton and others. Judgment for defendants, and plaintiff brings error. Reversed.

Compton filed an equitable petition against D. C. Newton and H. T. Newton, seeking to enjoin said defendants from trespassing on a certain lot of land alleged to belong to the plaintiff, and to recover damages for such alleged trespasses. The defendants in their answer admitted working the timber on said land for turpentine purposes, as alleged in the petition, but claimed the right to work the same under a lease to them from one W. J. Reeves. The title of the plaintiff to the said lot of land rested upon a grant from the state to the plaintiff, dated October 1, 1850. The plaintiff introduced no further evidence upon the question of title. W. J. Reeves, the defendants' lessor, testified in behalf of the defendants as follows: "I got a deed of land lot 387 [the land in dispute] in 1884 from E. Johnson. This land was not claimed by anybody but these parties who made me the deed. I bought in good faith. In 1884 I built a dwelling house, a corn crib, a smoke house, and a stable on it, and cleared up six or seven acres of the land. I have been continuously in possession of the land. Nobody ever set up a claim against it until last year, when this Compton claim was set up. * * * I knew that it took a plat and grant to make a good title. I considered the title I got to it a good title, from the fact that I saw no other person claiming it, and these

parties had been there since 1865. These parties squatted there in 1865, and stayed right on it until they traded their interest to Mr. J. Johnson. I knew it to be true that they squatted on it in 1865. In 1865 they were there, and traded their squatters' right to Mr. Johnson. Mr. Johnson did not live on the lot of land. He never cultivated any field down there. He never had anybody cultivating one down there that I know of." Defendants introduced a deed from Johnson to W. J. Reeves, dated January 7, 1884, and recorded January 17, 1884. The defendants claim the right to work the timber upon the land for turpentine purposes under a lease from said W. J. Reeves. It does not appear in the record who were the parties that "squatted" on the land in 1865, nor in what year they traded their squatters' rights to Mr. Johnson. The jury returned a verdict in favor of the defendants. The plaintiff moved for a new trial upon the general grounds, the court overruled the motion, and plaintiff excepted.

C. J. Haden and R. G. Dickerson, for plaintiff in error. W. T. Dickerson, for defendants in error.

BECK, J. (after stating the facts as above). The defendants in this case held under W. J. Reeves, and the validity of their defense depends upon the question as to whether or not Reeves had a good title to the land upon which the alleged acts of trespass were committed. If Reeves had good title, their defense was complete, and a verdict in their favor would have been required. If Reeves had no title, the defendants were liable in damages to the plaintiff under the facts disclosed by the record, and the verdict in their favor was unauthorized. Reeves relied upon prescriptive title, maintaining that he had been for over seven years in possession of the lands under color of title; that he had gone upon the lands in 1888, built a house there, and inclosed a field of considerable area. Without going into the question as to whether his occupancy of the land for the time elapsing between 1888 and the time of this suit was such as to have constituted a good foundation for a prescriptive title, we have reached a conclusion adverse to his contention that his title by prescription was good, based upon a fact that is independent of the question as to whether his possession was so open, notorious, peaceable, and adverse as to meet the statutory requirements relative to those necessary ingredients of a sound title by prescription. Uncontroverted evidence in the record discloses one defect in Reeves' title which is fatal thereto. And that is that the deed constituting the alleged color of title was taken by him from one who had purchased a squatter's right from a party who was a mere squatter upon the land. Reeves purchased from Johnson, and Johnson purchased from parties who squatted upon the land in 1865. That the parties from whom Johnson derived title were mere squatters was known to Reeves himself, as is admitted by him in his testimony given on the trial. Johnson, from whom he purchased, so far as appears from the record, had never been in possession of the land; nor was any deed from the squatters to Johnson introduced in evidence; the only evidence of title in Johnson being that "they [the squatters] traded their squatters' rights to Mr. Johnson in Homerville." His only title was derived from those whom Reeves knew to be squatters. Under this state of facts, it is clear that Reeves' title, originating from a mere possession of squatters, must be held to have originated in actual fraud. "Possession, to be the foundation of a prescription, must be in the right of the possessor, and not of another; must not have originated in fraud; must be public, continuous, exclusive, uninterrupted, and peaceable, and be accompanied by a claim of right." Code, § 3584. In the case of Brown v. Wells, 44 Ga. 573. it was said: "The point in the case is whether the defendant, under the evidence, was a purchaser of a mere squatter's title, or whether he was a purchaser under a bona fide claim of right to the land. If he knew at the time of the purchase that he was purchasing a mere squatter's title, he stands in no better position than the original squatter as against the title of the true owner of the land." See, also, case of Lee v. Ogden, 83 Ga. 325, 10 S. E. 349, and cases there cited.

Judgment reversed. All the Justices concur.

(129 Ga. 494)

## SMITH, County Treasurer, v. HODGSON et al., Road Com'rs.

(Supreme Court of Georgia. Nov. 14, 1907.)

1. MANDAMUS—WHEN WRIT DENIED.

The writ of mandamus may be refused by the court, in the exercise of a sound discretion, where the granting of the writ would in effect decide questions of importance between persons not parties to the proceeding, upon whom its enforcement would entail hardships and difficulties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 5, 47–49.]

2. SAME.

A mandamus should not issue when this remedy would be ineffectual to change the status of the parties, or afford any material advantage to the applicant, respecting the thing demanded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 47–49.]

(Syllabus by the Court.)

Error from Superior Court, Clarke County; Chas. H. Brand, Judge.

Action by E. I. Smith, county treasurer, for writ of mandamus to J. M. Hodgson and others, commissioners of roads and revenues. From an order denying the writ, relator brings error. Affirmed.

J. J. Strickland, for plaintiff in error. Erwin & Erwin, for defendants in error.

EVANS, P. J. The treasurer of Clarke county applied for the writ of mandamus to compel the board of commissioners of roads and revenues of that county to deliver to him $71,000, which was to their credit in the Georgia National Bank, or to deliver to him an order on the bank for the money. The case was tried by the judge on the pleadings, the material parts of which are as follows: In 1904, the commissioners of roads and revenues of Clarke county, by proper authority, issued $100,000 of bonds, for the purpose of permanently improving the roads of the county. The rate of interest was 4 per cent. per annum, payable semiannually. The bonds were dated July 1, 1904, and issued in denominations of $500 each, and matured as follows: $1,500 annually for the first 10 years; $4,000 annually for the next 15 years; and $5,000 annually for the next 5 years. The commissioners, after advertising for bids, were not able to sell the bonds at par. They then entered into a contract of sale with the Georgia National Bank, whereby the bank agreed to take the entire issue at a premium of $2,500, upon terms that the proceeds of the sale were to be left on deposit with the bank, to be paid on demand as needed in the improvement of the roads of the county. Pursuant to this contract, the commissioners delivered to the bank the bonds, and the bank, through its president, signed the following certificate, which is duly entered on the commissioners' records: "1904, July 1st. Sale Road Bonds, $102,500.00. The above amount was placed to the credit of the commissioners of Clarke county as per agreement of Georgia National Bank and commissioners at regular meeting of the board, May 2, 1904. To be paid as agreed upon on terms of sale. [Signed] Ga. Nat. Bank of Athens, by J. J. Wilkins, President." The contract of sale has been in force for more than 2½ years, during which time the bank has paid over to the county authorities $31,000, which sum has been properly disbursed in the purchase of road machinery and in improving the roads. The commissioners have disbursed this sum through the treasurer of the county, and expect to continue so to do, but at the time the petition for mandamus was filed none of the proceeds of the bond sale were available under the contract. It was admitted that at the time of the contract of sale with the bank one of the commissioners was a director of the bank, but the good faith and fairness of the contracting parties are not impugned. The court refused to make the mandamus absolute, except that the respondents were ordered to deliver to the treasurer the evidence of indebtedness they hold against the Georgia National Bank, under the contract made by them with the bank, and that applicant hold and collect same, and enforce the said contract according to its terms. In a written opinion the judge assigned as reasons for his refusal of the writ: That, as the bank is not a party, the validity of the bond sale cannot be inquired into, and the contract of sale must be treated, in passing on applicant's right to the writ of mandamus, as binding between the parties. The treasurer excepted to this order, and assigns error upon the refusal of the writ, and upon the legal propositions announced by the court as a basis of his judgment. We will not undertake to discuss specific assignments upon the reasoning of the court, except in the general discussion of applicant's right to compel by mandamus the county commissioners to deliver to him the unexpended money from the proceeds of the bond sale, or an order on the purchaser thereof.

The treasurer is the county's official banker, and all county funds are to be paid to and disbursed by him, unless otherwise specially provided by law. It is his duty to collect from all officers and others all county dues. Pol. Code 1895, §§ 458, 460. The proceeds of this particular bond issue are county funds, and, as there is no statute specially directing its disbursement by any other official, it should be disbursed through the treasurer. The respondents recognize the right of the treasurer to the custody of the various installments of the proceeds of the bond issue as they severally become available according to the contract of sale. The authority of the treasurer to disburse the fund is not involved in this proceeding. The question is whether the court will compel the

county commissioners, by mandamus, to give a peremptory order on the purchasers to pay to the treasurer the balance of the purchase price of the bonds, when they have contracted with the purchaser as a part of the consideration of the sale that they will not draw on the fund except as the road work progresses. The writ of mandamus can only be employed to compel a due performance of official duty where there is no other specific legal remedy for legal rights. Civ. Code 1895, § 4867. The granting or refusal of this writ must necessarily rest in the sound discretion of the court. Kelly v. Hall, 50 Ga. 636. It will not lie to compel official action unless the demandant shows a clear legal right to require the official to perform the act demanded. Brunson v. Caskie, 127 Ga. 501, 56 S. E. 621. The applicant demands of the commissioners that they violate the terms of their contract with the bank, and upon their refusal appeals to the court to compel them so to do. The contract of sale was made in good faith, under a belief that it was legal and binding. The purchaser has paid $31,000 of the money on the faith of it. Now, in a collateral way, the court is asked to declare, not that the sale is illegal, but that the bank is bound to pay immediately, when it did not contract that way. The court is asked to enforce so much of the contract as is favorable to the county, and to repudiate so much as is unfavorable. This is the logical effect of the treasurer's demand for a peremptory order from the commissioners on the bank for the balance of the money. Where, by granting the writ, the court would in effect decide questions of importance between persons not parties to the proceeding, upon whom its enforcement would entail hardships and difficulties, the court, in its discretion, may refuse a mandamus. High on Extraord. Rem. § 9; 19 Am. & Eng. Enc. Law (2d Ed.) 754. If the contract is illegal, it may be so declared in an appropriate suit to which all persons interested are parties, and their respective rights and equities may be defined and adjudicated. Indeed, it is most probable that the bank would refuse to honor a draft by the commissioners for the immediate payment of the balance of the purchase price, and the treasurer would have to sue for the same. The writ, if granted, should be effectual as a remedy, and, if the status would not be changed, a wise judicial discretion would justify its refusal. The court will refuse this extraordinary remedy when it would prove unavailing, and when no result will be accomplished, or the status changed, by its issuance. 26 Cyc. 147.

We do not decide whether the contract of sale of the bonds is legal or illegal, but we do decide that the court did not abuse his discretion in refusing the writ of mandamus to compel the commissioners to pay over funds not in their custody, or to give an order for the payment of the purchase money in contravention of the terms of sale.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 630)

## MATHEWS et al. v. TAYLOR COUNTY et al.

(Supreme Court of Georgia. Nov. 18, 1907.)

APPEAL—REVIEW—DISCRETION OF COURT.

It not appearing that any question of law was passed on by the trial judge in rendering the judgment complained of, but it appearing that the case as presented turned on issues of fact and that the evidence was conflicting, there was no abuse of discretion in refusing an interlocutory injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3983.]

(Syllabus by the Court.)

Error from Superior Court, Taylor County; W. A. Little, Judge.

Action by J. A. Mathews and others against Taylor county and others. From a judgment refusing an interlocutory injunction, plaintiffs bring error. Affirmed.

Hardeman & Jones and C. B. Marshall, for plaintiffs in error. W. E. Steed and O. M. Colbert, for defendants in error.

PER CURIAM. Judgment affirmed.

(129 Ga. 571)

## SWEAT & MATTOX v. GEORGIA NAVAL STORES CO.

(Supreme Court of Georgia. Nov. 16, 1907.)

EXCEPTIONS, BILL OF—TENDER—RECORD.

Where a bill of exceptions in a case in which an application for an injunction was granted recites that it was presented "within 30 days from the passing of the order as aforesaid and the trial of said case," and it does not appear from either the record or the bill of exceptions that the latter was tendered within 20 days from the rendition of the decision, this court is without jurisdiction to entertain the writ of error. Civ. Code 1895, § 5540; Evans v. State, 112 Ga. 763, 38 S. E. 78.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2320.]

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action by the Georgia Naval Stores Company against Sweat & Mattox. Judgment for plaintiff, and defendants bring error. Dismissed.

R. G. Dickerson, for plaintiffs in error. Crawford & Wilcox, for defendant in error.

BECK, J. Writ of error dismissed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 589)

## MILES v. STATE.

(Supreme Court of Georgia. Nov. 16, 1907.)

1. CRIMINAL LAW—INSTRUCTIONS.
In giving a summary of the defendant's contention, which, if true, would acquit him of the crime, the trial judge is not bound to instruct the jury, in immediate connection, that, if the enumerated circumstances were found to be true, they should acquit the defendant, where the court charges the law appropriate to the case.

2. SAME—CIRCUMSTANTIAL EVIDENCE.
The corpus delicti may be proven by circumstantial evidence, and it is not error for the court to so charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1269.]

3. SAME.
The evidence against the accused, while circumstantial, was sufficient to support the verdict, and the trial judge did not abuse his discretion in refusing to set aside the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2297.]

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Philip Miles was convicted of crime, and brings error. Affirmed.

John R. Cooper and R. G. Hartsfield, for plaintiff in error. W. E. Wooten, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

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(129 Ga. 627)

## SPENCER et al. v. CITY OF CLARKESVILLE et al.

(Supreme Court of Georgia. Nov. 18, 1907.)

1. WRIT OF ERROR—ASSIGNMENTS OF ERROR.
A general assignment of error in a direct bill of exceptions to a final judgment brings under review only such antecedent rulings as have been specifically made the subject of exception and of proper assignment of error.

2. MUNICIPAL CORPORATIONS—BONDS—PETITION FOR VALIDATION.
The answer of the municipality to the petition for the validation of the bonds was not demurrable on any of the grounds taken by the interveners in their demurrer thereto.

3. SAME—INTERVENTION.
Where an intervener in a proceeding for the validation of bonds interposes objections based upon facts which do not appear in the pleadings of the parties, but which depend for the proof of their existence upon aliunde evidence, the burden is upon him to prove the alleged facts thus set up.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 2006.]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Petition by the state against the city of Clarkesville in relation to the issue of bonds by such city. T. G. Spencer and others, taxpayers, intervene. From an order overruling their demurrer to the petition, they bring error. Affirmed.

A petition in the name of the state of Georgia against the city of Clarkesville was filed in the superior court of Habersham county on March 21, 1907, the substance of which was as follows: Clarkesville is located in the county of Habersham, and in the Northeastern judicial circuit of this state. On February 12, 1907, an election was held in that city, in accordance with the provisions of the Constitution of the state and the law controlling and regulating such elections, on the question of the issuance of bonds to the amount of $5,000. Registration for the election was had in conformity with law, and 89 of the voters of the city registered for the election; the registration showing that that number of voters of the city were qualified to vote in such election. Seventy-five of such registered voters participated and voted in such election—64 of them "for bonds" and 11 of them "against bonds." Due and legal notice of the election was given by publication in a named newspaper, the official organ of the county, published in Clarkesville. A copy of this notice was attached to the petition as an exhibit, from which it appeared that the election was held in pursuance of an ordinance passed at a regular meeting of the city council held in December, 1906. It also appeared therefrom that the original of this copy notice stated the time and place for holding the election, the amount and denomination of the bonds to be issued, the interest which they were to bear, the manner and time in which the principal and interest were, respectively, to be paid, and the purpose for which the bonds were to be issued. On March 1, 1907, at a regular meeting of the city council, the mayor and all the members of the council and the managers of the election being present, the returns of the election were opened and canvassed, and they showed that 64 votes had been cast "for bonds" and 11 votes "against bonds," making it appear that more than two-thirds of the qualified voters at the election had voted in favor of the issuance of bonds; and the result of the election was then and there declared in favor of the issuance of bonds. In accordance with the statute for such cases provided, the Solicitor General of the circuit was, within 20 days after the result of the election was so declared, notified in writing that such election had been held and of the result thereof; a copy of the notice being attached to the petition as an exhibit. The petition itself then set forth in detail the amount of the bonds, their denomination, the purpose for which they were to be issued, the interest they were to bear, when the interest was to be paid, and when the principal was to become due and to be paid, and alleged: "The indebtedness to be created by the issuance of said bonds, when added to all the other indebtedness of said city of Clarkesville, will not exceed the constitutional limit; that is to say, will not exceed 7

per centum of the assessed valuation of taxable property of and in said city of Clarkesville." It further alleged: "All the requirements of the law respecting the holding of said election, the declaring the result of said election, the service of said notice, and the issuance of said bonds have been fully met and complied with, and the issuance of said bonds by said city of Clarkesville will conform in all respects with the laws of said state." The city filed an answer, properly verified by the mayor and councilmen, in which all the allegations in the different paragraphs of the petition were admitted to be true.

T. G. Spencer and eight other citizens and taxpayers of the city intervened and filed a demurrer to the answer of the city, as well as an answer to the petition, in which they set up various grounds why the bonds should not be validated. The grounds of the demurrer were: The answer of the city did not set out a copy of the ordinance calling the election, nor a copy of the notice required to be published 30 days before the election, nor a copy of the tally sheets and list of the voters at the election, nor set out that a registration book was kept according to law and the ordinances of the city; and "because said answer does not set out any sufficient fact or facts which will authorize a legal judgment validating the bonds proposed to be issued, and said answer is wholly insufficient and void." The demurrer was overruled. On the hearing the court held that the petition and the answer of the city made out a prima facie case, and the burden was upon the interveners to show that the bonds should not be validated for the reasons set out in their answer. Upon the conclusion of the evidence and the argument, the court rendered a judgment validating the bonds. The interveners brought the case to this court upon a bill of exceptions, in which error is assigned upon the overruling of their demurrer to the city's answer, and upon the ruling of the court that the burden was upon the interveners of showing that the bonds should not be validated. The only other assignment of error is that "the court rendered judgment sustaining the petition and authorizing the validation of the proposed bonds, to which ruling the interveners then and there excepted and now except, and assign the same as error."

J. S. Grant and J. C. Edwards, for plaintiffs in error. H. W. Ketron, Robt. McMillan, and W. A. Charters, Sol. Gen., for defendants in error.

FISH, C. J. (after stating the facts as above). 1. The general assignment of error made in the bill of exceptions can bring under review only the two rulings of the court made pending the hearing, one upon the demurrer and the other as to the burden of proof, on which error was properly assigned. Lyndon v. Georgia Railway & Electric Co. (decided Oct. 3, 1907) 58 S. E. 1047; Stewart v. Marietta Trust & Banking Co. (decided Nov. 12, 1907) 59 S. E. 231.

2. The demurrer was properly overruled. The answer of the city admitted all the allegations of the petition, and the petition sufficiently met every requirement of the act of December 6, 1897. Acts 1897, p. 82; Van Epps' Code Supp. § 6075. That act specifies what the petition in such a case should set forth, and the petition in this case embraced all of the allegations therein specified.

3. Nor did the court err in ruling that the burden of proof was upon the interveners. A prima facie case in favor of the validation of the bonds was made out by the pleadings; and in Epping v. Columbus, 117 Ga. 263, 43 S. E. 803, it was held: "One who intervenes and interposes an objection to the validation of bonds, which rests upon matters which do not appear in the pleading, but are dependent for their existence upon allunde evidence, carries the burden of introducing evidence to substantiate the truth of his allegations."

It follows, from the foregoing, that the judgment must be affirmed.

Judgment affirmed. All the Justices concur.

(129 Ga. 595)

## LUNDAY et al. v. FOREMAN.

(Supreme Court of Georgia. Nov. 16, 1907.)

1. EXCEPTIONS, BILL OF—CONTENTS—BRIEF OF EVIDENCE.
Where a bill of exceptions is filed to a judgment of nonsuit, a brief of the evidence need not be incorporated in the bill of exceptions, or attached thereto, but may be, under Civ. Code 1895, § 5529, approved by the judge and made a part of the record and be brought up as such.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 13.]

2. CANCELLATION OF INSTRUMENTS—INCAPACITY OF GRANTOR—QUESTION FOR JURY.
Under the evidence offered by the plaintiffs in this case, the issue involved should have been submitted to a jury, and it was therefore error to grant a nonsuit.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 105.]

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action by M. J. Lunday and M. F. C. Hudson against J. S. Foreman. Judgment for defendant, and plaintiffs bring error. Reversed.

R. G. Dickerson, for plaintiffs in error. Wilson, Bennett & Lamdin and Spencer R. Atkinson, for defendant in error.

HOLDEN, J. M. J. Lunday and M. F. C. Hudson brought suit in Clinch superior court against J. S. Foreman to cancel a deed made by their mother, Mary Elisabeth Foreman, on July 24, 1906, to the defendant, whereby certain lands were conveyed to him, on the ground that the maker of the deed was insane at the time of its execution, and on the further ground that the defendant, by persuasion and undue influence, induced her to sign it when she was of weak mind and residing in his home. Plaintiffs also prayed for an injunction against defendant prohibiting him from cutting the timber on the land. The petition alleged that the only heirs at law of the intestate were the plaintiffs and the defendant. An amendment was allowed, alleging that Mrs. Foreman died intestate, and that there was no administration of her estate. Defendant denied that his mother was insane at the time of the execution of the deed, or that he exerted any undue influence upon her to make it. It was admitted in the answer that Mrs. Foreman, the maker of the deed, was the mother of the plaintiffs by her first husband, and of the defendant by her second husband; that she owned the lands described in the deed, and executed to the defendant the deed, a copy of which was attached to the petition, on the 24th of July, 1906. Upon the conclusion of the evidence, the court granted a nonsuit, to which the plaintiffs excepted, and bring this judgment of the court below here for review.

M. F. C. Hudson, one of the plaintiffs in the case, testified substantially as follows: There were several occurrences during her mother's lifetime that caused the witness to think her insane, or weak-minded. She detailed several instances on which she based this conclusion which occurred prior to the execution of the deed. In addition, she testified: That her mother was flighty in all her conversations and could talk but a very few minutes on any subject. That after a while she would bring up the same subject, and would fly off from it again. Sometimes she would remember things she talked about, and again she would not. From the facts detailed by the witness, she considered her mother's mind a blank when she saw her on the 26th of July, 1906, two days after the deed was made. The defendant wrote her on the 24th of July, the day the deed was made, that Mrs. Foreman was very low and not expected to live, and for her to come, but leave her children, as Mrs. Foreman was too nervous to stand them. Mrs. Foreman was about 64 years old at the time of her death, and had been an invalid for 12 or 15 years. That from the facts which she detailed, and upon which she based her opinion of her mother's mental condition, her mother's mind at times was absolutely gone, so that she knew nothing about what was going on. The two weeks that she was with her mother, beginning two days after the deed was signed, she was not even conscious that the physicians were there and knew nothing that passed. The witness knew nothing about her mother's mental condition before the deed was made. She was not present the day the deed was signed, and could not state what her mother's mental condition was on that particular day, because she was not there. It was three weeks after the deed was executed that she was put on notice that the deed was made. On Wednesday before her mother died on the 2d of September, in her mother's presence, the defendant brought up the matter and asked her mother to tell her about the deed being executed, but her mother begged him to tell about the transaction. Finally, her mother told about the defendant living with her and taking care of her, but asked the defendant to tell about the execution of the deed, which he did.

It was shown that no will of Mrs. Foreman had been probated, and no administration upon her estate had been had.

W. H. Hudson, the husband of one of the plaintiffs, testified, among other things, as follows: At times during the past several years the mind of Mrs. Foreman appeared to be all right, and at times it did not. He told some of the acts and conduct of Mrs. Foreman upon which he based his opinion. He was not prepared to swear, as a matter of opinion, that Mrs. Foreman was insane. She was not totally insane. She exhibited other evidences of childishness besides those he mentioned. She was not totally insane up to a

few days prior to her death. He did not think Mrs. Foreman had any more mind than a child 8 or 10 years old. He never saw her from February, March, or April, in 1906, until after she made the deed. He was only with her about two days during her last sickness, which was about the 23d or 24th of August. She was then helpless, and never moved while he was there, and talked but little. He had no reason to know whether her mind had become stronger or weaker from February to August, and knew nothing of her acts and conduct during that time, but would consider her mind weaker in August because her physical condition was then weaker. When he saw her in August he did not know that he noticed any marked change in her mental condition since he had seen her previous to that time. He had but little opportunity to judge of her mental condition when he saw her in August. He did not know what her mental condition was at the time of signing the deed, because he never saw her.

Dr. L. L. Robinson, a witness for the plaintiff, testified, in part as follows: He had been Mrs. Foreman's family physician for years. During the time he treated her in her last illness he saw her every other day from the 14th of July to the 25th of July, inclusive, and that he saw her about 10 different times after that up to and including the 25th of August. Her mind would vary during the time he treated her. Sometimes it was stronger than at others. He did observe things in her behavior going to show mental weakness. He gave several instances in her conversation which caused him to believe this. She would talk intelligently about the condition of her case, and then he would see her again when it would seem that her last hope of recovery was gone, and she would express herself as if she did not care to get well. At the time he had one conversation with her he could but notice the change in her mental condition, indicating that her mental condition varied, and that she was not at that time in the same state of mind as before. That at times her conversation varied, not realizing that she had talked on that line before. There was no reason he knew why the particular disease with which Mrs. Foreman suffered would affect her mind. He did not know as to whether at any time during her illness, and especially prior to the 24th of July, 1906, he considered her totally insane. He could not say about that. He was not treating her from that standpoint. He understood the condition of her case, and, had he found her in that condition, it would not have been any more than he expected. When he would call her mind to any particular feature of her case, her mind would act definitely and quickly. It would not always do that; at different times it would not. He recalled a time prior to July 24, 1906, when it did not. He talked with her prior to that time when it did and when it did not. He could not say that she always conversed with him intelligently when he visited her. Sometimes she would comprehend and understand the nature of the instructions he would give her in regard to her treatment, and sometimes she would not. When these spells came on her, she would be in an exhausted state one day, and better the next day. He would see her one day, when she would say she was taking her medicine regularly, was trying to get well, was better, and was coming along nicely, and he might see her again in a couple of days, and she would be "all to pieces." He considered her seriously sick from the 24th day of July until he saw her last. He could not say that the condition he ascribed to her when he said she was not at all herself was simply because of disappointments; it might have been disappointment, or it might not have been.

Another witness for the plaintiff testified that the property embraced in the deed was worth $5,000 at the time the deed was made.

1. "A nonsuit is not granted merely because the court would not allow a verdict for plaintiff to stand. But if the plaintiff fails to make out a prima facie case, or if, admitting all the facts proved and all reasonable deductions from them, the plaintiff ought not to recover, a nonsuit will be granted." Civ. Code 1895, § 5347. Applying the principles of law laid down in this section of the Civil Code to the facts of this case, we think the court committed error in granting a nonsuit. The question as to whether or not Mrs. Foreman, the maker of the deed, had or had not mental capacity sufficient to make it at the time of its execution, was a question of fact which, under the evidence in this case, should have been submitted to a jury. The testimony of one of the witnesses was that she had not seen Mrs. Foreman for some time prior to the making of the deed, but she saw her two days after the making of the deed, and her mind was then a blank; and that for the two succeeding weeks she was not even conscious of the presence of physicians, and knew nothing that occurred. She detailed acts and conduct of Mrs. Foreman occurring several months prior to the execution of the deed, and, in addition thereto, testified that Mrs. Foreman was flighty in all her conversations, and could talk but a few minutes on any subject. It was her opinion, based on the acts and conduct of Mrs. Foreman several months before the execution of the deed, that the latter was insane when the witness saw her two days after its execution. The physician who attended Mrs. Foreman during her last illness stated that he did not know whether or not he considered Mrs. Foreman totally insane. He testified he could not say about that, that he was not treating her from that standpoint, but he understood the condition of her case, and, had he found her in that condition, it would not have been

any more than he expected. From the evidence produced by the plaintiff, we think it should have been left to the jury to determine the question whether Mrs. Foreman, at the time of the execution of the deed, was mentally capable of making it.

The judgment of the court below is therefore reversed. All the Justices concur.

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(129 Ga. 622)

## ATLANTIC & B. RY. CO. v. BROWN et al.

(Supreme Court of Georgia. Nov. 18, 1907.)

1. WRIT OF ERROR—NEW TRIAL — GROUNDS — ERRONEOUS RULINGS ON PLEADINGS—HARMLESS ERROR.

Though the trial court erred in striking, on demurrer, a paragraph of the answer in which it was averred that defendant, for want of sufficient information, could neither admit nor deny the allegations of a given paragraph of the petition, such error is not cause for a new trial, when, notwithstanding such ruling, plaintiffs submitted ample proof of the truth of such allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4114.]

2. WRIT OF ERROR—FORMER WRIT—DECISION —LAW OF THE CASE.

The law applicable to the controlling issues in this case was announced when it was formerly before this court. Brown v. Atlantic & Birmingham Ry. Co., 126 Ga. 248, 53 S. E. 24. In view of the rulings then made, the court below, on the subsequent trial of the case in term, did not err, except as indicated in the first headnote, in striking, on demurrer, all of defendant's answer except so much thereof as either admitted or denied the allegations of the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4358.]

3. SAME—EVIDENCE—ERRONEOUS ADMISSION.

Even though the court may have erred in admitting in evidence, over the defendant's objection, a duly certified copy of an original certificate of the Secretary of State, certifying that there was filed in his office original articles of agreement, entered into upon a given date, between three named railway companies, consolidating them under the name of Atlantic & Birmingham Railway Company, and further certifying that there was filed in the office of the Secretary of State, with such agreement, certified copies of the resolutions of the stockholders and board of directors of each of the named companies, authorizing the execution of such articles of consolidation, such ruling was not cause for a new trial, for the reason that the uncontradicted evidence showed, and the answer of the defendant admitted, that defendant was operating, as its own, the section of road which it was sought to show by the copy of the certificate it did own, and defendant also admitted that it intended to tear up and remove the same, and was then engaged in so doing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4164.]

4. INJUNCTION — VERDICT — CONSTRUCTION — DECREE.

Where, on the trial of an action to enjoin a railway company from "tearing up, removing, or otherwise abandoning" a given section of its line of road, about 19 miles in length, it appeared that defendant had already torn up and removed more than 4 miles of the section in question before the temporary restraining order was passed, and where the court directed a verdict, over objection, that defendant be permanently enjoined "from tearing up, removing, or otherwise abandoning" such section, such verdict is ambiguous and susceptible of two constructions. One of them would render the verdict erroneous as offending the rule against granting affirmative relief by mandatory injunction, while under the other the verdict would be proper, as it would simply preserve the existing status. The verdict will not on this account be set aside, but will be given a construction which will uphold it. However, the decree should be entered so as to remove the ambiguity, and accordingly direction is given that the decree be so amended as to make it clear that it is not to have a mandatory effect, in requiring the defendant to reconstruct and replace so much of its line in question as had been torn up or removed prior to the service of the original restraining order on the defendant, but that the purpose of the decree is to permanently enjoin the defendant from in any way changing the status of its line of road from Bushnell to Ocilla, as it existed at the time defendant was served with such restraining order, to wit, on November 23, 1905.

(Syllabus by the Court.)

Error from Superior Court, Ware County; T. A. Parker, Judge.

Suit by J. L. Brown and others against the Atlantic & Birmingham Railway Company. From a decree in favor of complainants, defendant brings error. Affirmed, with directions.

King, Spalding & Little and Haygood & Cutts, for plaintiff in error. C. T. Roan and F. Willis Dart, for defendants in error.

PER CURIAM. Judgment affirmed, with direction.

(129 Ga. 602)

## DALLAS v. STATE.

(Supreme Court of Georgia. Nov. 18, 1907.)

1. CRIMINAL LAW — CONTINUANCE — ABSENCE OF WITNESS—EVIDENCE.

In a motion for continuance on the ground of the absence of a material witness, the movant must make it appear that the witness would testify as represented to the court.

(a) Where the absent witness is relied upon to prove an alibi, and the accused, in his motion, discloses that, though he had the opportunity of ascertaining what the witness would swear, yet he had not been informed by the witness or by others as to the nature or scope of the witness' testimony, and it further appearing, from a counter showing by the state, that the absent witness was not with the accused at the time and place fixed by him, it was not erroneous to refuse to continue the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1354.]

2. HOMICIDE—EVIDENCE.

The evidence was ample to support the verdict.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Anderson (alias Dennis) Dallas was convicted of murder in the second degree, and brings error. Affirmed.

E. H. Clay and Griffin & Attaway, for plaintiff in error. J. Z. Foster, Sol. Gen. pro tem., B. F. Simpson, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

EVANS, P. J. The defendant was convicted of murder as principal in the second degree and recommended to mercy. He made a motion for new trial on the ground that the verdict was contrary to the evidence, and on the special ground that the court erred in refusing to continue his case, because of an absent witness, who had been subpœnaed and by whom he expected to prove an alibi. A new trial was refused, and he excepted.

We will first notice the alleged error of the court in refusing a continuance of the case. It is of interest, not only to society, but as well to the person accused of crime, that a trial be had without unnecessary delay. If the accused be unprepared for trial because of the absence of a material witness, his motion to continue should apprise the court of at least a strong probability that the absent witness would actually depose to the matters desired to be proven by him. No person should ever be permitted to procure a postponement of his case by trifling with the court. Therefore a motion to continue a criminal case should show the defendant's source of information, or grounds for believing that the witness would testify as represented to the court. Bradley v. State, 128 Ga. 20, 57 S. E. 237. In the present case the accused asked a continuance of his case because of the absence of a witness by whom he expected to prove that the accused was standing by the witness outside of the house at the time the homicide was committed in the house. Though he had the opportunity, the accused had never talked with the witness upon this point, nor was he informed by others that the witness would deliver the testimony expected of him.

The court allowed the state to make a counter showing by witnesses who testified that at the time of the homicide the accused was in the house, but the witness was not with him. Ordinarily the opposite party will not be permitted to offer testimony to disprove the truth of the facts expected to be established by the absent witness, by way of a counter showing. The question in a motion to continue a case on the ground of the absence of a material witness is, not the truth or falsity of the expected testimony, but whether the witness, if present, would swear to its truth. In view of the failure of the accused to give the court any assurance that the absent witness would support his alibi, other than his supposition that he would so testify because of the accused's statement that the witness was with him at the time of the alleged crime at a different place, and the counter showing made by the state that the witness was not with the accused at the time of the homicide, the trial judge did not abuse his direction in refusing to continue the case. The state's counter showing was more to establish the improbability of the absent witness' testifying as the accused represented he would, than to disprove the alleged alibi.

2. The crime proven by the state's evidence was murder. The deceased was shot by one John Mitchell at the command and instigation of the accused, who was standing near the slayer at the time he fired the fatal shot. There was no provocation for the shooting. The evidence warranted the verdict.

Judgment affirmed. All the Justices concur.

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(129 Ga. 573)

## CROSBY v. PITTMAN.

(Supreme Court of Georgia. Nov. 16, 1907.)

1. JUDGMENT—ENTRY—WAIVER.

Generally it is requisite that a judgment be entered upon a verdict in order that the principle of res judicata may apply and operate as a bar to a future action for the same cause; but where, in a suit for land, the verdict is adverse to the plaintiff, and finds in favor of the defendant a sum due him as rent by the plaintiff, and the record shows that, by agreement made at the time the verdict was rendered, whereby the defendant made certain concessions to the plaintiff, the latter voluntarily pays the rent, and surrenders possession of the land to the defendant, who remains in possession for a time, and then conveys the land to a third person, who continues in possession of the same, and there is no suggestion that the verdict was ever set aside or modified, or that there was any order for an arrest of judgment, any objection by the plaintiff on account of the failure to enter up judgment will be considered as waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 562.]

2. WRIT OF ERROR—ASSIGNMENT OF ERROR.
An assignment of error, which merely alleges that "plaintiff objected to the introduction in evidence of the verdict because the same was void, which the court overruled," is too uncertain and indefinite to be considered by this court.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3010.]

3. INJUNCTION — TRESPASS TO LAND — EVIDENCE.
The verdict was demanded by the uncontradicted evidence, and the other matters complained of, if errors, were harmless.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 278.]
(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. J. Mitchell, Judge.

Bill by S. E. Crosby against Will Pittman. Judgment for defendant, and plaintiff brings error. Affirmed.

This was an equitable petition filed by the plaintiff, Crosby, to enjoin the defendant, Pittman, from trespassing or otherwise interfering with a certain tract of land alleged to belong to the plaintiff. The defendant claimed the land in dispute, which consisted of about 35 acres. The plaintiff and defendant were coterminous landowners, and the main question in the case was in regard to the location of the boundary line between their respective lots. The defendant alleged in his answer that in the year 1900 this same 35 acres had been the subject-matter of another suit between this same plaintiff and one Isam, defendant's grantor, and that "a verdict was returned into court against the said Crosby and in favor of the said Isam, and a few days afterwards the said Crosby paid to the said Isam the sum of $52.50, being the amount that had been found by the jury against her for rent on said 35 acres, * * * and no motion for a new trial was ever made by the said Crosby, and, on the contrary, she fully acquiesced in the finding of the jury, and from that time until December, 1904, no claim has ever been made by her to said 35 acres." It is conceded that no judgment was ever entered upon said verdict. But defendant sets up said verdict as a plea in bar to the plaintiff's present action. This was the only issue submitted to the jury, and the jury returned a verdict "in favor of the plea in bar." Plaintiff moved for a new trial upon various grounds. The motion was overruled, and plaintiff excepted.

T. H. Parker and W. C. McCall, for plaintiff in error. Edwin L. Bryan, for defendant in error.

BECK, J. (after stating the facts as above). 1. The general rule in regard to estoppel by res judicata is thus stated in the case of Walden v. Walden, 124 Ga. 145, 52 S. E. 323: "It has been held by this court as settled law that a verdict not followed by a judgment will not serve as such an estoppel, and that it is essential that a judgment be entered on the verdict before the parties will be concluded as to the matters in controversy. Carstarphen v. Holt, 96 Ga. 703, 23 S. E. 904; Mitchell v. Mitchell, 97 Ga. 795, 25 S. E. 385; Webster v. Mortgage Co., 93 Ga. 278, 20 S. E. 310; Harris v. Guano Co., 117 Ga. 934, 44 S. E. 11." But that this rule is not without some slight limitation is shown by the case of Webster v. Mortgage Co., supra, in which it was held that: "Where, in the court below and in this court, counsel on both sides have treated the verdict as serving the office of judgment as well as of verdict, any objection on account of the failure to enter up judgment may be considered as waived." A case involving the same question now under consideration was decided by the Supreme Court of Pennsylvania in Shaeffer v. Kreitzer, 6 Bin. (Pa.) 432, where it was said: "No judgment has been entered, but the defendant showed his acquiesence in the verdict by the payment of costs and delivery of possession. No other case exactly like this has occurred, but it falls within the principle of a verdict and judgment. It appears by the acts of the defendant that no objection was made to the verdict. There was no occasion to enter judgment, because the fruits of a judgment (the costs of suit and possession of the land) were yielded by the defendant and enjoyed by the plaintiff. I am therefore of opinion that the former verdict was properly admitted in evidence." This case is cited in 1 Herman on Estop. § 469, p. 566, where the rule is stated thus: "When the parties agree, either expressly or by implication, that a verdict shall be final and conclusive as between them, without the entry of a judgment, it will operate as an estoppel, on proof of the understanding or agreement."

The facts presented by the record before us fall clearly within the rule last announced. It was proved by witnesses in behalf of Pittman that Crosby paid the amount of rent found by the jury to be due by her to Isam, the defendant in the former suit, and that immediately after the trial surrendered possession of the land to Isam, and that Pittman, who purchased the land from Isam, is now in possession of the same. And these facts are nowhere denied by the plaintiff. Upon this issue the husband of the plaintiff testified as follows: "I represented her [plaintiff] in the litigation which had been conducted heretofore. She was with me when I paid some money. Our attorney told us it went against us, and we had better pay the costs and what they claimed for rent. * * * After the trial I paid some money to [P.]. He was representing Isam at that time. They told us we had better pay up. Said the case had gone against us. That was our lawyer's advice, and we went ahead and settled. * * * After the trial, Isam took possession of that land. It was two years before I undertook to go back on that land." In addition to the facts already stated, it appears

that the agreement to settle the dispute upon the finding of the jury without the entry of a judgment was based upon an additional consideration moving from Isam to Crosby. The evidence upon this point is not altogether clear; the testimony having been very poorly transcribed and is in part unintelligible. The attorney who represented Crosby in the former suit testified that a part of the land then in dispute was under fence and a part was not. "The part under fence [presumably the 85 acres involved in the present case] had been held by Mrs. Crosby pending the litigation. We agreed that she could pay rent on the land that she held at the rate of $1.50 an acre [this being the rate fixed by the jury], * * * and we who lost the suit should have the land that was not under fence. I told P. [the attorney for Isam] that I would advise my client to pay him that rent. I saw the husband of my client, who was the person with whom I talked most, advised him to do it. We agreed for the decree to be drawn that way. * * * I would not like to say that the agreement that my client was to have the land outside of the fence was the only reason that kept me from filing a motion for new trial in the case. I knew that the court had adjourned, and the jury had gone. I recognized that I could drive home a little contract to my advantage, and did it."

2. The rule announced in the second headnote has been settled by numerous decisions of this court.

3. Under the law as we have stated it above, the verdict was demanded by the evidence in the case, and the other matters complained of, if errors, were harmless.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 599)

MORAN v. BANK OF FORSYTH et al.

(Supreme Court of Georgia. Nov. 18, 1907.)

1. APPEAL—HARMLESS ERROR — STRIKING ON DEMURRER.

It appearing that the answer of the defendant, which was stricken upon demurrer, sought to set up a defense, which, under the facts in the case as disclosed by the record, the defendant was estopped from averring or proving, the ruling of the court sustaining the demurrer was not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4093.]

2. WRIT OF ERROR — REVIEW — RULINGS ON PLEADINGS—EXCEPTIONS.

Exceptions to the order of the court striking certain parties to the case, and striking certain portions of the pleadings, at the March term, 1906, made in the bill of exceptions sued out to review the final judgment rendered at the October term, 1906, cannot be considered; no exceptions pendente lite having been filed to such rulings, and the final judgment having been rendered more than 30 days after the adjournment of the term of the court at which the rulings complained of were made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1489.]

(Syllabus by the Court.)

Error from Superior Court, Crawford County; W. H. Felton, Jr., Judge.

Action by the Bank of Forsyth against T. J. Moran and others. Judgment for plaintiff, and defendant Moran brings error. Affirmed.

The Bank of Forsyth filed an equitable petition against T. J. Moran and H. P. Moran and others. The object of the action was to enforce the collection of several notes held by the plaintiff against said T. J. Moran and H. P. Moran, and to enjoin certain other named defendants from foreclosing their liens against said T. J. and H. P. Moran so as to defeat petitioner's claims, and to adjust the rights of all of the creditors of said defendants. One of the notes held by the plaintiff was for $824, secured by the assignment to plaintiff of a bond for titles, which had been executed to said T. J. Moran and H. P. Moran by the British & American Mortgage Company, to a certain tract of land in Crawford county. Another note, for $330, was secured to the plaintiff by the assignment of a mortgage to an undivided three-fifths interest in 135 acres of land; said mortgage being executed by one Mrs. Fletcher to said H. P. Moran. The third note, for $216, was secured by the transfer to the plaintiff of a note and mortgage executed by T. J. Moran to H. P. Moran; said mortgage covering an undivided one-fifth interest in the aforesaid 135 acres of land. The property involved in the litigation consisted of 400 acres of land originally belonging to the estate of A. B. Moran, deceased, the father of T. J. Moran, H. P. Moran, Mrs. Fletcher, and Mrs. Wooten. Thereafter the British & American Mortgage Company and the said Mrs. Fletcher and Mrs. Wooten were by amendment made parties plaintiff in the case. Several amendments were filed by the plaintiffs, praying that certain named grandchildren of the said A. B. Moran be made parties to the suit, and that the court construe certain items in the will of the said A. B. Moran. T. J. Moran filed an amended answer, in which he suggested the death of Mrs. Wooten, and prayed that the children of Mrs. Fletcher and Mrs. Wooten be made parties, and that the validity of the alleged sale by his mother, the executrix of said A. B. Moran, of the 135 acres of land to the five children be investigated, and that it be determined whether his title to the two-fifths interest in said 135 acres, which he had purchased from his sister, Mrs. Fletcher, was good or not. It appears that he had taken a one-fifth interest in said land, under said sale by his mother, and had purchased from his sister a two-fifths interest in the same. He had conveyed his three-fifths interest to Davis & Co. to secure a debt, and received a bond for titles to reconvey. He had mortgaged his interest to his sisters, and had been in possession of the three-fifths interest for several years and enjoyed the use of the same. To this amended answer the plaintiffs demurred, upon the ground that

said defendant was estopped from contesting the validity of that sale or division of the estate, inasmuch as he had accepted said deed and held thereunder. The court sustained the demurrer and struck the amended answer, and defendant excepted pendente lite, and assigns this ruling of the court as error.

Defendant T. J. Moran, plaintiff in error here, also complains in the bill of exceptions that at the March term, 1906, after the death of Mrs. Wooten, and before her administrator was made a party, the court passed an order striking the children of the said Mrs. Wooten and Mrs. Fletcher from the case, and striking therefrom the prayer for the construction of the will of the said A. B. Moran; "all of which orders, rulings, and decisions of the court the said T. J. Moran says were void and of no effect for the reason that one of the parties plaintiff was dead, and no representation upon her estate." At the next term of the court, the administrator of Mrs. Wooten, deceased, was made a party to the action, and made no objection to the rulings of the court complained of by the defendant. After the case had proceeded to trial, and the jury had returned a verdict adverse to the defendant, the latter excepted and assigns error upon the above-mentioned rulings of the court.

L. D. Moore, for plaintiff in error. J. M. Fletcher, H. A. Mathews, B. S. Willingham, F. Chambers & Son, R. L. Berner, and W. A. Scott, for defendants in error.

BECK J. (after stating the facts as above). 1. We are of the opinion that the court committed no error in striking that portion of T. J. Moran's amended answer which "sets up that the sale of the land by Mrs. C. E. Moran to her children of the 135 acres is void." The said T. J. Moran had been a party to the sale which he now attacks as void. He had accepted title to one-fifth interest thereunder. He had purchased the interest of his two sisters therein. He had gone into possession of the same under said sale, and made no tender of the lands, rents, or profits. He had sold this land to W. A. Davis, making him a deed thereto, and had mortgaged it to his sisters to secure a debt. He had deeded and mortgaged that very interest in the land which it is now sought to subject to the claims of his creditors, and in both deed and mortgage had recited that he had title to that interest. In a mortgage which he executed to H. P. Moran is to be found the recital that the said T. J. Moran covenants with the said H. P. Moran that he "has good title and right to mortgage and convey the property aforesaid." And in a mortgage of Mrs. Fletcher to H. P. Moran is to be found a recital in similar terms. Both of these last-mentioned mortgages had been deposited by the plaintiff in error and his brother with the Bank of Forsyth to secure the payment of money. And we do not think that in this proceeding, instituted to collect that money, the plaintiff in error should be allowed to set up and maintain that the sale to himself and his sisters, upon the validity of which depends the value of the deeds and mortgages, was void. Against such a defense the doctrine of estoppel was properly applied.

2. The final verdict and decree as rendered at the October term, 1906, in so far as it affects the interest of the plaintiff in error, was not invalid for any reason disclosed by this record under the pleadings as they stood at that time. It is true that orders had been taken at the preceding March term striking certain parties, and disallowing certain amendments over objections of the plaintiff in error. But the order of the court overruling the objections was not excepted to at the March term, nor within 30 days thereafter, save in regard to striking that portion of the answer of the plaintiff in error which we have held above was properly stricken, and the attempted assignment of error upon the ruling of the court at the March term is made too late in the main bill of exceptions sued out to the court's final judgment at the October term.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 571)

## CLARK v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court of Georgia. Nov. 16, 1907.)

1. INSURANCE — LIFE POLICY — PAYMENT OF PREMIUM—CONDITION PRECEDENT.

Where the application for a policy of life insurance and the policy itself both stipulated, in effect, that the policy should not become binding upon the insurance company until the first premium had been paid during the good health of the applicant, and the agent of the insurance company agreed with the applicant to accept the latter's note in payment of the first premium, there being no question as to the agent's authority to make this agreement, the execution and delivery by the applicant of his said note, or the actual payment of the first premium, during the good health of the applicant, was a condition precedent to the liability of the insurance company upon said policy. Reese v. Fidelity, etc., Life Association, 111 Ga. 482, 36 S. E. 637.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 232, 243-245.]

2. SAME—DEFAULT.

It appearing from the evidence introduced by the plaintiff that the applicant died before the policy was delivered, and without having paid or tendered the amount of the first premium, and without having tendered or delivered to the company or its agent his note in payment of said premium, the court did not err in granting a nonsuit in an action brought by the administrator of said applicant upon said policy of insurance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 234, 243-245, 1742.]

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Action by Julian Clark, administrator, against the Mutual Life Insurance Company of New York. Judgment for defendant, and plaintiff brings error. Affirmed.

Clark, the administrator of Moore deceased, brought suit against the Mutual Life Insurance Company of New York to recover the amount of a policy alleged to have been issued by said company to plaintiff's intestate. It appears from the record that Moore made an application to the insurance company for a policy of life insurance. The said application provided that the policy "shall not take effect until the first premium shall have been paid during my continuance in good health." The policy was issued by the company and forwarded to its agent, F. B. Arthur, at Americus, Ga.; but, before it was delivered to Moore, the latter died. The defendant in its answer denied liability to the plaintiff, for the reason, among others, that the first premium had not been paid as provided in the application. Upon this issue F. B. Arthur, the only witness introduced by the plaintiff, testified: "On the 30th day of January, 1906, I was agent of the Mutual Life Insurance Company of New York, at Americus. I remember the agreement I had with Mr. Moore at the time that application was made as to the premium. I was to take Mr. Moore's note for the premium, and wrote him with that understanding. After the policy came I told Mr. Moore I would bring it up and make settlement with him, and he said that was all right. That is everything that occurred, or was said. I agreed to take his note, and told him it [the policy] was there, and I would bring it down; and he said that was satisfactory. The next morning when I came down town, a few minutes after 8 o'clock, I heard that he was dead. I held the policy, and before 12 o'clock that day I mailed it back to the company. He [Moore] never gave his note; never paid the premium at all; paid no part of it." At the conclusion of the plaintiff's testimony, the defendant moved for a nonsuit, which motion the court sustained. Plaintiff excepted.

W. A. Dodson, for plaintiff in error. J. H. Gilbert and E. A. Hawkins, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 460)

## G. S. BAXTER & CO. v. CAMP et al.

(Supreme Court of Georgia. Nov. 18, 1907.)

1. WRIT OF ERROR — BRIEFS — FAILURE TO ARGUE POINTS—EFFECT.

Points made in the record, not referred to in the briefs filed by counsel, will be treated as abandoned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4256.]

2. SAME — PRESUMPTIONS — FINALITY OF DECREE.

Where the language of a decree is such that it is susceptible of a construction that the decree is final and of a construction that it is not final, and the trial judge who rendered it, in subsequent proceedings brought in the case, treats the decree as not being final, his construction will be upheld and adopted by this court.

3. PARTITION—APPOINTMENT OF PARTITIONERS IN VACATION—STATUTORY PROVISIONS.

In a proceeding of the kind set forth in the succeeding headnote, the judge of the court below had authority to act upon the application and appoint partitioners in vacation, under Civ. Code 1895, § 4323, as such appointment was not a matter requiring the services of a jury.

4. SAME—RIGHTS OF PARTIES.

In a proceeding in equity, where plaintiffs and defendants adversely claim full title to all timber in controversy, and each ask injunctions against the other from interfering with the timber, and the court through an auditor discovers that plaintiffs and defendants jointly own part of the timber, it is, though no partition was originally prayed, proper to allow, while the case is still pending, an application by one of the parties for partition of the timber so jointly owned and to appoint partitioners under such application. Such application is germane to the original proceedings and does not add a new cause of action.

5. SAME—REMEDY AT LAW.

The fact that plaintiffs had a remedy at law to secure partition did not make it improper, under the facts set forth in the preceding headnote, for partitioners to be appointed by the court which then had jurisdiction of the parties and the subject-matter, as partition was a needed and appropriate relief to be granted

by the court after it discovered a joint ownership by plaintiffs and defendants of a part of the timber.

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Equitable petition by R. J. Camp and others against G. S. Baxter & Co. and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

See 54 S. E. 1036.

Toomer & Reynolds, for plaintiffs in error. J. L. Sweat and W. G. Brantley, for defendants in error.

HOLDEN, J. An equitable petition was filed in Clinch superior court by R. J. & B. F. Camp and other against G. S. Baxter & Co. and others, in which the title to the timber on numerous lots of land was adversely claimed by the plaintiffs and the defendants, and in which injunctions were asked. On June 30, 1905, a decree was entered by the court, in which it was adjudged that the full title to the timber on certain lots of the land was in the plaintiffs, and that plaintiffs and defendants jointly owned the timber on certain other lots. Under a previous order of the court, granted August 5, 1899, plaintiffs and defendants were both enjoined from cutting or in any way interfering with any of the timber, and in the decree of June 30, 1905, it was provided that the injunction heretofore granted should continue of force until such time "as said parties, through partition had by the court or by consent, may specify and make certain their respective interests in the timber in controversy." After this decree was rendered, and affirmed by this court (126 Ga. 354, 54 S. E. 1036), the plaintiffs filed with the court below a petition, which they called a "supplementary petition," stating that they were unable by consent to have a partition of the timber with defendants, and praying that the injunction, so far as it related to the timber the full title to which was decreed to be in them, be dissolved, and that they have a right to cut and use the same, and that a commission of five freeholders be appointed for the purpose of making, between plaintiffs and defendants, upon an equitable basis, a partition of all the timber in controversy. Plaintiffs also alleged in this petition that defendants had cut some of the timber to which plaintiffs had been decreed to have a whole or a partial title, and have made no accounting therefor to the plaintiffs, and they prayed that the value of the timber so cut be charged against the defendants and their interests when the partition prayed for was had. Upon this petition being filed with the court, a rule nisi was granted requiring defendants to show cause why the prayers of the petition should not be granted. Defendants filed no answer, but upon the hearing presented a motion to dismiss the petition, and in addition thereto filed a demurrer to the same. Upon the hearing the court overruled the motion to dismiss and the demurrer, and appointed five commissioners to make partition as prayed. No evidence was introduced upon the trial of said case, but the same was tried upon the record. The defendants filed their bill of exceptions, complaining that the court committed error in granting this order and in overruling their motion to dismiss and their demurrer.

1. Plaintiffs in error made a motion before the trial judge to dismiss the application for partition because of want of sufficient service before the hearing of the same. This contention is not argued or referred to in the briefs filed by counsel for plaintiffs in error, and will therefore be treated as having been abandoned by them. Graves v. State, 127 Ga. 46, 56 S. E. 72.

2. The defendants contend that the decree of June 30, 1905, was a final decree in the case, and that no subsequent proceedings for partition or a dissolution of the injunction could be had under it. The trial judge granted a decree holding adversely to this contention, and entertained the petition filed by the plaintiffs, and appointed the partitioners as prayed. This decree of June 30, 1905, provided that the injunctions heretofore granted shall continue of force until such time "as said parties, through partition had by the court or by consent, may specify and make certain their respective interests in the timber in controversy." Defendants in error contend that the meaning of this decree was to keep the case in court until partition was had and that the court referred to was the one granting the decree. Perpetual injunctions were prayed by plaintiffs and defendants in the original proceedings. Full and complete title to the timber on certain lots was decreed to be in the defendants in error, but they were enjoined from using it until partition was had of the timber decreed to be jointly owned by the plaintiffs and the defendants. Defendants in error claimed full title to all of the timber in the original proceedings, and asked that the plaintiffs in error be perpetually enjoined from interfering with it. Complete title to part of the timber was decreed in the defendants in error, but they contend that, if this decree was final, the prayer for perpetual injunction against the plaintiffs in error from interfering with this timber, decreed to belong solely to defendants in error, would not be granted, and would not be acted upon at all, because, under the decree, injunctions granted in the case ceased when partition was had. Defendants in error contend that this prayer for permanent injunction could not be acted on until partition, setting apart to defendants in error a particular part of the timber jointly owned by them and the plaintiffs in error, and that the intention of the court rendering

this decree was to keep the case in court until this was done. They contend that a permanent injunction against the plaintiffs in error was the chief relief prayed for in the original case and that such full relief could not be granted until partition was had, and that as the court, in the trial of the case, discovered that a joint tenancy existed as to a part of the timber, and as it is a rule of a court of equity to grant full and complete relief to all parties in a case of which it has possession, it was the intention of the court to keep this case in hand until a partition was had. The wording of the original decree, above quoted, leaves the mind in doubt as to whether it was intended to be a final disposition of the case, or whether, should the parties fail to partition the timber by consent, the case was still to be left open for partition by the court which then had the case in hand, and for a dissolution of the injunction by the court after partition by the court or by consent was had. The judge who rendered this decree held that it was not final, and, by reason of the doubt existing as to whether it is or not, this court will uphold the construction given thereto by the judge who rendered it, when called upon to construe it in further proceedings had thereunder. Brown v. Richards, 114 Ga. 318, 40 S. E. 224; Barnes v. Macon & Northern R. R. Co., 105 Ga. 495, 30 S. E. 883. We therefore hold that this decree was not a final decree in the case, so as to preclude the filing of the supplemental petition praying for a dissolution of the injunction and a partition of the timber decreed to be jointly owned by the plaintiffs and the defendants.

3. The application for partition and a dissolution of the injunction was presented to and acted upon by the trial judge in vacation, and one ground of the demurrer is that he had no jurisdiction to act upon the matter in vacation. Under Civ. Code 1895, §§ 4926, 4967, the judge clearly had a right in vacation, to act upon that part of the petition which prayed for a dissolution of the injunction. Did he have a right in vacation to act upon that part of the petition which prayed for the appointment of partitioners? Under the act of the General Assembly approved December 18, 1900 (Acts 1900, p. 56) amending section 4786 of the Civil Code of 1895, the judge of a superior court has the right in vacation to appoint partitioners; but this application was not filed under this section. This supplemental petition, which is in the nature of an amendment, was filed as a part of the case then pending, and was not filed as an original application for partition under the section of the Code and the amendment thereto above referred to. There being no good reason shown why the partitioners should not be appointed, the judge had the right to appoint partitioners without a jury trial. Brown v. Mooney, 108 Ga. 331, 33 S. E. 942; Rodgers v. Price, 105 Ga. 67, 31 S. E. 126. As the appointment of partitioners was a matter not requiring the services of a jury, the judge had a right to act upon the matter and appoint the partitioners in vacation, under Civ. Code 1895, § 4323. This section provides: "The judges of the superior and city courts have power to hear and determine, in vacation as well as in term time, without any order passed in term time, all motions for new trial, certioraries, and all such other matters as they now can hear and determine in term time, and which are not referred to a jury." This application involved a matter which should not have been referred to a jury. It was a matter which the judge could hear and determine in vacation under this section. See Nisbet v. Tindall, 115 Ga. 374, 41 S. E. 569, where this court held that under this section a judge could pass upon an application for the discharge of a receiver in vacation. See, also, Cook v. Walker, 15 Ga. 457, 466, where it was held that a judge had power to sanction a supplemental bill, which is in the nature of an amendment, in vacation. The judge having power to appoint the partitioners in vacation under Civ. Code 1895, § 4323, it was only necessary to give 10 days' notice of the application, as section 4324 provides that 10 days' notice before the hearing of matters provided in this section is sufficient. As this was not an independent proceeding for partition under Civ. Code 1895, § 4788, where 20 days' notice is required, it was only necessary to give the 10 days' notice required in section 4324.

4. One ground of the demurrer is that the relief prayed for in the application could not be granted by the court, because it was at variance with that sought for in the original proceedings, and that there was no prayer in the original proceedings for partition. We do not think there is any merit in this ground of the demurrer, because a court of equity had obtained jurisdiction of the matter, and, as the case was still pending, should have retained such jurisdiction until full and complete justice and relief was granted all the parties. Martin v. Tidwell, 36 Ga. 332; Ray v. Home & Foreign Investment Co., 106 Ga. 492, 497, 32 S. E. 603; Civ. Code 1895, § 3925. Where a court of equity obtains jurisdiction of the parties and the subject-matter, while the case is pending all needed and appropriate relief should be granted, and the case should be retained until this is done. In Tate v. Goff, 89 Ga. 184, 15 S. E. 470, this court held that an amendment praying for partition by sale was allowable in a suit to recover an undivided interest in realty. It was there held that such amendment did not add a new cause of action and it was not improper to allow it. There was no prayer in the original petition, or in the answer thereto, for a partition of the timber. Both parties claimed to own it absolutely, and there was no claim on the part of either to an undivided interest in any of the timber involved. Upon an

investigation of the case, however, the court discovered that there was a joint tenancy as to part of the timber; and, after the court found and decreed that the plaintiffs and the defendants jointly owned the timber on some of the lots, partition of this timber was a needed and proper relief, to be granted upon a proper application being made therefor. The court below, therefore, did not commit error in acting upon the application for partitioners and in appointing them.

5. Another ground of the demurrer is that the court should not have granted the application for partition because the defendants in error had an ample remedy at law. As partition was a needed and appropriate matter to be considered in the proceedings, which were in a court of equity, the court should have granted it. All parties interested in the timber sought to be partitioned were before the court litigating in reference thereto, and, having jurisdiction of the parties and the subject-matter, the trial court had the power, and it was its duty, to grant full and complete relief to all parties in reference to the subject-matter involved in the proceedings, notwithstanding an independent remedy at law might exist. This principle is recognized in the authorities cited in the preceding paragraph of this opinion.

6. There was no error committed by the court in overruling the motion to dismiss and the demurrer, and in appointing the partitioners as prayed in the application.

The judgment of the court below is therefore affirmed. All the Justices concur, except ATKINSON, J., disqualified.

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(129 Ga. 623)

## PARKER v. GORTATOWSKY et al.

(Supreme Court of Georgia. Nov. 18, 1907.)

1. TENDER—KEEPING GOOD ON REFUSAL.
Where an owner of property claimed that a lease was at an end, brought suit to recover possession, and refused to receive a tender of rent, or any rent, pending the suit, it was not necessary, in order to prevent a forfeiture or termination of the lease, for the tenants to continue to make tenders during the litigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tender, § 55.]

2. LANDLORD AND TENANT—POSSESSION—RECOVERY—SUMMARY PROCEEDINGS.
Where, under such circumstances, the owner brought the case to this court, and a decision was rendered against her, but before the remittitur had been returned to the trial court she demanded rent, some of which was not then due, and interest thereon, and, on failure of prompt payment of the amount demanded, instituted summary proceedings to dispossess the lessees as tenants failing to pay rent, she could not prevail; and the direction of a verdict for the defendant was not erroneous.

3. SAME—RENT—MATURITY.
Where a lease provides for a stipulated yearly rental, but does not state when it shall be due, it is generally payable at the end of each rent year.

4. SAME—INTEREST.
Such annual rental bears interest from the date when it is due. To prevent interest from running, there must be a continuing tender.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 802.]

(Syllabus by the Court.)

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action by W. L. Parker against A. C. Gortatowsky and another. From a judgment for defendant, plaintiff brings error. Affirmed.

J. L. Sweat, for plaintiff in error. Wilson, Bennett & Lambdin, for defendants in error.

LUMPKIN, J. J. S. Bailey leased a portion of a building in Waycross, owned by him, to A. C. and L. E. Gortatowsky as an opera house. The contract was dated March 31, 1903, and provided for leasing the theater for one year from April 1st for the sum of $200. It contained this provision: "The said Gortatowskys, at the expiration of the first year, to have the option of leasing said theater at $300 per annum for a term of two years, and at the expiration of that lease to have the option of extending it for three years more." Bailey sold the property to Mrs. Willie L. Parker. Some time after the end of the first year she brought suit against the Gortatowskys and their agent in possession to recover the premises. They defended on the ground that the Gortatowskys had exercised the option to continue the lease. After a verdict in favor of the defendants, the plaintiff brought the case to this court, where the judgment was affirmed. 127 Ga. 560, 56 S. E. 846. On March 9, 1907, before the remittitur from this court had reached the court below, Calvin W. Parker, as agent for his wife, the plaintiff in the former proceeding, made an affidavit that there was due rent for three years from April 1, 1904, at $300 per annum, besides $126 interest thereon, making an aggregate of $1,026; that demand had been made therefor; that the lessees had failed to pay; and that he had then demanded possession of their agent holding for them, which had been refused. Wherefore the affidavit was made, in order that a warrant might be issued to dispossess them. A counter affidavit was filed, and the case returned to the superior court. On the trial the presiding judge directed a verdict for the defendants. Plaintiff made a motion for a new trial, which was overruled, and she excepted.

It is clear from the evidence that the lessees desired to retain the property, and that Mrs. Parker, or her agent, desired to get possession of it. The whole procedure was apparently aimed, not to obtain payment of the rent, but to secure a forfeiture of the lease. Forfeitures are not favorites of the law. Has the plaintiff, or her agent, succeeded in securing one now? We think not. When the former case, brought by the same plaintiff in the effort to recover possession, was before

this court (127 Ga. 560, 56 S. E. 846), we held that the Gortatowskys had exercised the option to renew the lease for the two years after the first had expired; that Mrs. Parker, who bought from Bailey, took subject to their rights; and that she could not recover possession from them. The evidence shows without conflict that, on the day when that case was decided in their favor in the superior court, one of the defendants tendered to the husband and agent of the plaintiff the rent for a year in cash, which he declined to receive. The husband testified that the ground for this was that the case might be carried to the Supreme Court. Among other things he stated as a witness as follows: "He [Gortatowsky] said: 'I will pay you the last year's rent.' I told him: 'I can't accept it right now.' * * * Any time while the case was pending in the Supreme Court, up to the time Judge Sweat [plaintiff's attorney] made this demand, I would not have accepted the rent, if it had been tendered to me, without giving to Judge Sweat to see whether or not to accept it. * * * I don't think I have made a demand on him [Gortatowsky] for the rent for any of these years. If I made the demand, I don't remember it. The case was in court, and I did not think it proper to make a demand until it was out. After we commenced this proceeding, I wouldn't have accepted the money for the rent, if it had been tendered to me, I don't suppose." He also testified that one of the Gortatowskys had said to him that they ought to compromise the matter and get it out of court. To which he replied that, as soon as the Supreme Court decided the case, he would talk to Gortatowsky and "we would get together"; also that Gortatowsky said: "The day it is decided, if it is in your favor, we will get on the train and come down and pay you all rents due, and will get a lease from you, and get on terms, and have you fix up the theater. If it is decided in my favor, I want you to do the same thing. I am willing to pay you more rent for it, and I want you to fix it up." The plaintiff was thus through her agent declining to recognize the relation of landlord and tenants or lessor and lessees, or to receive rent, and suing to recover possession of the property. Under this state of facts, it was not necessary to continue to make tenders until the right of the defendants under the suit was determined, in order to preserve their status. Biggers v. Pace, 5 Ga. 171 (4); Hunt v. Fornby's Guardian, 43 Ga. 79 (2); Ansley v. Hightower, 120 Ga. 719, 48 S. E. 197.

The Supreme Court announced its decision in favor of the defendants on February 14, 1907. A motion for a rehearing was made and denied. The remittitur was certified to the trial court on March 11th, and was filed in the office of the clerk of the superior court March 12th. In the meantime, on March 6th, the attorney for the plaintiff mailed a statement of the rent claimed to the defendants at Albany, about 111 miles from the place where the opera house was, and also a copy to their agent in possession, but who had no authority to settle this matter. The agent was absent, and returned home on Saturday evening, March 9th. Plaintiff's agent and attorney called on him and asked for the rent. He stated that he could not pay it, but would communicate with the Gortatowskys on Monday. They then demanded of him the property, and, upon his refusal, an affidavit was made at once for the purpose of having a warrant to dispossess the defendants issued. The defendants replied to the letter, mailing their answer on Saturday, that their attorney would take up the matter for settlement with the plaintiffs. The suit repudiating the lease and seeking to recover the property was not at an end before the remittitur was filed, at least. Perhaps entering judgment on it may not have been the duty of the losing party. The announcing of the decision of the Supreme Court did not close the record, so that, before it was ended, the effort to recover the property by dispossessory proceedings was premature.

Again, in the former decision in 127 Ga. 560, 56 S. E. 846, the time when the annual rent for the renewal of the lease fell due was not determined. Generally, where a lease is made for one or more years at a stipulated annual rental, without specifying when the rent is due, it is not due until the end of the year, or of each year. 24 Cyc. 1170, and citations; 18 Am. & Eng. Encyc. L. 270, and citations. In the present record the time for payment of the first year's rent does not appear. The report of the former case in 127 Ga. and 56 S. E., states that four notes were given for the rent of that year; but the renewal provided for was at $300 per year, without specifying any time or times for payment. The rent was therefore payable at the end of each year from the beginning of the renewal, namely, April 1, 1904. The demand included rent for three years, the last beginning April 1, 1906. Hence the demand made in March, 1907, was before the rent for that year was due; and the proceeding to dispossess, based in part on a failure to pay such rent, was premature for that reason also.

Still further, not only was rent demanded, but interest on it, calculated from the first of each rent year. Under the ruling just above made interest ran on the rent only from the time when it was due. The waiver of tender by refusal to receive rent during the pendency of the case did not prevent interest from running from the dates when installments of rent fell due. It requires a continuing tender to accomplish that result. Kerr v. Hammond, 97 Ga. 567, 569, 25 S. E. 337.

For the reasons above stated, no recovery

could be had by the plaintiffs in the dispossessory proceedings; and there was no error in directing a verdict for the defendants.

Judgment affirmed. All the Justices concur.

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(129 Ga. 589)

## ROGERS v. STATE.

(Supreme Court of Georgia. Nov. 16, 1907.)

1. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE — PROBABLE EFFECT — DILIGENCE.

The accused having been convicted of the crime with which he was charged, and his motion for a new trial overruled, and the judgment overruling the motion having been affirmed by this court, it was not error for the court below to overrule an extraordinary motion for new trial, inasmuch as it does not appear that such an extraordinary state of facts was shown by the affidavits submitted upon the hearing of the extraordinary motion as would probably produce a different result if a new trial should be granted; nor does it appear that so much of the newly discovered evidence as existed at the time of the first motion could not have been ascertained by the defendant or his counsel in the exercise of proper diligence at or before the time of the first motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2318, 2319, 2336.]

2. SAME — CUMULATIVE OR IMPEACHING EVIDENCE.

Newly discovered evidence, which is merely cumulative or impeaching in its character, will not constitute a good ground of a motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2328.]

3. SAME — VERDICT — VACATION — GROUNDS —SUBSEQUENT ADMISSIONS.

Admissions made by a material witness for the state, subsequent to the trial of one accused of crime, that his testimony given at the trial was false, will not be cause for setting aside the verdict and granting a new trial. Clark v. State, 117 Ga. 254, 43 S. E. 853.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2332.]

4. SAME—DISCRETION.

Whether an extraordinary motion, based upon the ground of newly discovered testimony, should be granted or refused, rests in the sound discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2134.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

Willie Rogers was convicted of an offense, and he brings error. Affirmed.

See 57 S. E. 227.

Twiggs, Oliver, Fazan & Oliver, for plaintiff in error. W. A. Osborne, Sol. Gen., and Jno. C. Hart, Atty. Gen., for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(129 Ga. 604)

## ROBERTS, CRANFORD & CO. v. DEVANE et al.

(Supreme Court of Georgia. Nov. 18, 1907.)

1. EXECUTION — CLAIMS — TRIAL — EVIDENCE —PLEADING.

Where land is levied upon as the property of the defendant in execution, and a claim is interposed by a third party, based upon the alleged facts, that such land had been purchased by the head of a family with the proceeds of other land duly set apart to him as a homestead, for the benefit of his wife and minor children, and that both the original homestead land and the land levied on had been, under a proper order of the judge of the superior court, subsequently sold, for the purpose of changing the homestead investment, by a commissioner duly appointed for the purpose of making such sale and reinvestment, and the claimant had purchased the property levied upon from such commissioner and taken his deed to the same, the homestead proceedings under which the homestead was set apart are admissible in evidence, upon the trial of the claim case, without special pleadings, in support of the claimant's alleged title to the premises in dispute, though the claimant, on the same day he purchased from the commissioner also took a deed from the defendant in execution.

2. NEW TRIAL — GROUNDS — EVIDENCE — ERRONEOUS ADMISSION—IDENTIFICATION.

A ground of a motion for a new trial complaining of the admission in evidence, over stated objections of the movant, of certain documents, which are neither set out literally nor in substance in the motion, nor attached thereto as exhibits, properly identified, but are merely referred to in the motion in general terms and "as being more particularly identified in the brief of evidence," presents no question for adjudication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 257, 258.]

3. SAME—LEADING QUESTIONS.

Allowing leading questions to be propounded to a witness by the party introducing him is not cause for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 55.]

4. SAME—INSTRUCTIONS—REFUSAL.

Where a request for instructions to the jury is not sound in its entirety, refusal to give it is not cause for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 57–61.]

5. EXEMPTIONS — PROPERTY PURCHASED WITH PROCEEDS OF HOMESTEAD.

Where land was purchased with the proceeds of crops grown on homestead land, and title thereto taken in the name of the wife of the head of the family, she taking possession thereof and remaining in possession of the same, such land is subject to the judgment of the wife's creditor, who, in good faith and without notice of its homestead character, extended credit to her upon the representation of her husband that the land was hers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, §§ 344–347.]

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Execution levy by Roberts, Cranford & Co. against Sallie Hiers, in which F. and E. Devane filed claim to the property levied on. A verdict was rendered finding the property not subject, and, from a judgment dismissing the execution over the execution creditors' motion for new trial, they bring error. Reversed.

In May, 1898, Roberts, Cranford & Co., in the superior court of Brooks county, obtained a judgment against Sallie Hiers, upon which execution was issued June 9, 1898, which was on the same date entered on the general execution docket of that county. On June 2, 1904, this execution was levied upon a certain described portion of lot 412, in the Twelfth district of Brooks county, to which land F. and E. Devane filed a claim. Upon the trial of the claim case, plaintiffs put in evidence the execution and the following deeds to the land in question: A deed from Mitchell J. Hiers to Sallie Hiers, dated February 1, 1879. A quitclaim deed from the executors of the will of A. J. Rountree to Sallie Hiers, dated January 7, 1901. A warranty deed from Sallie Hiers to Ellis and Frank Devane, the claimants, dated January 21, 1904. None of these deeds had ever been recorded. Claimants introduced the following evidence: Proceedings before the ordinary of Brooks county in 1874 setting apart the west half of lot 411, in the Twelfth district of that county, and certain personalty as a homestead and exemption for the benefit of the family of Jacob Hiers, consisting of his wife, Sallie Hiers, and one minor child. A copy of a petition of J. H. Hiers and Sallie Hiers to the superior court of Colquitt county, filed January 11, 1904, the substance of which was that petitioners had had the west half of lot 411 set apart as a homestead in 1874, that since then 10 children, naming them, had been born to petitioners, 5 of whom had arrived at majority, the others being still minors, and that petitioners, since the setting apart of the homestead, had purchased with proceeds therefrom a described portion of lot 412, in the Twelfth district of Brooks county (which appears to be the land involved in this case). At the time of filing the petition, petitioners were residents of Colquitt county. The described portion of lot 412 was deteriorating in value, and it would be beneficial to the petitioners and the beneficiaries of the homestead that this land be sold and the proceeds of the sale reinvested in other lands, in the county of Colquitt, for the same uses. Copies of the following documents were also put in evidence by claimants: Order of the judge of the Southern circuit appointing a guardian ad litem for the minor beneficiaries of the homestead, the acceptance of such appointment by the person appointed guardian, and his recommendation that the sale and reinvestment be made as prayed for. Order appointing a commissioner to sell the homestead land, to reinvest the proceeds as prayed for, and to make a report of his acts and doings to the court. A deed from such commissioner to Ellis and Frank Devane, conveying the original homestead land and the portion of lot 412 described in the petition as

being the land purchased with proceeds of the homestead estate, dated January 21, 1904. The substance of the testimony of J. H. Hiers, a witness for claimants, was as follows: His father was in possession of the land levied on when the witness was born, and witness was in possession of it two or three years before 1874. He is the husband of Sallie Hiers, the defendant in execution. His wife went into possession of the land levied on about 1879, and remained in possession until 1903, when claimants went into possession, and they have been in possession ever since. This land was purchased in 1879 with the proceeds of crops that had been made on the property which had been previously set apart as a homestead for the benefit of witness' family by the ordinary of Brooks county. Twelve or 15 acres of the land were cleared and a house built upon it while his wife was in possession of it, and she paid for such improvements. Sallie Hiers never paid anything to the executors of the will of Rountree for the quitclaim deed made by them to her. The witness further testified: "I acted as agent of my wife, the defendant in fi. fa., signed the notes, signing as her agent, in the purchase of the goods from Roberts, Cranford & Co., plaintiffs in fi. fa. When I purchased these goods as the agent of my wife, I did not represent to Mr. Roberts, of the firm of Roberts, Cranford & Co., that my wife, Sallie Hiers, owned and held title to the land now levied on, and to which claim is now filed by Frank and Ellis Devane. * * * My wife did not own any other land * * * except this land now levied on at the time of the purchase of the goods by me as my wife's agent from Roberts, Cranford & Co., the purchase price of which goods is represented by the fi. fa. now in question." John T. Roberts testified, in behalf of plaintiffs: "I am a member of the firm of Roberts, Cranford & Co. I never had any notice that the property now levied on was homestead property, or bought with homestead or the proceeds of homestead from any crops from any homestead. I had the statement of J. H. Hiers that Mrs. Sallie Hiers, defendant in fi. fa., owned a half lot of land in Brooks county, and that he and she lived on it, and on this representation I sold to Mr. Hiers as agent of Mrs. Sallie Hiers a horse and buggy, and he signed the note in her name. I did not ask Mr. Hiers anything about homestead property." There was a verdict finding the property not subject. Plaintiffs moved for a new trial, which motion being overruled they excepted.

M. Baum, for plaintiffs in error. S. M. Turner and Stanley S. Bennet, for defendant in error.

FISH, C. J. (after stating the facts as above). 1. One ground of the motion for a new trial was that the court erred in admitting, over the objections of the plaintiffs, the proceedings setting apart a portion of lot 411 as a homestead for the benefit of the family of J. H. Hiers; the objections urged being that this evidence was irrelevant, as the land levied on was not referred to in such proceedings, and there was no pleadings to authorize the introduction of the evidence, and that it was an effort to set up title adverse to that under which claimants held, as plaintiffs had shown that claimants held under a deed from defendant in fi. fa. to them. These objections were not well taken. The theory of the claimants was that the land levied on was purchased with proceeds from the homestead property, and was therefore as much exempt from levy and sale under plaintiffs' execution as if it had been originally set apart as homestead property. The homestead proceedings were therefore relevant. No special pleadings were necessary to authorize their introduction in evidence, and their introduction did not indicate an effort on the part of claimants to set up a title adverse to that under which they held. They relied upon the deed made to them by the commissioner appointed by the court to sell the property levied on as homestead property, and reinvest the proceeds in other property for the use of the beneficiaries of the homestead. The fact that claimants took a deed on the same day from the defendant in execution would not necessarily affect whatever title they obtained under the commissioner's sale and deed.

2. Complaint was made in the motion for a new trial that the court erred in admitting in evidence, over stated objections of the plaintiffs, certain documents which were referred to in the motion in general terms, and "as being more particularly identified in the brief of evidence." Under repeated rulings of this court, such an assignment of error presents no question for decision, as the evidence objected to, or, at least, the substance of it, should have been set out in the motion itself or attached thereto as an exhibit, properly identified.

3. Nor was there any merit in the ground that the court erred in allowing leading questions to be propounded to claimants' witnesses. Beaudrot v. State, 126 Ga. 579, 55 S. E. 592.

4. Error was assigned on the refusal of the court to give in charge a very lengthy written request for instructions, which seems to have been intended as a complete charge of legal principles applicable to the various contentions of the parties. The exception was to the refusal of the court to give the entire request. If any portion of such request should not, for any reason, have been given, then the exception was not meritorious. A part of this request was as follows: "The plaintiffs contend, also, that the claimants recognized the title of the defendant to the land in dispute by accepting a deed from her, and that they are estopped to deny her title thereto. Look to the evidence in this case, then, and ascertain if the claimants ac-

cepted a deed from the defendant in fi. fa. If you should so find, then I charge you, gentlemen, that the claimants are estopped from denying the title of the defendant to this land, and you should find said land subject to plaintiffs' fi. fa." This request did not state a proper application of the doctrine of estoppel. The mere fact that claimants on the same day that they purchased the land from the commissioner and took a deed from him thereto also took a deed to the land from the defendant in execution certainly would not estop them from relying for title on the commissioner's deed, and force them to admit that the true title was in the defendant in execution, and the land, therefore, subject to the fi. fa.

5. The court charged the jury, in substance, that if the land levied on was purchased with the proceeds of homestead property, and it was regularly sold under an order properly granted for the sale of the same for the purpose of reinvestment, and if claimants purchased under such sale, then the land should be found not subject to the execution. In view of the issues raised by the evidence on the trial of the case, this charge was error. Roberts, one of the plaintiffs, testified that J. H. Hiers, who it appears was the head of the family who had a homestead set apart for the benefit of his wife and children, informed him, before credit was extended by his firm to Mrs. Sallie Hiers, wife of J. H. Hiers and defendant in execution, that she owned the land levied on, and that it was upon this representation of J. H. Hiers that a horse and buggy was sold by plaintiffs to Mrs. Hiers and her note taken for the purchase money of the same by them, J. H. Hiers signing her name to the note as her agent. He further testified that he never knew that the property levied on was homestead property, or purchased with the proceeds of crops that were homestead property. It appeared that the execution levied upon the land was issued upon a judgment against Mrs. Hiers obtained upon this note. It appeared from the testimony of J. H. Hiers that his wife was in possession of the land at the time the horse and buggy were sold to her and the note given, and he testified that he represented her in making the purchase of the same and giving the note, though he denied telling Roberts that she owned the land. It further appeared that the legal title to the land was in Mrs. Hiers at the time the note was given and when plaintiffs' judgment was rendered against her. In Zimmer v. Dansby, 56 Ga. 79, it was held that, "if the legal title to land be in the husband, and he holds the possession thereof under such title, and the title and possession so remain until a creditor, who gave credit on the faith that the property was the husband's without notice of the wife's equity, reduces his debt to judgment, the lien of such judgment will bind the land, and will be enforced against a secret equity of the wife, resulting from the fact that her money paid for the land." In Reid v. Holbrook, 123 Ga. 781, 51 S. E. 720, it was held: "Where personalty duly exempted was used in connection with the labor of the applicant and his family in making crops on land, purchased by him subsequently to the exemption, title to which was taken in his own name, and the proceeds of the sale of the crops were applied to the payment of the purchase money of the land, such land was subject to a debt afterwards contracted by the applicant for provisions for himself and family, the creditor having no notice as to how the land had been paid for, and having extended credit knowing that the legal title to the land was in the applicant, and upon the belief, in good faith, that he had an absolute and unincumbered title to the same. The record of the exemption was not of itself sufficient to put the creditor on notice of the homestead character of the land." Under these authorities, if the legal title to the land was in Mrs. Sallie Hiers, the defendant in execution, and she was in possession of the same when the debt was contracted and when the judgment was recovered thereon, and her husband, who had previously had other land exempted as a homestead, for her benefit and the benefit of their children, represented to one of the plaintiffs that the land levied on was the property of his wife, and plaintiffs, believing such representation and upon the faith of it, extended credit to the wife, plaintiffs having no notice or knowledge that the land had been purchased with the proceeds of crops grown on the homestead land, then the land levied on would be subject to the execution, notwithstanding the fact that it was paid for with proceeds of the homestead, and had been regularly sold as homestead property for the purpose of reinvestment, under an order of court, procured after the rendition of the judgment, and claimants had purchased at such sale. The court should have so charged the jury and left it to them to determine, under the conflicting evidence, whether this was the true theory of the case or not.

Judgment reversed. All the Justices concur.

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(129 Ga. 582)

## BANK OF LAWRENCEVILLE v. ROCKMORE & CO.

(Supreme Court of Georgia. Nov. 16, 1907.)

1. BANKS AND BANKING — DEPOSIT — ACTION TO RECOVER—DEFENSES.

Where suit was brought against a bank to recover a balance on a deposit account, the plaintiff being named as R. & Co., a firm alleged to be composed of R. and his wife, it was competent to plead and prove that the wife was not a member of the alleged firm, that, in fact, there was no firm, but the title "R. & Co." was simply a name under which R. deposited his own funds in the bank, and that he was indebted to the bank on a matured debt an amount greater than the amount due on the deposit account.

2. SET-OFF AND COUNTERCLAIM—BANK DEPOSIT.

Against a suit to recover a balance due on a general deposit account the bank may set off a matured debt due to it by the depositor.

3. BANKS AND BANKING — DEPOSITS — EVIDENCE.

A bank passbook is evidence, but not conclusive evidence, of the amount due to a depositor.

4. SAME.

A request to charge which treated the passbook as conclusive was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, § 530.]

5. SAME—PLEADING—FRAUD.

The portion of the answer relating to the subject of the fraud of one of the plaintiffs in pretending that his wife was a member of the firm with himself, and which was stricken by the court, failed to allege that the bank was an innocent party, and was properly stricken.

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; E. J. Reagan, Judge.

Action by Rockmore & Co. against the Bank of Lawrenceville. Judgment for plaintiff, and defendant brings error. Reversed.

Rockmore & Co., a firm alleged to be composed of M. L. Rockmore and Mrs. Effie Rockmore, brought suit against the Bank of Lawrenceville, and alleged as follows: Defendant is indebted to the plaintiffs in the sum of $750, besides interest. On January 21, 1904, plaintiffs, in the name of Rockmore & Co., became customers of the bank in depositing the sum of $130 to their credit, and from time to time, up to and including March 2, 1904, they deposited the total sum of $7,387.72 to their credit. At divers times they drew checks in their firm name, aggregating about $6,637.82, leaving about $750 which they now have to their credit in bank. At different times they have demanded this balance by giving checks against it, which the bank has refused to pay. A copy of one of the checks for the sum of $500 payable to the order of J. A. Perry was attached. Plaintiffs have presented their passbook showing the deposit to their credit with the bank, and requested that the book be balanced, which was refused. The defendant denied indebtedness to the plaintiffs. It admitted that M. L. Rockmore for himself, but in the name of Rockmore & Co., opened an account with defendants, and up to March 2, 1904, had deposited the amount stated "to the credit of said alleged firm of Rockmore & Co." It also admitted that there was a balance of $718.26 to the credit of an account in the name of Rockmore & Co., but alleged that M. L. Rockmore was indebted to the defendant on an account in excess of the apparent balance, and that $665.44 belonged to the defendant, and was fraudulently deposited by M. L. Rockmore to the credit of said account of Rockmore & Co. under the following state of facts: In the fall and winter of 1903 Rockmore was engaged in the business of buying cotton, and made an arrangement with the defendant to get the money to carry on the business, under the terms of which the cotton was to be deposited in a certain warehouse, and warehouse receipts therefor were to be turned over to the defendant as security for the repayment of the sums thus advanced. Under this arrangement, he was also to keep the cotton insured against loss or damage by fire, and the insurance policies were to be delivered to the defendant for its protection, and the insurance money was to be paid to it in case of loss. In the month of December, 1903, the warehouse and 147 bales of cotton stored in it, and which defendant had furnished Rockmore funds to buy, were totally destroyed by fire. Defendant had loaned Rockmore about $8,000 for the purpose mentioned up to the time of the fire, and no part of it had been repaid. Among the insurance policies thus taken out on the cotton by Rockmore and indorsed by him and delivered to the defendant was one for $1,000 issued by the Continental Insurance Company. After the fire, defendant delivered this policy to Rockmore, who agreed to take it to the office of the local agent of the insurance company, receive the money, and bring it back to the defendant. As the policy had been issued in the name of Rockmore, it was necessary for him to receipt for the money before payment would be made. The insurance agent paid Rockmore the amount of the money for the defendant, but, instead of bringing it to the bank, he fraudulently converted $334.56 of the amount to his own use by using it to take up a claim held against him by a third party, and placed the balance of $665 to the credit of Rockmore & Co. on their account during the absence of the cashier of the defendant, who had delivered the policy to him for collection to be credited on the amount due by him to the bank, which amount is still due. It has refused to pay the balance thus standing in the name of Rockmore & Co. on their checks for the reasons above stated. The jury found for the plaintiffs. Defendant moved for a new trial. It was refused, and defendant excepted.

W. H. Simmons, for plaintiff in error. J. A. Perry, for defendant in error.

LUMPKIN, J. Rockmore & Co., alleged to be a firm composed of Rockmore and his wife, sued the Bank of Lawrenceville for an alleged balance due them on a deposit account and recovered a verdict. A motion for a new trial was refused, and defendant excepted.

1. Error was assigned because the court struck from the answer an allegation that there was no such firm at the time alleged in the petition as Rockmore & Co., "and that M. L. Rockmore is using said firm name for the sole purpose of defrauding and hindering this defendant from collecting just debts owing by him." It was assigned as error that the court, by striking this and another

part of the answer and rejecting evidence, excluded the defendant from showing that there was really no such firm as Rockmore & Co., and that, as a matter of fact, the name was simply a designation of Rockmore as an individual. When a suit was brought in the name of Rockmore & Co. against the bank, could it plead and prove the defense just indicated? If not, why not? The name "Rockmore & Co." imports prima facie the existence of a firm; but does not indicate who compose the firm. A deposit in the name of "Rockmore & Wife" might have been different. To do business as "Self & Co." is at best calculated to mislead; but it is possible for such a designation of one's self to coexist with the honest conduct of business. It does not necessarily follow as matter of law that one who enlarges his business title, or who outgrows his individual name to the extent that he feels it necessary to add the words "& Co." thereto, intends to commit or does commit a fraud on his creditors. Like the plural "we," employed by sovereigns and in editorial circles, it may be somewhat more impersonal than the singular, without being improper. Even the law has sometimes made use of fictions. John Doe is recognized as a respectable litigant, although, in reality, only a kind of nom de guerre. But neither John Doe nor "& Co." should be used to perpetrate a fraud on creditors of the real party. The addition "& Co." does not on its face define who constitute the company. It is susceptible of proof of who comprise it, or whether anybody does so. The jury may inquire into "& Co.," and make the acquaintance of its component members through the medium of the evidence. On questions of fraud, they may consider the addition of a name, without a person for it to apply to, where this throws light upon the subject in hand. In so far as the answer merely alleged that there was no company, but that Rockmore & Co. was identical with Rockmore, it should not have been stricken; and evidence was admissible to sustain the allegation. See, on the general subject, 1 Bolles, Modern Law of Bk'g. p. 482.

2. Another ground of the motion for a new trial was that the court refused to give the following request to charge: "If the jury believe from the evidence that M. L. Rockmore, a member of the firm of Rockmore & Co., the plaintiffs in this case, agreed with W. M. Sasser, the cashier of the defendant bank, that the $665.44 arising from the insurance policy should not be checked out or paid to Rockmore & Co., but should go as a credit on the amount owing the defendant from said M. L. Rockmore for money advanced to the latter, then the plaintiffs cannot recover that deposit in this case." There was no error in refusing to give this request. If there was no such firm as Rockmore & Co., and that name was merely a designation of Rockmore, then the deposit was his, and could be applied by his agreement to the individual debt to the bank, or without his consent the bank could set off against it his matured debt. But the vice in the request to charge is that it treats the firm as an existing firm "the plaintiffs in this case"; that is, composed of Rockmore and his wife. If, in fact, the deposit belonged to a firm composed of two persons, one of them could not by agreement apply such firm assets to his individual debt without the consent of the other partner, or have the deposit account due to the firm set off as a credit upon his individual debt to the bank. Harlow v. Rosser, Scurry & Co., 28 Ga. 219; Eady v. Newton Coal & Lumber Co., 123 Ga. 557, 61 S. E. 661, 1 L. R. A. (N. S.) 650. And a like principle is applicable to an effort by a bank to apply assets of a firm to individual debts of one of its members. Bank of La Grange v. Cotter, 101 Ga. 134, 28 S. E. 644. Whether, upon a settlement of accounts between partners, equity might apply the interest of a partner so agreeing to his indebtedness, would raise a different question.

3, 4. Complaint is made that the court refused to give in charge the following request: "If a depositor in a bank is indebted thereto in an amount in excess of the balance shown to be due on his pass book, it can refuse to pay a check on his account, and retain whatever balance is shown to be due thereon, to protect itself from loss by reason of such indebtedness. In other words, the bank could legally set off such indebtedness against the balance so due on account." This request is defective, in that it treats the pass book as being conclusive as to the state of the account. It is evidence, but not conclusive evidence. In this very case it was agreed that the pass book did not actually show the state of the account. A bank has the right to set off against the amount of a general deposit belonging to a customer a matured claim due by the customer to it. Georgia Seed Co. v. Talmadge & Co., 96 Ga. 254, 22 S. E. 1001; 1 Morse, Banks and Banking (4th Ed.) §§ 324, 334. It is not necessary to deal with the question of unmatured claims, or with deposits made by one in the name of another, but which have not ripened into complete gifts to the other for want of delivery, or as to which no title to the deposit or deposit account has passed to such other for want of notice. None of these matters are here involved. It may be also stated that Rockmore appears to have been insolvent, and the bank's claim was past due.

5. Error is further assigned because the court struck certain allegations of the answer, to the effect that Rockmore made the account with the bank in the name of Rockmore & Co., falsely pretending that his wife was a member of said pretended firm, for the purpose of defrauding, hindering, and delaying his creditors, and to prevent them from reaching the money by process of garnishment, and that, as matter of fact, there was not then or now any such firm as Rock-

more & Co., composed of Rockmore and his wife. The brief of counsel for plaintiff in error insists on this point under the contention that the bank was entitled to prove that there was no such firm as Rockmore & Co., and that this was merely a designation of Rockmore. Considered as a plea of fraud perpetrated upon the bank, it was defective, in that it did not show that the bank was an innocent party, but rather indicated the contrary. The statement that Rockmore made the account with it, pretending that his wife was a member of the firm, apparently means that he so stated to the bank. If he did state to the bank that his wife was a member of the firm, it could not well be a fraud on the bank that she afterwards claimed to be such. If there was a fraud, and the bank knew of it, and took part in it, then it cannot claim to have been defrauded thereby. One cannot have an action on account of an injury resulting from a fraud in which he himself takes part. He cannot participate in a fraud against himself and be relieved in equity from the consequences of his own wrong. Peacock v. Terry, 9 Ga. 137. We do not understand that by this portion of the answer the bank was seeking to raise a defense under the legal maxim that between those equally guilty of fraud the court will grant no relief. The brief argues the case on the basis of the bank's being innocent and defrauded, not that it and Rockmore were equally guilty. A depositor sometimes deposits in his own name or in a trade-name employed by him in business (such as A. & Co.) or in his name as agent or trustee. If this is done bona fide, it does not constitute fraud as matter of law. It may be done in good faith for the purpose of keeping separate accounts, as where a man is conducting two kinds of business, or where he has trust funds and also individual funds. But if one colludes with a bank to cover up his funds by making a deposit in a fictitious name, and this is done to delay and defraud his creditors, and to prevent them from discovering and subjecting to his debts the deposits so made, this would constitute a fraud. A bank is not generally required to investigate the causes which may lead to deposits in the name of a firm or of one as agent or trustee or the like. But it cannot properly collude with a depositor for the purpose of misleading creditors and covering up his funds under a fictitious name so as to prevent their being subjected to garnishment. But we do not understand that the bank is urging such a position as its defense; and we make no ruling on such theory.

The first ground of the amended motion complained of the striking of the sixth paragraph of the answer. This is not referred to in the brief of counsel for plaintiff in error, and is therefore not dealt with.

As the case will be returned for a new trial, we express no opinion upon the evidence; nor do we deem it necessary to discuss collateral questions touching the status, rights, and duties between banks and depositors, which are not made before us.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 614)

## WADE v. WATSON.

(Supreme Court of Georgia. Nov. 18, 1907. Rehearing Denied Nov. 27, 1907.)

1. PLEADING—ANSWER—VERIFICATION.
The contract sued upon was not an unconditional contract in writing, and it was not necessary that the defendant should have sworn to his answer made in the suit upon it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 859–879.]

2. SAME—CONTRADICTORY PLEAS.
A plea should not be stricken because one part of it is contradictory to another part of it.

(Syllabus by the Court.)

Error from Superior Court, Tift County; W. C. Worrill, Judge.

Action by Jacob Watson against Hardman Wade. Judgment for plaintiff, and defendant brings error. Reversed.

W. J. Wallace, for plaintiff in error.

HOLDEN, J. Jacob Watson brought suit against Hardman Wade on the following contract: "Georgia, Berrien County. I hereby transfer and assign the within bond for titles to Hardman Wade, of Madison county, Georgia, for the following consideration, to wit: In consideration of the sum of eleven hundred ($1100.00) dollars, cash in hand paid by the said Hardman Wade, receipt of which is hereby acknowledged, and also of the further consideration that the said Hardman Wade assumes the payment of two promissory notes, given by me to Thos. S. Marchant for part of the purchase money for said land, to wit: One note for $200.00 due November 1st, 1905, and one note for $200.00 due November 1st, 1906, as shown in within bond, which said notes the said Hardman Wade agrees to pay by or on the 1st day of January, 1906, it being understood that I am to receive the discount of 12 per cent. which said Thos. S. Marchant allows for the payment of said notes before maturity. I also agree to pay Tifton Real Estate Co. $50.00 as services for selling said place, and said Wade is hereby authorized and directed to pay said sum out of the proceeds of said discount. Witness my hand and seal, this the 18th day of November, 1904. [Signed] Jacob Watson. [Seal.] Attest: R. C. Ellis, Not. Pub. Berrien County, Ga." It was alleged in the petition that on the 28th of September, 1903, Watson purchased from Marchant 130 acres of land, and paid a part of the purchase money in cash and gave his notes for the balance to Marchant, who executed to Watson a bond for titles. Watson sold the lands to Wade, and transferred to him on November 18, 1904, the bond for titles as above

stated in the contract sued upon. The two notes referred to in the transfer were not due and were unpaid. Bond for titles and possession of the land were delivered to Wade by Watson. Wade refused to pay the notes and to pay the discount sued for. The seventh paragraph of the petition alleged that Wade agreed to pay the Tifton Real Estate Company $50 for Watson out of the discount due Watson, and that the company had transferred all of its rights to said $50 to Watson. The defendant in his answer alleged that he could neither affirm nor deny the allegations contained in paragraph 7 of the petition, for want of sufficient information, but denied all the other allegations of the petition, except that he was a resident of the county. The defendant in his answer, after doing this, set up "as additional matter of defense" that "the alleged agreement" by Marchant to allow Watson the discount, if made, was "nudum pactum without fresh consideration," and could not be enforced; that Watson was undertaking to enforce a penalty of 12 per cent. per annum for the nonpayment of an indebtedness, in violation of the laws fixing interest to be paid for the use of money; that under the terms of the alleged transfer Watson was the original debtor to the Tifton Real Estate Company, and the defendant could not be bound by the undertaking to pay this indebtedness, unless he made a promise to do so in writing signed by him, and, without a legal transfer of the alleged cause of action, suit could not be maintained against the defendant. This answer was not sworn to by the defendant. The plaintiff in the court below demurred generally to the answer of the defendant Wade, alleging that the suit was on an unconditional contract in writing and the plea was not sworn to; that the defendant admits the contract in his answer, and sets up to valid defense thereto. The demurrer had other special grounds, which it is unnecessary here to set out. The court sustained the demurrer and struck the plea of the defendant. The court then directed verdict for the plaintiff for $64 as principal and $11.20 as interest, and entered up judgment thereon. To the ruling of the court in sustaining the demurrer and striking the defendant's plea, the defendant in his bill of exceptions assigns error, first, that the alleged contract upon which Watson sued was not an unconditional contract in writing such as required his plea to be sworn to; and, second, that the plaintiff's suit was for a discount of 12 per cent. per annum, whereas the alleged contract provided for a discount of 12 per cent. and not 12 per cent. per annum. To the direction of a verdict and entering up judgment, the plaintiff in error assigns error because, first, the alleged contract provided for 12 per cent. discount on $400, which would have been only $48, whereas, the court directed a verdict and entered up judgment for $64, which was a discount of 12 per cent. per annum; and, second, that after striking defendant's plea the court was without authority to direct a verdict and any judgment based thereon was illegal. After striking defendant's plea, the defendant in error introduced the following evidence: A written assignment from the Tifton Real Estate Company to Jacob Watson, by which the real estate company transferred to Watson all interest in the indebtedness of $50 referred to in the transfer.

1. One of the general grounds of the demurrer to the defendant's plea was that the suit was upon an unconditional contract in writing, and the defendant's plea was not sworn to. If it was an unconditional contract in writing, the court did right in striking the plea of the defendant to the suit upon it because it appeared that the plea was not sworn to. If it was not an unconditional contract in writing, it was unnecessary to swear to the plea to the suit upon it, and the plea should not have been stricken because not sworn to. Was the contract upon which suit was brought in this case a conditional or unconditional contract in writing, so far as concerns the plaintiff in error, Wade? It appears from the contract itself that Marchant held two notes of Watson, which Wade in the contract agreed to pay on the 1st day of January, 1906, which was before maturity. In the contract appeared these words: "Which said notes the said Hardman Wade agrees to pay by or on the 1st day of January, 1906, it being understood that I am to receive the discount of 12 per cent. which said Thos. S. Marchant allows for the payment of said notes before maturity." Construing the words, "I am to receive," as meaning Wade is to pay to Watson, the meaning of the contract would be that Wade was to pay to Marchant the notes by the 1st of January, and was to pay to Watson the discount referred to. What discount is referred to? It is the discount which Marchant "allows for the payment of said notes before maturity." It is our construction of this contract that Wade only agreed to pay this discount to Watson in the event Marchant allowed it if the notes were paid before maturity. If this is the meaning of the contract, it is a conditional contract on the part of Wade to pay this discount to Watson. If Wade paid the notes before maturity and Marchant would not allow the discount, and was under no obligation to allow the discount, certainly Wade would not be required to pay this discount to Watson. Marchant is no party to the agreement, and it nowhere appears from the agreement that Marchant is bound to allow this discount. The defendant in his answer denies the allegation that Marchant was bound to allow it. There may have been some negotiations between Marchant and Watson in reference to Marchant allowing Watson the discount if the notes were paid before maturity; and still Marchant may have been under no legal obliga-

tion to allow it if the notes were paid before maturity, and may have refused to allow it. It certainly does not appear from this contract, to which Marchant is no party, that Marchant is bound to allow the discount. Suppose that Wade performed his obligation in paying to Marchant the amount due on the notes by the 1st of January, 1906, and Marchant refused to allow the discount and had good grounds for such refusal, could Watson sue and recover from Wade this discount? Manifestly not, because if he paid to Marchant the full amount of the notes, and then had to pay to Watson the discount, he would be paying the amount of this discount twice, and there is no agreement on his part to pay it but once. It is true he agrees to pay it this one time to Watson, but certainly a fair construction of this contract means that he is not to pay this discount to Watson unless Marchant allows it. It being a proper construction of this contract that Wade is to pay this discount to Watson if Marchant allows it, but is not to pay it unless Marchant does allow it, it follows that it is a conditional contract. According to the contract, the payment of this discount by Wade to Watson is contingent upon Marchant allowing the discount. The agreement by Wade to pay Watson this discount being conditional, under a proper construction of the contract, upon Marchant allowing it, makes it a conditional contract. The contract sued on being a conditional contract in writing, it follows that it was not necessary for the defendant Wade, when sued upon it, to swear to his plea. It was error, therefore, for the court to strike the plea because it was not sworn to.

2. The other general ground of demurrer to the defendant's plea was that, while the defendant denied in a general way certain paragraphs of the plaintiff's petition, he admitted the contract, and set up no valid defense thereto. The defendant in his plea admitted the first paragraph of plaintiff's petition that he was a resident of the county, but denied the allegation in the petition that he failed and refused to pay said two promissory notes, and denied all other paragraphs in the petition, except paragraph 7, which he neither admitted nor denied, and which is substantially set forth in the statement of facts. The defendant in his plea denies the allegation in the petition that Marchant had agreed to allow the discount referred to should the notes be paid by January 1, 1906, and that he is indebted to petitioner as set forth in the petition. He then, in his plea, undertook to set up additional matters of defense, but nowhere in his plea does he admit making or assenting to the contract sued upon. He refers to the contract and transfer in his plea as the "alleged contract and transfer." If he averred in his plea that he was not bound by the contract if he had made it, this would not be cause for striking the whole plea when in another portion of the plea he denied substantially every allegation in the plaintiff's petition, except the allegations in paragraph 7 above referred to, which he neither admitted nor denied for want of sufficient information. The defendant Wade in his plea denies the allegation in the petition that he failed and refused to pay the notes, and denies the allegation that Marchant had agreed to allow the discount. He further denied the allegation that he owed plaintiff on the contract sued on. The plea, in the denials, made issues requiring evidence on the part of the plaintiff to show his right to recover before he was entitled to a verdict. On the face of these denials, it was error to strike this plea because of any inconsistent, or apparently inconsistent, allegations therein. A party has the right to file contradictory pleas. Civ. Code 1895, § 5065.

3. It follows from what we have said that it was error to strike the defendant's plea and direct a verdict and enter judgment, and the judgment of the court below is

Reversed. All the Justices concur.

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(129 Ga. 576)

## GEORGIA RY. & ELECTRIC CO. v. TOWN OF OAKLAND CITY et al.

(Supreme Court of Georgia. Nov. 16, 1907.)

1. INJUNCTION—RESTRAINING CRIMINAL PROCEEDINGS—ENFORCEMENT OF ORDINANCE

The general rule is that a court of equity has no jurisdiction to enjoin criminal prosecutions; and this rule is applicable to proceedings to punish for violations of municipal ordinances, which are quasi criminal in their nature. The cases in which proceedings to enforce such ordinances will be enjoined are exceptional in character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 176–179.]

2. SAME.

Where a municipal corporation passed an ordinance requiring street cars on a public street extending through the town to be stopped at three designated points for the reception of passengers, in addition to those where the company itself was accustomed to stop its cars for that purpose (except one), and fixing a penalty for disobedience thereof, injunction will not be granted to restrain the enforcement of the ordinance by prosecution, or to determine the question of its validity or its reasonableness or unreasonableness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 176–179.]

3. SAME.

The case arose and was decided before the passage of the act of August 23, 1907 (Acts 1907, p. 72), enlarging the powers of the Railroad Commission of the state; and the present decision is made without reference to that act.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Bill by the Georgia Railway & Electric Company against the town of Oakland City and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Rosser & Brandon and W. T. Colquitt, for plaintiff in error. J. F. Golightly, T. O. Hathcock, and Walter McElreath, for defendants in error.

LUMPKIN, J. The Georgia Railway & Electric Company operates a line of street and suburban railway which passes through the town of Oakland City; its tracks being in a public street of the town known as the "Chert Road." It has been accustomed to stop its cars at certain points in the corporate limits to receive and discharge passengers. The municipal authorities passed an ordinance requiring street cars traversing the street named to be stopped at the points already in use (except one) and also at three additional points to receive passengers who might there seek to board such cars, and signal or give notice of their intention to do so. The company filed an equitable petition, seeking to enjoin the enforcement of the ordinance by frequent arrests and trials of its employés for violating it. The petition alleged that the ordinance was void on the grounds that it was unconstitutional, that the defendant had no power under its charter to enact the ordinance, and that such ordinance was unreasonable. It was claimed that to allow such arrests and prosecutions would cause a multiplicity of cases, would interfere with the running of its cars and schedules, and disarrange the schedule established by the company. The defendant denied the invalidity or unreasonableness of the ordinance. The evidence was conflicting as to the necessity or convenience of making the stops at the fixed places. The injunction was refused, and the plaintiff excepted.

Without determining whether the ordinance complained of is valid or not, or whether it is in whole or in part unreasonable, the facts of this case are not such as to require the reversal of the judgment refusing an injunction. The general rule is that equity has no jurisdiction in criminal matters. Its jurisdiction is for the protection of property and property rights and franchises. Certain courts of law are invested with power to try persons accused of the violation of the criminal laws. The two are separate; and the general rule is that a court of equity will neither aid nor interfere with the administration of the criminal laws in the courts established by the state and invested with criminal jurisdiction. The rule has often been applied both to criminal proceedings under the state laws and quasi criminal proceedings under municipal laws. An additional reason for it might be suggested in respect to the state, on the ground that it might be an attempt to restrain the sovereign power in the name of which criminal proceedings are conducted. The state is not suable at all without its consent, save by another state in the Supreme Court of the United States, while municipalities have not the same immunity from litigation. While this question as to the parties to the suit may furnish some difference, yet the principle of the general want of jurisdiction in equity to interfere with the administration of criminal laws has long been treated as applicable to the laws of the state and also to the quasi criminal ordinances of a municipal corporation. In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402. Many efforts have been made to establish various exceptions to the general rule; but, if exceptions have been allowed, it was only where they were held to clearly involve subjects of equitable cognizance, and where equitable interference was necessary. Every arrest and prosecution is likely to work injury to the character and business of the defendant; and many crimes relate to acts affecting property. Still a court of equity cannot undertake, merely on account of some possible incidental injury, to practically stop a court of competent jurisdiction from trying one accused of an offense. If it did so, a very large part of criminal prosecutions and the due enforcement of criminal laws would be stopped by defendants invoking the aid of equity, on the ground that their persons, character, business, or property would be injured by permitting the prosecution to proceed, and that the law on which it is grounded is invalid, or does not apply to the defendant; in other words, that he is not guilty. See Davis v. American Society, 75 N. Y. 362.

In England, though there has been some conflict in the decisions, it seems to be the rule that a Court of Chancery may enjoin a party to a suit already pending before it from proceeding by prosecution to try the same right which is in issue in that court. In some of the United States the rule of non-interference has been announced absolutely and as if almost without exception. Crighton v. Dahmer, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, 35 Am. St. Rep. 666. That there are cases, however, which form exceptions to the rule has been recognized. In the case of In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, Mr. Justice Field, in his concurring opinion, said: "In many cases proceedings, criminal in their character, taken by individuals or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity." The principle on which such cases usually rest is that the action sought to be enjoined is in the nature of a fraudulent use or an abuse of legal proceedings, where the rights of the applicant for injunction are clear, and the proceedings are obviously nothing but a circuitous method of depriving him of his property or property rights, or where municipal authorities, under the pretense of seeking the good of the portion of society intrusted to their supervision, are, in fact, attacking the vested property rights of individuals or corporations.

It has been often sought to obtain an injunction on the general ground of multiplicity of suits, but these efforts have generally been denied. Poyer v. Village of Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494. If mere multiplicity of prosecutions alone, without other grounds for equitable interfer-

ence for the protection of property or franchises, would require injunction against criminal proceedings, every person who might be prosecuted for conducting a business without a license, or for doing business on Sunday, or for violating a municipal ordinance against keeping goods on the streets, or in many other cases which might be suggested, could protect himself with an injunction, so as to continue to violate the law while the single case in equity was being tried and appealed from court to court. In some cases, where there was a clear right which was being invaded under an invalid ordinance, multiplicity of prosecutions has been considered as adding force to the plaintiff's position. In one or two of them injunction has been granted, not against proceeding altogether, but only against the excessive multiplying of cases under the ordinance. In Port of Mobile v. Louisville & Nashville R. Co., 84 Ala. 115, 4 South. 106, 5 Am St. Rep. 342, it was held that where a city attempted unlawfully to destroy a franchise which had been conferred upon a railroad company, and which the municipality had no right to revoke, by means of a quasi criminal ordinance, injunction would be granted. In the opinion Somerville, J., said: "There is no sort of pretense that it was a mere police regulation. * * * The purpose of the defendant corporation is obviously to destroy the franchise which it has conferred, and the ordinance under consideration, having this effect, if executed, must be held to be void." For other authorities outside of this state on the subject, see 1 High on Injunctions (4th Ed.) § 68; 2 Id., § 1244; note to Crighton v. Dahmer, 21 L. R. A. 84; note to same case in 35 Am. St. 670 et seq., 16 Am. & Eng. Encyc. L. 370–372.

We now turn to the authorities in this state. In Gault v. Wallis, 53 Ga. 675, the general rule was applied in a case where a justice of the peace discharged a prisoner and issued a cost fi. fa. against the prosecutor. It was alleged that this action was wrongful, and that the justice was insolvent. The rule was again announced broadly in Phillips v. Mayor, etc., of Stone Mountain, 61 Ga. 387. There on ordinance required the doors of all retail liquor stores to be closed during the continuance of divine worship by any denomination of Christian people within the corporate limits. It was alleged that the ordinance was void, and restricted the complainants' business; that two of the complainants had already been fined and had carried their cases to the superior court by writs of certiorari; and that it was the intention of the municipal authorities to strictly enforce the provisions of the ordinance. The injunction was denied. In Garrison v. City of Atlanta, 68 Ga. 64, injunction was denied to restrain the enforcement by fine or imprisonment of an ordinanee prohibiting the allowing of cattle to run at large on the streets. In Pope v. Mayor, etc., of Savannah, 74 Ga. 365, shelves were built in front of a store, complainant claiming the right to do so. An ordinance prohibited the obstruction of streets and sidewalks. The city threatened to have the complainant arrested and fined for every day the shelves were allowed to remain. Insolvency of the city was alleged. Injunction was denied. See, also, Bainbridge v. Reynolds, 111 Ga. 758, 36 S. E. 935. In Salter v. City of Columbus, 125 Ga. 96, 54 S. E. 74, a resident of Alabama delivered beer by wagons in Columbus. Injunction was sought to prevent frequent threatened arrests under an ordinance requiring a license to be obtained by dealers in the city; but the injunction was denied. In City of Atlanta v. Gate City Gaslight Company, 71 Ga. 106, somewhat broad language was used; but in the opinion it was declared that, where it was manifest that prosecution and arrest were threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law (a state law which the city had no right to disregard), injunction was a proper remedy to prevent injury to the party menaced. This ruling was repeated in Georgia Railroad & Banking Co. v. City of Atlanta, 118 Ga. 486, 45 S. E. 256, where the city was enjoined from preventing the railroad company, by threatened arrest and prosecution of its employés, from fencing a strip of land forming a part of its right of way, and to which the city sought to lay claim as a street. In Paulk v. Mayor, etc., of Sycamore, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128, an ordinance making penal the sale or keeping for sale of liquor in the town of Sycamore was sought to be enjoined on the ground that it was void, and had also been repealed, and that threatened prosecutions would harass and jeopardize the personal liberty and interfere with the enjoyment of the civil rights of the complainant and his business, and cause irreparable damage. Injunction was denied. See, also, O'Brien v. Harris, 105 Ga. 732, 31 S. E. 745. The case of City of Atlanta v. Gate City Gaslight Co., supra, was discussed and explained. This ruling was repeated in Mayor, etc., of Moultrie v. Patterson, 109 Ga. 370, 34 S. E. 600, where the ordinance involved was one making it penal to sell beef, pork, fish, etc., within the city limits, except in the city market. The Gate City Gaslight Case was again referred to as resting on the right of equity to interfere where it was evident that private property and civil rights were being invaded by means of the use of such ordinances, and that injunction was necessary in order to protect a right which was in jeopardy, and which could not otherwise be fully protected. In Hasbrouck v. Bondurant & McKinnon, 127 Ga. 220, 56 S. E. 241, the facts do not appear from the headnotes. Two parties were involved in a controversy over the right to dig and haul sand from a sandbank. One of them filed a petition in equity against the

other; and pending the case he sought to enforce his claim by suing out, and threatening to continue to sue out, criminal warrants. This was an effort to misuse criminal process for the purpose of acquiring or establishing a property right; and was also during the pendency of the equitable proceeding to determine the right. Injunction was granted.

The rule that a court of equity will not ordinarily enjoin a criminal act considered merely as such, but will enjoin a trespass working irreparable damage to property, although the act may also be the subject of punishment, is often invoked to authorize an injunction against a criminal prosecution. But an individual act causing irreparable damage is one thing; the prosecution of a person charged with an offense, in the courts provided for the trial of such proceeding, is a different thing. Without reciting the evidence in the present case, a comparison of it with the principles above enunciated will show that, whether the ordinance was reasonable or not, the injunction prayed was properly denied. There was no effort to take away property or property rights, or to destroy or substantially impair a franchise. The ordinance was a police regulation of travel in the street of a municipality. It was not shown that any irreparable injury would result; but, at most, a small interference with the schedules which the company desired to maintain, while the cases made against its employés proceeded to trial when the validity of the ordinance could be tested.

Judgment affirmed.

All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 582)

## WHITE v. CITY OF TIFTON.

(Supreme Court of Georgia. Nov. 16, 1907.)

INJUNCTION — CRIMINAL PROSECUTIONS — ENFORCEMENT OF ORDINANCES.

The general rule is that a court of equity has no jurisdiction to enjoin the institution of prosecutions for criminal offenses, and this rule is applicable to prosecutions for violations of municipal ordinances, which are quasi criminal proceedings. Nor will a court of equity, upon a petition for an injunction of such a nature, inquire into the validity or reasonableness of an ordinance making penal an act for the doing of which prosecutions are threatened. Paulk v. Mayor of Sycamore, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128; Georgia Railway & Electric Co. v. Town of Oakland City (this day decided) 59 S. E. 296.

(Syllabus by the Court.)

Error from Superior Court, Tift County; R. G. Mitchell, Judge.

Action by H. H. White against the city of Tifton. Judgment for defendant, and plaintiff brings error. Affirmed.

Fullwood & Murray, for plaintiff in error. W. J. Wallace, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur.

(129 Ga. 512)

## REYNOLDS et al. v. NORVELL.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. JUDGMENT—COLLATERAL ATTACK—WIDOW'S ALLOWANCE.

"While lapse of time between the death of a husband and the application of his widow for a year's support, during which time she lived upon the land and made use of the personalty of her deceased husband, may furnish ground to defeat the application before the ordinary, yet, when the final judgment of that court has been rendered in the case, it is too late to attack it, especially before another court, except for cause apparent upon the face of the record showing a want of jurisdiction either of the person or subject-matter."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 924, 925.]

2. EXECUTORS—WIDOW'S ALLOWANCE—JUDGMENT—VALIDITY.

A testator died, leaving a wife and an insane son by a former marriage. He devised his realty to his wife for life or during widowhood, and upon her death or marriage "one half of the same to go to" his son, "provided he should be restored to sanity and sound mind, and the other half expended" as set out in the second item of his will, the material part of which was as follows: "In the event of the death or marriage of my said wife Elizabeth before the restoration of my said son to sanity, it is my will that my executor * * * shall sell and dispose of all my property, upon such terms as they deem best, either publicly or privately without the order of any court, and my executor * * * shall not be required to give security, all the proceeds after the sale shall be expended in endowing the graves, and erecting suitable monuments over the same, of myself, and former wife, and said son at the graveyard known as the Gilpin graveyard." Upon the death of the testator, his widow entered upon the land and her possession continued until the land was set aside to her as a year's support, which occurred after the son's death. *Held*, that the judgment allowing the widow a year's support in the land is not void on the ground that title had passed out of the testator's estate at the time the year's support was assigned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 684.]

3. JUDGMENT—ATTACK—FRAUD.

A judgment approving the return of commissioners setting aside a year's support, where all the proceedings are regular, cannot be attacked as fraudulent because interested parties could have successfully resisted the judgment had they interposed timely objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 954.]

(Syllabus by the Court.)

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Petition by Almodine Reynolds and others against Thomas E. Norvell, individually and as administrator with the will annexed of Dickerson Reynolds, deceased. An order was entered sustaining a demurrer to the petition, and plaintiffs excepted and brought error. Affirmed.

The petitioners, as sole next of kin of Dickerson Reynolds and Seaborn A. Reynolds, filed their petition to the March term, 1906, of Columbia superior court, against Thomas E. Norvell, individually and as ad-

ministrator with the will annexed of Dickerson Reynolds, wherein they set up the following state of facts: Dickerson Reynolds died in 1886, and his will was duly probated in 1887, and Gilpin the nominated executor duly qualified as such. He left surviving him his wife, Elizabeth, and Seaborn A., a son by a former marriage. Seaborn A. was at the time of the testator's death a lunatic, and was confined in the lunatic asylum. By his will certain realty, which is the subject-matter of the present suit, was devised to his wife for life or during widowhood, and upon the death or marriage "one half of the same to go to" his son, "provided he should be restored to sanity and sound mind, and the other half expended" as set out in the second item of his will. The material of the second item is as follows: "In the event of the death or marriage of my said wife Elizabeth before the restoration of my said son to sanity, it is my will that my executor * * * shall sell and dispose of all my property, upon such terms as they deem best, either publicly or privately without the order of any court, and my executor * * * shall not be required to give security, all the proceeds after the sale shall be expended in endowing the graves, and erecting suitable monuments over the same, of myself, and former wife, and said son, at the graveyard known as the Gilpin graveyard." Gilpin having been adjudged insane, Norvell, the defendant, was appointed administrator with the will annexed in 1895. As such administrator, Norvell in 1898 applied for and had set apart to the widow, as a year's support, the property devised, and the return of the appraisers setting this property aside was duly recorded in 1898. Upon the death of her husband, the widow had entered upon the land bequeathed to her, accepted the devise of the life estate, and lived thereon as tenant for life till the same was set aside to her as a year's support. In 1899 the widow conveyed the land in question to Norvell. Subsequently, in 1902, she died, and since her death Norvell has taken possession of the land, claiming it under the deed from the widow. The son died in 1891, without restoration to sanity. It is alleged that an intestacy resulted as to the one half of the remainder devised to the son, and that the life estate devised to the wife was evidently intended to be in lieu of a year's support; that the proceedings upon the application for a year's support were void by reason of the delay of 11 years after testator's death in making the application, the court by reason of this fact being without jurisdiction to entertain the same. It is charged that the year's support is also void for fraud, in this: that after having accepted the legacy intended by the testator in lieu of a year's support for 11 years, and having at the time of the application therefor no right thereto, "yet nevertheless for the illegal and fraudulent purpose of divesting out of the estate of said testator the fee in said tract of land, and of vesting said fee in said Elizabeth Reynolds, and thence into said Thomas E. Norvell, individually for their own use and benefit, to the destruction of said will and the rights of your petitioners in said testator's estate, said Elizabeth Reynolds and said Thomas E. Norvell, individually and as administrator, as aforesaid, in 1898 illegally and fraudulently combined and confederated together to divest the fee in said tract of land out of the estate of said testator into said Elizabeth Reynolds, under color of a setting apart said tract as a year's support unto the said Elizabeth" for the purpose of conveying it to Norvell, and, to effectuate this combination and confederacy, Norvell, as administrator, applied for the year's support, and the widow conveyed the land to him, concealing from the ordinary "said lack of right in said Elizabeth to a year's support, * * * and the real purpose for which the application was made," and obtained the year's support, and petitioners "had no notice or means of notice of said combination and confederacy until very shortly, to wit, one month before the filing of this writ." It is further alleged that Norvell refuses to turn over one half of the property to petitioners, and has failed to apply the other half towards placing monuments over the graves of the decedent's family, etc., as directed in the will. The prayers are that the year's support be declared void, the deed to Norvell canceled; that petitioners recover one half of the property and mesne profits; that Norvell's letters of administration be revoked, and a trustee appointed to take charge of the other half of the property and the mesne profits thereof; and that the trustee be directed to sell the one half undivided half interest, and apply the proceeds to "the execution of the mortuary trust in said will specified; and, in the event it should appear that the intention of testator was to apply the entire remainder to the mortuary trust, then that the trustee be directed so as to apply the same. Defendant filed his demurrer, which was sustained, and plaintiffs excepted.

B. B. McCowen and Salem Dutcher, for plaintiffs in error. Lamar & Callaway, for defendant in error.

EVANS, P. J. The petition alleges that the tract of land sued for was set aside as a year's support to defendant, Norvell's grantee, and duly ordered to record. "Such a record has the binding force and effect of any other judgment." Birt v. Brown, 106 Ga. 23, 31 S. E. 755; Josey v. Gordon, 107 Ga. 110, 32 S. E. 951. Therefore, if the judgment was valid, and the property set aside was in the estate of the testator, Dickerson Reynolds, at the time it was set aside, petitioners, who claim only as next of kin of

Dickerson Reynolds, have no right to recover.

But it is claimed that the proceedings had upon the application for a year's support were "coram non judice, null and void; * * * it manifestly appearing on the face of the record of said proceedings that said ordinary had no jurisdiction in the premises, said application having been made on behalf of Elizabeth Reynolds, widow of Dickerson Reynolds in 1898 for a year's support out of the estate of said Dickerson Reynolds, who departed this life in 1886, and on whose estate letters testamentary issued on July 4, 1887." Plaintiffs contend that the right to a year's support is limited to the 12 months immediately succeeding the death of the person out of whose estate it may be set aside, and must be asserted within that time, and that, as the application for a year's support in the present case showed that it was not applied for until 11 years after Dickerson Reynold's death, the court of ordinary had no jurisdiction to entertain the application, and the record of the return of the appraisers therein was a void judgment. In Goss v. Greenaway, 70 Ga. 130, this court held: "While lapse of time between the death of a husband and the application by his widow for a year's support, during which time she lived upon the land and made use of the personalty of her deceased husband, may furnish ground to defeat the application before the ordinary, yet, when the final judgment of that court has been rendered in the case, it is too late to attack it, especially before another court, except for causes apparent upon the face of the record showing a want of jurisdiction either of the person or subject-matter." This ruling is expressly put upon the cases of Miller v. Defoor, 50 Ga. 566, where the year's support was allowed after the family had lived nearly 12 years on the land set apart; and Tabb v. Collier, 68 Ga. 643, where the land had been occupied and used by the applicants for several years after the husband and father's death. It will thus be seen that, while mere lapse of time may be a good ground to resist an application for a year's support, it not only does not deprive the court of ordinary of jurisdiction, but does not afford a ground for setting aside the judgment after the return of the appraisers has been admitted to record. See, also, Fulghum v. Fulghum, 111 Ga. 635, 36 S. E. 602; Lowe v. Webb, 85 Ga. 731, 11 S. E. 845; Bardwell v. Edwards, 117 Ga. 824, 45 S. E. 40.

2. But it is contended that, even if the court had jurisdiction, that judgment merely gave to Mrs. Reynolds whatever title was in the estate of her husband, and as the executor had assented to the devise in her husband's will of a life estate to her in this property, and she had entered upon this estate, this assent to the life estate was also an assent to those taking the remainder. It is urged that the title to one half of this remainder passed to the executor as a trustee, for the purpose of applying the same to the care of the graves, as provided in the second item of the will; that, as the son died without restoration to sanity, an intestacy resulted as to the half of the remainder devised to him in the event of his restoration; and that this half vested in the son, and passed to plaintiffs on his death as his next of kin. If it be granted as contended by plaintiff, that the direction to the executor in the second item of the will to sell and disposed of all his property referred only to one half of the remainder, and that, as the son was never restored to sanity, there was an intestacy as to that part of the estate, still the property had not passed out of the estate at the time the year's support was set aside. The will especially provides that, upon the death or marriage of the wife, at least one half of the remainder shall be sold and disposed of by his executor, and the proceeds applied in caring for testator's cemetery lot, and clearly indicates that by such sale title was to be passed out of his estate. If so, there was a partial intestacy as to the other half of the remainder. In Lamar v. Gardner, 113 Ga. 781, 39 S. E. 498, after a full review of the conflicting lines of our decisions upon this point, it was held that under Civ. Code 1895, § 3313, an executor or administrator with the will annexed was required to "administer the undevised, as well as the devised, estate of the testator." If, as claimed, this one half of the remainder was undevised by the testator, it had never been administered by the administrator with the will annexed at the time the judgment setting aside the year's support was rendered, and thus both halves of the remainder remained in the testator's estate, and passed by the judgment.

3. Nor can the petition be sustained as a direct attack by a proceeding in equity to set aside the judgment for fraud. In the first place, the estate of the widow, in whose favor the judgment was rendered, is not represented, and it would seem that her legal representative is a necessary party. In the second place, the petition does not set out any acts of fraud or fraudulent scheme, which would justify a court of equity in setting aside this judgment. There is no allegation of concealment by the administrator in making the application, and, as no attack is made upon the regularity of the proceedings, it must have been advertised by citation in the usual way, which is the open and only method of service provided by law. The appraisers made their return, and no one came forward to oppose the record of the proceedings. The representative of the estate made the application, and not the widow. It is not alleged that the appraisers, who alone selected the property to be set aside, were in any way influenced to make the return they made. Whatever may have

been the purpose of Norvell and the widow, it is manifest that the appraisers intended to give the widow the full title to the property set apart. Their return and its record alone are the judgment, and it is not even hinted that the administrator or the widow in any way influenced this return. It could not have been material to them, or to plaintiffs, what disposition she made or wished to make of the property in the event it was set aside. If it became hers, it was no concern of plaintiffs what she did with it. They do not allege that anything was done to prevent them from knowing of the application, but allege merely that they "had no notice or means of notice of said combination and confederacy" until a month prior to filing their petition. They had the only notice the law requires—the citation from the court of ordinary, regularly published. If a judgment were recovered in an action at law upon a petition regularly served, it would not avail the defendant in fi. fa. in a proceeding to set it aside to say merely that he did not know that the suit had been instituted. The attack upon the judgment in the present case must resolve itself either into a plea of payment, or the bar of the statute of limitations, both of which are defenses that must be set up before judgment. The law gives the widow a right to a year's support, nor is she deprived of that right by accepting a legacy under his will, unless expressly in lieu thereof. It has been more than once ruled that, where upon the death of the husband a widow and minor children have a life estate in the property by virtue of a homestead, this "does not defeat their right, after his death, to the statutory year's support, even though for more than a year succeeding his death they may have lived on the homestead estate and derived a support from it." Bardwell v. Edwards, supra. The mere fact that Mrs. Reynolds had accepted the life estate, and subsequently was awarded by the appraisers appointed the remainder interest as a year's support, is surely no ground of fraud.

Since the petition showed that the remainder passed to defendant's grantee by the record of the return of the appraisers in the year's support proceeding, and fails to show any sufficient reason, either in law or equity, why this judgment should be set aside, the trial judge did not err in sustaining the demurrer to the petition.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 613)

## McCALL v. LEWIS.

(Supreme Court of Georgia. Nov. 18, 1907.)

EXECUTION—CLAIM—TRAVERSE — JOINDER OF ISSUE—DISMISSAL—DISCRETION.

A the trial of this case in the court below, the same being the trial of an issue arising upon the interposition of a claim by Lewis to the levy of a fi. fa. in favor of Bentley, administrator, for use, against Walker, defendant in fi. fa., McCall filed a petition setting up that he was the purchaser and owner of said fi. fa., and praying to be made a party plaintiff in said case, whereupon an order was granted making McCall a party plaintiff. Twenty minutes later claimant's attorney moved to dismiss the levy on the ground that issue had not been tendered within five minutes after the announcement of ready by both sides. The court sustained the motion and dismissed the levy. It appears that within five minutes after the announcement of ready McCall wrote upon the back of his said petition, in which he had prayed to be made a party to the case, the following traverse of claimant's affidavit: "And now comes the plaintiff and joins issue, and says that the property is subject to said fi. fa." No traverse appears on the claim papers, and plaintiff did not call the attention of the court, nor of claimant's attorney, to the foregoing traverse until twenty minutes after the announcement of ready by both sides; and, it not appearing that the attorney for claimant had done anything that could be construed as a waiver of the tender of issue being made at the proper time and in the regular manner, *held*, that the writing of said traverse upon the back of said petition, no attention having been called thereto, was not a substantial compliance with Code, § 5646, and the court did not err in dismissing the levy, in the exercise of a sound discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 570.]

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Execution levy in favor of one Bentley, as administrator, for use, etc., against one Walker, in which J. O. Lewis interposed a claim, and W. C. McCall filed a petition alleging that he was the purchaser and owner of the fi. fa., praying to be made a party plaintiff in the case, which was allowed. From an order dismissing the levy, McCall brings error. Affirmed.

J. D. Wade, Jr., and W. C. McCall, for plaintiff in error. Stanley S. Bennet, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

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(129 Ga. 562)

## MARTIN et al. v. BROWN et al.

(Supreme Court of Georgia. Nov. 15, 1907.)

1. MARSHALING ASSETS AND SECURITIES — RIGHT TO RELIEF.

Equity will not entertain jurisdiction of a suit by a solvent individual to marshal his assets, to collect various items severally demanded of some of the defendants, and to adjudicate the liability or nonliability of his property to disassociated claims of other defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marshaling Assets, §§ 1–4.]

2. EQUITY — CAUSES OF ACTION — JOINDER — CONTRACT AND TORT—MULTIFARIOUSNESS.

In a suit for equitable relief the union of distinct causes of action, one arising out of tort, and the other based on contractual liability, renders the petition multifarious.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 341–367.]

3. SAME—JOINDER OF PARTIES.

A petition by five plaintiffs, wherein a cause of action in favor of all of them against some of the defendants is joined with a cause of action in favor of four of them against other defendants, is multifarious. The coincidence of some of the defendants to both causes of action does not relieve the petition of this infirmity.

4. INJUNCTION—RELIEF—BILL.

An injunction will not be granted to preserve the status upon which to decree relief upon the various unrelated matters which render a petition multifarious.

5. EQUITY — PLEADING — "MULTIFARIOUSNESS."

"Multifariousness" is the improper joining in one bill of distinct and independent unconnected matters against one defendant, or the demand of several matters of a distinct and independent nature against several defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 340.

For other definitions, see Words and Phrases, vol. 5, pp. 4616–4618; vol. 8, p. 7726.]

(Syllabus by the Court.)

Error from Superior Court, Calhoun County; W. N. Spence, Judge.

Suit by Herbert Brown and others, minors, by their next friend, against R. B. Martin and others. Judgment for complainants and defendants bring error. Reversed.

Herbert Brown, Louis Brown, Kathleen Brown, Mary Brown, and Ruth Madden, minors, by their next friend, filed an equitable petition in the superior court of Calhoun county against R. W. Martin, J. O. Exum, Mrs. W. F. Madden, B. M. Lee, Sealy & Co., the Cowart Loftin Company, W. L. Godwin, the Dawson Naval Stores & Lumber Company, L. H. Davis, sheriff of Calhoun county, D. W. James, and the Bank of Randolph, defendants, being residents of Calhoun, Early, Terrell, and Randolph counties. The allegations and prayers of the petition are substantially as follows: On October 6, 1893, A. J. Bell, who was the father of plaintiffs' mother, then Mrs. Rilla R. Brown, now the defendant Mrs. W. F. Madden, made and delivered a deed, wherein it is recited "that the said Andrew J. Bell, for and in consideration of the natural love and affection he has for his daughter, said Rilla R. Brown, hereby grants, gives and conveys to said Rilla R. Brown, her heirs and assigns," certain described lands, aggregating 1,778 acres, together with certain mules, wagons, plantation implements, etc., then on the land, "to have and hold the same unto the said Rilla R. Brown for and during the period of her natural life for the comfortable support and maintenance of the said Rilla R. Brown and her children, and at her death the said property to vest in her children, share and share alike, forever in fee simple." Herbert Brown and Louis Brown were in life at the time this deed was made; the remaining plaintiffs having been born since its execution and delivery. Brown died December 12, 1901, and Mrs. Brown subsequently married her present husband, Madden. Since December, 1901, the property and its proceeds have been managed and controlled by Mrs. Madden "directly or through her agents and assignees, or those who had been such and become tortfeasors as hereinafter set out." In addition to the property described in this deed and its proceeds, Mrs. Madden as administrator of her former husband, E. H. Brown, and as natural guardian of all of plaintiffs, except the infant Ruth Madden, has since his death, until March 6, 1906, "in like manner managed and controlled * * * the property which said plaintiffs inherited from the said Brown, their father," consisting of lands in Calhoun, Baker, and Early counties, a hotel in Arlington, and other property, of the value of $10,000. On March 9, 1906, R. B. Martin qualified as guardian of all of the plaintiffs except Ruth Madden, and gave bond with J. S. Cowart and J. O. Exum as sureties in the sum of $16,000. Since his appointment as guardian he has also managed and controlled all of the property of Mrs. Madden and plaintiffs, and still manages and controls the same.

On March 26, 1904, Mrs. Madden entered into an arrangement with defendant Godwin, whereby he claimed to have been made her general agent both individually and as representative of plaintiffs, and as such agent managed and controlled all of the property until September 25, 1905. During this time Godwin entered into an arrangement with defendant Lee, whereby Lee claims to have rented the "Godwin-Cordray place" for five years from January 1, 1904, for four bales of cotton a year, although the same is well worth eight bales per annum, and Lee has paid these rents to Mrs. Madden or her agents, "and the same have not been applied to the proper use of plaintiffs, who are the donees and tenants in common under said deed of said gift from A. J. Bell." Lee is still in possession under his lease. "Plaintiffs charge that said leasing was without authority of law, and in violation of plaintiffs' rights, and the said Godwin and the said Madden and the said Lee, by reason of their said acts in reference to said place, have injured and damaged plaintiffs in the sum of $1,000, * * * and have diverted that amount from the use of petitioners," and they pray for an accounting, and a judgment for the rents paid to Mrs. Madden, and for actual damages, and for a decree so shaped as to adjust the equities of the parties, and that he be enjoined from continuing on the land.

On February 10, 1904, Godwin, claiming to act as Mrs. Madden's agent, made an arrangement with the Moye Naval Stores Company, by which this company claims to have purchased the timber on certain lands embraced in the Bell deed, and afterwards entered thereon and boxed and worked the timber for turpentine purposes for a time not stated, and subsequently transferred this lease or

purchase to the Dawson Naval Stores Company for $3,000, and the latter company are now cutting and removing the timber from this land. It is alleged that Mrs. Madden, Godwin, the Moye Company, and the Dawson Company, by virtue of these alleged tortious acts, have injured and damaged petitioners in the sum of $5,000, and plaintiffs pray for an accounting and a judgment for actual damages, and for an injunction against the Dawson Company restraining it from cutting or removing timber or lumber from the land. The Dawson Company also entered into an arrangement with Mrs. Madden for the purchase of certain other timber interests on other lands embraced in the Bell deed, which was transferred to Sealy & Co., who worked it for turpentine, and removed all the timber, thereby damaging plaintiffs in the sum of $2,500, and they pray for an accounting and a judgment against Sealy & Co. for the value of this timber, and for an injunction against the Dawson Company and Sealy & Co. restraining them from continuing on the land, and from cutting the timber thereon, and that their pretended leases be delivered up and canceled.

Martin, since taking charge of the property in 1906, has continued to collect all the rents and profits of the yearly value of $3,000, and converted the same to his own use. As guardian, he fails and refuses to make returns to the ordinary as required by law. In addition to these, Martin and Exum, his son-in-law (who is charged to be in collusion with Martin), have sold off and received the proceeds of certain timber interests to the parties unknown, and Martin has admitted receiving $444 from such sales, but has failed to account therefor. Martin has also converted certain mules and live stock of petitioners to his own use, and mingled them with his own so as to make identification difficult, if not impossible. He has allowed the property to run down, the lands to be improperly cultivated, the stock to be improperly kept, and the buildings and fences to become dilapidated. He has failed to pay the taxes, but has allowed tax executions to be issued against the property, sold the timber on part of the land belonging to the estate of E. H. Brown, and committed waste. Plaintiffs (except Madden) pray for an accounting, and for a judgment against Martin and the sureties on his bond for the amount found to be due by Martin for the amount Martin, as transferee, holds a mortgage given by Mrs. Madden to A. D. Harris for $3,500 on certain described lands (embraced in the Bell deed), which mortgage it is alleged Mrs. Madden had no right to make except to a one-fifth undivided interest in the life estate, and her acts of waste have damaged plaintiffs in an amount exceeding her interest in this life estate, and she has forfeited her life estate, and a decree is prayed adjudicating that she has no interest in the property subject to the lien of the mortgage, and that her life estate be declared forfeited.

It is alleged that although this mortgage and all other claims that Martin holds against plaintiffs or their mother have been fully paid by the proceeds of their property which has come into his hands, that he is proceeding to advertise the mortgaged property for sale under a power contained in the mortgage, stating in the advertisement that he will make a deed conveying a fee-simple title to the purchaser in the name of Mrs. Madden, his purpose being to bid in the property either directly or through his agent, for an insignificant amount, and to secure a deed to same, which would create a cloud upon plaintiffs' title. They pray that he be enjoined from proceeding to advertise or sell the property, and that he be compelled to surrender up his mortgage for cancellation. Martin also holds an insurance policy on the life of Mrs. Madden for $10,000 as collateral for the amounts he claims she owes him, the premiums on which have been paid by trust funds belonging to plaintiffs, and they pray that he be required to deliver this policy to them. On October 14, 1905, D. W. James sued out an attachment against Mrs. Madden for $1,655.50, and had the same levied on two brick stores in the town of Arlington, and upon certain lands embraced in the Bell deed. These stores were built on land purchased with trust funds belonging to plaintiffs (except Madden) and paid for with similar trust funds. This property is alleged not to be subject to the lien of the attachment, and they pray that their equitable title therein be set up in the present proceeding, and that the attachment proceedings be enjoined. Mrs. Madden had by deed conveyed these stores to the Bank of Randolph as security for a pre-existing debt, with full knowledge on the part of the bank of plaintiffs' equities. They pray that this deed be decreed to be null and void, and that it be surrendered for cancellation. In December, 1906, the Cowart-Loftin Company obtained a judgment against Mrs. Madden on an attachment previously sued out for $800, which has been levied on certain real and personal property embraced in the Bell deed, which is advertised for sale on the first Tuesday in February, 1907. They pray for a decree declaring this property to be the property of plaintiffs, and that the sale be enjoined. Notwithstanding Martin's agency has been revoked, he and Exum continue to hold this property, renting and controlling it, and they are wasting and mismanaging it in such a way that the whole or a large part of its income will be lost unless the relief herein prayed be granted, and there is immediate danger of waste and destruction of all their property which may be in his hands or those of the other defendants. "Plaintiffs show that all of the matters and things mentioned

herein relate to the estate of plaintiffs in the hands of said Martin and said Mrs. Madden, and their joint tort-feasors, and that it is necessary to have all the parties defendants named herein as parties to this suit, that the assets of said estate of plaintiffs be properly marshaled, and all the equities belonging thereto be adjusted, and plaintiffs' rights and others' be protected."

The further prayers are that the assets of plaintiffs' estate be marshaled, and all parties defendant be required to set up their rights with reference thereto in this case; that a receiver be appointed to take charge of the assets; that plaintiffs have judgment recovering from each of the defendants such of their property as may be shown to be in their hands, for process, and such other and further relief as they may be entitled to.

At the interlocutory hearing the defendants demurred and filed their answers, and proof was submitted by both plaintiffs and defendants. An injunction was granted as to certain defendants and a receiver appointed, and to the judgment thereon defendants excepted.

S. A. Roddenbery, Smith & Miller, Calhoun & Lyon, and Pottle & Glessner, for plaintiff in error. Pope & Bennet and J. C. Boynton, for defendants in error.

EVANS, P. J. A ground of demurrer urged at the interlocutory hearing was that the petition was multifarious, and the writ of injunction should be denied on this account. An injunction will not be granted to preserve the status upon which to decree relief on the various unrelated matters which render the petition multifarious. White v. North. Ga. Elec. Co., 128 Ga. 539, 58 S. E. 33. So that our investigation of the alleged errors of the trial court may well begin at this point. Multifariousness is defined in Nail v. Mobley, 9 Ga. 280, to be "the improperly joining in one bill distinct and independent matters, and thereby confounding them, as, for example, the uniting in one bill of several matters perfectly distinct and unconnected against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." The latter phase of this definition finds terse expression in Civ. Code 1895, § 4938: "Distinct and separate claims of and against different persons cannot be joined in the same action." Under the uniform procedure act of 1887, a plaintiff may in the same suit unite a legal and an equitable cause of action, and have appropriate relief. Civ. Code 1895, § 4937. As liberal as our system of pleading is, we have not reached the extent that a litigant may have all persons against whom he has a complaint into court in one suit, and demand separate relief against each, upon entirely disassociated and unrelated matters. However desirable it may be to a litigant to bring into one forum at the same time all persons against whom he has a grievance, without regard to their residence, or the nature of the claims severally demanded, his convenience cannot be consulted to the sacrifice of the law and the rights of the adverse parties. Objection to a petition on the ground of multifariousness is not a favorite of the law. Equity delights in the completeness of its relief, and, when it acquires jurisdiction for one purpose, it will generally afford full relief to all the parties. But, before equity will harken to the prayer of a litigant, it will first ascertain from the pleadings its jurisdiction to grant the relief prayed. The petition in the present case is framed on the theory that the defendants have in the manner set out unlawfully deprived plaintiffs of some of their property, and have damaged them by neglect; not that all of the defendants have concurred in the various acts of which complaint is made, but that some one or other defendant in some way or other has either damaged their property, or is threatening to do so, or has deprived them of some of their property, or has become liable to them because of neglect of duty. This petition does not fall within the scope of the case of Conley v. Buck, 100 Ga. 187, 28 S. E. 97, where it was ruled that a petition would not be multifarious, though it concerned things of different natures against several defendants, whose rights were distinct, if it set forth one connected interest among them all, centering in the point in issue in the cause. The probable purpose of the pleader in praying that the plaintiffs' property be marshaled, and its status with respect to the various claims of the defendants be adjudicated in their several relations to the plaintiffs' property, was to supply that element so prominent in the Conley and Buck Case, viz., the common connection of the various defendants' acts with the plaintiffs' property, as affording one general right to equitable relief. We have been unable to find any authority for the proposition that a solvent person may come into a court of equity, and ask the court to adjust in one suit his general business affairs, so that he may know what the net result would be. It was decided by this court that a corporation cannot as a plaintiff maintain an equitable suit to marshal its own assets. Steele Lumber Co. v. Laurens Co., 98 Ga. 329, 24 S. E. 755. The reason for the refusal of a court of equity to take charge of the assets of a solvent individual, and adjudicate what may or may not be a claim against his property, is plain. If such practice was allowable, the court would be called upon to administer the property of any solvent business man who found himself unable to conveniently deal with his own affairs. Creditors may in a proper case marshal the assets of an insolvent debtor, and administrators of an insolvent intestate, where the affairs of the estate are in a com-

plicated condition, may maintain a suit to marshal the assets of their intestate. But courts will not exercise any species of judicial paternalism over the business affairs of a solvent litigant, so as to take charge of his property and untangle its complexities, and relieve him of the burden of a laborious, and perhaps disagreeable task. The untenableness of this proposition becomes more manifest when several persons, owning distinct properties, join in such a petition.

If we apply either test involved in the definition given in Nail v. Mobley, supra, the petition in the instant case must be held to be multifarious. An analysis of the petition will demonstrate (1) the improper joining in one petition of distinct and disconnected matters, thereby confounding them; and (2) the demand of several matters of a distinct and independent nature against several defendants. We will apply the first test. The plaintiffs are minors, and they ask to recover of some of the defendants damages to the freehold resulting from spoliation of the timber. These defendants are declared to be joint tort-feasors. They ask, also, that they have judgment on a guardian's bond against the guardian and his sureties for an alleged devastavit of the guardian. Here is a union of two entirely distinct matters, not only disconnected from each other, but the alleged liability in one instance is ex delicto, and in the other it is based on contract. Now, apply the second test. All the plaintiffs take as remaindermen under the Bell deed. The deed conveys the land to Mrs. Madden, the mother of plaintiffs, for life, with remainder over to them on her death. They are not joint tenants with their mother in the life estate, and, at most, they could only claim a support and maintenance as a charge upon the land. Whether the terms of the deed charge a support of the remaindermen upon the life estate is not decided, as it is not necessary for the adjudication of the question in hand. Hence, as to the realty passing by the Bell deed, all the plaintiffs are interested in the protection of the remainder estate. But so much of the realty and personalty included in the petition which was inherited by the four plaintiffs (the Brown children) from their father belongs exclusively to them, and their coplaintiff, Ruth Madden, has no interest therein. Then, clearly, the petition is multifarious, because all the plaintiffs are claiming relief against some of the defendants on an alleged cause of action relating to the property passing to them in remainder under the Bell deed, and four of the five plaintiffs are claiming relief against other defendants based on transactions relating to property inherited from their father. Surely these are separate and distinct claims of and against different person, which cannot be joined in the same suit without rendering the petition multifarious.

It is not necessary to draw further illustrations of the violation of this rule of pleading from the summary of facts. Neither would it be profitable to spread out the evidence submitted on the interlocutory hearing, as the injunction and receivership comprehended the various matters which rendered the petition multifarious.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 466)

## DRAKE et al., County Com'rs, v. BECK, Solicitor, et al.

(Supreme Court of Georgia. Nov. 13, 1907.)

1. OFFICERS — TERM OF OFFICE — STATUTORY PROVISIONS.

Construing as a whole the act of August 22, 1907 (Acts 1907, p. 193), which amended the act of 1897 creating the city court of Griffin (Acts 1897, p. 462), it did not, immediately upon its approval, oust the judge and solicitor of that court from office. They will continue to hold until their successors are elected and qualified in accordance with the terms of the act of 1907.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 71.]

2. JUDGES—SALARY—INCREASE.

The salary of the present incumbent in the office of judge of the city of Griffin, prior to the election provided for, was not increased by the act of 1907; but remained the same as previously fixed by the act of 1897.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, § 82.]

(Syllabus by the Court.)

Error from Superior Court, Spalding County; E. J. Reagan, Judge.

Petition by R. H. Drake and others, commissioners of Spalding county, for leave to file an information in the nature of a quo warranto to determine the right of W. H. Beck, solicitor of the city court of Griffin, to hold that office, the petitioners claiming that by the act of August 22, 1907 (Acts 1907, p. 193), that office was abolished or at least that the tenure thereof was suspended until filled by election or appointment. From a judgment sustaining a demurrer to the petition, petitioners bring error and the solicitor files a cross-bill. Mandamus by E. W. Hammond, judge of the city court, against R. H. Drake and others, commissioners of Spalding county, to command payment of his salary, the judge claiming that the same was increased by the act of August 22, 1907 (Acts 1907, p. 193). From a judgment making the mandamus absolute as to part of the salary demanded, the commissioners bring error and the judge assigns a cross-bill. In the quo warranto case judgment on the main bill and on the cross-bill dismissed. In the mandamus case, judgment on the main bill affirmed and cross-bill affirmed.

W. E. H. Searcy, Jr., and Lloyd Cleveland, for plaintiffs in error. Wm. H. Beck, Jno. I. Hall, Robt. T. Daniel, J. J. Flint, and J. D. Boyd, for defendant in error.

LUMPKIN, J. On December 14, 1897, an act was approved by which the city court of Griffin was established, its jurisdiction and powers defined, and provision made for the appointment of a judge and other officers thereof, and for the carrying of cases therefrom by bills of exceptions to the Supreme Court. Acts 1897, p. 462. By the third section of that act, it was declared "that there shall be a judge of the said city court of Griffin who shall be appointed by the Governor, by and with the advice and consent of the Senate, whose term of office shall be four years, and all vacancies in said office shall be filled by appointment by the Governor for the residue of the unexpired term; such appointment being subject to the approval of the Senate." It fixed the salary of the judge at $800 per annum, to be paid from the county treasury, and declared that this should not be increased or diminished during his term of office. The fifth section of the act provided that there should be a solicitor of the court, to be appointed by the judge, whose term of office should be two years, and that the judge might remove the solicitor and appoint a successor at any time. It also fixed his fees, and the oath to be taken and the bond to be given by him. In 1900 an act was passed which changed the mode of appointment of the solicitor, so that, instead of being appointed by the judge, he should be appointed by the Governor. Acts 1900, p. 137. On August 22, 1907, an act was passed having the following title: "An act to amend an act entitled 'An act to establish the city court of Griffin in Spalding county,' approved December 14, 1897, and the act amendatory thereof approved December 17, 1900, as follows: First. By providing for the election of the judge of said court by the qualified voters of Spalding county and providing for an increase in the salary of the said judge. Second. By providing for the election of the solicitor of the city court of Griffin by the qualified voters of said county of Spalding; by providing for the collection of fees of the solicitor of the city court of Griffin and the payment of the salary of the said solicitor and the disposition of the fees aforesaid." Acts 1907, p. 193. In this act it was declared that section 3 of the act of 1897 "be, and the same is, hereby stricken and repealed and the following be, and the same is, hereby substituted and enacted in lieu thereof, to wit: 'Sec. 3. Be it further enacted by authority of the same, that there shall be a judge of the city court of Griffin, who shall be elected by the qualified voters of the county of Spalding and whose term of office shall be four years, and all vacancies in the said office shall be filled by appointment of the Governor of Georgia for the residue of the unexpired term. The first election held under the provisions of this act shall be at the same time and place and under all the rules and regulations provided for the election of county officers of Spalding county, in October, 1908, and shall be for a term of years beginning January 1, 1909. Subsequent elections shall be held at intervals of four years from date of this first election. The judge of the city court of Griffin shall receive a salary of fourteen hundred dollars per annum, which shall not be increased or diminished during his term of office and which shall be paid monthly on the receipt of said judge out of the treasury of Spalding county.'" In like manner, it was declared that section 5 of the act of 1897 "be, and the same is, hereby stricken and repealed and the following section is hereby substituted and enacted in lieu and instead thereof." Then followed a provision that there should be a solicitor of the city court to be elected in like manner as the judge, and in regard to his qualifications, compensation, oath of office, and bond. The qualifications and bond required were different from those in the original act, and a fixed salary was provided in lieu of fees. It was declared that the solicitor should pay into the county treasury all the money to which he would have been entitled as fees under the act of 1897. Then follows this statement: "It is hereby enacted, however, that the present solicitor of the city court of Griffin shall not be entitled to collect any insolvent costs out of any funds which may come into court after January 1, 1909, until after the solicitor elected under this act and his successors shall have collected out of the funds brought in court during their respective terms, all the costs, solvent or insolvent, to which they may be entitled."

The county commissioners of Spalding county, in their official capacity and as citizens and taxpayers, presented their petition for leave to file an information in the nature of a quo warranto to determine the right of the solicitor who held office prior to the act of 1907 to continue to exercise the functions of such office, claiming that by that act the office was abolished, or at least that the tenure thereof was suspended until it should be filled by election or appointment. The respondent demurred to the petition on several grounds. The court sustained the demurrer on the ground that under the act of 1907 the office of solicitor of the city court was not abolished, but that the respondent was still the solicitor of that court. The petitioner excepted to the sustaining of the demurrer on this ground; and the respondent filed a cross-bill of exceptions because the demurrer was not sustained on all the grounds thereof. The commissioners declined to issue a warrant or order on the county treasurer for the salary of the judge after the passage of the act of 1907. He applied for a mandamus to compel payment of his salary at the rate of $1,400 per annum. The court made the mandamus absolute, so far as to hold that he was entitled to the payment of a salary, but ruled that the amount was at the rate of $800 per annum, as fixed by the act of 1897. The commissioners excepted to the ruling first

stated, and he excepted to the decision as to the amount of the salary by cross-bill of exceptions.

The city court of Griffin was created by the Legislature. It was not a court which the Constitution required to exist. The Legislature had power to abolish the court, or to amend the act establishing it; and this could be done, although it might result in shortening the terms of office of the judge and solicitor, or terminating their tenure of office and requiring successors to be elected, in lieu of the officials previously appointed by the Governor. Dallis v. Griffin, 117 Ga. 408, 43 S. E. 758; Waters v. McDowell, 126 Ga. 807, 56 S. E. 95. The authority of the Legislature is not denied; but the controlling question is, not what the Legislature could do, but what did it actually do by the act of August 22, 1907. It is not so much a question of legislative power, as of legislative intent. Did the Legislature, by that act, intend to abolish the offices of judge and solicitor of the city court of Griffin, or to terminate the authority of the occupants of those offices to further exercise their functions, until a judge and solicitor should be elected? Upon the answer to this question both cases depend.

In establishing the city court and providing for its procedure by the act of 1897, the Legislature impliedly determined that such a court would subserve the public necessity or the public convenience. They could have changed this determination and could have abolished the court; but mere amendments to the act establishing the court would not destroy the presumption of the utility of its continued operation, unless there was some expression or implication to that effect. There is nothing in the act of 1907 to indicate any such legislative view. It provides for the continuance of the court, but only changes the method of selecting its judge and solicitor from appointment to election. The caption does not declare that the act is to repeal or even generally to amend the act creating the city court of Griffin, nor does it contain the somewhat vague, precautionary words, "and for other purposes." It sets out that the act is one to amend the former act in certain specified particulars, and enumerates them. No doubt the act can be broad enough to carry into effect the purposes mentioned; but there is nowhere in the title any intimation that it was the legislative purpose to oust the judge and solicitor immediately, or to leave the court existing in name, but in a state of coma as to all its functions for more than a year, and then to reawaken it into activity after the election of a new judge and a solicitor. This was a court of record. It had both civil and criminal jurisdiction. It may fairly be assumed that there were pending before it cases of both characters. There may have been motions for new trials pending. It is common practice, where a brief of evidence cannot be made up within 30 days, for the presiding judge to allow until some definite time for it to be completed and approved. If the judge were legislated out of office with no provision for cases thus pending, what would become of them? If there were persons accused of crime before that court and who were in jail awaiting trial, what would become of them and their cases in the alleged interregnum between August 22, 1907, the date of the passage of the act, and October, 1908, the date when the first election would be held? Did the Legislature intend that pending suits should languish for 13 or 14 months, and that motions for new trials and such other matters as required the action of a judge within a limited time should die of inanition? Or did they intend, if there should be persons in jail awaiting trial, that they should cultivate the virtue of patience until after the election in 1908? The act provides for direct exception from that court to the Supreme Court (now to the Court of Appeals). If there had been judgments rendered against parties who desired to except and have their cases reviewed, did the Legislature intend to cut off this right by terminating the official existence of the judge? Or did they intend for him to be treated as one who was dead, or whose term of office had expired, or who had resigned, and have bills of exceptions verified as in such cases? No provision was made in the act of 1907, by transfer of pending matters to any other court or otherwise, for such contingencies. It may be doubted whether the Legislature could have constitutionally effected such results, if they had sought to do so; and we feel very well assured that they had no such purpose. Again, in the latter part of the act, it is declared that the solicitor of the city court shall collect all the money which he is entitled to under the distribution of fines and forfeitures in that court, and turn over the money to the county treasurer. This evidently has reference to the solicitor who shall be elected under the former provisions of the act. Then occurs this expression: "It is hereby enacted, however, that the present solicitor of the city court of Griffin shall not be entitled to collect any insolvent costs out of any funds which may come into court after January 1, 1909, until after the solicitor elected under this act and his successors shall have collected out of the funds brought in court during their respective terms, all costs, solvent or insolvent, to which they may be entitled." This clause is perhaps susceptible of the construction that it merely meant to prohibit the solicitor who had held office from claiming an interest in funds collected by the solicitor elected and holding office after January 1, 1909, on account of insolvent costs, except under the condition stated.

But the language may be fairly used to throw some light, though perhaps not very

strong, upon the manner in which the Legislature considered the solicitor already in office. The act was of no effect until it was approved. When it was approved and became the law, it referred to the solicitor as "the present solicitor." Now, if the act itself operated to terminate the office of the previous incumbent eo instanti upon becoming of force by being approved, he was not then the present solicitor, but the past solicitor. Moreover, the manner in which the clause is framed in referring to any funds which may come into court after January 1, 1909, permits the inference, if it does not indicate the expectation, that funds may come in before that time. This verbal analysis may not in itself furnish strong proof of the legislative purpose, but it may be legitimately considered along with other matters already referred to. While the act uses the expression that sections 3 and 5 of the act of 1897 are stricken and repealed, and that certain provisions shall be substituted therefor, yet, in the light of what has been said, we think that the evident legislative purpose was merely to amend that act and to provide for the election of a judge and solicitor in 1908 and thereafter; and that it was not the purpose to destroy either the court or its officers in the interval between the passage of the act and the election of their successors.

The ruling here made does not conflict with that in Butner v. Boifeuillet, 100 Ga. 743, 28 S. E. 464. There the charter of a city established by legislative act the office of chief of police. By a later act so much of the charter as created the position as a distinctive charter office was repealed and the title of the incumbent to the office was extinguished; but by the same act the municipal council was given authority to elect a chief of police.

2. As we have held that the act of 1907 was prospective in character, and that the amendment intended to provide for an election for successors to the judge and solicitor at a fixed time, and for the qualifications and salaries of the persons elected, this controls the contention that it increased the salary of the present incumbent in the office of judge. The terms of the amendment did not apply to him at all except to limit the time of his holding by appointment. Having held that for this reason the act did not terminate his official existence, we cannot hold that it nevertheless increased his official salary. Until the election provided for, he retains his office under the terms of the act of 1897, and at the salary therein fixed. In the case of Drake et al., Com'rs, v. Hammond, the judgment complained of in the main bill is affirmed, and also that complained of in the cross-bill of exceptions. In the case of Drake et al. v. Beck, on the main bill of exceptions the judgment is affirmed. The cross-bill is dismissed. All the Justices concur.

(3 Ga. App. 152)

## SMITH v. STATE. (No. 787.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

JUDGES—TENURE OF OFFICE.

This case is controlled by the decision of the Supreme Court in the case of Drake et al. v. Beck, 129 Ga. —, 59 S. E. 306.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Ed Smith was convicted of crime, and brings error. Affirmed.

Farr & Williams, for plaintiff in error. Wm. H. Beck, Sol., for defendant in error.

POWELL, J. Judgment affirmed.

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(3 Ga. App. 69)

## ROGERS v. MAYERS. (No. 493.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. WRIT OF ERROR—DISMISSAL—FAILURE TO FILE BRIEF.

Noncompliance with rule 15 of this court (57 S. E. xi), relating to filing and service of briefs, is not a ground for dismissal of a writ of error; but such violation is a matter between the court and the offending attorney, on contempt proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3108-3110.]

2. CERTIORARI—WHEN SUSTAINED.

Under the evidence in the record, the judge of the superior court did not err in sustaining the certiorari and in remanding the case for a new trial under the instructions given.

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action between M. W. Rogers and A. W. Mayers. From the judgment, Rogers brings error. Affirmed.

W. T. Burkhalter, for plaintiff in error. H. C. Beasley, for defendant in error.

HILL, C. J. Judgment affirmed.

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(3 Ga. App. 65)

## AMERICUS MFG. & IMP. CO. v. HIGHTOWER. (No. 484.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. LANDLORD AND TENANT—ACTION FOR RENT—RELEASE OF TENANT.

The material question in this case is fully controlled by the position of this court in Cuesta v. Goldsmith, 1 Ga. App. 48 (1), 57 S. E. 983.

2. SAME—EVIDENCE.

The verdict for the defendant, being wholly unsupported by the evidence, must be set aside as contrary to law.

(Syllabus by the Court.)

Error from City Court of Americus; J. E Sheppard, Judge pro hac.

Action by the Americus Manufacturing & Improvement Company against A. F. Hightower. Judgment for defendant, and plaintiff brings error. Reversed.

Ellis, Webb & Ellis and Lane, Maynard & Hooper, for plaintiff in error. H. B. Simmons, for defendant in error.

HILL, C. J. The Americus Manufacturing & Improvement Company sued out a distress warrant against Mrs. A. F. Hightower for $109.32, besides interest, for rent due under a rent contract for a storehouse in the city of Americus from May to December, 1906, inclusive. The defendant filed a counter affidavit, in which she set up that the sum distrained for was not due, and, further, that she had been released from said rent contract by the plaintiff, who had accepted as tenant, in lieu of herself, her subtenant, one E. G. Leben, to whom she had sublet the premises with the sanction and the approval of the plaintiff; that subsequently the plaintiff collected the rents from said Leben and recognized him as the tenant under said contract; and that the indebtedness distrained for was the indebtedness of Leben, and not of the defendant. The defendant further averred that the plaintiff, without her knowledge or consent, had allowed the said Leben to get in arrears with the rent, and after his bankruptcy had demanded the rent due by him of the defendant. The verdict was for the defendant, and the plaintiff's motion for a new trial was overruled.

The evidence for the plaintiff was a contract of lease, made between it and the defendant, for the period of three years from the 8th day of September, 1905, for a stipulated rental, and that the defendant had not paid the rent due for the months covered by the distress warrant, and that demand had been repeatedly made on her for the amount, and payment refused. The evidence further disclosed the fact that the defendant, soon after the execution of the rent contract, had sold her stock of merchandise in the rented storehouse to one E. G. Leben, and had given the possession of the store to him, and had asked the secretary and treasurer of the plaintiff corporation to consent that the rent contract of the defendant with the plaintiff be transferred to and assumed by Leben, and the secretary and treasurer had agreed to submit her request to the board of directors of the plaintiff; that for several months after the premises had been sublet by the defendant to Leben he (Leben) had paid the rent to the plaintiff, but that in every case where this was done the defendant had called upon the plaintiff for the rent, and she had instructed its secretary and treasurer to go to Leben and that he would pay the rent for her, which he had done for several months; that all the rent the secretary of the company had collected from Leben by direction of the defendant had been placed to her credit, and that the company had never in any way recognized Leben as its tenant or released the defendant from her contract; that when Leben got behind with the rent the secretary of the company informed the defendant of the fact and demanded of her the payment of the rent; that when Leben went into bankruptcy he was behind in the payment of the rent, and at the request of the defendant the secretary of the plaintiff company proved, in behalf of the defendant, Leben's debt to her on account of the rents, and collected on said proof an amount for the rent, and placed the same, at her request, to the credit of her rent account with the plaintiff; and that the board of directors of the plaintiff did not release the defendant from her contract, and did not accept Leben in her stead as tenant of the corporation. The testimony introduced by the defendant in support of her defense did not materially differ from that of the plaintiff. She and her attorney both testified that they requested the secretary and treasurer of the plaintiff corporation to release her from the rent contract and to accept Leben as tenant; that the secretary and treasurer promised to submit the request to the board of directors; that while they heard nothing from them as to whether this request had been submitted to the board of directors, yet he, as secretary and treasurer of the plaintiff, had for several months subsequent to the request been collecting the rents from Leben, and had been treating him, therefore, as the tenant in lieu of the defendant. The defendant denied that she had told the secretary and treasurer to go to Leben and he would pay the rents for her. She further testified that after Leben's failure she agreed to assume the balance due by Leben as rent, provided she could have the unexpired term of the lease, and under that agreement the claim against Leben was proved in bankruptcy in her name, and that subsequently the plaintiff took possession of the leased premises, and re-leased the same to the Price Furniture Company without her knowledge or consent.

Numerous exceptions are made to certain portions of the charge of the court; but, in the view which we take of this case on the merits, these exceptions all become immaterial. In our opinion the evidence as set out in the record is wholly insufficient to show that the plaintiff released the defendant in any manner, either expressly or by implication, from the contract. The mere fact that the plaintiff allowed the subtenant to remain in possession of the leased premises for several months, and collected from him the rent for this period, would not be sufficient, without more, to show any release of the tenant from her contract. Cuesta v. Goldsmith, 1 Ga. App. 48, 57 S. E. 983. It is not claimed by the defendant that there was any expressed release; but it is insisted that the request made to the secretary and treasurer of the plaintiff corporation to release her and accept in her stead her subtenant, followed by the collection of the rents from the subtenant, operated as a release of the tenant from her contract and the substitution of her subten-

ant. This position is wholly untenable for several reasons. The request of the defendant and her attorney at law, made to the secretary and treasurer of the plaintiff, asking that the defendant be released from the obligations of her written contract covering the period of three years, was a mere offer on her part to rescind, and not in any sense binding upon the plaintiff. There was no corporate assent to the proposition by the plaintiff. On the contrary, the subsequent repeated demands made on her directly by the secretary and treasurer show either that the corporation had not agreed to her proposition, or that the proposition had not been acted upon by it at all. It was not claimed that the secretary and treasurer of the plaintiff released the defendant from her contract, or that he had any authority to make such release. Besides, the evidence of the defendant herself shows conclusively that she did not consider herself as released from the contract, for she continued to act under it after she claimed that she had been released by the act and conduct of the plaintiff. She proved her claim in the bankrupt court in her own name against her subtenant as her tenant, and directed that the amount recovered from the bankrupt court be applied by the plaintiff as a credit on her rent contract, and she subsequently endeavored to sublet the premises and to induce the plaintiff to consent to the subletting.

The fact that the plaintiff took possession of the leased premises in January, 1907, and leased them to the Price Furniture Company, even if it was not with her consent, would not have operated as a release from the payment of the rents due by the defendant up to that time, and the distress warrant was for a period covered by the contract prior to the re-lease of the premises by the plaintiff to the furniture company. As the defendant had failed to pay the rent due under the contract, we think the plaintiff, at its election, could either hold her on the contract or retake the premises and re-lease the same for the balance of the time covered by the lease, holding the defendant for the rent due and unpaid up to the time of the re-lease. Under the most favorable view of the evidence in behalf of the defendant, we think it utterly fails to establish any breach of the contract by the plaintiff, or any release of the defendant and acceptance of the subtenant in her place. On the contrary, the evidence affirmatively shows that the plaintiff did not release her from her contract, either expressly or by implication, until it took possession of the premises in January, 1907, and leased them to the Price Furniture Company, and that prior to this date she was held by the plaintiff to the contract. The verdict in her favor is contrary to law, as being wholly without evidence to support it, and must be set aside, and a new trial ordered.

Judgment reversed.

(3 Ga. App. 79)

## ASKEW v. STATE (No. 515.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. PERJURY—FALSE TESTIMONY—MATERIALITY.

An indictment for perjury should specifically allege, and the proof should show, how and wherein the testimony upon which the perjury is assigned was material to the issue in the trial in which the alleged false testimony was delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perjury, § 38.]

2. CRIMINAL LAW—DATE OF OFFENSE—LIMITATIONS—BURDEN OF PROOF.

It is essential, to sustain a conviction of a criminal offense, that it be distinctly shown that the alleged offense was committed prior to the suing out of the accusation, or to the finding of the indictment or presentment by the grand jury. The burden is as much upon the state to prove affirmatively that the accusation, indictment, or presentment was subsequent in time to the commission of the alleged offense, as it is to show that the offense did not so far antedate the accusation as to be barred by the statute of limitations. The failure to prove either is fatal to the state's case.

3. SAME—SEQUESTRATION OF WITNESSES—DISCRETION.

Where the rule requiring the sequestration of witnesses is invoked, and one of the witnesses is an officer of the court, to wit, the sheriff, it is within the discretion of the presiding judge to sequester him, or to allow him to remain in the court. The court can not transact its business without its officers and the discretion of the trial judge will not be controlled, when he sees proper to except them from the general rule in regard to the sequestration of witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1551.]

4. SAME.

In view of the fact that there must be another trial in this case, the decision of the other questions presented by the record is unnecessary.

(Syllabus by the Court.)

Error from Superior Court, Quitman County; W. C. Worrill, Judge.

Jack Askew was convicted of perjury, and he brings error. Reversed.

Raines & Gurr, for plaintiff in error. J. A. Laing, Sol. Gen., R. R. Arnold, and J. B. Ridley, for the State.

RUSSELL, J. Judgment reversed.

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(3 Ga. App. 574)

## SMITH v. STATE. (No. 488.)

(Court of Appeals of Georgia. June 26, 1907.)

CRIMINAL LAW—NEW TRIAL—DISQUALIFICATION OF JUROR.

While, upon the hearing of a motion for new trial (where the sole ground of the motion complains that a member of the jury which convicted the accused was related by affinity to the prosecutor within the prohibited degrees, and upon hearing affidavits were introduced supporting and disputing this ground), the trial judge is the trior of the facts in controversy, and this court will not control his decision as to the credibility of the witnesses, still, where all the evidence adduced upon the subject of relationship showed the juror to be related to the prosecutor

within the ninth degree, a new trial should have been granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3070.]

(Syllabus by the Court.)

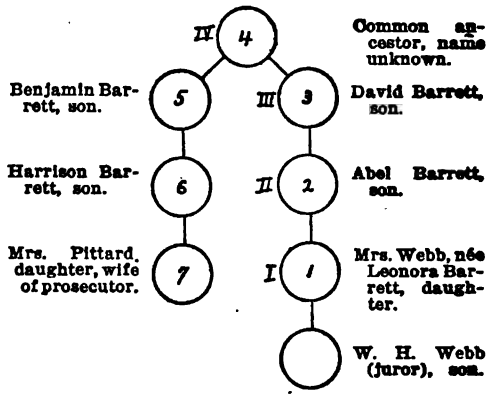
Error from Superior Court, Oglethorpe County; H. M. Holden, Judge.

Bryant Smith was convicted of arson, and brings error. Reversed.

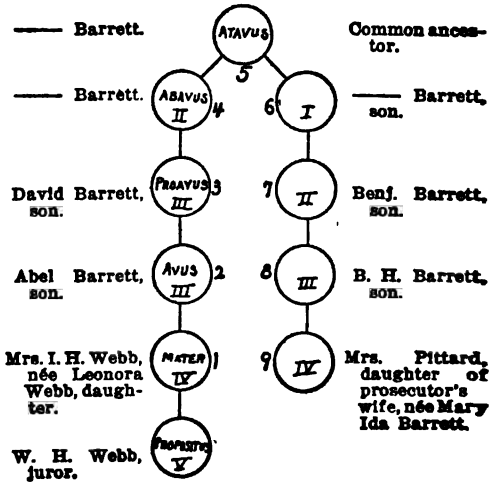
Sam L. Olive and Paul Brown, for plaintiff in error. David W. Meadow, Sol. Gen., and Sibley & McWhorter, for the State.

RUSSELL, J. The plaintiff in error was convicted at the April term, 1906, of the offense of arson. His motion for new trial was refused, and the judgment of the lower court was affirmed by the Supreme Court. Smith v. State, 125 Ga. 296, 54 S. E. 127. Thereafter, on October 17, 1906, he filed an extraordinary motion for a new trial, upon the ground that one of the jurors who rendered the verdict finding him guilty was disqualified by relationship to the prosecutor. This motion was overruled on March 14, 1907, and upon the judgment denying a new trial error is assigned.

Affidavits were properly submitted by the movant showing that the juror Webb was related by affinity to the prosecutor, Mr. Pittard, within the prohibited degrees, and a counter showing establishing, a more distant degree of relationship was made by the state. If the evidence submitted by the state on the hearing before the lower court had shown that there was no kinship, or that the relationship between the juror and prosecutor was within and beyond the prohibited degrees, we would have no difficulty in affirming the judgment refusing a new trial. Upon the authority of the decision in Buchanan v. State, 118 Ga. 751, 45 S. E. 607 (9), "where a ground of a motion for a new trial complained that a member of a jury, which convicted the accused, was related by consanguinity to the prosecutrix within the prohibited degree, which fact had been discovered by the accused since the trial, and upon the hearing of the motion affidavits were introduced to support this ground, and the state introduced affidavits to the effect that no such relationship existed, this court will not interfere with a finding by the trial judge, upon the issue of fact thus made, adverse to the contention of the accused." But the affidavits presented by the state on the hearing of the motion, instead of contradicting and disproving movant's contention that the juror Webb was disqualified, themselves established the juror's disqualification. A juror related by consanguinity or affinity to either party to a cause within the ninth degree is disqualified from sitting in the case. This was expressly decided in Ledford v. State, 75 Ga. 857, and our examination has failed to discover any ruling in this state to the contrary. According to the evidence for the state, the juror Webb was related to the deceased wife of Pittard, the prosecutor, in the ninth degree, and several living children of Pittard and his deceased wife continue the kinship by affinity. According to the movant's showing, the juror Webb was a great grandson of David Barrett, who was a brother of Benjamin Barrett, Mrs. Pittard's grandfather. If we apply the diagram illustrative of lineal and collateral consanguinity prepared by Blackstone (2 Bl. Com. 203), we find that Webb and Mrs. Pittard were related in the seventh degree by the civil law, and in the fourth degree by the canon law, adopted by use as part of the common law:




According to the state's counter showing, the juror and the prosecutor's wife were related in the fifth degree by the canon law, and within the ninth degree by the civil law; the relationship being exactly the same as that subsisting between Richard III and Henry VII, used by Blackstone as an example. The following diagram shows the relationship as evidenced by the testimony for the state; the Roman numerals indicating kinship by the canon law, and the Arabic figures the relationship by the civil law:



"The method of computing these degrees in the canon law, which our law has adopted, is as follows: We begin at the common ancestor, and reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other." 2 Bl. Com. 206. The degree of relationship which will disqualify a judge from sitting in a case is fixed by our Civil Code (Civ. Code 1895, § 4045), and as ruled in Short v. Mathis, 101 Ga. 286, 28 S. E. 918, is to be ascertained by the canon-law rule; but the quantum of kinship on the part of a juror which will disqualify has not been defined by statute in this state. Pen. Code 1895, § 973, recognizes kinship as a ground of challenge for cause: "On calling each juror, he shall be presented to the accused in such a manner that he can distinctly see him, and then the state, or the accused, may make either of the following objections: * * * (4) That he is so near of kindred to the prosecutor or the accused, or the deceased, as to disqualify him by law from serving upon the jury." But the decree of kinship which will disqualify is not declared in terms. So far as we are aware, however, the rule announced in the Ledford Case has never been questioned. It was cited with approval in McElhannon v. State, 99 Ga. 680, 26 S. E. 501. In Roberts v. Roberts, 115 Ga. 261, 41 S. E. 616, 90 Am. St. Rep. 108, Justice Cobb, after referring to Am. & Eng. Enc. L. (2d Ed.) 1124, where it is said that, while at common law originally relationship in any degree by consanguinity or affinity worked a disqualification of the juror, later writers state that the relationship must be within the ninth degree, calculated according to the civil law rules. He then quotes with approval from the Ledford Case: "The juror was disqualified, being a third cousin and within the ninth degree"—and states that it is supposed that the ninth degree referred to is to be "calculated by the rules of the civil law, and not by the rules of the canon law, which are of force in this state in reference to matters of inheritance." But it matters not whether the degree of relationship be computed according to the civil law or the canon law; in neither event was Webb, the juror, qualified to try this case.

The degree of relationship to a party which will disqualify a juror is not the same as will disqualify a judge. At common law favor was not presumed in a judge, while originally the presumption as to a juror was that any relationship whatever, either by affinity or consanguinity, would disqualify a juror; this rule being later modified so that the disqualification by reason of kinship extended no further than to include the ninth degree. The limitation of the disqualification of judges to cases where one or more of the parties to the cause may be of kin within the fourth degree was the adoption of an arbitrary rule by statute, regardless of the common law, while the rule as to the disqualification of jurors, in the absence of legislation on the subject, is the common law. The relationship of a party to a judge is ascertained by the rules of the canon law, because of the adoption, as stated by Blackstone, of the common-law rule. But it matters not in this instance whether the degree of relationship be computed according to the civil or the canon law; in neither event, under the evidence submitted, was Webb a juror qualified to try this case. Counsel for defendant in error virtually concede this by putting the stress of the case on the proposition that, even if the juror was disqualified, it was not properly an extraordinary ground for new trial, and affords no sufficient reason for the grant of an extraordinary motion. The argument in support of this contention is drawn from the decision in Cox v. Hillyer, 65 Ga. 57 (2), in which it was held: "The extraordinary motions or cases contemplated by the statute are such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder, and it afterwards appears that the supposed deceased is alive, or where one is convicted on the testimony of a witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like character." We think that the uncontradicted evidence of the juror's disqualification, and of the fact that this was brought to the attention of the court as soon as it was known, or ordinarily could have been known, presented a good extraordinary ground of a motion for a new trial. There is no higher purpose to be subserved in the administration of the criminal law than that every defendant shall be accorded a trial by jury, and jury trial is a mockery unless the jury be not only impartial, but also beyond just suspicion of partiality. It is not mere punishment, but punishment justly inflicted, which compels that respect for law which is essential to the prevention of crime.

It is earnestly insisted in the briefs of the learned counsel for the state that, even if the disqualification of the juror is shown, and even if such disqualification would be good ground for granting an ordinary motion, it cannot be classed as among the extraordinary grounds provided and recognized by law, and that nothing was submitted to the court showing that the result would probably be different on another trial. Counsel argue that "the question of the relationship of a juror not only ordinarily occurs in the trial of cases, but is of general and constant occurrence. And the motion in this case shows on its face that it did occur in this case and was inquired for." We will agree with counsel that the inquiry into the subject of the relationship of jurors—questions as to such relationship—is a matter of almost daily occurrence in the courts; but in the opinion that the discovery of disqualification after

counsel has called attention to the subject of relationship, and the trial judge has taken the pains to have an investigation in open court touching relationship, and the cautious juror's mind is again indirectly turned to any cause which might bias his judgment by the questions propounded on the voir dire, is a common or ordinary occurrence, we do not concur. We hold such a circumstance to be extraordinary, and the law has long so regarded it, for, contrary to the prevailing rule, it absolutely shuts its ears to the explanation that the juror was not aware of the relationship, and that such relationship did not in any wise affect the verdict. The law will not hear or consider that the presence of the disqualified juror did not hurt the losing party. This ground of motion for new trial is extraordinary in the same sense as the ground mentioned in Cox v. Hillyer, supra, where one is convicted on the testimony of a witness subsequently found guilty of perjury in giving that testimony. It is lamentably true that perjury is not uncommon, but the law justly considers it an extraordinary circumstance that the falsity of testimony which has been credited by a jury and has induced a solemn verdict of guilty should be established.

The exact point decided in Kelly v. Hall, 50 Ga. 636, and Cox v. Hillyer, 65 Ga. 57, which were applications for mandamus to compel the certification of second bills of exceptions, and in Malone v. State, 49 Ga. 210, and Doyal v. State, 73 Ga. 72, cited in O'Neil v. State, 104 Ga. 543, 30 S. E. 843, is that, inasmuch as generally no second bill of exceptions can be allowed where the judgment refusing a new trial has been affirmed, a second motion for new trial must be "an extraordinary motion or case," as specified in section 1064 of the Penal Code of 1895. The rule as clearly stated in the first headnote in Doyal v. State, supra, is that "after the trial of a cause by the jury and the return of a verdict of guilty and the refusal of a new trial by the circuit court, and the affirmance of that judgment by this court, the grounds of a second motion for new trial will be scrutinized closely, and must be laid in the very foundations of the purity of jury trial, to authorize the grant of such an application." Then is the presence and service of a juror, clearly disqualified, good ground for an extraordinary motion for a new trial, or, put more properly, does such a case present good extraordinary ground of a motion for a new trial? As has been held, and more than once, motions upon extraordinary grounds are not viewed with favor, especially when newly discovered evidence, generally merely cumulative, is the basis of the motion; and the distinct and close scrutiny with which motions for new trial upon extraordinary grounds are regarded is evidenced by the provisions of Pen. Code 1895, §§ 1063, 1064. In the Cox and Malone Cases, cited supra, the extraordinary ground was newly discovered evidence, and there was a distinct holding that the evidence was merely cumulative. But in the Doyal Case, supra, a new trial was ordered after the presiding judge had refused to interfere with a verdict which had been affirmed by the Supreme Court (70 Ga. 134), upon the sole ground of the disqualification of a juror; the objection to the juror, as in this case, being propter affectum, and the reason given (irrespective of the probable result on another trial) being that this ground was "laid in the very foundations of the purity of jury trial." In Beall v. Clark, 71 Ga. 849, although there was no extraordinary motion for new trial, one of the grounds of the motion was that one of the jurors was a half-brother of an interested witness. After a review of the evidence on this subject, Justice Hall, observing that the fact that the juror and the witness were intimate and of near kinship is the only circumstance which can cast a shadow of doubt upon the truthfulness of the juror's statement that he knew nothing of the witness' interest in the matter, nevertheless proceeds to deliver the opinion of the court as follows: "The trial by jury cannot be too carefully guarded, to protect it not only from unfairness, but also from any uncertainty on that score. Jurors should be above suspicion. 'Omni exceptione majores.' On another hearing this wrong can be avoided. The defendants will be then left free to assail the witness, if they deem it advisable, and will not be trammeled in their defense by the presence of his kinsman upon the jury. There can be no doubt that he was an improper juror. Brown v. State, 28 Ga. 439; Rust v. Shackleford, 47 Ga. 538."

If the juror Webb would be held disqualified in a civil case because his presence on the jury might trammel the defense by reason of his relationship to Pittard, how can less be held in a criminal case where the kinsman, Pittard, is the prosecutor, and the liberty of the citizen is involved?

One reason why a new trial is demanded where there is no doubt as to the disqualification of a juror, and where such disqualification is not waived by knowledge of that fact, is that the verdict is illegal and void. As held by the Supreme Court in Georgia Railroad v. Cole, 73 Ga. 713: "A jury composed of men who are not lawful men—men whose relationship to the parties renders them incompetent as jurors—cannot render a lawful verdict. If the parties consent to the jurors, or have knowledge of their incompetency, then they will be held to waive the same. It cannot be said that the defendants in error have had their case tried, certainly not legally, and although the verdict may be in accordance with the facts, and such as a lawful jury should have rendered, yet it is no verdict, and the court did right to set it aside." Of course, it has been uniformly held, with reference to extraordinary mo-

tions, that due diligence must be shown to have been exercised by the movant in ascertaining the disqualification, if possible, before the trial; and it must further appear that diligence was manifested by counsel in moving on these extraordinary grounds and in bringing the facts before the superior court as soon as discovered. Failure to apprise the court of the disqualification of a juror, discovered during the trial, as soon as the fact was ascertained by counsel, was held to be a waiver in Lampkin v. State, 87 Ga. 516, 13 S. E. 523. No complaint of lack of diligence on the part of plaintiff in error or his counsel in this case can be made in the present instance. It is uncontradicted that the facts upon which the disqualification of the juror depended were first ascertained within one week before the extraordinary motion was presented and filed on October 17, 1906, which, according to the admission of counsel for the state in their brief, was the day following the judgment making the judgment of the Supreme Court the judgment of the lower court.

There is no merit in the suggestion that the exercise of a greater degree of diligence on the part of plaintiff in error and his counsel might have discovered the disqualification of the juror before the trial. It is undisputed that the defendant's counsel requested the court to inquire of the jury as to the relationship to the prosecutor, and that the trial judge did this. As said by Justice Cobb in rendering the opinion of the court in Moore v. Farmers' Mutual Ins. Asso., 107 Ga. 209, 33 S. E. 69: "When parties to a case announce ready for trial, it is the duty of the court, if the case is one to be tried by a jury, to furnish a panel of jurors composed of persons competent to sit as jurors in the case. When parties are furnished with a list of the jury, it is their duty, if they know if any of the jurors are disqualified, to call attention to the same, or the disqualification will be held to have been waived. If they have reasonable grounds to suspect that any of the jurors are disqualified, it is their duty to call attention to the fact, so that due inquiry may be made of the panel. Further than this they are not required to go. Due diligence requires no more than this. The rule in reference to such matters is thus stated by Judge Stephens in Brown v. State, 28 Ga. 439: 'He must make the objection at the right time, if he knows of the fact; but if he does not know of the fact, nor have special reasons to believe it, he is not bound to offend every man of the panel by making random imputations against him.' Parties are not required to make searching investigation out of court to determine whether the jurors who are summoned are disqualified in their cases. Not only is such a duty not placed by the law upon parties and their counsel, but the contrary practice is to be encouraged for obvious reasons."

In our opinion the movant's "case" fulfills all the requirements of a meritorious extraordinary motion for new trial, and he should have a new trial.

Judgment reversed.

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(3 Ga. App. 97)

## DURDEN et al. v. DEKLE. (No. 560.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

PARTNERSHIP—AUTHORITY OF PARTNER—CONTRACT OF GUARANTY—RATIFICATION.

A contract of suretyship, guaranty, or accommodation indorsement is not within the legitimate business of an ordinary partnership. Hence one partner has not the power to bind the partnership or the other partners by any such contract without their consent. While the partners not originally bound may, in certain events, ratify the unauthorized acts of the other partner, no facts sufficient to supply the necessary elements of a ratification appear in the present case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 256, 257.]

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by Roxie Dekle against W. M. Durden and others. Judgment for plaintiff, and defendants bring error. Reversed.

Saffold & Larsen and Hines & Jordan, for plaintiffs in error. G. S. Johnston, for defendant in error.

POWELL, J. Judgment reversed.

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(3 Ga. App. 110)

## SMITH v. COTTON STATES BELTING & SUPPLY CO. (No. 594.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

WRIT OF ERROR—ASSIGNMENTS OF ERROR—QUESTIONS RAISED.

Where a trustee in bankruptcy sues upon an account contracted by the defendant with the bankrupt, and the latter defends by pleading that prior to the institution of the suit he had paid the account in full to a third person to whom it had been transferred prior to the bankruptcy, and the judge, by consent, acting as trior of both law and fact, renders a general judgment for the defendant, an assignment of error in general terms alleging that under the facts and the law applicable thereto the judgment should have been for the plaintiff instead of for the defendant is insufficient to raise the question, not hinted at by the pleadings or otherwise considered upon the trial, so far as the record discloses, that the transfer of the account was void under a statute of a sister state, wherein such transfer was executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3074–3083.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. M. Smith against the Cotton States Belting & Supply Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Dorsey, Brewster, Howell & Heyman and Francis L. Eyles, for plaintiff in error. McDaniel, Alston & Black, for defendant in error.

POWELL, J. In the city court of Atlanta, Smith, as trustee of the Anniston Rolling Mills Company, bankrupt, brought suit against the Cotton States Belting & Supply Company upon an open account; the action being in the ordinary form. The defendant filed a general denial of liability but afterwards amended this answer by setting up that the plaintiff was not the legal owner of the account; that prior to its bankruptcy the Anniston Rolling Mills Company by writing transferred the account to the Alabama National Bank and directed that payment thereof be made to the bank; also that prior to the institution of the suit the defendant had paid the account in full to the bank. By consent all issues both of law and fact were submitted to the trial judge. He rendered judgment for the defendant. To this judgment the plaintiff excepts, and the sole assignment of error is that "the court erred in rendering said judgment, for that under the facts of said case and the law applicable thereto said court should have rendered judgment in favor of the plaintiff with interest as set out in the petition."

In this court the plaintiff presents in argument two reasons why the judgment is wrong. The first is that under the evidence it is shown that the transfer of the account from the rolling mills company to the bank is void as a preference under the bankruptcy act; the other, that the transfer is void because in contravention of section 2150 of the Civil Code of 1896 of the state of Alabama, which provides that "all deeds of gift, all conveyances, transfers and assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same are void against creditors, existing or subsequent, of such person." This last point is not even hinted at in the pleadings or in the bill of exceptions; but, as Judge Bleckley once said, appears here for the first time "in its maiden blushes." We do not think that the assignment of error is sufficient to raise the question of the validity of the transfer under the laws of a sister state, when such laws are not pleaded and are not otherwise referred to in the record, especially when under the laws of this state the transfer would be valid. Anderson v. Usher, 59 Ga. 578 (2); Nesbit v. Donald, 86 Ga. 26, 12 S. E. 183 (2); Lathrop v. Adkisson, 87 Ga. 340, 13 S. E. 517 (10); Trice v. Rose, 80 Ga. 416, 7 S. E. 109; Jones v. Grantham, 80 Ga. 479, 5 S. E. 764; Milledgeville Co. v. Gobert, 89 Ga. 473, 15 S. E. 551; Bullock v. Johnson, 110 Ga. 486, 35 S. E. 703; So. Bell Tel. Co. v. Parker, 119 Ga. 730, 47 S. E. 194.

Possibly the assignment of error is sufficient to raise the question that under the evidence this transfer is shown to be a preference, since the bankruptcy act is as binding as law in this state as if it were enacted by the General Assembly. Pol. Code 1895, § 1 (1). The proof as to the essentials necessary to the recovery of a preference under the bankruptcy act being in conflict, the finding of the trial judge is not to be disturbed. If as a matter of fact the transfer from the rolling mills company to the bank is voidable for any reason, the trustee by suit in proper form against the bank can recover from it the money which it has received through collection of the account. Bankr. Act, §§ 67e, 70e, Act Cong. July 1, 1898, c. 541, 30 Stat. 564, 566 [U. S. Comp. St. 1901, pp. 3449, 3452].

Judgment affirmed.

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(3 Ga. App. 97)

BALES v. J. L. & E. J. GRIFFIN. (No. 559.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. WRIT OF ERROR — REVIEW — FINDINGS OF FACT.

The finding in favor of the plaintiff being authorized by the evidence in his behalf, the verdict of the jury will not be disturbed. Crankshaw v. Schweizer Manufacturing Company, 1 Ga. App. 363, 58 S. E. 222.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928–3934.]

2. NEW TRIAL—GROUNDS—VARIANCE.

The grant of a new trial would not be authorized for an immaterial variance between the allegations and the proof. Folsom v. Lewis, 85 Ga. 146, 11 S. E. 606.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 29.]

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action by J. L. & E. J. Griffin against J. T. Bales. Judgment for plaintiffs, and defendant brings error. Affirmed.

P. L. Wade, for plaintiff in error. J. S. Adams, for defendants in error.

RUSSELL, J. Judgment affirmed.

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(3 Ga. App. 58)

HOWELL v. ATKINSON. (No. 469.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. LIENS—CONSTRUCTION OF STATUTES.

Lien laws, being in derogation of the common law, are to be strictly construed, and he who claims a lien must show that there was a contract by the terms of which he is entitled to the lien he claims.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Liens, §§ 1, 2.]

2. MASTER AND SERVANT—"LABORERS."

"Primarily a clerk in a mercantile establishment is not a 'laborer' in the sense in which that word is used in section 1974 (now section 2792, Civ. Code 1895) of the Civil Code of 1882, even though the proper discharge of his duties may include the performance of some amount of manual labor." When a clerk seeks to foreclose a lien as a laborer, he assumes the burden of proving that the labor he contracted to perform, as well as such as he did in fact perform, was mainly physical, and that by reason of the nature of his employment he can properly be classed as a laborer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 129, 130.

For other definitions, see Words and Phrases, vol. 5, pp. 3952–3968; vol. 8, p. 7700.]

3. SAME.

If the contract of employment of a clerk in a store contemplates that his services are to consist mainly of work requiring mental exercise or personal influence in inducing custom, and involving the use of his intellectual faculties, rather than work dependent upon physical power to perform manual labor, he would not be a laborer. "If, on the other hand, the work which the contract requires the clerk to do was, in the main, mere manual labor, he would be a laborer."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 129, 130.]

4. SAME—NATURE OF EMPLOYMENT.

The nature of the labor to be performed, and whether the mental element preponderates or not, is to be determined by the contract of employment; and, while the facts and circumstances as to the duties actually performed may be considered, where the contract of employment rests in parol, in determining what was the real contract, the nature of the duties required to be performed under the contract classifies one as a laborer or as not a laborer. One who claims a laborer's lien must be classified with reference to the character of the services required of him by his employer under the terms of the contract of employment.

5. SAME—EVIDENCE.

The evidence being insufficient to establish the fact that the plaintiff was a laborer, the certiorari should have been sustained.

(Syllabus by the Court.)

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

Action by J. L. Atkinson against R. L. Howell. Judgment for plaintiff was affirmed on certiorari, and defendant brings error. Reversed.

G. L. Callaway, for plaintiff in error. Jno. T. West, for defendant in error.

RUSSELL, J. The defendant in error sought to foreclose a laborer's lien in a justice's court against the plaintiff in error. The defendant filed counter affidavits, contesting and denying the existence of the alleged lien. The plaintiff claimed a lien for $41.10. The jury in the justice's court returned a verdict in his favor for $38.94. The defendant carried the case, by certiorari, to the superior court, the certiorari was overruled, and he excepts to that judgment. The petition for certiorari presents various assignments of error which need not here be considered. One question is involved which is determinative of the case. Was the evidence on the trial in the justice's court sufficient to authorize the finding that the plaintiff was a laborer? He was proceeding to foreclose a lien as such. It is a quick remedy, but also a harsh one. In any event, he had the right, if the defendant owed him, to sue and recover; but, unless he was a laborer, he was not entitled to that remedy provided expressly and primarily for those who toil and in the sweat of their brows earn their bread. The liberality of judicial decision has added largely to the number of those included within the class known as laborers or laboring people. The writer doubts not, after a review of the earlier cases upon this subject, but that the tendency of judicial interpretation has been to increase the number of those included in the laboring classes far beyond the bounds originally contemplated by legislative wisdom. There are few subjects which have been oftener before the Supreme Court than the question, "Who is a laborer?" That there is apparent conflict in the definitions given by the court in different decisions is recognized by Justice Lumpkin in Oliver v. Macon Hardware Company, 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300; and in that decision certain rules for the determination, from the facts in each particular case, of the question whether a certain individual is or is not a laborer, are enumerated; and we shall base our decision in this case upon these rules. Before we come to that portion of the case, however, in view of the fact that "in any given case the question whether or not a clerk is entitled as a laborer to a summary lien against the property of his employer must be determined with reference to its own particular facts and circumstances," and in view of the further fact that we shall, in this case, deal only with the evidence submitted on the trial in the justice's court, it is proper to inquire into the nature of the burden devolving upon the plaintiff in such a case as this.

Every plaintiff carries the burden of establishing his case as laid. If the plaintiff had brought an ordinary suit, it would have devolved upon him to prove that the defendant was indebted to him in the amount he claimed. When he claims a special lien as a laborer for that amount, the burden he assumes is increased. It then devolves upon him to show that the defendant owes him not only the amount claimed, but, in addition, to show that he is entitled, under the evidence and by law, to that special preference and priority which results from his lien, if established. Lien laws, being in derogation of the common law, must be strictly construed, and he who claims a lien must show that there was a contract, by the terms of which he was entitled to the lien he claims.

It is strenuously insisted by learned counsel for defendant in error that the determination of the issue as to whether one is a laborer is dependent upon the facts of each particular case, and that, the jury in this case having passed upon the facts and adjudged the defendant in error to be a laborer, their verdict should not be disturbed. Nothing is further from the intention of this court than to interfere with the prerogative of the jury in the ascertainment of the truth or the settlement of the true issues of fact; but the nature and amount of proof necessary to establish an essential fact is determined by law. The nature of the proof is not only declared, but it has also been adjudicated, that as to one claiming to be a laborer the proof must show that his duties, as defined by his contract of employment, and the requirements of his employer, are

mainly physical. It will not suffice to show that some of his duties are physical or manual in their nature, while some of the labor he is required to perform depends upon the exercise of his intellectual faculties. This must be shown, it is true, but the proof must go further, and must establish the ratio and proportion between the two, and must demonstrate that in the labor required to be performed by the employé the manual or physical preponderates over the mental. It is as much a part of the burden which the plaintiff has to carry to establish this fact of preponderance of physical duties as it is to show that the defendant owes him at all, if he wishes to entitle himself to those special privileges of priority of lien accorded by law to the laborer. The plaintiff in this case did not, in our opinion, establish the right of his claim to the priority of a laborer's lien; because the evidence does not disclose or give any intimation that the major portion of his duties under the contract of employment were to be those of laborer, or that the major portion of the duties he actually performed at the requirement or with the assent of his employer were manual. Whether the contract of employment be oral or in writing, it is by the contract of employment primarily that the nature of the duties of the employé is to be determined, and from the contract primarily it is to be ascertained whether the major portion of the employé's service requires the exercise of the intellectual faculties, or whether the major portion of his duties are such as require only the use of physical force, strength, and endurance. Of course, there may be a novation of the contract growing out of a requirement of different or additional services at the hands of the employé from those originally contracted for, and his assent to and performance of these new duties. Or the employer may, by assenting to the performance of duties by his employé, which are mainly physical and whereby the major portion of the service performed becomes mere manual labor, himself consent to the creation of a new contract, and thereby waive the original contract from which would arise a novation. But, in any event, it must appear that there was a contract between the employer and the empolyé, and that under the terms of that contract, either as originally made or as construed by the action of the parties, the greater portion of the duties of the employé were those of a laborer—merely manual.

2. "Primarily a clerk in a mercantile establishment is not a 'laborer' in the sense in which that word is used in section 1974 (now section 2792, Civ. Code 1895) of the Civil Code of 1882, even though the proper discharge of his duties may include the performance of some amount of manual labor." When a clerk seeks to foreclose a lien as a laborer, he assumes the burden of proving that the labor he contracted to perform, as well as such as he did in fact perform, was mainly physical, and that by reason of the nature of his employment, he can properly be classed as a laborer. In Hinton v. Goode, 73 Ga. 233, in which it was decided that "one who is employed merely to labor as a clerk in a store is not such a laborer as is contemplated by section 1974 of the Civil Code of 1882, giving a lien to a laborer on the property of his employer." Justice Blandford, who delivered the opinion of the court, said: "'Laborers,' as used in the statute, mean what were generally and universally known as laborers at the time of the passage of the act. A laborer is one who works at a toilsome occupation—a man who does work requiring little skill, as distinguished from an artisan—sometimes called a laboring man. (Webster.) Clerks, agents, cashiers of banks, and all that class of employés, whose employment is associated with mental labor and skill, were not considered laborers, * * * so as to have a lien for their wages. And this is the effect of the previous rulings of this court. Savannah & C. R. Co. v. Callahan, 49 Ga. 511; Oliver v. Boehm, 63 Ga. 172; Richardson v. Langston, 68 Ga. 658. This is a summary remedy, and the party seeking it must show himself clearly entitled to it, and the statute affording the remedy will be strictly construed. Porter v. Lively, 45 Ga. 161; Dart v. Mayhew, 60 Ga. 104; Mabry v. Judkins, 66 Ga. 732."

In Ricks v. Redwine, 73 Ga. 275, Justice Hall, delivering the opinion and referring to the Hinton Case, supra, says: "All the former cases on the subject were reviewed in the case of Hinton v. Goode & Crumbley, decided at this term of the court. We are entirely satisfied that the conclusion rendered in that case is correct, and we think it amply vindicated by the reasons given by Crawford, J., in Richardson v. Langston & Crane, 68 Ga. 658." In the Richardson Case, in the opinion of Justice Crawford, which was approved in the Ricks Case, it is said: "To entitle one to his summary right to an execution against the property of another without a hearing, the uniform ruling of this court has been that he must bring himself strictly within the requirements of the law. Section 1991 declares that he must show all the facts necessary to constitute a lien under the Code. I do not understand that clerks or persons doing general service, although they may labor, are therefore laborers in legal contemplation. * * * To enlarge upon class legislation by implication should not be the policy of courts, and especially so where ex parte summary remedies are allowed."

The Supreme Court thus having reviewed and considered the numerous decisions up to the seventy-third volume of Georgia Reports, in Oliver v. Macon Hardware Co., 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300, it reviews the intervening cases of Lamar v. Chisholm, 77 Ga. 306, Abrahams v. Anderson, 80 Ga. 570, 5 S. E. 778, 12 Am. St. Rep. 274, Briscoe

v. Montgomery, 93 Ga. 602, 20 S. E. 40, 44 Am. St. Rep. 192, and also the case of Smith v. Johnston, 71 Ga. 748. In delivering the opinion of the court in the Oliver Case, Justice Samuel Lumpkin says that all the previous cases can be harmonized by the adoption of a uniform rule. This rule he announces in the first headnote, and expressly holds that the character of work to be done must be taken into consideration and that the laborer must be classified—"not according to the arbitrary definition given to his calling, but with reference to the character of the services required of him by his employer." The first headnote (which, the court says, "states the idea as clearly as we can express it") is as follows: "Primarily a clerk in a mercantile establishment is not a 'laborer' in the sense in which that word is used in section 1974 of the Civil Code of 1882, even though the proper discharge of his duties may include the performance of some amount of manual labor. If the contract of employment contemplated that the clerk's services were to consist of work mainly requiring mental skill or business capacity, and involving the exercise of his mental faculties, rather than work the doing of which properly would depend upon a mere physical power to perform ordinary manual labor, he would not be a 'laborer.' If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labor as that last above indicated, he would be a 'laborer.' In any given case, the question whether or not a clerk is entitled, as a laborer, to enforce a summary lien against the property of his employer, must be determined with reference to its own particular facts and circumstances." The opinion then proceeds: "Every human being who follows any legitimate employment, or discharges the duties of any office, is, in a very broad sense, a 'laborer.' The President of the United States, the Governor of this state, and the justices of this court are all laboring men, in the sense that they do a great deal of hard work, much of which is, indeed, attended with physical and muscular exertion; but, at the same time, they cannot properly be termed 'manual laborers,' either in the popular sense in which these words are used and understood, or in the sense in which the term 'laborers' was employed in the statutes under consideration."

Whether one is or is not a laborer has been uniformly tested by the Supreme Court by the fact as to whether the labor of such a one is mainly physical and drudgery or mental labor. The decision in the Oliver Case has been followed in McPherson v. Stroup, 100 Ga. 232, 28 S. E. 157; Ensel v. Adler, 110 Ga. 326, 35 S. E. 334; Hunter v. Morgan, 108 Ga. 409, 33 S. E. 986; Kline v. Russell, 113 Ga. 1085, 39 S. E. 477; Tabb v. Mallette, 120 Ga. 101, 47 S. E. 587, 102 Am. St. Rep. 78; and other decisions. In Pike v. Sutton, 115 Ga. 688, 42 S. E. 58, while the decision in the case is merely a headnote, upon an examination of the original record, we find in addition to what appears in the headnote that the employer testified that the clerk in that case was employed to do anything he was wanted to do and that he had the duty, among others, of delivering parcels of goods purchased to the vehicles of the customers. The evidence plainly shows that under the terms of his employment the clerk in that case might have been kept at manual labor exclusively. The cases of Stuart v. Poole, 112 Ga. 818, 38 S. E. 41, 81 Am. St. Rep. 81, and Prather v. Pantone, 125 Ga. 808, 54 S. E. 663, are cited by counsel for defendant in error. Neither of these cases are in conflict with our ruling in this case. In the first case cited, as stated by the Supreme Court, the major portion of the work required of Stuart was of a character depending more upon a mere physical power to perform manual labor than upon the possession by him of mental skill or business capacity, and it was "quite apparent that the greater portion of Stuart's time must have been occupied in performing labor of the former, and not of the latter, kind." Nothing is decided in the Prather Case except that a laborer who is paid by the amount of his work, instead of by the length of time in which he is engaged at the work, is none the less a laborer. The decision in the Prather Case rests on the previous decisions in Johnson v. Hicks, 120 Ga. 1002, 48 S. E. 383, and Moultrie v. Crocker, 125 Ga. 82, 54 S. E. 197. In none of these three cases, however, was there any dispute that the parties who were sought to be garnished, were engaged in labor almost wholly physical.

4. The plaintiff in this case sought a laborer's lien. The evidence in the application of such a remedy and in the bestowal of such a priority must clearly show his right to the privilege and benefit he claims. The evidence failed to classify the plaintiff as a laborer, in that the proportion of physical labor performed by him, or rather contracted to be performed, does not clearly appear to have been greater than the mental. He was employed as a clerk and for his influence in inducing custom, which is sometimes one of the most valuable assets of a clerk. Primarily he was no laborer. The evidence does not show that the greater portion of his time was taken up with dusting or scrubbing, or sweeping the floor. And the fact that this clerk may have brought an occasional bucket of water or upon occasion may have trucked some goods from the depot is not sufficient to remove the presumption that a clerk is not a laborer. The burden is upon him to show that his duties were mainly physical, and that the performance of manual labor occupied the greater portion of his time. In our opinion the plaintiff in this case, not only failed in this regard, but the evidence

does not disclose any proof of the real proportion between the menial and the mental duties.

Judgment reversed.

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(3 Ga. App. 152)

KRONMAN v. ROUSH PRODUCE CO. (No. 374.)

(Court of Appeals of Georgia. Nov. 27, 1907.)

1. SALES—IMPLIED WARRANTY—ACCEPTANCE—QUESTIONS FOR JURY.

While "an implied warranty of the fitness of property sold for ordinary use does not embrace defects discoverable by ordinary care," and even though the acceptance of the property purchased waives all defects which the purchaser could have discovered by the exercise of ordinary care and prudence before delivery, still, whether reasonable opportunity for inspection was afforded him, and whether he waived an inspection, or inspected in a careless and indifferent manner, or whether he exercised ordinary care and prudence, are questions of fact, to be determined in each and every case according to its peculiar facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 494.]

2. SAME—HIDDEN DEFECTS—WAIVER.

The absence of an express warranty raises an implied warranty that the seller knows of no hidden defects, and the acceptance of articles whose defects are concealed by the ordinary method of shipment of such goods, does not necessarily amount to a waiver of such defects or preclude the defense of total failure of consideration. In such a case it is for the jury to determine, from the evidence, whether the defects were latent, or were, in fact, waived by the purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 817–823.]

3. APPEAL—REVIEW—QUESTION OF FACT.

The evidence in behalf of the defendant made out a complete defense. The jury believed this evidence in preference to that in behalf of the plaintiff and rendered a verdict in favor of the defendant. The verdict, approved by the trial judge, will not be disturbed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3948–3950.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Judge.

Action by Nathan Kronman against the Roush Produce Company. Judgment for defendant was affirmed in the superior court, and plaintiff brings error. Affirmed.

C. E. Brown, for plaintiff in error. Dasher & Parks and Miller & Jones, for defendant in error.

RUSSELL, J. Roush Produce Company, Macon, Ga., bought 20 kegs of grapes from Nathan Kronman, of New York. Roush refused to pay for the grapes, and Kronman brought suit in a justice's court to recover their value. The case was carried by appeal to the superior court. A verdict was rendered in favor of the defendant and this verdict was approved by the trial judge, who declined to grant the plaintiff another hearing. The evidence of Roush, the proprietor of the Roush Produce Company, that the grapes were worthless, unfit to use, could not be sold by him, and that he received nothing from them, was undisputed. The question in the case is whether Roush, by accepting the goods, after being afforded a reasonable opportunity to inspect them, is bound because he waived all defects which might have been discovered by the exercise of ordinary care and prudence before delivery. If there had been an express warranty that the goods were to be of a certain kind or description, the acceptance of the goods and their application to the uses of the buyer would raise the presumption that they were of the quality ordered. We so held in De Loach Mill Mfg. Co. v. Tutweiler Coal Co., 2 Ga. App. ——, 58 S. E. 790. We find, however, no evidence of an express warranty. The invoice from Kronman to the Roush Produce Company was as follows:

"New York. Oct. 2, 1905.

"Sold to Roush Produce Company, Macon, Georgia.

20 kegs of grapes, 300..... $60 00
Cartage ..... 1 00

"H. R. Stromer, Broker."

The grapes, therefore, were sold with the implied warranty that they were merchantable and reasonably suited to the use intended. They were to be salable and eatable grapes. As stated above, the evidence that the grapes in question were not salable nor fit to eat was not contradicted, but the purchaser must exercise caution in detecting the defects in everything he buys. Civ. Code 1895, § 3555. "After acceptance of goods purchased, the presumption is that they are of the quality ordered, and the burden is on the buyer to prove the contrary." Civ. Code 1895, § 3557. The plaintiff in error rested his case, first, upon the proposition contained in the decisions in Falvey v. Richmond, 87 Ga. 100, 13 S. E. 261, Wade v. Hamilton, 30 Ga. 450, Star Glass Co. v. Longley, 64 Ga. 576, and Atlantic Phosphate Co. v. Ely, 82 Ga. 438, 9 S. E. 170, that the delivery to the carrier is delivery to the purchaser. Next, relying upon the presumption stated in Civ. Code 1895, § 3557, he contends that there was an acceptance of the goods by the purchaser Roush, whose duty it was to exercise caution in detecting the defects in the grapes before accepting them, and that Roush, having accepted them, after full opportunity of inspection, waived all defects in the grapes, and cannot now be heard to plead or say that there was a total failure of consideration. There was conflict in the evidence as to the condition of the grapes at the time that they were shipped from New York. The plaintiff testified that they were in excellent condition. They were shipped October 3d. Roush and his witnesses testified that the grapes were sour and worthless on October 16th, and that, from their experience as dealers in fruit, if the grapes had been sound when shipped on October 3d, they would have remained in good condition for several months. This testimony authorized the jury to believe that

the goods were in bad condition when shipped; so that the actual condition of the grapes at the time of shipment was a question of fact which the jury was authorized to determine either way. And, even should the principle that delivery to the carrier is delivery to the purchaser be applicable in this case, the purchaser ordinarily would not be bound to pay for the worthless grapes delivered to him.

Was there, then, such lack of caution on the part of the purchaser in inspecting the grapes or such an acceptance by him of the grapes, after reasonable opportunity for inspection, as constituted a waiver of the defects in the grapes, and precluded his defense of total failure of consideration? We think not. Counsel for plaintiff in error relies upon the ruling in the case of Cook v. Finch, 117 Ga. 541, 44 S. E. 95. The principles therein stated are well settled, if not elementary. Where property is bought under the implied warranty that it is merchantable and reasonably suited to the use intended, an acceptance by the purchaser waives all defects which might have been discovered by the exercise of ordinary care and prudence before delivery. Or, as stated by the Supreme Court in Hoffman v. Oates, 77 Ga. 701, "an implied warranty of the fitness of property sold for ordinary use does not embrace defects discoverable by ordinary care." But the questions whether the purchaser in this case exercised due diligence or ordinary care and prudence in his examination and inspection of the grapes before accepting them, or whether he did in fact accept them, were (as in all other cases) peculiarly issues of fact for the determination of the jury. The evidence showed that the defendant was not in the city of Macon, nor at his place of business, when the goods reached his store. Certain orders of grapes from his customers were filled by shipment of several kegs before his return, and these kegs were returned by these customers as worthless as soon as they were opened. So far from holding that the shipment of the kegs of grapes so shipped by the purchaser to his customers was an acceptance on his part, as it seems to be considered by the plaintiff in error, we rather think that this circumstance and the immediate return of the grapes by the customers could justly be considered by the jury as part of the inspection which developed the fact that the grapes were worthless. The grapes were shipped in kegs, and it was not possible to ascertain their condition without opening the kegs. It appeared from the evidence that it was usual with the defendant to buy them in that way. The true condition of the grapes could only have been ascertained by opening the kegs and then repacking them in other kegs. We do not think that the purchaser was required to go to this expense; because he had the right to presume that there were no latent defects undisclosed. Latent defects are such as are hidden. The defects in the grapes, if any, were hidden by the kegs which concealed them. Whether the purchaser, in the exercise of ordinary caution and prudence, should have broken open the kegs in order to ascertain the defects in the grapes, was a question for the jury; and they have found (we think, not improperly, under the evidence) that such action on the part of the defendant was not required. The fact that there was evidence for the plaintiff that it was customary for dealers to inspect grapes before they were sent out should have been considered by the jury, and probably was, but it was not necessarily determinative of their decision on the subject of the defendant's diligence or caution. The questions of diligence and negligence, and the exercise of due caution, are peculiarly questions of fact for the jury; and we would not be authorized to say, under the evidence in this case, that the jury erred in finding that the defendant exercised ordinary care and prudence. The fact that the defendant, after his discovery of the bad condition of the grapes, agreed with an agent of the plaintiff that he would have the grapes reassorted and pay for any of them that he could sell, cuts no figure in the case, in view of the uncontradicted testimony of the plaintiff that, though he had the grapes reassorted he was never able to sell any of them. Counsel for the plaintiff in error further insists that the exercise of dominion over the grapes after the defects were discovered by the defendant's customers should have authorized a recovery in behalf of the plaintiff for at least part of the amount sued for. This does not necessarily follow.

In the determination of the questions involved in this case—those of negligence or diligence, of caution or a careless and indifferent inspection—every case is controlled by its own peculiar facts. In fact, if the evidence had shown that the defendant was at his store when the shipment of grapes was received, and himself accepted the grapes in kegs, and stored them away and did not discover the defects until he opened them, and that he did not open them until the latter portion of the period of time in which the evidence disclosed that they should still be good, and then discovered for the first time that they were totally worthless, a jury, passing upon the facts, would have the right to find that the defendant exercised due care and diligence in the discovery of the defects. We do not say that they should so find, but, under the uniform rulings of the courts, they would be authorized to so find. In the case of Courier-Journal v. Howard, 119 Ga. 379, 46 S. E. 440 (a case far stronger for the plaintiff in error than the case at bar), the Supreme Court unanimously held that "the evidence of the defendant made out a complete defense to the action against him. The jury believed it and rendered a verdict in his favor, which was approved by the trial judge, and this court will not disturb it." The facts do not appear in the report of that case, but

an examination of the original record shows that the defendant, Howard, paid in advance a part of the purchase price, then took possession of the books purchased, and kept them for nearly a year under his control, before he discovered that they were not the books he had bought, yet the verdict finding that he had exercised ordinary caution in the discovery of the defect was sustained. In that case the defect upon which the plea of total failure of consideration was sustained was that the defendant proved that the Encyclopedia Britannica accepted by him did not contain valuable copyrighted articles which were included in the edition he had contracted to buy. This would seem to be an extreme case, but it furnishes evidence that the fact of caution or prudence, or the absence of either, is peculiarly for the jury.

We think the verdict in this case is fully sustained by the evidence and authorized by law, and that the trial judge did not err in refusing a new trial.

Judgment affirmed.

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(3 Ga. App. 160)

W. D. SIMPKINS & CO. v. HESTER. (No. 625.)

(Court of Appeals of Georgia. Nov. 27, 1907.)

1. JUSTICES OF THE PEACE—JURISDICTION.

A justice of the peace has no authority to preside in a case outside of his district, unless the justice or notary of the district in which the case is pending is disqualified, or by consent of parties litigant. Civ. Code 1895, § 4072.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 146, 147.]

2. SAME—JUDGMENT.

A judgment rendered by a justice unauthorized to preside as a justice in the district where such judgment was rendered is a nullity and of no effect.

3. CERTIORARI—WHEN LIES.

The office of the writ of certiorari is to review erroneous verdicts and judgments by some inferior judicatory or person lawfully exercising judicial power. It does not lie to review either a void judgment by a court legally constituted, or any pretended judgment by an individual or body of individuals assuming to exercise judicial powers without lawful authority. Sawyer v. City of Blakely, 2 Ga. App. —, 58 S. E. 399; Bass v. City of Milledgeville, 122 Ga. 177, 50 S. E. 59; People v. Moore, 48 Hun (N. Y.) 619, 1 N. Y. Supp. 405; Dixon v. Cincinnati, 14 Ohio, 240.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 146, 147, 374.]

4. SAME.

The superior court did not err in dismissing the certiorari.

(Syllabus by the Court.)

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Action by W. D. Simpkins & Co. against J. U. Hester. Judgment for defendant, and plaintiff brings certiorari. From an order dismissing the writ, plaintiff brings error. Affirmed.

Simpkins & Co. sued Hester in a justice's court on his promissory note. A judgment was rendered against Hester, and he appealed to a jury in the justice court. Pending the appeal the plaintiff dismissed his suit, and the order of dismissal was duly entered on the docket of the justice's court. At a subsequent term of the justice court, before a justice of an adjoining district, the defendant appeared and moved that the case previously dismissed by the plaintiff and so entered be reinstated and tried. The justice from the adjoining district, presiding, granted the motion to reinstate on the ground that the plaintiff had no right to dismiss his case, because the defendant had filed a plea of recoupment, reinstated and tried the case, and a verdict and judgment were rendered against the plaintiff and in favor of the defendant on his plea of recoupment for $100. These proceedings all took place in the absence of the plaintiff and his counsel, without their consent, and without notice to them. The magistrate before whom these proceedings took place, in answer to the writ of certiorari, set out that he was a justice of the peace in an adjoining district to that in which said proceedings were had; that he had been asked by the justice of the latter district to preside therein in a case in which he as the justice of said district was disqualified; that the proceedings were had before him in the case of Simpkins & Co. v. Hester as set forth in the petition for certiorari; that the disqualified case in which he was asked to preside was not this case, but another case, to wit, the case of Duggan v. Central of Ga. Ry. Co. The judge of the superior court overruled the certiorari, and this judgment is assigned as error.

D. H. Clark, for plaintiff in error. A. C. Wright, for defendant in error.

HILL, C. J. Judgment affirmed.

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(3 Ga. App. 93)

COCHRAN v. HOLLEMAN. (No. 544.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

WRIT OF ERROR—REVIEW—REFUSAL OF NEW TRIAL.

Where the motion for a new trial is made only on the general grounds, and the verdict is fully warranted by the evidence, this court cannot interfere with the discretion of the trial judge in refusing to grant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860-3865.]

(Syllabus by the Court.)

Error from Superior Court, Douglas County; Price Edwards, Judge.

Action by Grandison Cochran against Frances Holleman. From the judgment, Cochran brings error. Affirmed.

W. A. James, for plaintiff in error. J. S. James, for defendant in error.

HILL, C. J. Judgment affirmed.

(3 Ga. App. 136)

## BROOKE v. ROBSON. (No. 624.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

SALE—DEFAULT OF BUYER—RESALE.

When the buyer, under a contract of sale, commits an anticipatory breach or renunciation by countermanding and giving notice that he will not accept the goods, and the seller elects the remedy of reselling the goods at the risk of the buyer, to hold the buyer liable for the difference between the original price and the price on resale, it must appear that the resale was made without unreasonable delay after an honest effort to get the best price obtainable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 921.]

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by G. W. Brooke against R. C. Robson. Judgment for defendant, and plaintiff brings error. Affirmed.

On May 13, 1904, Robson contracted with Brooke to buy of him 3,000 bushels of No. 2 mixed corn at 73 cents per bushel. On May 19th, before the corn had been shipped, Robson wrote to Brooke countermanding the order. On May 21st Brooke wrote, refusing to cancel the contract and asking for shipping directions. On May 26th Robson by letter reiterated that he would not accept the corn. On May 29th Brook wrote: "Beg to advise that it took two to make this contract, and it takes two to unmake it. We respectfully insist that you let us have shipping instruction on same at once." Again on May 31st, June 1st, and June 3d Brooke requested shipping instructions, but Robson made no answer. On June 18th Brooke wrote: "Shall we close corn for your account, or shall we carry longer for you?" And on June 25th he telegraphed: "Am offered sixty-six half basis Milledgeville three cars corn. Will sell for your account unless have shipping instructions by 2 o'clock to-day." To neither of these Robson replied. Brooke sold the corn on June 25th for 66½ cents per bushel, immediately notifying Robson to that effect. There was evidence that on and for several days after the date Robson gave notice of the countermand the market price ranged at and above the purchase price of 73 cents per bushel. The jury found for the defendant. The plaintiff made a motion for a new trial on the general grounds, and to the overruling thereof brings error.

Hines & Vinson and Payne, Jones & Jones, for plaintiff in error. C. T. Crawford, for defendant in error.

POWELL, J. (after stating the facts as above). The countermand was an anticipatory breach or renunciation of the contract. Oklahoma Vinegar Co. v. Carter, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112. By Civ. Code 1895, § 3551, the seller in such cases "may retain [the goods] and recover the difference between the contract price and the market price at the time and place for delivery, or he may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and the price on resale, or he may store and retain the property for the vendee and sue him for the entire price." An election as to which remedy the seller will pursue must be made with reasonable promptitude. In this case the seller relied upon the second option—that of reselling and charging the buyer with the difference. In order to conclude the defendant in this manner it must appear that the resale was made without unreasonable delay, after an honest effort to get the best price obtainable. Green v. Ansley, 92 Ga. 649, 19 S. E. 53, 44 Am. St. Rep. 110. While the above case, so far as it relates to sales of land, was explained and somewhat modified in Cowdery v. Greenlee, 126 Ga. 798, 55 S. E. 918, 8 L. R. A. (N. S.) 137, the principle in point was in no wise disturbed by anything there said. See, also, Davis Sulphur Ore Co. v. Atlanta Guano Co., 109 Ga. 607, 34 S. E. 1011. Presumptively the corn could have been sold for its market value on any day after the renunciation. Western Union Tel. Co. v. James, 90 Ga. 254, 16 S. E. 83 (2); Americus Grocery Co. v. Brackett, 119 Ga. 491, 46 S. E. 657.

There being evidence from which the jury could have found that Brooke, by exercising the privilege of resale within a reasonable time, could have protected himself from all damage, the judgment refusing a new trial is affirmed.

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(3 Ga. App. 142)

## CENTRAL OF GEORGIA RY. CO. v. SOWELL. (No. 637.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. DAMAGES—PUNITIVE DAMAGES.

To authorize the imposition of punitive damages there must be evidence of willful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Southern Ry. Co. v. O'Bryan, 119 Ga. 148, 45 S. E. 1000. However, in this case the testimony of the plaintiff and the inferences possible of deduction therefrom were such as to authorize an instruction to the jury upon this subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 188–205.]

2. TRIAL—POSITIVE AND NEGATIVE TESTIMONY—INSTRUCTIONS.

It is erroneous for the trial judge to instruct the jury, without proper qualification as to the credibility of witnesses, that positive testimony is to be believed in preference to negative. Atlantic Coast Line R. Co. v. O'Neill, 127 Ga. 685, 56 S. E. 986; Phillips v. State, 1 Ga App. 687, 57 S. E. 1079; Wood v. State, 1 Ga. App. 684, 58 S. E. 271; Selman v. Malcom (Ga. App.) 59 S. E. 85.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 447; vol. 20, Evidence, §§ 2432–2435.]

(Syllabus by the Court.)

Error from City Court of Sylvania; H. A. Boykin, Judge.

Action by W. F. Sowell against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. L. Gamble, for plaintiff in error. E. K. Overstreet, for defendant in error.

POWELL, J. Judgment reversed.

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(3 Ga. App. 97)

## EMPIRE MUT. ANNUITY & LIFE INS. CO. v. AVERY et al. (No. 566.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. BILLS AND NOTES — EXECUTION — FORM — BONA FIDE PURCHASER.

One cannot, by causing a promissory note, for which he himself is to furnish the consideration, to be made payable to another person, and by having the latter to indorse it, become that bona fide transferee for value to whom the law accords rights superior to those of ordinary promisees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 805–817.]

2. INSURANCE—PREMIUM NOTES — CONSIDERATION.

Where an agreement has been made to take a policy of life insurance, the tender of a policy substantially different from that ordered, unless it is accepted, will not furnish a consideration for a note, executed in advance, for the premium on the policy which was to be taken under the agreement.

3. SAME—APPLICATION — PAROL — TENDER OF POLICY.

An application for insurance may be oral. If a son makes oral application for a policy of a certain kind to be issued on the life of his father, and the agent afterwards gets the father, without the knowledge of the son, to sign a written application in which a policy of a substantially different nature is described, a tender of a policy of the kind described in the written application will not be a compliance with the contract made with the son, and he may refuse to accept the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 178, 229.]

4. SAME.

No material error appears in the record.

(Syllabus by the Court.)

Error from City Court of Mt. Vernon; J. B. Geiger, Judge.

Action by the Empire Mutual Annuity & Life Insurance Company against H. L. Avery and others. From a judgment for defendants, plaintiff brings error. Affirmed.

M. B. Calhoun and L. C. Underwood, for plaintiff in error. W. M. Lewis, for defendants in error.

POWELL, J. The insurance company sued H. L. Avery and L. P. Avery upon a promissory note made payable to the order of their agents, Langford & Jones, duly indorsed by the latter. The verdict was for the defendants. The insurance company excepts to the order overruling its motion for a new trial. H. L. Avery filed a plea of non est factum, which was not only proved, but uncontradicted. Of course, as to him, the verdict should stand. The defense asserted by L. P. Avery was that the note was given in payment of the first premium of a life insurance policy to be issued by the insurance company on the life of his father; that he orally agreed to take a certain character of policy; that a different policy was sent; that within a reasonable time, upon discovering the variance, he returned it; that, though the note was payable originally to Langford & Jones, and indorsed by them to the plaintiff, still the plaintiff was not a bona fide transferee for value, but was really the original payee, since the note was taken by their agent for them; and that by reason of the facts stated there had been a total failure of consideration. The plaintiff proved a written application by the father of the defendant for a policy of the kind issued. The defendant proved that he knew nothing of this written application.

1. The plaintiff is not to be accorded the rights of a bona fide transferee for value. Shedden v. Heard, 110 Ga. 461, 465, 35 S. E. 707. One cannot, by having a promissory note for which he is to furnish the consideration made payable to another and indorsed by that other to him, acquire the superior rights of a bona fide holder of a negotiable instrument for value. Compare Sibley v. Am. Ex. Bank, 97 Ga. 126, 147, 25 S. E. 470.

2. If the policy delivered is substantially different from the policy ordered, the person contracting for it may refuse to take it. The tender of a policy different from that ordered, unless accepted, will not furnish a consideration for a note, executed in advance, for the premium on the policy so ordered. Jones v. Gilbert, 93 Ga. 604, 20 S. E. 48.

3. If a written application was signed by the defendant's father, without the defendant's knowledge or direction, such writing would not estop the defendant from proving by parol that the application does not describe the policy he actually ordered. The application not being his contract in writing, it does not prevent his proving the true contract. The consideration for the note was, according to the evidence, a policy ordered by the defendant; not a policy to be ordered by his father. If the defendant had accepted the policy, a waiver of strict compliance would have resulted, and all the terms of the application and of the policy would have been binding on him; but neither of them become his contract until he makes it so.

4. The question of the right of a local agent to make parol contracts of insurance, or of the right of such agent to waive the terms of the policy, is nowise involved. There may have been some slightly erroneous rulings in the admission of testimony, but nothing materially so. The charge was fair and unexceptionable. The verdict was fully supported by the evidence.

Judgment affirmed.

(3 Ga. App. 93)

GILMORE v. TAYLOR (No. 555.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

WRIT OF ERROR—REVIEW—VERDICT—MISTAKE IN CALCULATION.

"That a verdict for the plaintiff is not as large as the testimony warranted is no ground for a new trial at the instance of the defendant." Mullins v. Murphy, 69 Ga. 754; Roberts v. Rigden, 81 Ga. 440, 7 S. E. 742 (2); Ellis v. U. S. Fert. Co., 64 Ga. 751. But when a verdict is manifestly, from the pleadings and the evidence, the result of a plain mistake in calculation against the complaining party, such verdict can be corrected by a reviewing court by a new trial or direction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 40, 41, 150.]

(Syllabus by the Court.)

Error from City Court of Sandersville; J. E. Burch, Judge.

Action by S. J. Taylor against G. T. Gilmore. Judgment for plaintiff, and defendant brings error. Affirmed, on condition.

R. L. Gamble and Evans & Evans, for plaintiff in error. Hines & Jordan and W. E. Armistead, for defendant in error.

POWELL, J. Taylor sued the assignee of the Davisboro Bank for the balance of his deposit account. Two items only were in dispute at the trial. He claimed a credit of $600 which had not been allowed him, and the assignee, in addition to denying this credit, set up that there was an error in his passbook, and the account taken therefrom and attached to the petition, in that an item of $498.12 was twice included, when it should appear but once. This last error, it is claimed, arose by reason of the fact that on the passbook there were posted three individual items of $300, $160.62, and $37.50, and then the total of these items, $498.12. The plaintiff sued for $703.75. If he was entitled to the credit of $600, and the credit of both the total, $498.12, and the three individual items which aggregate that amount, the above was the sum to which he was entitled. There was introduced in evidence a paid check, given by Taylor on the bank for $200, which had not been credited on the passbook, but which Taylor recognized to be a good charge against him; for in the account attached to the petition he deducts this check, in order to make the sum due of $703.75, instead of $903.75, as it otherwise would be. The passbook was in evidence; and the balance marked due, after crediting the $600 and deducting $498.12, on account of the double credit of that sum, but not deducting for the $200 check, was $505.63, the exact amount of the verdict. Plaintiff's testimony showed plainly and unequivocally that he was entitled to the credit of $600. Only by weak inference and generality of statement does he claim both the $498.12 and the individual items composing that sum, while the evidence of error in crediting the amount twice is overwhelming. He did not dispute the correctness of the $200 item, which should be charged against him. It is apparent, therefore, that the jury intended to find in favor of the plaintiff as to the $600 item, and against him as to the $498.12, but that in their calculation they used the passbook on which the $200 check was not charged, and thereby overlooked it. The judgment will therefore be affirmed, upon the condition that the plaintiff shall, within 20 days from the time the remittitur of this court is filed in the office of the clerk of the trial court, write off from his judgment the sum of $200, and interest on that sum from November 5, 1904, and that in default of compliance with this condition a new trial is granted.

Affirmed, on condition.

(3 Ga. App. 80)

FORD v. ROUNTREE.
ROUNTREE v. FORD.

(Nos. 517, 518.)

(Court of Appeals of Georgia. Nov. 25, 1907.

TRESPASS—CUTTING TIMBER—DEFENSES.

The evidence showing a good title to the land by prescription in those from whom the defendant derived his right under lease to cut and remove the timber, the verdict for the defendant was demanded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, §§ 59–61.]

(Syllabus by the Court.)

Error from City Court of Quitman; W. B. Bennet, Judge.

Action between J. J. Ford and S. S. Rountree. From the judgment, Ford brings error, and Rountree assigns cross-error. Judgment on main bill of exceptions affirmed, and cross-bill dismissed.

W. C. McCall and M. Baum, for plaintiff in error. J. W. Edmondson and Stanley S. Bennet, for defendant in error.

HILL, C. J. Judgment on main bill of exceptions affirmed. Cross-bill dismissed.

(3 Ga. App. 89)

HILL v. MAFFETT et al. (No. 536.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

EXECUTORS AND ADMINISTRATORS — ASSETS —CHOSES IN ACTION.

Upon the death of a person intestate, choses in action in his favor pass to his administrator; and his heirs at law can take no more than an equitable interest therein, except through the intermediation of the administrator. The heirs, although all of them are sui juris and of full age, cannot maintain an action at law upon a chose in action in favor of the intestate, notwithstanding there is no administrator and all debts due by the intestate have been paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, § 253.]

(Syllabus by the Court.)

Error from Superior Court, Macon County; Z. A. Littlejohn, Judge.

Action by J. D. Maffet and others against

J. R. Hill. Judgment for plaintiffs, and defendant brings error. Reversed.

Jas. M. DuPree, for plaintiff in error. Greer & Felton, for defendants in error.

POWELL, J. J. F. Norris died intestate, leaving as his sole heirs at law, the defendants in error, all of full age and sui juris. His estate owed no debts, and there was no administrator. Hill owed the intestate a sum of money upon a rent note. The heirs at law joined in suing out a distress warrant for this rent. To a judgment in their favor Hill brings error.

The sole question in this case is whether the heirs at law of an intestate, who died free from debt, leaving no minor or other person not sui juris interested in his estate, may, in their own names and without the intervention of an administrator, maintain a distress warrant against one who is indebted to the estate upon a rent note made to the intestate in his lifetime. Expediency, in such cases, loudly argues for an affirmative answer, but the law says no. The dictates of the law are superior to the dictates of expediency. The title to personal property, including choses in action, belonging to the estate of a decedent passes at his death not to his heirs, but to his administrator. The heirs have merely an equitable interest in such assets; and they can sue for the recovery of such property or the collection of such debts only when, on the part of the administrator, there is collusion, insolvency, unwillingness to collect the assets when called on, or some other like special circumstance. Worthy v. Johnson, 8 Ga. 236; Morgan v. Woods, 69 Ga. 599; Smith v. Turner, 112 Ga. 533, 37 S. E. 705. Many more citations to the same effect could be given if necessary. As against themselves and strangers, the heirs at law may divide the property or otherwise dispose of it without legal objection. Amis v. Cameron, 55 Ga. 449; Alderman v. Chester, 34 Ga. 152. A large number of cases could also be cited in support of this proposition. In Juhan v. Juhan, 104 Ga. 253, 255, 30 S. E. 779, the Supreme Court, through Mr. Justice Lewis, after asserting the general rule as stated above, makes the following remark in passing: "We do not mean to say, however, that where there are no debts against the estate nor against the copartnership, and all of the heirs are sui juris and no necessity appears for any administration, they cannot by agreement among themselves take charge of the estate and collect and distribute among themselves its assets." However, further in the opinion the learned justice suggests good reasons why this should not be the true rule. This same justice again spoke for the court in the case of Smith v. Turner, 112 Ga. 533, 37 S. E. 705; and, the point being there squarely before the court, it was held that such a suit could not be maintained except through an administrator. In that case the petition alleged that the intestate died owing no debts, and that, petitioner being the sole heir, there was no necessity for administration. While another point was made in the case, the court at the conclusion of the opinion expressly states that the judgment of the court is based solely on the ground that the right of action does not lie in the heir at law. See, also, in this connection, Gouldsmith v. Coleman, 57 Ga. 425. Absence of debts and of minor heirs does not preclude the possibility of administration. A recovery by the heirs at law would not be a bar to a suit by a subsequently appointed administrator. Thus the debtor might be subjected to the liability of two suits.

The rigidity of the rule forbidding suits by the heirs for the recovery of personalty is not so closely observed in courts of equity as in courts of law. Upon the death of the intestate, the heirs at law are invested with the equitable title to the personalty. Therefore, in equitable actions, the courts may allow direct and immediate suits by the heirs when there is no administrator and no creditor. Numerous decisions in this state recognize this principle. The apparently general statement found in 14 Cyc. 109, that, "according to the weight of authority, however, where there are no debts and no letters of administration have been granted, the heirs or distributees may take or divide and enforce choses in action of the intestate, or receive payment of and discharge the same," is supported almost entirely by a citation of decisions rendered in actions purely equitable; and in most of the cases cited the distinction between the right of the heirs when suing in equity and when suing at law is mentioned. Some states have by statute provided that in cases such as this actions may be maintained by the heirs at law. When properly guarded by provisions protecting the defendant in such actions against a suit by a subsequently appointed administrator, such statutes are very expedient.

In the absence of such legislative expression in this state, it is necessary that the judgment be reversed.

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(3 Ga. App. 157)

## HUSBAND BROS. v. GEORGIA, S. & F. RY. CO. (No. 572.)

(Court of Appeals of Georgia. Nov. 27, 1907.)

1. CERTIORARI—BOND—ATTORNEY AS SURETY.
The rule of court providing that no attorney or other officer of court shall be taken as bail or security in any proceeding therein is directory merely, and, if violated, does not render the obligation either void or voidable. The purpose of the rule is sufficiently accomplished by punishing the attorney or other officer of court for contempt, and, in the discretion of the court, requiring the party to give other bail or security, without holding the bond a nullity.

2. SAME—DISMISSAL.
The judgment of the superior court dismissing the certiorari proceedings, because the surety on the certiorari bond was an attorney of the court, was erroneous.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action between Husband Bros. and the Georgia, Southern & Florida Railway Company. From an order dismissing a certiorari, Husband Bros. bring error. Reversed.

R. S. Wimberly, for plaintiffs in error. Hardeman & Jones, for defendant in error.

HILL, C. J. This was a certiorari from a justice court. On the call of the case in the superior court, counsel for defendant in certiorari moved to dismiss the certiorari proceeding on the ground that the certiorari bond was signed by an attorney at law, who was an officer of the court, and that therefore the bond was void and of no effect. The court sustained the motion and dismissed the certiorari upon this ground, and the sole question before this court is whether this judgment was erroneous.

Independently of any prohibitory statute or rule of court, an attorney at law or any other officer of the court would have a right to become surety on any bond or obligation which the law requires as a necessary part of the proceedings in a case. We do not think, however, from an ethical standpoint, that an attorney at law, and especially in the case in which he is acting as attorney, should ever assume the obligation of bail or surety. Since 1654 it has been the rule in England that attorneys cannot become bail or surety in court proceedings, and this rule has been generally adopted by statute law in this country, or by rules of courts on the subject. In this state the matter is regulated by a rule of the court. Rules of Superior Court, Civ. Code 1895, § 5641. It has been uniformly held that this statute or rule of court is directory merely, and if an attorney, in violation of the statute or rule of court, does become such surety or bail, his obligation is neither void nor voidable, and the purpose of the regulation would be sufficiently accomplished by punishing the attorney for contempt of court, without holding the bond a nullity. Weeks on Attorneys, § 119; 3 Amer. & Eng. Enc. of Law (2d Ed.) p. 291, note 6; 4 Cyc. 919, and cases cited; Burton v. Wynne, 55 Ga. 615.

Unless the statute or rule of court is expressly mandatory in terms, and declares that a bond signed by an attorney or other officer of the court as bail or security is absolutely void, the regulation is clearly directory, and for the government of attorneys as officers of court, and its violation does not affect the rights of parties. The rule of court in this state on the subject does not provide that the effect of its violation shall be to render the bond void, but that the offending attorney shall be punished for contempt, and the party shall be compelled to give other bail or security. As to the party, we think it clear that he should be allowed, if the court in its discretion requires it, the privilege of giving other bail or security, in order that his rights in the litigation may be preserved. The Supreme Court, in the case of Burton v. Wynne, supra, in construing the terms of the statute as contained in Code 1873, § 3268, now Civ. Code 1895, § 4514, providing that no person shall be taken as security on any attachment or garnishment bond who is an attorney for the plaintiff, held that this section was directory merely, and that its violation would not make the proceeding void, or the bond a nullity. We think the rule of court is by its terms more clearly directory than the statute construed in Burton v. Wynne. The rule points out what shall be the effect of its violation, to wit, the punishment of the offending attorney and the compelling of the party to give other bail or security; but the statute simply declares that no attorney for the plaintiff shall be taken as security on any attachment or garnishment bond, and the mandatory character of the statute might have been reasonably inferred from this language. We think, therefore, that our learned brother misconstrued the terms of the rule of court, and in dismissing the certiorari proceedings imposed an unauthorized punishment for its violation.

Judgment reversed.

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(3 Ga. App. 91)

## MACON, D. & S. R. CO. v. CALHOUN.

(No. 541.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

JUSTICES OF THE PEACE—APPEAL—REMAND—AMENDMENT OF PLEADING.

The judgment of the superior court sustaining the certiorari and remanding the case to the justice's court for a new trial, with directions, is affirmed, with direction from this court to the superior court to add to said instructions the following: That the plaintiff in the justice court be allowed to amend the copy of his cause of action attached to the summons, by striking therefrom the word "defendant" wherever it occurs in said copy, and substituting therefor the word "plaintiff."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, §§ 328-330; vol. 39, Pleading, § 645.]

(Syllabus by the Court.)

Error from Superior Court, Montgomery County; J. H. Martin, Judge.

Action by C. H. Calhoun against the Macon, Dublin & Savannah Railroad Company. Judgment for plaintiff was reversed on certiorari, and defendant brings error. Affirmed, with directions.

Calhoun brought suit against the Macon, Dublin & Savannah Railroad Company in a justice's court for damages for killing his cow. The summons was in the usual form. The copy of the cause of action attached to the summons was in the following language: "The Macon, Dublin & Savannah R. R.: You are Dr. to C. H. Calhoun $8.00 for killing one heifer two years old belonging to said defendant, by the engine of a freight train, at 82

mile post in said district, on or about the 20th day of August, 1906; and the said C. H. Calhoun is damaged to the amount of $8 caused by the careless running and managing of the locomotive by the employé of said railroad company. The heifer was well worth amt. Defendant did not cause the damage by any negligence on his part, and defendant is damaged to said amt. $8.00 in said summons." The railroad company filed a general demurrer to the summons, because no cause of action is set forth and no specific acts of negligence are alleged. The justice overruled the demurrer, and, after hearing the evidence, rendered a judgment in favor of the plaintiff for $8 and costs. The defendant filed a petition for certiorari. The judge of the superior court sustained the certiorari and remanded the case to the court below for a new trial, with instruction to render a verdict for the defendant, "unless a stronger case was made for the plaintiff, C. H. Calhoun." To this order the defendant excepted, because the superior court should have rendered a final judgment in the case, as the error of the magistrate in overruling the demurrer to the summons was an error of law which must finally govern the case. It was contended that the summons did not comply with Civ. Code 1895, § 4116, in that it did not have attached thereto a sufficient notice as to the character of the plaintiff's demand, and that, it appearing from the copy of the cause of action attached to the summons that the heifer belonged to "defendant," the "defendant" did not cause the damage by any negligence on his part, and that "defendant" is damaged to the amount sued for, no cause of action was shown, because the defendant had the right to kill its own heifer, either by negligence or otherwise.

W. L. Wilson and Akerman & Akerman, for plaintiff in error. M. B. Calhoun, for defendant in error.

HILL, C. J. Judgment affirmed, with direction.

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(3 Ga. App. 106)

TAYLOR v. FELDER et al. (No. 586.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

PARTNERSHIP — AUTHORITY OF PARTNER—DEFENSE OF ACTIONS—BONDS.

Any member of a partnership has the authority to appear and defend a suit in the firm name, and for that purpose may execute a statutory dissolving bond in the name of the partnership. A judgment, however, entered upon such bond binds only partnership assets and the property of the partner or partners, by whom or through whose authority it was executed; and does not bind the individual property of a nonresident partner who was not served in the original action, who did not appear therein, and who took no part in the execution of the bond.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by R. G. Taylor against T. J. Felder and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Upon a judgment against W. A. Mathews & Co., principal, and Joseph Jacobs, security, on a statutory dissolving bond under Civ. Code 1895, § 4718, given in a previous action, the plaintiff caused summons of garnishment to issue to Mrs. Felder, administratrix, requiring her to answer as to effects in her hands belonging to T. J. Felder, a nonresident of this state, alleged to be a partner of the firm of W. A. Mathews & Co. Upon traverse to the answer, which admitted indebtedness, but which set up that Felder in his individual capacity was not a party to the bond or the judgment, the case was submitted for decision to the judge upon the following facts: On the 2d day of February, 1898, process of garnishment was sued out by the plaintiff in the case of Bishop v. W. A. Mathews & Co., then pending in the city court of Atlanta, the same being a common-law action on account, upon which summons of garnishment issued, directed to the Atlanta National Bank and others, answerable at the March term, 1898, of said court. Said garnishee afterwards answered, admitting indebtedness to W. A. Mathews & Co., the defendant in said cause. On said day—i. e., February 2, 1898—W. A. Mathews & Co. executed a bond to dissolve said garnishment, of which the following is a copy: "State of Georgia, Fulton County. We, W. A. Mathews & Company, principal, and Jos. Jacobs, security, acknowledge ourselves jointly and severally bound unto Thomas L. Bishop, in the sum of $400.00, subject to the following conditions: That the said Bishop has an action pending in the city court of Atlanta, of said county, for the recovery of $200.00, which the said Bishop alleges is owing to him by the said W. A. Mathews & Company, and that Bishop has sued out summonses of garnishment, which summonses have been served upon the Third National Bank, Fourth National Bank, Atlanta National Bank. Now, if the said W. A. Mathews & Company shall pay to the said Bishop the amount of the judgment that shall be rendered in said garnishment, then this bond to be void. Witness our hands and seals, this 2nd day of February, 1898. W. A. Mathews & Co. [Seal.] Joseph Jacobs. [Seal.]" On the 8th day of March, 1898, the plaintiff recovered judgment in the main case of Bishop v. W. A. Mathews & Co. for $200 principal, $1.39 as interest, to date of judgment, and costs of suit, and, on the same date, judgment was entered up on the dissolving bond filed in said cause against principal and surety therein. Upon this judgment upon said bond, execution was issued upon said 8th day of March, 1898, on which execution there were several entries and transfers by which several transfers it became the property of R. G. Taylor, by whom said judgment was

sought to be enforced against Thos. J. Felder, by process of garnishment served upon the administrator of the estate of his mother, Lucy B. Felder. It was admitted that the property seized by the garnishment proceedings was the individual property of T. J. Felder, and that the partnership of W. A. Mathews & Co. had no interest in the funds garnished. It was admitted that Thos. J. Felder was a member of the firm of W. A. Mathews & Co. at the time of the commencement of the suit of Bishop v. W. A. Mathews & Co., at the time the dissolving bond was given, and at the time judgment was entered upon said dissolving bond in said case. It was admitted that W. A. Mathews signed the firm name to the said dissolving bond, without notifying or consulting his partner, the said T. J. Felder, and T. J. Felder had no knowledge thereof.

From the record in the main case of Bishop v. W. A. Mathews & Co., it appeared that no service of the suit was ever effected upon Thos. J. Felder personally, and that he had no knowledge of the suit, and as he had not personally signed the dissolving bond; and had no notice thereof, the sole question presented to the judge trying the issue was whether or not the judgment entered up as aforesaid upon said bond bound the individual property of said Felder. The judge held that said judgment did not bind the individual property of Thos. J. Felder, and gave judgment against the traverse of the answer of the garnishee, and sustained said answer, to which ruling and judgment plaintiff excepts, and assigns error for the following reasons: It was contrary to law. It was contrary to the evidence. No facts are alleged in said answer that constitute a good defense to the enforcement of said judgment in this proceeding, and the court erred in sustaining said answer and overruling the traverse to the same, and in refusing to give judgment in favor of the plaintiff against the funds answered by the garnishee. The said dissolving bond was the undertaking and obligation of the firm of W. A. Mathews & Co., and was binding upon each member of said firm individually. The judgment entered upon said dissolving bond in said case was binding upon the said partnership and upon each partner individually, and upon the funds of said T. J. Felder in the hands of the garnishee. In the briefs of the plaintiff in error and in the oral argument of his counsel an attempt is made to raise other points, such as that the trial court was without jurisdiction, but it will be seen from the foregoing statement taken almost verbatim from the direct bill of exceptions filed in the case, that no such points are made.

George Gordon and Ellis, Webb & Ellis, for plaintiff in error. Williams & Harper, for defendants in error.

POWELL, J. (after stating the facts as above). By Civ. Code 1895, § 2638, "judgments may be entered up and execution issue in the name of a firm or against a firm. And service of process on one partner with a return of non est inventus as to the others, shall authorize a judgment against the firm binding all the firm assets and the individual property of the one served." It is insisted that, while Felder, on account of not being served in the original action, was not bound individually by the judgment then rendered, yet his partner, Mathews, had as an incident of the partnership relation the power to sign the firm name to the bond, thereby causing all the partners to appear and rendering all individually bound by the judgment on the bond. Section 2639 of the Civil Code of 1895, which, of course, is implicitly a part of every contract of partnership in this state, provides: "In all legal proceedings wherein it becomes necessary for partners to give bond, any one of the partners may execute such bond in the firm name." It is undoubtedly true that any person voluntarily appearing and subjecting himself to the jurisdiction of the court, whether in person or through some other person authorized to act for him, becomes subject to such judgment as may be rendered. If it is the intention of our law that each partner is to have as an incident to the contract of partnership an agency authorizing him voluntarily to appear in court for partners not served, and to submit them individually to the jurisdiction of the court, then Felder could legally be held bound by the judgment on this bond; for such bonds submit both the principal and the surety thereon to the immediate judgment of the court whenever the initial liability, upon which they are conditioned, is established. It should be kept in mind, however, that the law for many purposes recognizes the partnership as an entity distinct from the members who compose it. Does section 2639 of the Civil Code of 1895 quoted above, confer the power on each partner to execute the bond on behalf of the partnership as an entity, or on behalf of the partnership as individuals? The section of the Code last quoted should be construed in the light of the preceding section and of the general law of partnership. Under the generally recognized rule on the subject, "one partner has no implied power to enter an appearance in a suit except for the partnership, and cannot by such appearance, bind a partner personally and individually who is not within the jurisdiction and who has not been served with process." Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Bowler v. Huston, 30 Grat. (Va.) 266, 32 Am. Rep. 673; Hills v. Ross, 3 Dall. (U. S.) 331, 1 L. Ed. 623; D'Arcy v. Ketchum, 11 How. (U. S.) 165, 13 L. Ed. 648; Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; Story on Partnership (7th Ed.) § 114, and note; Conley v. Chapman, 74 Ga. 709. Any partner may appear and defend a suit in the name of the partnership and the judgment will bind the partner appearing and the part-

nership, but not individual unserved partners. Likewise, when in defense of an action instituted against a partnership a bond if permitted or required, any partner may in the name of the partnership execute the bond, and it will be the binding obligation of the partnership and of the partner making it. The filing of such a bond in court submits to the jurisdiction of the court the partnership and the partner executing the bond. The judgment thereon binds the property of the partnership and of the member who signed, but not the individual property of the other partners. This generalization, however, is not to be construed as deciding whether the other partners may not by directing such a bond to be executed or by defending under it, or, by other acts of ratification, make themselves individually liable upon it. See Freeman v. Carhart, 17 Ga. 348.

Judgment affirmed.

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(3 Ga. App. 83)

## NATION v. JONES. (No. 525.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. WRIT OF ERROR — BILL OF EXCEPTIONS — FAILURE TO CERTIFY—TIME—DISMISSAL.

Where it appears from the bill of exceptions that it was duly tendered to the trial judge, a mere failure on his part to certify the same within the prescribed time shall be no cause for dismissal.

2. BANKRUPTCY—DISCHARGE—EVIDENCE.

Judgments based on provable debts are released by the discharge of the judgment debtor in bankruptcy. Therefore, in a claim case, a certificate of discharge in bankruptcy of the defendant in fi. fa. is admissible in evidence as the basis of an attack by the claimant on the judgment against the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 841.]

3. TRIAL—MISLEADING INSTRUCTIONS.

A charge containing a correct statement of an abstract principle of law, but not applicable to the evidence, and tending to mislead the jury and prejudice the rights of one of the litigants, is reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 596.]

4. EXECUTION—CLAIM—TITLE—EVIDENCE.

The claimant fully established by uncontradicted evidence her title to the property in dispute; and the verdict finding the property subject should be set aside, and a new trial ordered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 573.]

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Gober, Judge.

Action by R. F. Jones against one Nation. Plaintiff, having recovered judgment, levied on a horse as the property of the defendant, whereupon Alice Nation filed a claim. A justice's judgment against claimant was affirmed on appeal to the superior court, and from an order denying the claimant's motion for a new trial she brings error. Reversed.

E. W. Coleman and J. P. Brooke, for plaintiff in error. P. P. Du Pre and Payne, Jones & Jones, for defendant in error.

HILL, C. J. This was a claim case, in which a judgment was rendered against the claimant in a justice court. It was appealed to a jury in the superior court. The plaintiff in fi. fa. had the execution in his favor levied upon a horse as the property of the defendant in execution. A claim to the horse was interposed by the wife of the defendant. The burden of proof was shifted from the plaintiff in fi. fa. to the claimant by the introduction of the execution, with the levy, and evidence that since the rendition of the judgment the horse levied upon had been in the possession of the defendant in fi. fa. The claimant met the presumption against her, arising from these facts, by showing that the horse in question was bought by her husband in 1900; that at the time he bought the horse he made a small cash payment and gave his note for $50 for the balance of the purchase price; that her husband being unable to pay the note, sold the horse to his mother, who paid the note for $50, and took possession of the horse, and kept possession of it for over four years prior to her death; that his mother had fully paid him for the horse, not only in assuming and paying the note for the balance of his purchase price, but by giving him board sufficient to pay for any interest which he had in the horse on account of the cash payment which he had made for it. Claimant further proved that in 1905 her husband's mother, just before her death, divided her personal property between his sister and herself, giving to claimant the horse in question, and that immediately upon the death of the mother she took possession of the horse, and she had kept him in her possession from that date. She explained her husband's possession of the horse subsequent to the sale to his mother by evidence that he had simply used the horse by permission of his mother, and afterwards, when the horse became her property, by her permission; that as a matter of fact the horse had never been otherwise in the possession of her husband since he sold it to his mother in 1901. The jury, under these facts and the charge of the court, found that the property levied upon was subject to the execution, and the claimant filed a motion for a new trial based on the general grounds and on two special grounds.

1. A motion was made, on the call of this case, to dismiss the bill of exceptions because it was not tendered to the judge nor certified by him within 30 days from the date of the final judgment on the motion for a new trial in vacation as provided by law. Prior to the act of 1896 (Laws Ga. 1896, p. 45) this would have been a good ground for dismissal, but since that act it would not be a good ground of dismissal, unless it should affirmatively appear that the failure of the judge to sign and certify the bill of exceptions within the time prescribed by law was caused by some act of the plaintiff in error or his counsel. From the recital in the bill of ex-

ceptions it appears that it was tendered to the judge within the time required by law, but the actual date of the judge's certificate was subsequent to the 30 days from the rendition of the judgment in vacation overruling the motion for a new trial. The judge having certified that the bill of exceptions was tendered to him within the 30 days, under the terms of the above act of the Legislature, the motion to dismiss is denied. Stamps v. Hardigree, 100 Ga. 160, 28 S. E. 41; Clegg Lumber Co. v. Railway Co., 123 Ga. 603, 51 S. E. 575; Johnson v. Tanner, 126 Ga. 718, 56 S. E. 80.

2. The special grounds are as follows: (1) Because the court erred in refusing to admit in evidence a certificate of discharge in bankruptcy, issued by the United States District Court for the Northern District of Georgia to the defendant in fi. fa., dated subsequently to the rendition of the judgment against him. (2) That the court erred in charging the jury that an insolvent person cannot make a valid gift to the injury of his existing creditors because this law was not applicable to the facts in this case, as the only evidence of a gift was of the horse to the claimant by her mother-in-law, and there was no evidence whatever that the mother-in-law at the time of the gift was either insolvent or owed any debts. A judgment founded upon a provable debt, which is entered after the filing of the petition and before the discharge of the bankrupt, is also provable, and is released by the discharge of the judgment debtor in bankruptcy, unless it falls within the exceptions contained in the bankrupt act. The certificate of discharge, therefore, we think was admissible as a basis of proof showing that the judgment of the plaintiff in fi. fa. and the debt upon which it was based were released by said discharge in bankruptcy. Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810; 5 Cyc. 401, 402.

3. Under the undisputed facts in the record, the charge of the court objected to, that "an insolvent person cannot make a valid gift, to the injury of his existing creditors," was inapplicable, and tended to mislead the jury and to prejudice the rights of the claimant. The court in its order approving this ground of the motion for a new trial makes this explanatory note: "Plaintiff in fi. fa. insisted that defendant in fi. fa. was insolvent, and this debt was in existence when defendant in fi. fa. gave what he had paid for horse to his mother. For this reason I gave charge." There was no evidence whatever that the defendant in fi. fa. had ever given his interest in the horse to his mother; on the contrary, the evidence was undisputed that his mother had fully paid him for his interest in the horse, and had also paid the balance of the purchase price for the horse. The only evidence of a gift was as to that of the horse to the claimant by her mother-in-law just before her death; and there was no evidence that this donor was insolvent or owed any debts. Even if the charge was applicable under any evidence as explained by the judge's note, we think it should have been limited, in its application, to that particular evidence, and not have been left where it would probably have been applied by the jury to the gift of the horse by the mother-in-law to the daughter-in-law.

4. We think, under the uncontradicted evidence in this case, that the claimant successfully carried the burden cast upon her, and clearly established her title to the horse. We think all the essentials of a valid gift by the mother to the daughter are fully shown by the evidence. The horse was unquestionably the property of the mother, and had been so for over four years. Just before she died she gave the horse in question to the claimant, her daughter-in-law, and it was clear that the gift was intended to be absolute only in the event of death. In other words, we think that the alleged gift could only be construed as a donatio causa mortis and not as a gift inter vivos. Immediately on the death of the donor the donee took possession of the horse, and it was her property before and at the time of the rendition of the judgment against the defendant in fi. fa. The possession of the horse by the defendant in fi. fa. since the rendition of the judgment against him was fully explained by the evidence, and was shown to have been entirely consistent with the title of the claimant. We think the verdict in this case is unwarranted by the evidence, and a new trial should have been granted.

Judgment reversed.

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(3 Ga. App. 112)

## HICKS v. HAMILTON. (No. 602.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. BILLS AND NOTES — ACTION ON DRAFT — DECLARATION.

In a suit brought by the bona fide holder of a draft against the acceptor, a demurrer to the declaration, on the ground that the specific date of the transfer is nowhere set forth, was properly overruled, where it appeared from the declaration that the transfer was made before maturity, and that the action was not barred by the statute of limitations.

(a) Such a declaration is not demurrable on the ground that it does not allege that the drawer was either a corporation or a partnership. Complaints of defects in the transfer and assignment of the acceptances could only be presented by an appropriate plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 444–452.]

2. PLEADING—STRIKING PLEA.

It is error to strike, on oral motion or general demurrer, a plea which, though defective in several paragraphs, contains one paragraph which properly presents a substantial issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1102–1110.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action by Harry Hamilton against R. N.

Hicks. Judgment for plaintiff, and defendant brings error. Reversed.

Payton & Hay, for plaintiff in error. Polhill & Foy, for defendant in error.

RUSSELL, J. There can be no doubt that the rulings of the court were right, except in striking defendant's plea. Plaintiff filed a complaint in short form on two acceptances. Defendant demurred. Plaintiff amended. Demurrer overruled. Defendant pleaded. Plea stricken. No evidence. Judgment for plaintiff. The rencounter was brief, the result decisive. This is the story of the action told by the record as it appears in black and white. We know not (for upon this the record does not speak) how lengthy the war of words, how deep the delving for authorities, how loud the thunder of oratory, nor how extensive was the work of sapper and miner in the court below. However this was, the legal battle is now history, preserved in the record, and it is our duty critically to inspect the strategic positions occupied by the contending parties and decide whether the victor is justly entitled to his judgment, whether that judgment is right which proclaimed the plaintiff victor. The position and defenses occupied by the contending parties are well defined by the pleadings, except that in respect to the defendant's plea it is certified by the judge that it was destroyed by being struck by an oral motion.

Omitting immaterial portions, the petition averred: "Second. That the said R. N. Hicks is indebted to your petitioner in the sum of one hundred and nineteen and $^{70}/_{100}$ dollars, upon two certain accepted drafts drawn by the Continental Manufacturing Company against said R. N. Hicks and transferred to petitioner for value received and before due, said drafts dated January 14, 1907, and one for $62 due 30 days after date, and one for $57.70 due on or before the first Monday in February, 1907, a copy of which drafts are hereto attached, which drafts provide for the payment of reasonable attorney's fees. Third. That on the 8th day of March, 1907, plaintiff's attorneys gave the defendant written notice of the plaintiff's intention to bring suit on said drafts in the city court of Sylvester, returnable to the April term, 1907, as provided by law in suits for the recovery of attorney's fees. Fourth. That said drafts are past due, and the defendant refuses to pay the same. Wherefore, your petitioner prays that process may issue requiring the said R. N. Hicks to be and appear at the next term of this court to answer this complaint." Attached to the petition were copies of two drafts drawn by "S. C. M. Cash, Continental Manufacturing Co.," one dated January 14, 1907, Birmingham, Ala., at 30 days sight and payable at Birmingham, Ala., and the other dated January 17, 1907, payable on or before the first Monday in February, 1907, at Sylvester, Ga. Upon each appears the following writing: "Accepted, R. N. Hicks." And on the back of each is the following indorsement: "Sold to Harry Hamilton without recourse before maturity. Continental Manufacturing Company, S. C. M. Cash, Mgr."

The defendant demurred because: (1) "The specific date of the alleged transfer to plaintiff of the drafts sued on is nowhere set forth, nor is the defendant in any way put on notice of the date or place of such alleged transaction." (3) "It is nowhere alleged or set forth that the Continental Manufacturing Company is a corporation or that such company is a partnership, nor is it alleged that the individual who is alleged to have transferred the drafts in question to the plaintiff had any such authority from the Continental Manufacturing Company to do so." (4) "It is nowhere alleged in plaintiff's declaration that the person making the alleged transfers was acting within the sphere of his employment in so doing." (5) "The date and place of the alleged acceptance of the drafts sued on is nowhere set forth with sufficient particularity." It is not necessary to refer to the second special demurrer, because it is conceded that the defect therein alluded to was cured by amendment.

The first paragraph of the defendant's demurrer contended that the date and place of the alleged transfer of the draft ought to be alleged in the petition. We cannot see wherein the place of transfer can be material. The drafts were drawn (according to the copies attached to the petition and thus made a part of it) at Birmingham, Ala.; and the written assignments would be valid or legal either there or in Georgia. The drafts were presumably accepted (in the absence of anything appearing to the contrary) at Bridgeboro, Ga. An allegation of the time of the assignment or transfer is essential, but we think the allegations of the petition sufficiently conform to the requirement of law upon this subject. In Bond v. Central Bank, 2 Ga. 92, it was held that "there must be a time averred in the writ when every material or traversible fact transpires;" and in the decision (page 100) it was said: "The writ must aver a time when every material or traversible fact transpires. It must allege all the circumstances necessary for the support of the action, and contain a statement of the * * * time and place with such precision, certainty, and clearness that the defendant, knowing what he is called upon to answer, may be able to plead a direct and unequivocal defense, and that the jury may be able to give a complete verdict upon the issue, and that the court, consistently with the rules of law, may give a certain and distinct judgment upon the premises." Cowp. R. 682; 6 East R. 422; and 5 Tr. Rep., 623. The acceptances are

set forth as part of the petition and the date of their maturity is apparent. The plaintiff then alleges that they were transferred before maturity. It is therefore plainly to be seen that the action is not barred by the statute of limitations; and for that reason the defendant is not placed in any uncertainty as to his preparation for that defense. In Warren v. Powell, 122 Ga. 4, 49 S. E. 730, it was held that "there must be time averred in the writ showing when every material or traversible fact transpires;" and that a special demurrer attacking the petition, on the ground that no time was stated, should have been sustained. We cheerfully follow and adhere to the ruling in this case, as well as the ruling in the Bond Case, but it is unnecessary, nor do we deem it advisable, to extend the rule further than it is defined in these decisions. In the Warren Case, supra, it appeared on the face of the petition that the cause of action was barred. As well stated by Judge Lamar in delivering the opinion: "The rules of pleading have been adopted partly with a view of saving both the parties and the public the trouble and expense of an unnecessary trial. A defendant is not bound to avail himself of the benefit of the statute of limitations. But, if he intends to do so, it would be a useless consumption of time to enter upon the hearing and introduce evidence to establish the existence of a cause of action which the plaintiff admitted to be barred. If, by a special demurrer, the latter attacks the sufficiency of the petition on the ground that no date is alleged, he is entitled to an order requiring the plaintiff to make such an averment, not only to enable him to know the time of the action referred to and to prepare his evidence accordingly, but also that he may thereafter demur if it should appear that the cause of action was barred, and thus avoid a useless hearing." In this case the petition makes plain that the case at bar is not identical, as to its facts, with that case. The petition meets both of the requirements stated by Justice Lamar. Our holding is further supported by the ruling in the Bond Case, supra, where the court says (page 100): "The real date need not be stated." Construing this with the language of the decision in Warren v. Powell, we understand the word "real" to be used in the sense of "exact"; and therefore hold that, while the time must be stated so that the defendant can be sufficiently informed to prepare his defense and to demur, the statement of time should be so defined as to deprive the defendant of none of his rights. Taking the allegations of the petition with the contents of the copy notes attached thereto, the defendant was deprived of none in this case; and there was therefore no error in overruling the special demurrer. What we have said likewise disposes of the fifth ground of the demurrer.

The third and fourth paragraphs of the defendant's demurrer were properly overruled because, the Continental Manufacturing Company not being a party to the case, it was immaterial whether it was a corporation or a partnership. If it had been material, the defendant could have raised the point by appropriate plea averring that such inquiry would let in some valid defense of which otherwise he would be deprived. Civ. Code 1895, § 3698; Johnson v. Cobb, 100 Ga. 139, 28 S. E. 72; Andrews v. John Church Co., 1 Ga. App. 560, 58 S. E. 530. As said before, we think the questions raised by the third and fourth paragraphs of the defendant's demurrer were immaterial because the Continental Manufacturing Company was not a party to the case; but, even if it had been a party, the defendant could not have contracted with that company, and then denied its legal existence. Miss. R. Co. v. Plant, 58 Ga. 168; Wilson v. Sprague M. Co., 55 Ga. 673. There was no error in overruling all of the grounds of the demurrer.

We think, however, that the court erred in striking the defendant's plea as a whole. And, inasmuch as it was not attacked by special demurrer, we are of the opinion that the court was in error in striking any portion of it. The plea was defective in many respects. The second paragraph merely denies indebtedness. Since the pleading act of 1893 (Civ. Code 1895, § 5050) general denial of indebtedness is prohibited. This paragraph states only a conclusion of the pleader, and offers no reason why the plaintiff should not have judgment against the defendant. It is no defense. Camp v. Young, 119 Ga. 981, 47 S. E. 560 (4); Johnson v. Cobb, 100 Ga. 139, 28 S. E. 72; Lester v. McIntosh, 101 Ga. 675, 29 S. E. 7; Wood v. Roberts, 97 Ga. 254, 22 S. E. 986; Smith v. Holbrook, 99 Ga. 256, 25 S. E. 627. The title of the holder of these acceptances could not be inquired into except to let in a meritorious defense of which the defendant would otherwise be deprived, and for that reason there was no merit in the latter portion of the second paragraph of the defendant's plea, and the same principle applies to the third paragraph. These paragraphs could have been reached by proper special demurrer. But the fourth paragraph of the plea, by an unequivocal denial of all the other paragraphs of the declaration, properly raised an issue and called for proof of the allegation contained in the third paragraphs of the petition. Since it has been held that a defendant may, in one paragraph, deny the allegations of all the paragraphs of a plaintiff's petition, we think that the averment of the fourth paragraph of the answer, that "defendant denies the remainder of the plaintiff's declaration," is a sufficient denial of both paragraphs 3 and 4 of the petition. If the defective paragraphs of the defendant's answer had been stricken on special demurrer, there would still have

remained, as an issue to be tried before the jury, the question as to whether the defendant had been given the written notice alleged in paragraph 3 of the petition. It was only by proving this allegation that he would be entitled to recover attorney's fees at all; and the defendant denies absolutely that he had been given the written notice alleged.

The court, therefore, erred in entering judgment for the attorney's fees, especially as there was a demand for trial by jury. True, after the plea had been stricken, no proof that $20 was a reasonable amount for attorney's fees was necessary or proper because the amendment to the plaintiff's petition alleging that that amount was reasonable was not answered, and the defendant's denial that he had been served with written notice had been stricken. The error consisted in striking a good, though defective, answer, on an oral motion. A general demurrer to a plea of which some parts are sufficient should be overruled. Baer v. Christian, 83 Ga. 322, 9 S. E. 790. See, also, Higginbotham v. Conway, 113 Ga. 1155, 39 S. E. 550; May v. Jones, 88 Ga. 312, 14 S. E. 552, (4), 15 L. R. A. 637, 30 Am. St. Rep. 154; Treadaway v. Richards, 92 Ga. 264, 18 S. E. 25. In all these cases the rule announced in Finney v. Cadwallader, 55 Ga. 75 (3), is adhered to, that "on general demurrer to a plea or motion to strike the same, if any part of the plea be good in substance, the demurrer or motion should be overruled, but the court may and ought to direct looseness to be cured by amendment, and, if the defendant refuses to amend in that respect, the plea should then be stricken as if standing upon special demurrer." The force of the reason for this rule has been increased, rather than diminished, since the passage of the pleading act of 1893. Counsel for defendant in error insists in his brief that the defendant did not offer to make any amendment to his answer, as will be seen from the bill of exceptions. It does not appear from the bill of exceptions that the court directed the counsel to amend. It may therefore be assumed that no such direction was given by the court, and this (and not that the counsel must offer to amend) is the requirement of the rule in Finney's Case, supra. If the defendant had amended (concurring in the opinion that certain paragraphs of his answer were defective) by striking all of his answer except the formal portions and the fourth paragraph, he would still have had an answer with the issue on the subject of attorney's fees properly presented. Consequently he would have been entitled to go to the jury on the question of the service of the written notice; and, if he had disproved, to the satisfaction of the jury, the allegations of the third paragraph of the petition, which he denied, he would at least have been relieved from the judgment for the attorney's fees.

Judgment reversed.

(3 Ga. App. 94)

## LUNSFORD et al. v. SUTTON. (No. 557.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

NEW TRIAL—MOTION—AMENDMENT.

In a claim case the property was found subject, and the claimant made a motion for a new trial. The name of the claimant did not appear in the title of the case or in the body of the motion, but it was expressly stated that the motion was made by the claimant. On the back of the original motion as filed, the case was entitled in the name of the claimant as the movant eo nomine. Subsequently several consent orders were granted postponing the hearing of the motion, in which orders the title of the case was stated, giving the name of the claimant as the movant, and in them the claimant, by name, was recognized by court and counsel as the movant. *Held*: (1) An amendment inserting the name of the claimant in the face of the motion for new trial should have been allowed. (2) Such amendment did not add a new party to the motion for new trial. (3) The maxim, "Id certum est quod certum reddi potest," was applicable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 282.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action by R. L. Sutton against W. D. Lunsford and others, in which Mary E. Lunsford filed a claim to property levied on under an execution. An order was entered denying claimant's motion for a new trial, and refusing to approve claimant's brief of evidence, and she brings error. Reversed.

L. D. Passmore and Mark Tison, for plaintiff in error. Polhill & Foy, for defendant in error.

HILL, C. J. This was a claim case in which the property was found subject to the execution. The claimant filed a motion for a new trial, entitling the case in which the motion was filed as that of the plaintiff in fi. fa. against the defendant in fi. fa., and stating that the motion for a new trial was made after verdict and judgment for the plaintiff in fi. fa. After the case was thus stated, there followed, in the body of the motion, the following: "The claimant, being dissatisfied with the verdict and judgment in said case, comes during said term of the court," etc. Nowhere in the title of the case, nor in the body of the motion, is the name of the claimant who makes the motion stated. This motion was filed, and on the back the case was stated as it was entitled inside, except that the name of the claimant, Mary E. Lunsford, was added. On this motion for a new trial as thus filed, the judge of the court in which the case was pending granted a rule nisi as follows: "Read and considered. It is ordered that plaintiffs in fi. fa. show cause before me at Sylvester, Ga., at 10 o'clock on the 30th day of March, 1907, why the foregoing motion should not be granted," etc. The court also passed the following order: "The claimant having made a motion for a new trial in said case on the

grounds therein stated, and said grounds having been approved by the court, and it appearing that it is impossible to file a brief of testimony in said case before adjournment of court, it is ordered," etc. On the day fixed for the hearing of the motion, a consent order postponing the hearing of the motion and the filing of the brief was passed, which order was as follows: "R. L. Sutton, Plaintiff in Fi. Fa., v. W. D. Lunsford, W. A. Whiddon, T. S. Harris, Defendants in Fi. Fa., Mrs. Mary E. Lunsford, Claimant. In the City Court of Sylvester. Motion for New Trial." Then follows the order of the court granted by consent of counsel postponing the hearing of the motion until April 20, 1907. On April 20th a further order, by consent, was granted, postponing the hearing of the motion, and in that order the case was again entitled as in the consent order of March 30th, and on April 20th the hearing of the motion was again postponed by consent until May 12th; the motion being entitled as in the two preceding orders. On the hearing of the motion, counsel for the movant (after stating that the word "claimant" in the original motion referred to Mrs. Mary E. Lunsford, whose name had been inadvertently omitted from it, but had been placed on the back of that motion when filed, and who had been subsequently recognized by name as the claimant in the consent orders, in all of which consent orders the case in which the motion for new trial was pending was properly entitled, and in which the name of the claimant was given as Mrs. Mary E. Lunsford) asked to amend the face of the original motion for new trial, by adding, after the statement of the case as it appeared therein, the words "Mrs. Mary E. Lunsford, claimant," which amendment the court refused to allow, and the claimant excepted. The claimant, Mrs. Mary E. Lunsford, then presented her brief of evidence for the approval of the court and the court in the following order refused to approve it: "The court refuses to approve the brief of evidence, for the reason that no such case is pending; the original motion for a new trial having no party claimant set out, the amendment to add parties being refused." To this order the claimant excepted. All the foregoing facts appear from the record and are verified by the bill of exceptions.

Under these facts, we think the court should have allowed the amendment. Mrs. Mary E. Lunsford was denominated the claimant on the back of the original motion when filed. She was by name recognized and treated as the claimant who had filed the motion for new trial by repeated consent orders, and in the title of the case in which said orders were passed. In view of these facts, the mere omission to state her name as claimant in the face of the original motion was not material, and to insert it in view of the facts above recited was not adding a new party to the motion for a new trial. The well known maxim, "Id certum est quod certum reddi potest," is clearly applicable. We think the court erred in refusing to allow the amendment, and also in refusing to approve the brief of evidence for the reason stated in his order of refusal.

Judgment reversed.

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(3 Ga. App. 118)

## BEARD v. HAMMOCK. (No. 603.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

JUSTICES OF THE PEACE—CERTIORARI—DIRECTION OF VERDICT—CONFLICTING EVIDENCE.

The evidence being conflicting on the question whether the oral contract sued on was an original undertaking, and therefore binding, or was a promise to answer for the debt or default of another, and therefore violative of the statute of frauds, the judge of the superior court erred in rendering final judgment upon a certiorari brought to review a verdict in favor of the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 816.]

(Syllabus by the Court.)

Error from Superior Court, Randolph County; W. C. Worrill, Judge.

Action by W. J. Beard against R. G. Hammock. A justice's judgment was rendered in favor of plaintiff, and defendant brought certiorari to the superior court, where final judgment was rendered in favor of defendant, and plaintiff brings error. Reversed.

Beard sued Hammock in a justice court on the following account: "To damage for breach of contract which was substantially as follows: $68.80. During the year 1906 there was a negro, Sam Cox by name, working for W. J. Beard. During the year 1906 R. G. Hammock, desiring to work the said negro in 1907, took him from the fields of W. J. Beard to Coleman and there contracted with him. Returning, the said R. G. Hammock did tell the said W. J. Beard that he had contracted with the negro to work for him during the year 1907, and that if he, the said W. J. Beard, would pay the said negro for all the work which he did for him during the balance of the year 1906, he, R. G. Hammock, would on or before January 1, 1907, pay to the said W. J. Beard the sum of $68.80, which amount the said negro then owed to said W. J. Beard, and which amount has never been paid to W. J. Beard, but is now owing to him, as the said W. J. Beard has kept his part of the contract, although he could have made his money, or a good part thereof, by holding up a part of the negro's wages, but, relying on the promise of R. G. Hammock, he did pay to the negro for all work which he did." Hammock pleaded the statute of frauds. The contract was not in writing. According to Beard's testimony the transaction took place as set out in the statement of the cause of action above. Hammock testified that he agreed that if Beard would work the negro till the end of the year, and let him have only nec-

essary living expenses, and would credit the remainder of his wages on the $68.80, he would pay the balance which might then be due. The jury found for the plaintiff. The defendant brought certiorari. The judge of the superior court sustained it, and rendered final judgment in favor of the defendant. To this judgment Beard excepts.

H. H. Turner, for plaintiff in error. Robt. L. Moye and C. L. Glessner, for defendant in error.

POWELL, J. (after stating the facts as above). Under Beard's version Hammock's contract was an original undertaking, not within the purview of the statute of frauds. According to Hammock's testimony it was an agreement to answer for the default of another, and, not being in writing, was void. Evans v. Griffin, 1 Ga. App. 327, 57 S. E. 921; Chapman v. Conwell, 1 Ga. App. 212, 58 S. E. 137 (3); Bluthenthal v. Moore, 111 Ga. 297, 36 S. E. 689. The evidence being conflicting, the judge of the superior court could not properly grant final judgment. He may still grant a new trial if he sees proper; for, when the evidence is conflicting, his discretion in ordering a new trial will not be disturbed.

Judgment reversed.

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(3 Ga. App. 69)

## WHILDEN v. MILLEDGEVILLE BANKING CO. (No. 494.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. PRINCIPAL AND SURETY — PLEADING — AMENDMENT.

Where a defendant in a suit brought against him as a principal to recover the sums due on certain notes, who had filed a plea averring that he was in fact only a surety, offered an amendment to such plea, properly verified, averring that, by reason of usury exacted without his knowledge by the plaintiff from the principal, a waiver of homestead contained in said notes had been avoided and the security of the waiver thereby had been destroyed, whereby the liability of the defendant as surety was increased, it was error to refuse such amendment. The plea of usury was a good defense, if the jury was satisfied that the defendant was a surety and that usury was, without his knowledge or consent, collected from the principal on the notes; and the plea could have been established by parol evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 392.]

2. WRIT OF ERROR—EXCEPTIONS—REVIEW.

The verdict directed in favor of the plaintiff was not, in view of the state of pleadings, itself erroneous, but it was not necessarily the proper legal result of the trial; and, as the error in refusing defendant's amendment to his plea necessarily compelled the return of the verdict rendered, and as exceptions to both rulings are properly presented in accordance with the decision in Lyndon v. Ga. Ry. & Electric Co., 129 Ga. —, 58 S. E. 1047, the defendant is entitled to a new trial and to the allowance of his amendment.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by the Milledgeville Banking Company against G. T. Whilden. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Hines & Vinson, for plaintiff in error. D. B. Sanford & D. S. Sanford and C. T. Crawford, for defendant in error.

RUSSELL, J. This was a complaint on two promissory notes appealed from the county court of Baldwin to the superior court. The banking company brought its petition against the plaintiff in error as principal. It joined with him the administratrices de bonis non cum testimento annexo of the estate of Mrs. I. A. Hendrix, deceased. The petition alleged that one H. E. Hendrix, executor, and said G. T. Whilden, were indebted to the petitioner on two joint promissory notes, one dated May 9, 1903, due 30 days after date, for $100, and the other, dated May 12, 1903, and due 60 days after date, for $150 both bearing interest at 8 per cent. per annum from maturity. It is further alleged that H. E. Hendrix was the sole executor of Mrs. I. A. Hendrix at the time he executed the notes to petitioner, and that he died before the maturity of either of the notes, leaving no estate and being utterly insolvent; and that there has been no administration applied for or granted on the estate of H. E. Hendrix. Attached to the petition are copies of the two notes, which are payable to the Milledgeville Banking Company, and each has indorsed on it the words, "Protest waived. G. T. Whilden." The defendant pleaded that he signed the notes only as surety, and not as principal, and that H. E. Hendrix and the Milledgeville Banking Company both knew and understood that he was only a surety. The administratrices of the estate of Mrs. I. A. Hendrix demurred to the petition, upon the grounds that the letters, "Ext.," following the signature of H. E. Hendrix upon each of the notes, are mere descriptio personæ, that the notes were not the debt of the estate of Mrs. I. A. Hendrix, and it was not alleged that the consideration represented by the notes ever entered into the estate of Mrs. I. A. Hendrix. This demurrer was sustained. Thereafter the defendant, Whilden, offered the following amendment (which was properly verified) to his original plea: "And now comes G. T. Whilden, and by leave of the court amends his plea and answer heretofore filed in the above stated case, and for amendment says: (1) Strike out the word 'admits' in paragraph 5 of the original plea, and answer and insert in lieu thereof the word 'denies.' (2) Defendant further says that the notes sued on were executed upon the 9th day of May, 1903, and on the 12th day of May, 1903, respectively; that the first note was for a loan of $100, and was to run 30 days from its date, and that the principal and the Milledgeville Banking Company agreed that the principal should pay at the Milledge-

ville Banking Company the sum of $1, interest on said note for the said period of 30 days, of which 33 cents was usurious; that the second note was executed and delivered on the 12th day of May, 1903, was for the loan of $150, and was to run for 60 days, and that the said principal and the Milledgeville Banking Company agreed that the sum of $3 should be paid as interest on said note for the period of 60 days, and the Milledgeville Banking Company collected from the principal on said note the sum of $3 as interest for a period of 60 days, of which $1 was usurious; that said usurious sums were paid as interest by the principal at the execution of said notes; that this defendant, the surety on said notes, had no knowledge or information that the said principal and the Milledgeville Banking Company had agreed upon the payment of said usurious interest, and was not aware that the said principal had paid the Milledgeville Banking Company the usurious interest set out above. This defendant further says that, had he known that the said Milledgeville Banking Company had charged and collected from the said principal such usurious interest, he would not have signed said notes as surety; that the said notes contained a waiver of homestead and exemption, which waiver was rendered of no force, by reason of the usury charged, and by reason thereof the liability of this defendant as surety was increased without his knowledge or consent. Wherefore petitioner prays that he be discharged from said suretyship, and that he recover of the plaintiff the costs expended in this behalf." The court refused to allow the amendment, and the defendant properly excepted pendente lite.

On the trial the banking company introduced the two notes and proved the debt and the insolvency of Hendrix, and that there was no administration and nothing to administer upon. The defendant Whilden testified that he signed the notes, at Mr. Hendrix's request, for Hendrix to borrow money from the bank. At the maturity of the notes, they were brought to the witness, and he waived protest, as shown on the backs of the notes. After Hendrix died, Mr. Bell, the cashier of the banking company, stated to the witness that Hendrix's estate was liable for this debt as he (witness) had only signed as surety for Mr. Hendrix, and had received no benefit himself from the execution of the notes. Whilden further testified that, if he had known that they charged over 8 per cent. interest, he would not have signed the notes. All parties connected with the transaction understood and recognized that he was only a surety. He also introduced the interest book of the Milledgeville Banking Company, which showed that the notes were entered as payable by Hendrix as principal and Whilden as surety, and that $1 was the interest collected on the first note, and $3 on the second note. At the conclusion of the evidence, the court directed a verdict for the plaintiff for the principal and interest evidenced by the notes.

There are two assignments of error in the bill of exceptions. Exception is taken to the refusal of the court to allow the amendment offered by the defendant to his plea, and it is insisted that the judge erred in directing a verdict for the plaintiff. The verdict directed was the legitimate conclusion of the issues before the court under the pleadings, but the previous ruling of the court in refusing defendant's amendment to his plea necessarily controlled it. The plaintiff in error having excepted according to the rules announced in the case of Lyndon v. Georgia Railway & Electric Co., 129 Ga. ——, 58 S. E. 1047, his exceptions are properly presented for our consideration. We think the court erred in refusing to allow the amendment. Whilden had already pleaded that he was not a principal, but only a surety, and the amendment offered properly set up such a defense in his behalf as would have operated to discharge him; and the plea can be established and proved by parol evidence. It is so well settled that usury collected by the creditor, unknown to the surety, will operate to discharge such surety that citation of authority would seem to be unnecessary. It is equally well settled that this plea of usury may be proved by parol. There is no defect which we can discover, either of form or substance, in the plea offered by the defendant; and it was properly verified. If the plea had been allowed, the evidence offered by the defendant, unless rebutted, would have authorized a verdict in his favor. With the amendment allowed, and the evidence, which is in the record, before the jury, it would have been error to have directed a verdict for the plaintiff.

We will remand the case to the lower court in order that defendant's amendment may be allowed, and that a jury may determine, not only whether this defendant was a surety, but also whether the act of the creditor, in charging and collecting a greater sum as interest than the law allows, destroyed the waiver of homestead and exemption, and thereby by increasing the risk of the surety released him from his obligation of suretyship. That usury in an obligation containing a waiver of homestead and exemption will release the surety, see Lewis v. Brown, 89 Ga. 115, 14 S. E. 881; Harrington v. Findley, 89 Ga. 385, 15 S. E. 483; Howard v. Johnson, 91 Ga. 319, 18 S. E. 132; Denton v. Butler, 99 Ga. 264, 25 S. E. 624; Allen v. Wilkerson, 99 Ga. 159, 25 S. E. 26. That a plea of usury may be sustained by parol evidence, see Einstein v. Butler, 65 Ga. 561; Dwelle v. Blackwood, 106 Ga. 486, 32 S. E. 593.

Judgment reversed.

(3 Ga. App. 50)

LEWIS v. AMOROUS et al. (No. 465.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. PRINCIPAL AND AGENT—TORT OF AGENT—AUTOMOBILE ACCIDENT—ACTION PLEADING.

A principal or master being responsible for the negligent acts of his agent or servant only when done by command or within the scope of the employment, it is necessary, in an action seeking to charge one for the acts of another upon the theory that the latter was agent for the former, that the petition should disclose, either expressly or by necessary implication, not only the existence of the agency, but also the connection of the act with the employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 600.]

2. SAME—RELATION.

Where the owner or person in possession of an automobile merely permits another to use it, the latter does not thereby become the agent or servant of the former so as to charge the one with the other's negligence.

3. NEGLIGENCE—DANGEROUS APPLIANCES—AUTOMOBILES—USE BY TRESPASSER—DEATH OF PEDESTRIAN—LIABILITY OF OWNER.

The owner or keeper of an automobile will not be held liable for a negligent homicide committed therewith in a public street by a person old enough to be discreet and responsible in the eyes of the law, who took the machine, without the knowledge of the former, from a shop or garage where it had been left, although the person who thus took and drove the machine was inexperienced in its operation and unlicensed to run it, notwithstanding the leaving of the automobile at the shop or garage furnished the opportunity whereby such person got possession of it.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by R. M. Lewis against F. M. Amorous and others. From a judgment dismissing the action, plaintiff brings error. Affirmed.

For the homicide of her minor son Mrs. Lewis brought an action against Martin F. Amorous, John F. Toole, and Edward H. Inman. The petition contained four counts. The first count is as follows: Defendants on the 25th day of September, 1905, kept an automobile on North Pryor street, in the city of Atlanta. It had been kept there for some time. Said automobile was kept there by all the defendants. On the day aforesaid defendants permitted one Percy Pybus to take and run said automobile. Said Pybus was by said act created the agent for each and all of said defendants. For his negligent conduct in running said automobile, they are jointly and severally liable. All of the negligence herein set forth was the concurrent negligence of each of the said defendants. On the day hereinbefore named, in the city of Atlanta, Fulton county, petitioner's son, Branch Lewis, Jr., was run down and killed as hereinafter set forth. Petitioner's son was on Washington street near the corner of Clark street at about 7 p. m., on said date. A number of children were skating and playing in the streets and on the sidewalks at said place. Said automobile, being then and there run by said Pybus, agent as aforesaid, dashed down Washington street at a dangerous and reckless rate of speed, without any warning or notice of any sort, into the midst of the children. Petitioner's son and the other children were in plain view of said Pybus for a great distance, and the least ordinary care would have given him notice of the childrens' presence in the street and the danger of running the automobile at such a reckless rate of speed into their midst. Petitioner's son was just prior to his death standing on the sidewalk on Washington street, watching the other children skate. He started across the street and as he was standing, or walking, in the street, he was struck by said automobile and killed. Defendants' agent negligently failed to blow his horn after he passed Rawson street. Defendants' agent negligently ran said automobile at an unsafe and improper rate of speed. He negligently failed to check the machine and avoid striking deceased. Defendants' agent negligently ran into the crowd of children without any warning of any sort. Defendants' agent negligently ran the automobile against petitioner's son and killed him.

The second count contained the following allegations: Defendant Amorous owned an automobile and kept it at an establishment run by defendants Inman and Toole. Said establishment is in the city of Atlanta, on North Pryor street, and is run for the purpose of selling, handling, renting, and repairing automobiles. Defendants negligently permitted the young son of defendant Amorous, Clinton Amorous by name, to control and use said machine and act as agent for them. Said Clinton Amorous within the scope of his authority, turned said machine over to one Pybus. Said Clinton Amorous permitted him to operate and run the same. Said Clinton Amorous constituted said Pybus agent for all the defendants. For his negligent conduct in running said automobile they are jointly and severally liable. All of the negligence herein set forth was the concurrent negligence of each of the defendants. This is followed by allegations as to injury and loss just as in the first count.

The third count contains the following allegations: On the 25th day of September defendants were keeping a certain automobile at a shop or place of business on North Pryor street, in the city of Atlanta. Said automobile was a large and heavy machine, capable of going at a great rate of speed. It was complicated and difficult as to its management and construction. Said automobile was intended to be run in the public streets of the city of Atlanta. It was a machine which was dangerous and unsafe to intrust to any one, unless that person was capable of, not only understanding its mechanical appliances, but also possessed of age and experience which it takes to operate the same. Defendants negligently so kept said automobile as that one Pybus, an in-

experienced youth of 19 years of age, was given an opportunity to operate said machine and run the same about the streets of Atlanta, and use the same on pleasure jaunts. Said Pybus was young and inexperienced and without discretion necessary to run said machine in the city of Atlanta. Said Pybus had no license authorizing him to run said machine, and the running of the same was a violation of a valid municipal ordinance of the city of Atlanta. To permit such a machine to be run by him was negligence on the part of the defendants. For his negligent conduct in running said automobile, they are jointly and severally liable. All of the negligence herein set forth was the concurrent negligence of each of the defendants. This is followed by allegations as to injury and loss just as in the first count.

The fourth count varied from the third only in that it was alleged that the automobile was registered and licensed under a valid ordinance in the name of Clinton Amorous, and that it was negligence to allow any one other than Clinton Amorous to run it.

The defendants each demurred generally and specially. The court sustained the demurrers, and dismissed the action.

**Burton Smith, for plaintiff in error. Edgar Watkins and A. A. & E. L. Meyer, for defendants in error.**

POWELL, J. (after stating the facts as above). 1, 2. The theory of the first count is that the defendants, as principal through Pybus, as agent, committed the tort. If the allegation had been the simple direct statement that the defendants by their agent Pybus committed the wrong, this as against demurrer, either general or special, would have been sufficient. Gilmer v. Allen, 9 Ga. 208. However, the plaintiff by stating his action with greater particularity has disclosed (what, in the event of his having used the other form of pleading, would not have been developed until he presented his evidence) the fact that no such agency existed as would make the alleged principal responsible for the act of the agent. The practice of pleading facts relied upon with particularity is commendable; for it is better for plaintiff, for defendant, and for the court that the case should be ended by demurrer rather than that the same result should be reached through nonsuit or verdict after all the expense and trouble of preparation and trial has been incurred. The pleader in this count does not merely allege the ultimate fact that Pybus was the agent of the defendants, but sets up the preliminary facts by which he claims this relation is established. The demurrer admits only the facts pleaded, not the legal conclusions drawn by the pleader. The principal or master is responsible for the negligence of the agent or servant only as to acts done within the scope of the agency or service. The unequivocal allegation that the act is done by the principal or agent by or through the agent or servant necessarily connotes the idea that the agent or servant was employed or directed to do the particular act. But, if the petition alleges that one is the agent or servant of another, without disclosing either explicitly or implicitly the scope of the employment, and then alleges an act done by the agent, there is no inference that the act was within the scope of the employment; and the petition is demurrable as not setting out a cause of action against the principal.

The doctrine that the principal is not responsible for the acts of his agent not within the scope of the employment is so well established as to require no citation of authority; but, as applied to the specific question of the operation of automobiles, we call attention to the following cases: In Clark v. Buckmobile Company, 107 App. Div. 120, 94 N. Y. Supp. 771, it is held: "In an action brought to recover damages for personal injuries sustained by the plaintiff in consequence of being struck by an automobile owned by the defendant, the fact that the persons in charge of the automobile at the time of the accident were employés of the defendant does not render the defendant responsible for their negligent acts, unless they were then engaged in the defendant's business." Likewise in Stewart v. Baruch, 103 App. Div. 577, 93 N. Y. Supp. 161: "In an action brought to recover damages for personal injuries sustained by the plaintiff in consequence of his being struck by an automobile while crossing a city street, the fact that the defendant was the owner of the automobile, and that the chauffeur in charge thereof was in his employ, is sufficient to establish prima facie that the chauffeur was acting within the scope of his employment at the time. If, however, it appears that at the time in question the chauffeur, in disobedience of the defendant's express instructions, was using the automobile for his own pleasure, the defendant is not liable to the plaintiff." Also, to quote from Patterson v. Kates (C. C.) 152 Fed. 481: "Defendant owned an automobile which broke down on the way from Atlantic City to Philadelphia, and which he then left in charge of his driver, with directions to repair it and bring it on to Philadelphia. After the driver had reached the Delaware river, and while waiting for the ferry, he consented to take a third person in the machine to a place about a mile back on the road, and while making such trip, through his negligence in running too fast, he came into collision with a horse and buggy on the highway, by which plaintiffs were injured. Held, that under such facts defendant was not liable for the injury." See, generally, Huddy on the Law of Automobiles, pp. 64, 94, 95. See, also, McCarthy v. Timmins, 178 Mass. 378, 59 N. E. 1038; Hayes v. Wilkins (Mass.) 80 N. E. 449, 9 L. R. A. (N. S.) 1033 and notes.

Further, as to this count it may be said that the premise, "defendants permitted Pybus to take and run said automobile," and the conclusion pleaded, "said Pybus was by said act created the agent of each and all of said defendants," present a plain case of legal "non sequitur." Agency arises by contract express or implied. The courts will not imply nor could the jury legally imply an agency from the facts stated. Under the British motor car act of 1903, the person causing or permitting a motor car to be used contrary to the regulations is held responsible, as well as the driver in certain instances. Pettitt, Law of Motor Cars, 62; Pettitt, Law of Heavy Motor Cars, 58. But in this state we have no such statute. From what we have said it is apparent that the general demurrer was properly sustained to, not only the first count, but also to the second.

The third and fourth counts proceed upon a very different theory than that of agency. It is insisted in the argument that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While by reason of the rate of pay allotted to judges in this state few, if any, of them have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines, not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil disposed mules, and the like. In the case of Berman v. Schultz (Sup.) 84 N. Y. Supp. 292, quoted in Huddy on the Law of Automobiles, 64, it is said as to the duty of an owner who leaves his automobile unguarded at the street curb: "When, however, the person in charge of a motor car leaves it upon the street, it is his duty to take all reasonable care that no injury will result during the time the machine is there, especially if the car be left standing alone with no person in charge of it. It is not his duty before leaving the car to chain it to a post or in some manner to fasten it so that it would be impossible for it to be started by a third person. If, during the absence of the person in charge of the car and after he had turned off the power and applied the brake, the car be started by the willful act of two small boys and collide with a wagon, the unauthorized interference and act of the boys is the proximate cause of the injury, and the owner of the car is not liable." Without approving that decision, so far as it places the acts of small boys upon the same footing with those of conscious agents sui juris, we cite the case upon the general principle involved.

Several turntable cases and other decisions upon attractive nuisances are cited in the brief of the plaintiff in error as being apposite. Conceding that an automobile may be considered as within the purview of these cases, still it must be remembered that in the case at bar the person who immediately did the injury was not an irresponsible child, but was a conscious agent, who had long since arrived at the age of discretion. While it is alleged that the defendants left the automobile where opportunity to take and operate it was given to a person inexperienced in the operation of the machine, yet this is very different from alleging, as is necessary even under the theory of the turntable and other attractive nuisance cases, that the defendant left the automobile where opportunity to operate it was given to a person whose mental incapacity and indiscretion was such that he would be attracted to interfere with it, and would not know better than to trespass upon it. Even if we could for a moment concede (as in all common sense we cannot) that it would be negligent for a person to leave an automobile in a shop or garage without chaining it down or locking it in, still, when the injury which actually happens is directly resultant from the immediate negligence of a conscious, efficient, and responsible actor, with whose conduct the former is in no wise bound by any privity, the leaving of the machine unguarded is not the proximate cause of the injury. A hand car left by a section crew near a railway track would probably tend to attract young and incautious persons to commit the trespass of putting the car on the track and riding. As to passengers or persons on the track by permission or invitation the railway company might be held liable for an injury arising as a result of the car being thus run by the youthful and incautious trespassers, on the theory that a railroad company is under a duty to maintain its tracks and its appliances upon them with reasonable care to protect from injury persons lawfully passing over the tracks or being transported upon them. Such, indeed, is substantially the holding in the case of Salisbury v. Erie R. Co., 66 N. J. Law, 233, 50 Atl. 117, 88 Am. St. Rep. 480; but in that case the court says: "If a master lends his wagon to his servant to carry the servant's property over an ordinary public highway, no one would seriously contend that, while the servant was engaged in his own business, the master would be liable for any injury which resulted from the negligence of the servant. It would not be an injury done in the service of the master, and the master would be under no duty to the public to maintain the safety of the highway." In the case of Reynolds v. Buck, 127 Iowa, 601, 103 N. W. 946, the defendant dealt in automobiles, and his son (who, for the sake

of clearness and for the purpose of distinguishing him from the elder Buck, we may call the young Buck) clerked in the store. On a holiday, the young Buck, outside the scope of his employment, took one of the automobiles and carried a young lady to ride. While he was driving, plaintiff's horse took fright at the machine, whereby plaintiff was injured. It was held by the court that the defendant was not liable, even conceding the young Buck's negligence.

In the argument of the case the discussion ran into several collateral matters; but we do not deem it necessary to pursue the subject further. None of the counts set forth a cause of action. If Pybus were a party defendant, of course, under the allegations, he would be liable. In running, automobiles are dangerous machines. This state has not yet, as many states have done, enacted those regulations which the introduction of this new mode of conveyance would seem to make salutary. Until some change is made, the responsibility of persons owning, keeping, and operating motor cars will be determined according to the precedents of the common law and the general law upon cognate subjects. Reckless driving of these machines brings upon the person responsible not only civil liabilities, but sometimes the penalties of the criminal law. Indeed, as we learn, outside the record Pybus for the reckless taking of the life of the child whose homicide is the basis of this action has been convicted and sentenced for involuntary manslaughter. The persons immediately responsible will be held to full liability; but persons only so remotely connected with the injury as these defendants are cannot be held.

Judgment affirmed.

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(3 Ga. App. 80)

## LOUISVILLE & N. R. CO. et al. v. BLACKMON. (No. 524.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. DEAD BODIES—MUTILATION—RIGHT OF ACTION.

The unauthorized mutilation of the dead body of a husband gives a right of action to his widow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dead Bodies, § 13.]

2. MASTER AND SERVANT—TORTS OF SERVANT—SCOPE OF AUTHORITY.

A surgeon, being sent by two railway companies to a wreck to give professional attention to an engineer who had been injured, caused him to be moved to a hospital, where he soon died. After the death had occurred, he ordered the body carried to an undertaker's establishment, and there he and the undertaker, without the consent of relatives, mutilated the corpse. *Held*, that the tort of the surgeon was not within the scope of the business for which he was employed, and that the railway companies were not responsible for the mutilation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1225.]

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by M. E. Blackmon against the Louisville & Nashville Railroad Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

This action was instituted by Mrs. Blackmon against the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, as lessees of the Georgia Railroad, W. E. Platt, and W. R. Houston, as joint tort-feasors. The portion of the petition material to an understanding of the issues presented before the court are as follows: "On or about June 6, 1906, Thomas J. Blackmon, the husband of the plaintiff, while in the discharge of his duty as engineer on an engine on said road between Atlanta and Augusta, was fatally injured in a collision or wreck on said railroad, and, after said injury, the said Thomas J. Blackmon was by the officers or employés of said railroad placed under the charge of said W. R. Houston, physician and surgeon, who had been sent to the scene of the wreck by the officers of said company for the purpose of giving professional attention to said Thomas J. Blackmon and others who were injured; and the said W. R. Houston was the authorized agent and surgeon of said lessees. The said Thomas J. Blackmon was promptly removed to the hospital in the city of Augusta, under the direction of said W. R. Houston, agent and surgeon as aforesaid, who gave him professional attention up to the time of his death, which occurred about 36 hours after the injury. After the death of said Thomas J. Blackmon at the hospital, his body under the direction of said W. R. Houston, or other agent of said lessee companies, was removed to the undertaking establishment of said W. E. Platt, in the city of Augusta, where said body, on the same day, with the consent and co-operation of said W. E. Platt, was terribly mutilated by the said W. R. Houston, agent and servant as aforesaid, by cutting and sawing said dead body from the top of the breast bone clear down nearly to the pelvic bone, and all the internal organs were taken out, but afterwards replaced by the said W. R. Houston, agent and surgeon as aforesaid, or the said W. E. Platt, acting in co-operation with him. The mutilation of the remains of plaintiff's husband as aforesaid was done without lawful authority and without the consent of this plaintiff or of any other member of the family of deceased or any relative or kinsman, and said mutilation was not discovered until after the remains had been shipped to Atlanta for burial and an examination of them was there made, and, when the facts were disclosed to plaintiff, she suffered intense mental pain and anguish by reason thereof. Plaintiff charges that in mutilating the remains of her husband as aforesaid all of said defendants were joint tort-feasors, and

each and all are liable to her in law, and she claims damages in the sum of $5.000, and asks judgment of the court for the same." Each defendant filed a general demurrer, which the court overruled. The defendants jointly and severally assign error in that judgment.

Jos. B. & Bryan Cumming and C. Henry & R. E. Cohen, for plaintiffs in error. Wm. H. Fleming, for defendant in error.

POWELL, J. (after stating the facts as above). 1. That the unauthorized mutilation of the dead body of the husband gives a right of action to the wife is conceded. Medical College of Georgia v. Rushing, 1 Ga. App. 468, 57 S. E. 1083; 13 Cyc. 281; 8 Am. & Eng. Enc. of Law (2d Ed.) 834; 64 Cent. Law J. 275. Therefore, under the allegations of the petition, there can be no question as to the liability of the individual defendants, Platt and Houston, who participated in the alleged mutilation. So we shall discuss only the proposition whether the two railroad defendants are liable for the acts of their surgeon who committed the mutilation of the body.

2. Conceding that a surgeon of a railway company is such a servant as to be within the purview of section 3817 of the Civil Code of 1895, which provides that "every person shall be liable for the torts committed by his * * * servant by his command, or in the prosecution and within the scope of his business, whether the same be by negligence or voluntary," still we cannot hold that the tort complained of here was within the scope of the business for which the servant was employed. Whether the railway company furnished surgical attention to the engineer for the purpose of diminishing the effect of an injury for which they apprehended they might be held liable, or as a mere gratuity, the business intrusted to the surgeon was that of ministering to a living man; and, when death had rendered all further ministration unavailing, the duty and business with which he had been intrusted by the railway companies were at an end. Certainly the limit to the scope of his authority was reached when he had closed the dead eyelids down, and had delivered the body to him to whom next in natural order the corpse should go—the undertaker. A case might arise in which a railroad company would be liable for the mutilation of a dead body by a surgeon; as when, for the purpose of obtaining evidence or for other reason, it directed an autopsy to be made. Such is not here alleged to be the case. The mere allegation that the person committing the tort was agent and surgeon at the time does not render any the less necessary the statement of facts showing that the act was by command of the employer or within the scope of the employment. Lewis v. Amorous, 59 S. E. 338 (this day decided).

As to the plaintiffs in error Houston and Platt, the judgment is affirmed; as to the plaintiffs in error Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company the judgment is reversed.

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(3 Ga. App. 143)

## HILLEY v. PERRIN. (No. 647.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. WRIT OF ERROR — REVIEW — EXCEPTIONS — CERTIFICATION.

Exceptions pendente lite, though filed and recorded under order of the judge, cannot be considered, unless duly certified to be true. Civ. Code 1895, § 5541; Binyard v. State, 126 Ga. 635, 55 S. E. 498.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2703.]

2. LANDLORD AND TENANT—DISTRESS WARRANT.

Distress warrant lies in favor of a landlord against a tenant for the recovery of any rent due the former by the latter. This is true, although the landlord, subsequently to the time the rent becomes due, takes a note for the rent. The character of the indebtedness is not changed by the taking of the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1070.]

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Action between D. A. Hilley and G. G. Perrin. From the judgment, Hilley brings error. Affirmed.

Jos. N. Worley, for plaintiff in error. Z. B Rogers, for defendant in error.

POWELL, J. Judgment affirmed.

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(3 Ga. App. 86)

## SCHLITTLER & JOHNSON v. DEERING HARVESTER CO. (No. 530.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. PRINCIPAL AND SURETY — DISCHARGE OF SURETY—RELEASE OF PRINCIPAL.

The contract of the indorsers of the notes sued, being manifestly in consideration of a benefit given by the payee of the notes to the maker, is one of suretyship, and the verdict in favor of the maker on his plea of failure of consideration extinguished ipso facto the obligation of the sureties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 286.]

2. ELECTION OF REMEDIES.

Where the holder of the notes treated the contract of indorsement as one of suretyship, and brought suit against the maker and the indorsers jointly, and a verdict was rendered in favor of the maker of the notes on his plea of failure of consideration, he could not subsequently treat the contract as one of guaranty and have judgment entered in the same suit against the indorsers as guarantors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Election of Remedies, § 16.]

(Syllabus by the Court.)

Error from City Court of Baxley; J. H. Thomas, Judge.

Action by the Deering Harvester Company against Schlittler & Johnson and M. B. Swain.

Judgment for defendant Swain, and the other defendants bring error. Reversed.

W. W. Bennett, for plaintiffs in error. Parker & Moore and V. E. Padgett, for defendant in error.

HILL, C. J. The Deering Harvester Company brought suit on two promissory notes against M. B. Swain, as principal, and Schlittler & Johnson, a copartnership composed of A. Schlittler and J. M. Johnson, as indorsers. Swain filed an answer alleging failure of consideration. The court entered the suit: "Answered, April term, 1906." At the December term the jury found a verdict for the principal defendant, Swain. No effort was made to set aside this judgment, nor was the case ever marked in default as to the other defendants. At the April term, 1907, the court, on motion of plaintiff's counsel, rendered a judgment against Schlittler & Johnson, A. Schlittler, and J. M. Johnson, indorsers, for the full amount of said notes, principal, interest, and attorneys' fees, and all court costs. To this judgment they except.

The controlling question in the case is as to the validity of this judgment against the defendants sued as indorsers, when the principal maker of the note had been released from payment on his plea of failure of consideration. It is insisted that these defendants were only sureties on the notes, that their obligation was accessory to that of the principal, and that, as the latter's obligation to pay the note had become extinct by the verdict of the jury in favor of the principal, theirs ceased as a legal consequence. Civ. Code 1895, § 2967. The defendant in error seeks to avoid this legal result generally, if the contract was one of suretyship, by claiming that the contract of the plaintiffs in error was that of indorsers for value or guarantors; that the contract, being one of guarantee, was entirely distinct and separate from that of the principal, and consequently the release of the principal by the verdict of the jury did not extinguish their liability or their separate obligation to pay the notes. This conclusion follows if the premise is correct.

In this case the premise is assumed from the phraseology of the indorsement. On the back of the notes appears the following indorsement, which it is claimed constitutes a contract of guarantee, and not one of suretyship: "For value received I hereby guarantee the payment of the within note," etc.—signed by Schlittler & Johnson. It is contended that this indorsement, signed by Schlittler & Johnson, expresses a consideration flowing to them, and fixes their liability on the contract as guarantors of the payment of the notes. The mere language of the contract does not determine its legal character. "Courts may disregard formal expressions, to ascertain the real intent of the parties, and the form of the contract is immaterial, provided the fact of suretyship exists." Fields v. Willis, 123 Ga. 276, 51 S. E. 280; Civ. Code 1895, § 2969. The mere use of the word "guarantee" will not make a contract one of guarantee. Baldwin Fertilizer Co. v. Carmichael, 116 Ga. 763, 42 S. E. 1003. See, also, Geiser Mfg. Co. v. Jones, 90 Ga. 307, 17 S. E. 81. Nor do the words "value received" conclusively import a consideration. We think the indorsement quoted, written on the backs of the notes, indicated that the signers thereof were only accommodation indorsers or sureties.

We do not deem it necessary to enter into a discussion of the rather shadowy and illusive distinction between a contract of suretyship and a contract of guarantee. In Small Co. v. Claxton, 1 Ga. App. 83, 57 S. E. 977, we have attempted to do this and to show that the distinction is more fanciful and theoretical than real and practical. Our Civil Code of 1895 (section 2966) mentions one test by which we can distinguish and determine the character of the contract, whether one of suretyship or one of guarantee. If the consideration is for a benefit to the principal, the contract is one of suretyship. If the consideration is one of benefit flowing to the guarantor, the contract is one of guarantee. Let us apply this test to the present contract, under the facts disclosed by the record. Suit was brought against Swain as the maker of the notes, and against Schlittler & Johnson as indorsers. Swain filed an answer, in which he set up that the consideration for which he made the notes was "one Deering mower" and that this consideration had failed, in that the mower was worthless. The credit was manifestly extended to the maker of the notes, and he was released from payment, because the consideration to him and for which the notes were given had failed. What possible benefit was there flowing to Schlittler & Johnson? They simply indorsed Swain's executory contract, and thus became liable with him, but not independently of him. This was the plaintiff's construction of the contract when suit was brought. He then treated the contract as one of suretyship, and the idea of a guarantee was an afterthought. The suit was not properly brought against Schlittler & Johnson as guarantors, for as guarantors they could not have been joined as defendants with the maker of the notes; but as sureties they were properly joined. The form of the suit, the allegations of the suit, the character of the notes, and the facts in the record all show that Schlittler & Johnson were considered as sureties, and were in law only sureties, and that their obligation as such was extinguished by the verdict and judgment in favor of the principal maker of the notes.

The subsequent judgment rendered against them was unauthorized, and should be set aside. This opinion on the vital and substantial question makes the other assignments immaterial.

Judgment reversed.

(145 N. C. 472)

## STATE v. RAYNOR.

(Supreme Court of North Carolina. Nov. 20, 1907.)

1. SEDUCTION — CRIMINAL RESPONSIBILITY — EVIDENCE—PROMISE OF MARRIAGE.
In a prosecution for seduction under promise of marriage, the testimony of prosecutrix that she yielded on defendant's promise of marriage is competent.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, § 77.]

2. CRIMINAL LAW—EVIDENCE—ADMISSIONS.
In a prosecution for seduction under promise of marriage, the answer of the prosecutrix to a question why she yielded that she could not help it, and that he said he was not trying to fool her, but was going to marry her, was competent as an admission.

3. SAME—TRIAL—RECEPTION OF EVIDENCE—REPETITION OF ANSWER.
In a prosecution for seduction under promise of marriage, it was discretionary with the court to allow the prosecutrix to repeat her testimony that she yielded on defendant's promise of marriage.

4. SEDUCTION — CORROBORATION OF PROSECUTRIX—SUFFICIENCY.
Where the mother of prosecutrix testified that defendant admitted in her hearing the promise and the seduction, the testimony of prosecutrix is sufficiently corroborated.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, §§ 83–86.]

5. SAME—INSTRUCTIONS—REFUSAL.
A requested instruction on the necessity of support to the testimony of prosecutrix, stating that her statements to her mother, after the fact that defendant had promised to marry her, were not sufficient support, was properly refused as misleading, where there was evidence not only of such statements to the mother when alone with prosecutrix, but also that statements of the seduction and promise to marry had been made by prosecutrix to her mother in the presence of defendant without contradiction by him.

6. SAME — ELEMENTS OF OFFENSE — TIME OF PROMISE.
It is immaterial that the promise was made previous to the time of the seduction, if defendant made use of it to induce the prosecutrix to yield her person to him.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, § 58.]

Appeal from Superior Court, Pender County; Long, Judge.

Cephas Raynor was convicted of seduction under promise of marriage, and he appeals. Affirmed.

R. G. Grady and W. T. Dortch, for appellant. Hayden Clement, Asst. Atty. Gen., for the State.

WALKER, J. The defendant was indicted and convicted of seduction under promise of marriage (Revisal 1905, § 3354), and appealed.

He assigns four errors, as follows:

(1) The court erred in permitting the prosecutrix to answer the question asked by the solicitor, to wit, "Why did you yield to the defendant, and have intercourse with him that night?" The witness had previously stated that they had sexual intercourse at the time mentioned. She answered: "I could not help it. He kept right on at me. I told him he was trying to fool me into it. He said he was not, that he was going to marry me." The answer was also objected to. The court overruled the objections, and admitted the evidence. We do not see why it was not competent and relevant. It tended to prove directly the very fact in issue. As an admission, it was clearly competent. State v. Lawhorn, 88 N. C. 634; State v. Horton, 100 N. C. 445, 6 S. E. 238, 6 Am. St. Rep. 613. The fact that it was a repetition of evidence to the same effect previously introduced did not render it incompetent. It was in the discretion of the court to permit the witness to repeat her answer, if it was thought that the jury had not understood her, or for any other good reason.

(2) That the court erred in refusing to instruct the jury, as requested by the defendant, that there is no evidence in the case supporting the testimony of Eddie Jones, the prosecutrix, as to the promise of marriage and the jury should acquit. There was evidence, we think, sufficient to support the witness in her statement that the defendant had seduced her under a promise of marriage. Her mother, Catherine Jones, testified that the defendant had admitted, in her presence and hearing, that he had made the promise, and thereby accomplished the ruin of her daughter. This admission was made to the prosecutrix, in the hearing of her mother, when she was reproving him for his vile conduct and his faithlessness. She was then pleading with him to save her from the consequent disgrace. There was other testimony which was competent to be considered by the jury in this connection. The defendant admitted the seduction.

(3) The court erred in refusing to instruct the jury, as requested by the defendant, that the supporting testimony required by the statute is something more than corroborative evidence. It must be such independent facts and circumstances as tend to establish the credibility of the prosecutrix [and the statements of the latter to her mother after the alleged seduction, that the defendant had promised to marry her, are competent only to corroborate her as a witness, and are not such supporting testimony as is required by the statute]. The instruction was given, except the part inclosed in brackets. If there was not evidence in this case that the prosecutrix had told her mother, in the presence of the defendant, of the seduction under promise of marriage, and he did not deny it, but, in fact, admitted it, the objection of the defendant would have to be sustained under State v. Ferguson, 107 N. C. 841, 12 S. E. 574. It is true there was evidence that she had told her mother the circumstances before the time they had the conversation in the defendant's presence, but, if the court had given the instruction without qualification or explanation, it might have misled the jury by inducing them to believe that the instruction embraced every statement made to her

mother, whether the defendant was present or not. In view of the entire evidence, the prayer was not sufficiently specific. In this respect this case differs from State v. Ferguson, supra, and State v. Whitley, 141 N. C. 825, 53 S. E. 820. The instruction was so framed that it might have produced the impression on the jury that there was no supporting evidence in the case, but only corroborative, and his honor seems, from the last instruction he gave, to have taken this view of it.

(4) The court erred in charging the jury as follows: "If you find that she [the prosecutrix] was induced to yield and submit her person to the defendant by reason of his promise of marriage so made at the time, or before that time, the defendant would be guilty, there being other supporting evidence required by the statute." This instruction was proper under State v. Ring, 142 N. C. 596, 55 S. E. 194, where we said: "In an indictment for seduction under promise of marriage, when the evidence shows that the prosecutrix trusted to the defendant's 'pledge that he would never forsake her,' and to his promise of marriage, when she permitted him to accomplish her ruin, a conviction was proper, and the mere fact that the promise existed long before the seduction can make no difference, if he afterwards took advantage of it to effect his nefarious purpose. His conduct in such a case would be the more reprehensible, as showing a studied and deliberate purpose, first to engage her affections, and then by taking advantage of her weak and confiding nature and the trustfulness he had inspired by his perfidy to insidiously ensnare her with his wicked and faithless promises of love and constancy. Such conduct is the legal equivalent of an express promise to marry if she would submit to his lecherous solicitations, provided the jury found, as they did, that it had the effect of alluring her from the path of virtue." The evidence in this case is, if anything, much stronger against the defendant than that in the case of State v. Ring was against the defendant there to establish the essential elements of the crime charged in the indictment. We think from the entire case that the jury fully understood the difference between "corroborating" and "supporting" evidence, and, in other respects, were properly instructed by the court.

No error.

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(146 N. C. 116)

## RUSSELL v. WADE.

(Supreme Court of North Carolina. Nov. 20, 1907.)

1. TRUSTS—CONSTRUCTIVE TRUST.

Where plaintiff and defendant agreed to procure an option on land and secure title thereto for the purpose of sale, profits to be divided equally, and plaintiff procured a promise from the owner to give them an option, and defendant sent to get the option, took it and the deed in his own name, afterwards denying any right in plaintiff, a constructive trust arose in plaintiff's favor for a half interest after payment of half the purchase money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 150.]

2. SAME—STATUTE OF FRAUDS.

A constructive trust is not within the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 141.]

3. SAME—CORROBORATIVE EVIDENCE.

Where plaintiff and defendant agreed to take an option for land, they to share equally in the profits, and plaintiff got a promise of the owner to give it to them, and defendant took it, and later the deed, in his own name, and afterwards denied any right of plaintiff, the promises of defendant after taking the option and deed to make a writing showing plaintiff's interest are not the basis of his right, but are merely to be used as corroborative of the original agreement and its continuance.

Appeal from Superior Court, Montgomery County; Moore, Judge.

Action by L. N. Russell against O. M. Wade. Judgment for plaintiff. Defendant appeals. Affirmed.

Plaintiff alleges that he and defendant some time during the month of April, 1902, entered into an agreement to procure an option on, and some time later to purchase, a tract of land containing about 2,500 acres, fully described in the complaint, which was owned by Miss Adelaide Kron; that plaintiff and defendant were each to have one-half undivided interest; that they were to sell the land and divide the profits equally; that defendant agreed that, if plaintiff would negotiate the trade for the option, he, defendant, would advance the money necessary to pay therefor; that, pursuant to said agreement, plaintiff did negotiate with the owner of the land for an option; that he sent defendant to Miss Kron to get the option and to pay the amount of cash agreed upon; that defendant wrongfully, in violation of the contract and without knowledge of plaintiff, had said option executed to himself, omitting the name of plaintiff therefrom; that when plaintiff first had knowledge thereof, defendant promised to give him a writing showing that he, plaintiff, owned one-half interest in said option, but failed to do so; that about the time said option was to expire the parties made arrangements with Miss Kron for a new or extended option; that said second option was also taken by defendant to himself, but he promised to give plaintiff a writing showing his interest therein; that plaintiff negotiated with one or more persons to sell the option at a large profit, but was induced by defendant to let him borrow some money from O. R. Cox, the father-in-law of defendant, to pay for said land; that defendant got the money from Cox and had Miss Kron to make a deed to himself for said land, again promising plaintiff to make him a writing showing his, plaintiff's, interest therein; that, without plaintiff's knowledge and in fraud of his rights, defendant conveyed one-half interest

in said land to said O. R. Cox, and executed a mortgage to him for the other one-half undivided interest to secure a note of $2,400, being the amount of one-half the purchase money paid to Miss Kron, with interest; that the land is very valuable, being worth more than $10,000; that he is ready and able to pay one-half the purchase money and redeem the one-half interest covered by the mortgage to Cox, etc. Plaintiff alleges that, by virtue of the facts set forth, he is the equitable owner of a one-half undivided interest in said land and demands appropriate relief in the premises, etc. Defendant denied the material allegations in the complaint, and stated his version of the transactions. It is unnecessary to set forth more fully defendant's contentions. His honor submitted the following issue to the jury: "Is the plaintiff the equitable owner of a one-half undivided interest in the lands described in the complaint, subject to the mortgage deed executed by O. M. Wade and wife to O. R. Cox for one-half the purchase money thereof?" The defendant excepted to the issue submitted to the jury. Both parties introduced testimony tending to sustain their contentions. At the close of the evidence, defendant moved for judgment as of nonsuit. Motion denied, and defendant duly excepted. The court charged the jury fully upon the different contentions of the respective parties, and, among other things, explained to the jury and charged them that, where evidence had been admitted in the cause for a limited purpose, they could consider said evidence only for the purpose for which it was admitted, and pointed out to the jury in each instance, as set forth in the foregoing evidence, for what purpose the evidence was admitted, and explained to them the purpose for which they could consider the evidence in each instance. The court also made this explanation to the jury in each instance at the time the evidence was admitted. Among other things, the court charged the jury that if the plaintiff believed that he had arrangements made to secure his part of the purchase money of the land in controversy, and informed the defendant that he had such arrangements made, and that the defendant thereupon told him that he had arranged to secure the whole of the purchase money from his father-in-law for the benefit of both plaintiff and defendant, and thereby induced the plaintiff to refrain from any further effort to secure his part of the purchase money, it made no difference whether the plaintiff could have secured his part of the money or not. To the foregoing paragraph of the charge the defendant excepted. The jury answered the issue submitted to them in favor of the plaintiff. Motion for a new trial, motion overruled, and the defendant excepted. There was judgment upon the verdict, to which the defendant excepted and appealed.

Adams, Jerome & Armfield, for appellant. U. L. Spence, J. A. Spence, and R. T. Poole, for appellee.

CONNOR, J. (after stating the facts as above). The issues tendered by defendant were properly rejected. They are based upon a misconception of plaintiff's allegation. The action is not brought to enforce specific performance of a parol contract to convey land but to declare defendant a trustee in respect to one-half undivided interest in the land described in the complaint. While there is contradictory evidence the verdict of the jury, construed with reference to the instructions, establishes plaintiff's allegation that he and defendant entered into a contract to procure an option on the land and secure the title thereto for the purpose of selling and dividing the profit made on the transaction; that defendant took the option to himself, or in his own name, but recognized plaintiff's interest therein and promised to give him a writing showing that he was joint owner. The conduct of both parties in negotiating sales of the property and otherwise strongly corroborates plaintiff's contention. There is but little difference in the testimony in this respect. Miss Kron says that, when she gave the option, she understood that it was for the benefit of both parties. It appears that, upon the expiration of the first option, a new one was given under substantially the same conditions as the first so far as the interest of plaintiff and defendant were concerned. When the time came to raise the purchase money, plaintiff was negotiating with several parties to get his part, when defendant suggested that he could borrow the whole amount "for both of us" from O. R. Cox, his father-in-law. Plaintiff, relying upon this suggestion, made no further effort to raise the money, stating that he wished his interest to stand security for his part of the debt. Defendant, instead of doing as he had proposed, obtained the money from Cox, took title to himself, and immediately conveyed one-half interest to Cox in full, and executed a mortgage to him, Cox, for the other one-half interest to secure a note of $2,400, being one-half the purchase money, thereby depriving plaintiff of any interest in the land. The value of the land is very greatly in excess of the amount paid.

The plaintiff's equitable right is based upon the well-settled principle and authorities discussed and cited by Mr. Justice Walker in the recently decided case of Avery v. Stewart, 136 N. C. 426, 48 S. E. 775, 68 L. R. A. 776. In that case the plaintiff had contracted for the purchase of a tract of land, and, being unable to raise the purchase money, procured the defendant to pay the amount and take title for his, plaintiff's, benefit and convey to him upon payment of the amount advanced with a bonus agreed upon. We held the trust valid, upon the authority of a

long line of cases decided in this court. In this case plaintiff, in violation of his duty to defendant, takes the option to himself, whereas, he should have taken it to the defendant and himself jointly. This was a clear breach of duty, both legal and moral, and so recognized by defendant, who promised to give plaintiff a "writing" showing his interest in the option. The promise to give the writing, made at various times after getting the option, is not the basis of plaintiff's claim, but corroborative of his evidence in regard to the original agreement. The trust arises and is attached to the legal title procured by defendant "by operation or construction of law." Mr. Justice Walker in Avery v. Stewart, supra, after enumerating the several ways in which such trusts arise, says: "Trusts of the second class exist purely by construction of law, without reference to any actual or supposed intention to create a trust, for the purpose of asserting rights of parties or of frustrating fraud, and are therefore termed constructive trusts. * * * The party guilty of the fraud is said, in such case, to be a trustee ex maleficio, and will be decreed to hold the legal title for the use and benefit of the injured party and to convey the same when necessary for his protection, as when one has acquired the legal title to property by unfair means"—citing Wood v. Cherry, 73 N. C. 110, and other cases. "When one party has, by his promise to buy, hold, or dispose of real property for the benefit of another, induced action or forbearance by reliance upon such promise, it would be a fraud that the promise should not be enforced." The following language, in the opinion, extracted from Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418, is pertinent and conclusive of the plaintiff's equity: "When a party acquires property by conveyance secured to himself under assurances that he will transfer the property to, or hold and appropriate it for, the use and benefit of another, a trust for the benefit of such person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself." If the plaintiff had contracted with Miss Kron for an option to himself, and after doing so procured defendant to take the option upon an express promise to hold for his, plaintiff's, benefit and transfer to him, can there be any question that the court would have enforced the promise? Can it be that there is any substantial difference when, as in this case, he procured a promise from Miss Kron to give the option to them jointly, and, pursuant to an arrangement between the parties that the option was to be so taken, defendant, in violation of his promise, takes the option to himself? Is not this a clear case of obtaining the property by unfair means? If he took the option in his own name, intending to exclude plaintiff from any interest therein, it presents a clear case in which the court declares him a trustee ex maleficio. In Cloninger v. Summitt, 55 N. C. 513, in which the same principle is involved, Pearson J., says: "The plaintiff's equity does not rest upon the idea of the specific performance of a contract. The parties did not occupy the relation of vendor and vendee. The defendant did not agree to sell the land to the plaintiff; for, at the time of the arrangement, he did not have the land, or any interest therein, to sell; nor was the plaintiff to pay a price for it. But the plaintiff's equity rests upon the idea of enforcing the execution of a trust." Hargrave v. King, 40 N. C. 430. If, as is probable, defendant took the option to himself, intending, in good faith, to carry out his agreement with plaintiff, and thereafter, for any reason, changed his purpose or decided to hold for himself, is the plaintiff without remedy? We think not. To permit defendant to so deal with the property to plaintiff's injury would be to encourage, instead of preventing, fraud and wrong.

It is true, as contended by defendant, "that a breach of a mere moral obligation is not by itself sufficient ground for the interference of the court." But, as said in Avery v. Stewart, supra: "The evidence, if taken as true, shows that there was more than that in this instance, and that the defendant has acquired property which he could not have obtained but for the plaintiff's request that he furnish the money and take the title and his promise to do so. * * * The plaintiff's equity seems to us to be plain." The difference in the two cases consists in the fact that in one the defendant agreed to take the title to himself for the benefit of plaintiff, whereas, in the other, he was to take the option in the name and for the benefit of both, and, in violation of his promise and his duty, he took it to himself. In one the wrong was in refusing to execute an express promise upon the faith of which defendant got the property; whereas, in the other, defendant took title in violation of his agreement. In the first case, the court enforces the execution of an express parol trust. In this case, the court declares defendant a trustee, to prevent fraud, ex maleficio. The law and the authorities have been so recently discussed and cited in Avery v. Stewart, supra, that we deem it unnecessary to repeat what was so well said in that case. The doctrine of trusts, both parol and constructive, has been frequently before this court, and the principles so clearly stated. that we prefer to adhere to our own decisions. In several jurisdictions the statutes differ from ours. The court has uniformly held that parol, and, of course, constructive, trusts, are not within our statute of frauds. Defendant's counsel, in his very excellent brief, stresses the principle and authorities relating to resulting trusts, which usually arise when the purchase money is paid by

one person and the title taken by another. As we have seen, this case does not come within that class, and is not therefore affected by the fact that defendant furnished the money to pay for the option. The trust attached to the option and the interest acquired by defendant, by virtue thereof, and, in the absence of any action on the part of plaintiff releasing such equity, it adhered to such title as defendant acquired pursuant to the original option. The evidence tends to show, and the fact passed into the verdict, that plaintiff was at all times asserting his rights. His honor expressly submitted the question to the jury whether he was induced to discontinue his efforts to raise the purchase money by the promise of the defendant to do so for both. If defendant intended to put an end to the relation established between himself and plaintiff, by the original agreement, he should have given him clear, express, and unequivocal notice thereof, and thereby let plaintiff understand that he must assert his rights or lose them. This he did not do. While there is some evidence indicating a purpose to exclude plaintiff from further participation in the transaction, the first unequivocal act done by defendant was the execution of the deed to his father-in-law. Since then we find no change in the status of the parties in respect to their rights and liabilities. The defendant lodges a number of exceptions to the admission of evidence. They are based upon the theory that they were offered to establish the plaintiff's case by acts and declarations subsequent to the execution of the first option. His honor confined them at all times during the trial to the office of corroboration of the substantive evidence upon which the cause of action was based. The testimony was competent for this purpose. His honor correctly refused to dismiss the action. The judgment secures to the plaintiff what was to be his by the original agreement; that is, a one-half interest after paying one-half the purchase money. If the defendant has lost his one-half interest by conveying it to his father-in-law in fee, he has no one to blame except himself. He had no right to give away the interest of the plaintiff who, it seems, originated the idea and plan which, if carried out, as agreed upon, would have given each party a handsome profit on the purchase.

We have examined the record with care, and find no error.

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(146 N. C. 125)

## PARRISH v. HIGH POINT, R., A. & S. RY. CO.

(Supreme Court of North Carolina. Nov. 20, 1907.)

EVIDENCE—OPINION—EXPERT—COMPETENCY.

In an action for personal injuries a question was asked a medical expert that, if the jury found from the evidence that plaintiff was injured by falling against the arm of a seat, and struck his back over the region of the kidney, and it then gave him great pain, followed by faintness or nausea, and the next morning and several times since he passed bloody urine, as late as the 5th day of this month, that his nervous system was affected, and when he made a misstep or had a sudden jar he had acute pain in the region of the kidney, followed by passing bloody urine, "what, in your opinion is the cause of his being affected in this way?" *Held*, that the question was competent; the witness not being called upon to express an opinion as to the existence of disputed facts, but merely as to the result of certain assumed facts which the jury might find from the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2369–2374.]

Appeal from Superior Court, Randolph County; Justice, Judge.

Action by Melvin W. Parrish against the High Point, Randleman, Asheboro & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This action was brought to recover damages for injuries to the plaintiff by defendant's negligence. The plaintiff had taken passage on defendant's train from Greensboro to Asheboro on July 23, 1906. He went to get some medicine for his wife and a glass of water, and while returning to his seat he received a severe shock, which was caused by the backing of the engine against the cars. He was hurled forward, and then backward, falling against the arm of a seat, which injured his back, hips, and spinal column. There was evidence tending to show the extent of his injuries. In order to further prove the extent and nature of the injuries to himself, the plaintiff introduced Dr. Lewis, admitted to be a medical expert, who testified: "I have been a physician nearly 20 years. I examined the plaintiff on the 7th and 8th of July, 1907. There was nothing the matter with his lungs, but his heart beat a little fast. I found trouble—a swelling, puffiness, and tenderness—over his right kidney." The witness was then asked the following question: "If the jury find the facts to be from the evidence that the plaintiff was injured by falling back against the arm of a seat in the train, and struck his back over the region of the kidney, and at the time it gave him great pain, followed by faintness or nausea, and that the second morning thereafter he passed urine mixed with blood, and that several times since he has passed bloody urine, as late as the 5th day of this month, that his nervous system was affected, and when he makes a misstep, or has a sudden jar, he has acute pain in the region of the kidney, followed by passing bloody urine, what, in your opinion is the cause of his being affected in this way?" The witness answered: "In my opinion the kidney was dislocated by the fall, and the dislocation is permanent, and the plaintiff will be disabled for life, unless he has the kidney removed by an operation." The question and answer were objected to by defendant in apt time. The objections were overruled, and defendant excepted. The exception as above stated was

the only one in the case. There was a verdict for the plaintiff, and, judgment having been entered thereon, the defendant appealed.

J. T. Brittain and King & Kimball, for appellant. J. A. Spence and Morehead & Sapp, for appellee.

WALKER, J. (after stating the facts as above). We cannot agree with the learned counsel of the defendant that this case bears any resemblance to Summerlin v. Railroad, 133 N. C. 550, 45 S. E. 898. In that case the questions excluded by the court were so framed as to require the witnesses to express an opinion as to the existence of a fact which was controverted, and it was there said by the court that this was not the proper form for the question to take, but that the expert's opinion should be founded upon a hypothetical question containing a statement of facts which the jury might find from the evidence, and supposing, of course, that they will find them to be as stated in the question. The rule is stated in 3 Wharton & Stille's Medical Jurisprudence (5th Ed.) p. 580, as follows: "An opinion that an injury resulted from a certain designated act, being the one upon which the action is based, as distinguished from an opinion that certain causes would produce certain results, is improper, as usurping the province of the jury." And so did we say substantially in Summerlin v. Railway, upon the authorities therein cited. The same rule practically is stated in 6 Thompson on Negligence, p. 694, § 7755, as follows: "A medical expert is generally allowed to state his opinion as to whether the injury for which the action is brought might have resulted from a particular cause."

But in this case the witness was not asked to give an opinion as to the mere existence of a controverted fact; but upon the assumption that the jury found certain facts from the evidence as to the symptoms of the plaintiff's disease, including the fact that he had been injured by the jar, in the manner described, he was asked to give his scientific opinion as to what produced those symptoms. He answered that the kidney had been permanently dislocated by the fall, and that he would be disabled for life, unless the kidney was removed by an operation. The injury from the jar and the marked symptoms immediately following it were assumed as facts that the jury might find to have existed, and his opinion was based on the facts so to be found. He was not asked, if the symptoms existed, what particular injury caused them; but the injury and its instant manifestations were first assumed as established, and his opinion was deduced from these supposed facts. It was necessarily assumed by the very form of the question that whatever injury the plaintiff had suffered was directly caused by the fall, and the witness was called upon to state what the physical conditions produced by the fall indicated to his trained and experienced mind as a medical practitioner. We think the evidence comes strictly within the rule admitting expert testimony, or that which is given by a witness having special or peculiar knowledge and skill in the particular calling to which the inquiry relates; and the competency of the question, as predicated on the hypothetical facts stated, is sustained by the best-considered authorities. Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655, 64 L. R. A. 969, 103 Am. St. Rep. 573; Stouter v. Railway Co., 127 N. Y. 661, 27 N. E. 805; Perkins v. Railroad Co., 44 N. H. 223; State v. Bowman, 78 N. C. 509. The question was not so put to the witness "as to require him to draw a conclusion of fact, nor to pass upon the effect of the evidence in proving controverted facts," but merely to express his opinion upon the facts stated in the question, leaving them to be found exclusively by the jury. There was evidence upon which the jury could have made such a finding. The ruling of the court in admitting the evidence of Dr. Lewis was therefore correct.

No error.

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(146 N. C. 38)

## LOGAN v. HODGES.

(Supreme Court of North Carolina. Nov. 13, 1907.)

1. LIBEL—WORDS ACTIONABLE PER SE—IMPUTING CRIME.

Plaintiff in an action for libel was county treasurer, and had a large sum of public money in his care which he had deposited in a safe at his store. The safe was blown open, and the money taken. *Held*, that a written communication referring to the robbery, saying, "Turn your searchlights on your treasurer, and you will find the money," was actionable per se, as imputing crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 17–25, 36.]

2. SAME—PUBLICATION—WHAT CONSTITUTES.

Where a postal card containing libelous matter was sent through the mails, and passed through the hands of a carrier and others, a publication is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 108.]

3. SAME — PRIVILEGED COMMUNICATIONS — QUALIFIED PRIVILEGE—DISCHARGE OF DUTY TO PUBLIC.

A postal card imputing to a county treasurer the theft of public money in his care, addressed to the superintendent of public instruction of the same county, is not qualifiedly privileged as information as to misconduct of a public official and written in the public interest; the recipient having no power to hear the complaint or redress the grievance, and no duty in the matter referred to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 124, 130.]

4. SAME — ACTION — MALICE — BURDEN OF PROOF.

In an action for libel, where the defense was that the libelous matter was a privileged communication, the party claiming the privilege has the burden of proof to show it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 279.]

5. SAME—JUSTIFICATION—PLEADING.
Justification as a defense in an action for libel must be specially pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 219–226.]

6. SAME—DAMAGES—PLEA OF GOOD FAITH IN MITIGATION—EVIDENCE.
Where defendant in an action for libel pleads good faith and lack of malice, he may show these facts in mitigation of damages, and may also offer evidence of the general bad character of plaintiff or any facts which tend to disprove malice, but do not tend to show the truth of the charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32. Libel and Slander, § 253.]

7. SAME—EXEMPLARY DAMAGES.
Exemplary damages may be awarded for a libel published in reckless indifference to the rights of others, the spirit of mischief or criminal indifference to civil obligations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32. Libel and Slander, § 351.]

Appeal from Superior Court, Yadkin County; Moore, Judge.

Action for libel by J. A. Logan against J. D. Hodges. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial ordered.

Civil action to recover damages for publication of a libel. At the conclusion of the evidence, upon an intimation from his honor that he would charge the jury that, if they believed the evidence, the mailing of the postal card declared upon was qualifiedly privileged, that the burden of showing malice was upon the plaintiff, and that there was no evidence of actual malice, the plaintiff, having duly excepted, submitted to a nonsuit and appealed.

Holton & Reece and Benbow, Hall & Hanes, for plaintiff. E. L. Gaither, for defendant.

BROWN, J. As gathered from the record, the facts upon which the plaintiff bases his right of action are as follows: The plaintiff was the treasurer of Yadkin county at the time the cause of the action arose, having been elected to said office at the regular election on November 6, 1904. As such treasurer, he had in his hands belonging to said county the sum of $4,139.09, and other moneys in cash, and had the same securely locked in an iron safe in his store in the town of Yadkinville, the county seat of Yadkin county, and on the night of September 6, 1904, the store house in which the said safe was located was broken into, and said safe containing said funds and moneys was blown open by unknown parties, supposed to be burglars, and robbed of its contents. On September 9, 1904, the defendant, J. D. Hodges, wrote a postal card to one A. J. Martin, and sent same through the United States mails from some point in Davie county to Longtown post office in Yadkin county; the contents of the card being as follows: "Dear Sir: From conversation I have had with a gentleman from Davie county who was in Yadkinville the day after the robbery, I believe the guilty men live in Yadkinville. Turn your searchlights on your treasurer and the man that boards with him and the postmaster, and you will find where the money went. Yours truly, J. D. Hodges. Augusta, N. C. Sept. 9, 1904." The defendant was at that date superintendent of public instruction and a resident of Davie county, and the addressee of the postal card, Martin, held the same office in Yadkin county.

1. That the words written upon the postal card are of such a character as makes them actionable per se is hardly debatable. They plainly imply the commission of a crime, which not only involves moral turpitude and is punishable by imprisonment, which is sufficient to make words actionable per se, but under the law of this state constitutes a felony punishable by imprisonment in the state's prison. Odger, Libel & Slander, pp. 253–256; Brayne v. Cooper, 5 M. & W. 249; Posnett v. Marble, 62 Vt. 486, 20 Atl. 813, 11 L. R. A. 162, 22 Am. St. Rep. 126, and cases cited.

2. That there was a publication of the libel is proven by the testimony of the addressee, who testifies he received it in the mail, as well as by the testimony of the carrier and others. Communications in the nature of telegrams and postal cards containing defamatory matter, transmitted in the usual manner, are necessarily liable to be communicated to all the clerks through whose hands they pass. Newell on Slander & Libel, p. 233. The exact question was decided by the Supreme Court of Tennessee. In that case a clerk in one bank wrote on a postal card, and mailed it to a correspondent bank, in reference to a draft held for collection by the former for the latter, "Bowdie in the hands of a notary." The court held it to be a publication, and that the words, being false, were libelous and actionable per se, without proof of special damage. This case is cited with approval by Newell, Slander & Libel, p. 233, note. Besides, it is to be noted that the very method of making this communication adopted by defendant is prohibited by law and made a crime against the United States for the evident reason of its publicity. While the government may legislate against the reading of postal cards by those through whose hands they pass, it nevertheless recognizes the frailty of human nature, and prohibits the mailing of postal cards containing defamatory matter under severe penalties. 2 U. S. Comp. St. 1901, p. 2661.

3. The occasion of the publication was neither absolutely or qualifiedly privileged. It is contended by the learned counsel for defendant that the occasion was qualifiedly privileged because the communication concerned a public official of the county of Yadkin, and was written in the public interest. We admit the general proposition that it is the duty of all who witness or have knowledge of the misconduct of any public officer

to bring such misconduct to the notice of those whose duty it is to inquire into it, but the complaining party must be careful to apply to some person who has jurisdiction to entertain the complaint or power to redress the grievance or some duty to perform or interest in connection with it. Newell on Slander & Libel, pp. 504, 505; Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715; Lansing v. Carpenter, 9 Wis. 540, 76 Am. Dec. 281; Hamilton v. Eno, 81 N. Y. 116. To illustrate: Words charging a party with theft, spoken in good faith under a belief of their truth and with probable cause to a police officer employed to detect the robber, are in the nature of a privileged communication. Smith v. Kerr, 1 Edm. Sel. Cas. (N. Y.) 190. So a letter accusing a school mistress of unchastity written in good faith to the school committee is privileged so as to put the burden on plaintiff to show actual malice. Bodwell v. Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228. The American & English Encyclopedia of Law states the law as follows: "A communication in regard to the character or conduct of a public official is privileged if addressed to a functionary having the authority to redress grievances or to remove the official from office, and for the purpose of making such communication every citizen is regarded as having an interest or duty in the subject matter. But a communication addressed to a third person, having no such authority, is not privileged." 18 Am. & Eng. Ency. (2d Ed.) p. 1040. The author has there collected many adjudications on the subject. In commenting on the subject, Mr. Odger says: "But in seeking redress the defendant must be careful to apply to some person who has jurisdiction to entertain the complaint or power to redress the grievance. Statements made to some stranger who has nothing to do with the matter cannot be privileged." Page 222; Newell, p. 475; Folkard's Starkie, p. 356, § 294. Byam v. Collins, 111 N. Y. 150, 19 N. E. 75, 2 L. R. A. 129, 7 Am. St. Rep. 726, is a full and instructive case. To the same effect are the rulings of the English courts. Dickeson v. Hilliard, 9 Exchequer, L. R. 79. In Bragg v. Sturt is was held by the Court of Queen's Bench in an action for libel that a letter to the Secretary of State, by an inhabitant of a borough, imputing to a person who is town clerk and clerk to the justices of the borough corruption in office is not a privileged communication. 59 E. C. L. Rep. 899. Lord Denman, delivering judgment, said: "We are of opinion that the defendant was not exempt from responsibility for that which would otherwise be a libel by reason of its being an application to a competent tribunal for redress, because the Secretary of State has no direct authority in respect to the matter complained of, and was not a competent tribunal to receive the application." In Harrison v. Bush, 5 Ellis & Black (Q. B.) 344, the rule is thus stated: "A communication made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty is privileged if made to a person having a corresponding interest or duty, although it contained criminatory matter which, without this privilege would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation." This has been generally approved by judges and text-writers since. In Toogood v. Spyring, 1 Cr. M. & R. (Ex.) 181, quoted in Byam v. Collins, supra, and commended by Folger, J., in Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360, and in Hamilton v. Eno, 81 N. Y. 116, it is said that the law considered a libelous "publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral; or in the conduct of his own affairs in matters where his interest is concerned." As privileged communications are exceptions to the general rule which implies malice in a libelous publication and infers some damage, it rests with the party claiming the privilege to show that the case is brought within the exception. In this case the defendant has wholly failed to show such facts and circumstances as will give him the protection of either an absolute or a qualified privilege.

4. The defendant having failed to plead justification, that defense is not open to him, even if he had any evidence to support such a plea. It therefore follows that his honor erred in his intimation. He should have instructed the jury that if the evidence is believed by them to be true, and the facts found as testified to by the witnesses, the plaintiff was entitled to recover some damages. Of course, upon all the authorities, the defendant having pleaded his good faith and lack of actual malice in mitigation of damages, it is open to him to offer testimony of that character, as well as other competent and pertinent facts tending to mitigate the damage. Damages may be mitigated by showing the general bad character of plaintiff, by showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge. In his valuable work on Slander and Libel, Mr. Newell has published the headnotes of a large number of cases which admirably illustrate how this rule on mitigation of damages has been applied, and what facts and circumstances have been admitted in evidence under it. In actions for libel juries have great latitude in the matter of damages. They may and sometimes do award nominal damages only, and then again substantial damages, and in some cases exemplary damages by way of punishment. In such actions juries are authorized to give such exemplary damages as the circumstances justify, when the evidence shows that the publication (as expressed by the Supreme Court of the United States) "was the

result of that reckless indifference to the rights of others, which is equivalent to the intentional violation of them" (Railroad Co. v. Arms, 91 U. S. 489, 23 L. Ed. 374), or "when the act complained of was conceived in the spirit of mischief, or of criminal indifference to civil obligations" (Railroad Co. v. Quigley, 21 How. 213 [16 L. Ed. 73]).

New trial.

CLARK, C. J. (concurring). Act Cong. June 18, 1888, c. 394, § 2, 25 Stat. 187 [2 U. S. Comp. St. 1901, p. 2661], provides that "all matter, otherwise mailable by law, upon the envelope or outside cover or wrapper of which or any postal card upon which any * * * language of a * * * libelous or defamatory * * * character or calculated by the terms and manner * * * and obviously intended to reflect injuriously upon the character or conduct of another may be written or printed or otherwise impressed or apparent is hereby declared non-mailable matter * * * and any person who shall knowingly deposit or cause to be deposited for mailing or delivery" any such matter, "shall for each and every offense, upon conviction thereof, be fined not more than $5,000 or imprisoned at hard labor not more than five years, or both, at the discretion of the court." It should seem too clear for argument that when any act is made indictable and punishable by heavy penalties by the federal government, which has sole jurisdiction of any criminality attaching thereto, the defendant cannot be held privileged or quasi privileged to commit such act when sued in the state court. This act of Congress is a part of the law of the land. No one who violates the criminal law can claim that he is privileged or quasi privileged to do so. The defendant's communication was not addressed to one charged with the public duty of investigating the charge. Even if it had been, the defendant should have sent it, if through the mail, in a sealed envelope. Being sent openly on a postal card, this was in violation of law, if libelous, and his only defense is to prove that it was true, and therefore not libelous. It is not unusual for a judge to file a concurring opinion giving his reasons, or additional reasons for assenting to the opinion of the court, but, of course, no other member of the court is in any wise responsible for the views expressed in a concurring opinion.

CONNOR, J. (concurring). For the reasons, and upon the authorities cited, in the opinion of Mr. Justice BROWN, the court below was in error in holding that the communication was privileged. I cannot assent to the suggestion that the federal statute referred to can be invoked to show malice. I am unable to perceive how, in this court, and in this action, the statute has any bearing upon, or connection with, the case or its merits. While, for the purpose of enforcing obedience to public statutes, the courts of necessity have always held that every person was presumed to know the law, I cannot think that such presumption can be invoked for any other purpose, or in any other jurisdiction, than that of the government in whose courts its statutes are being enforced. The presumption used as a basis for visiting pains and penalties is sufficiently harsh and works sufficient hardship when confined within its legitimate sphere. To fix upon a person for an act being litigated in a state court a malicious motive by reason of a presumption that he had actual knowledge of the existence and provisions of a federal statute, buried somewhere between the covers of one of three volumes of more than 1,300 pages each, is well calculated to make our jurisprudence a rock of offense and a pitfall of destruction to lawyers, no less than laymen. I venture the suggestion that, except in the public and federal court libraries, there are not 25 copies of the Revised Statutes in this state of 2,000,000 souls. This statute is not invoked by counsel, and it is no reflection on their learning to suppose that they did not know of its existence. Of course, when either the state or federal government in their own courts seek to enforce their statutes, the presumption has its full and conclusive force, but to "call them in aid" in other courts and in civil actions is not only dangerous to the rights of the citizen, but conducive to jurisdictional conflict between the courts in our dual system of government. State courts can neither construe nor enforce federal statutes. Under proper limitations, and with wise administration, these agencies of proof, based upon long experience, are useful in the trial of causes, but, like "fictions" and other expedients, they should be resorted to only to aid in the ascertainment of truth and the administration of substantial justice. With the enlightened relaxation of the rules of evidence and the tendency of the courts to permit the jury to hear all relevant testimony, the necessity for resorting to presumption largely disappears. We should endeavor to so try causes that the very truth of the matter shall be established by evidence, and not by arbitrary presumptions. If, as a matter of fact, this defendant, as is quite certain, knew nothing of the statute sought to be used to his undoing, how is it possible that the animus with which he wrote and sent the postal card can be affected by it? I am strongly inclined to think that if it had been shown that the money which was stolen from the plaintiff, or any part of it, belonged to the public school fund of Yadkin county, the postal addressed to the superintendent of education of that county by defendant, the superintendent of Davie county, would have come within the principle of the authorities cited in the opinion as a privileged communication. I think that both defendant and Martin, the addressee, had such relation to the school fund, of either county, as made it their duty to protect it, and, in good faith, seek

its recovery if stolen or lost. I cannot forbear saying that, in my opinion, a post master or mail carrier who reads a postal card is guilty of a gross breach of duty. I do not assent to the suggestion that the contents of postal cards are not as sacred from officious interference as those of a letter. As the case goes back for a new trial, I forbear saying more.

WALKER, J., concurs in opinion of CONNOR, J.

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(145 N. C. 466)

## STATE v. JONES.

(Supreme Court of North Carolina. Nov. 20, 1907.)

1. HOMICIDE — DELIBERATION — PREMEDITATION—EVIDENCE—SUFFICIENCY.
In a homicide case, evidence *held* to justify a finding that the killing was premeditated and deliberate.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 480.]

2. SAME—MURDER IN FIRST DEGREE.
Where accused weighed the purpose of killing another long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how remote, the design was executed, accused was guilty of murder in the first degree.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 19, 36–38.]

3. SAME—MURDER IN SECOND DEGREE.
Where accused intentionally shot decedent with a pistol and killed him, and the state failed to show beyond a reasonable doubt that the killing was done with deliberation and premeditation, accused was guilty of murder in the second degree.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 19, 39, 40.]

4. CRIMINAL LAW — CONFESSIONS — ADMISSIBILITY.
The fact that accused was in the custody of an officer when a confession was made does not of itself render it incompetent.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1163–1174, 1202–1206.]

5. SAME.
Where accused, while in the custody of an officer, made a confession, and there was no promise held out to him nor any influence exerted which would be calculated to induce a confession, it was admissible.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1163–1174, 1202–1206.]

Appeal from Superior Court, Guilford County; Moore, Judge.

Frazier Jones was convicted of murder in the first degree, and he appeals. Affirmed.

The defendant was indicted for and convicted of killing his wife, Lula Jones. The exceptions were mainly directed to the evidence and the charge of the court upon the question whether the killing was done with deliberation and premeditation, so as to constitute murder in the first degree and to the instruction as to murder in the second degree. There was no evidence of manslaughter or excusable homicide. The testimony relating to the killing was as follows:

"Bettie Holt testified: That she and Lula Jones, on Thanksgiving Day, 1906, were in the kitchen getting dinner, and the prisoner was outdoors somewhere. He came in at 12 o'clock, and called for something to eat, and Lula, his wife (the deceased), gave him a piece of meat. The prisoner said he didn't want that piece, but wanted a piece with a bone in it, and threw it at his wife. His wife returned the compliment, and in the exchange of meat some grease found its way into the prisoner's face, and 'he got angry because she put some grease on his face.' The prisoner's wife then went out of the door, into the adjoining room, and prisoner followed right behind her. Witness heard them talking pretty loud, and in a short time heard the report of a gun. Ethel Gibson, another witness, stepped to the door, and, looking in, said, 'Uncle Frazier has killed Aunt Lou.' Witness then ran, and, while running, heard a gun fire, and when she had run as far as the hogpen heard the gun fire again. Witness also testified that she saw deceased lying in front of the fireplace, and that one bullet went in one ear and out the other. Another entered the back of the head and came out of her forehead. The third went through deceased's hand. Witness also testified that the prisoner was the only person in the room with the deceased."

"Ethel Gibson testified: That when she heard the first shot she stepped up to the door, and, looking in, saw deceased sitting by the fire in a chair, and the prisoner was standing on her left side. She then saw the prisoner hold the pistol up to the left ear of deceased. She then hollered and ran. Witness heard three shots in all, and then the prisoner ran out of the house, towards the railroad, with a pistol in his hand."

"Caleb Summers testified: That, when the first shot was fired, he was standing about 25 or 30 feet from the house, and when he heard the shot he looked towards the house, and saw the prisoner shoot right down at his wife, who was lying on the floor. Then saw him come out of the house, and kneel down by the deceased. He then got up and came out with the revolver in his hand."

"Gus May, a policeman, testified: That he was near the house when the shooting occurred, and saw the prisoner come out of the house with the pistol in his hand; that he ran after the prisoner and called upon him to halt, and arrested him and asked him why he shot his wife, and the prisoner said, 'Maybe I will tell that later, but her business and my business is our business, and nobody else's'; and, further: 'I shot my wife, and if she is dead I killed her. I am satisfied that she is dead, but I want to see her stretched out. I have killed her and can pay the penalty. I will be hanged, and I don't expect anything else.' He also told the witness that he had shot her three times,

and for the witness to keep the crowd from shooting him, as he wanted to be hanged, and not butchered."

"Dr. Jordan testified as to the death of the deceased, the wounds, the range of the bullets, and also that the deceased's clothing was burned from powder."

The prisoner introduced no evidence.

The court, after explaining the nature of the charge to the jury, the different degrees of homicide and the bearing of the evidence, instructed the jury as to premeditation and deliberation, as follows: "If you are satisfied beyond a reasonable doubt that the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how remote, put it into execution and killed the deceased in pursuance of such fixed design to kill, then you should convict the prisoner of murder in the first degree. When the purpose or design to kill is formed with deliberation and premeditation, it is not necessary that such purpose or design be formed any particular length of time before the killing. The law does not lay down any rule as to the time which must elapse between the moment when a prisoner premeditates and comes to a determination in his own mind to kill another person and the moment when he does the killing, as a test. It is not a question of time. It is merely a question of whether the accused formed in his own mind the determination of killing the deceased, and then at some subsequent time, either immediate or remote, carried his previously formed determination into effect by killing the deceased. If there be an intent to kill and a simultaneous killing, then there is no premeditation. If the prisoner weighed the purpose of killing long enough to form a fixed design to kill, and at a subsequent time, no matter how soon or how remote, put it into execution and killed the deceased, then he is guilty of murder in the first degree. The question of when or how long he had the fixed purpose to kill, if you find that he had such purpose, is determined independently of when he took up the pistol. If the prisoner intentionally shot Lou Jones, the deceased, with a pistol and intentionally killed her, and if the state has failed to show, beyond a reasonable doubt, that the killing was done with deliberation and premeditation, then the prisoner would be guilty of murder in the second degree. The jury are instructed that the prisoner cannot be found guilty of murder in the first degree unless the jury are satisfied from the evidence, beyond a reasonable doubt, not only that the prisoner is guilty of feloniously and intentionally killing the deceased, but it must appear from the evidence, beyond a reasonable doubt, that the killing was done with deliberation and in pursuance of a fixed and premeditated design on the part of the prisoner to kill the deceased."

There was a conviction of murder in the first degree, and judgment having been pronounced upon the verdict, the defendant excepted and appealed.

J. A. Barringer, for appellant. The Attorney General and Hayden Clement, for the State.

WALKER, J. (after stating the facts as above). The charge of the court to which exception has been taken by the defendant conforms to the rule of law which we have repeatedly laid down as applicable to cases of this kind. It was full and explicit, and there was evidence to sustain it. Indeed, the proof tended to show, not only premeditation and deliberation, but that the defendant committed a cruel murder in cold blood upon his weak and defenseless wife. The language used by us in State v. Daniel, 139 N. C. 553, 51 S. E. 859, is appropriate to the facts as they appear in the record: "When we consider these facts in connection with the utter and cold indifference of the defendant after the shooting, what more deliberate act upon previous reflection and meditation, we may well ask, could be imagined than this one? The evidence was quite as strong as it was in State v. Hunt, 134 N. C. 684, 47 S. E. 49, State v. Teachey, 138 N. C. 587, 50 S. E. 232, State v. Exum, 138 N. C. 599, 50 S. E. 283, State v. Conly, 130 N. C. 683, 41 S. E. 534, State v. Lipscomb, 134 N. C. 694, 47 S. E. 45, and State v. McCormac, 116 N. C. 1034, 21 S. E. 693, in which convictions for the capital felony were sustained. Indeed, the defendant's intent to kill was more calmly and deliberately conceived and executed than was the intent of any one of the defendants in the cases above cited. There was some ground to argue in those cases that the slayer might have committed the act in a transport of passion, but there is no evidence in this case to indicate anything but coolness of design and a deliberate purpose recklessly and wantonly to take human life, all of which was prompted by a bad heart, desperately wicked and fatally bent upon mischief. The mere fact that the defendant accomplished his purpose within a comparatively short space of time can make no difference." The cases therein collected, and State v. Banks, 143 N. C. 652, 57 S. E. 174, fully sustain the charge. In the case last cited Justice Hoke says: "In this charge, as to murder in the first degree, the court excludes all idea of a killing simultaneous with the conception of the homicidal purpose, and directs the jury, in effect, that, before they can convict of the higher crime, the killing must be from a fixed determination previously formed after weighing the matter. The charge, we think, gives the prisoner the full benefit of the principle contended for by him, and is fully sustained by authority," referring to numerous cases. We have examined the entire charge carefully, and have failed to discern any error therein. The evidence tends to show that the defendant made

up his mind as to what he would do, or, in other words, premeditated the killing when he left the house in which his Thanksgiving dinner was being prepared, and that he executed his purpose deliberately and with heartless brutality. The manner of the killing tends to show that he had fully determined to do his innocent victim to death. His wife's slight retaliation when he threw the meat at her was not sufficient legal provocation, under the circumstances of the case, and if, after so slight a provocation, if provocation it was in law, he slew upon a principle of revenge after sufficient time had elapsed thereafter in which he premeditated and deliberated upon his act, he is as guilty as if there had been no such alleged provocation. Foster in his Crown Law, p. 296, says: "For let it be observed that, in all possible cases, deliberate homicide upon a principle of revenge is murder. No man, under the protection of the law, is to be the avenger of his own wrongs. If they are of such a nature for which the laws of society will give him an adequate remedy thither, he ought to resort, but be they of what nature soever he ought to bear his lot with patience."

The confession made to the policeman was competent; it appearing that no threat was made to extort it and that there was no promise to induce the defendant to make it. There is nothing to indicate that it was not voluntary. The fact that the defendant was in the custody of an officer when the confession was made does not of itself render it incompetent. The question is, was it voluntary? State v. Bohanon, 142 N. C. 695, 55 S. E. 797; State v. Conly, 130 N. C. 683, 41 S. E. 534; State v. Flemming, 130 N. C. 688, 41 S. E. 549; State v. Edwards, 126 N. C. 1051, 35 S. E. 540; State v. Daniels, 134 N. C. 641, 46 S. E. 743; State v. Smith, 138 N. C. 700, 50 S. E. 859. There was no promise held out and no influence exerted which would be calculated, under the circumstances, to induce a confession irrespective of its truth or falsity. Wigmore on Ev. § 831.

Upon a review of the record and case on appeal, we find no error in the proceedings below.

No error.

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(146 N. C. 135)

## EFLAND et al. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 20, 1907.)

1. RAILROADS — CORPORATIONS — LEGISLATIVE REGULATION.

The right of the state to regulate public service corporations and other business enterprises in which the owners have devoted their property to public use is too firmly established to permit discussion.

2. STATUTES — CONSTRUCTION — PARTICULAR WORDS AND PHRASES.

The word "company" may be construed to include all corporations, companies, firms, or individuals in statutes passed in promotion of the public good, such as the enforcement of the collection of revenue, regulation of the exercise of quasi public franchises, and in other similar matters.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1347-1350.]

3. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW—CARRIERS—OVERCHARGE—PENALTY.

Under Revisal 1905, c. 61, §§ 2642, 2643, 2644, providing that no transportation company shall charge more than the legal and published rate allowed by law, and that any overcharge shall be returned within 60 days after demand, and prescribing the penalty for failure to make such return, and in view of the sections of chapter 20, Revisal 1905, dealing with cognate subjects, and giving the corporation commissioners power to establish regulations as to companies engaged in domestic traffic, it is clear that the term "company" was intended to include all corporations, companies, firms, or individuals engaged as common carriers of freight, so that the law does not deny to corporate common carriers the equal protection of the law required by Const. U. S. Amend. 14, by arbitrarily imposing a penalty on corporations and not on individuals.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1347-1350.]

4. SAME—REGULATION OF FRANCHISES.

Where the law establishing regulations and imposing penalties makes a classification on a reasonable basis, and having a real relation to the privileges or duties of the members of the class created, it is not imposing a penalty for the nonpayment of debts, thereby creating an arbitrary classification within the prohibition of Const. U. S. Amend. 14, forbidding the denial of the equal protection of the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 703.]

5. SAME — CARRIERS — REGULATION — VIOLATION—PENALTIES.

Revisal 1905, c. 61, §§ 2242, 2243, 2244, provide that no transportation company shall charge more for its services than the legal published rates, and for a penalty for not returning an overcharge within 60 days after formal demand upon the company. *Held*, that the penalty is not for the nonpayment of a debt, but for having made an extortionate charge and failing to return the same within a reasonable time after demand, and hence the statute does not deny such companies the equal protection of the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 703.]

Appeal from Superior Court, Orange County; Councill, Judge.

Action by John L. and M. P. Efland against the Southern Railway Company to recover an overcharge and the penalty for not returning the same within the time required by law. From a judgment for plaintiffs, defendant appeals. Affirmed.

The demand was for the amount of an overcharge paid by plaintiffs on a shipment from Efland, in North Carolina, to Lexington, N. C., and for a penalty for failure to adjust same imposed by section 2644, Revisal 1905. There was evidence on part of plaintiffs tending to establish the claim and formal demand therefor as required by the statute. The judge charged the jury as follows: "That if they should find from the evidence that the plaintiffs had paid an overcharge of $7.96 as alleged by plaintiffs, and that plaintiffs had filed claim, as alleged, on the 20th day of September, 1906, accompanied

with paid freight receipt and bill of lading, with freight claim agent of the defendant company, and the same was not refunded within 60 days after the filing of said claim, then the plaintiffs would be entitled to recover $100 as penalty for such failure to settle the demand, it being admitted that more than 60 days had lapsed since the claim was filed." On the testimony and under the charge, the jury rendered the following verdict: "Is defendant indebted to plaintiff, and, if so, in what amount? Ans. Yes; (1) by way of overcharge, $7.96; (2) by way of penalty, $100." Defendant by exception, duly noted, objected to the validity of the judgment and appealed, assigning for error that the statute imposing the penalty is in violation of section 1 of the fourteenth amendment to the national Constitution and denies to the defendant the equal protection of the law.

F. H. Busbee & Son and S. M. Gattis, for appellant. Frank Nash, for appellee.

HOKE, J. (after stating the facts as above). Our statute applicable to the questions involved in this appeal (Revisal 1905, c. 61, § 2642) directs: "That no railroad, steamboat, express or other transportation company engaged in the carriage of freight, and no telegraph company or telephone company shall demand, collect or receive for any service rendered or to be rendered in the transportation of property or transmission of messages, more than the rates appearing in the printed tariff of such company in force at the time such service is rendered, or more than is allowed by law." In section 2643 a method is established by which formal demand for return of an overcharge shall be made, and allows a maximum period of 60 days within which to return the same; and section 2644, the section objected to, provides as follows: "Any company failing to return such overcharge, within the time allowed, shall forfeit to the party aggrieved the sum of twenty-five dollars for the first day and five dollars per day for each day's delay thereafter until said overcharge is paid, together with all costs incurred by the aggrieved: provided, the total forfeiture shall not exceed one hundred dollars." Under the charge of the court and the admissions therein referred to, the facts are necessarily established that there has been an overcharge for freight collected from plaintiffs by defendant, that demand for its return has been formally made, as required by the statute, and that there has been a failure to return the amount to plaintiffs for a period greater than the 60 days declared to be the maximum period allowed, and for a time more than sufficient to make the maximum penalty of $100. On the facts, therefore, the plaintiffs' claim comes directly within the provisions of the statute, and, unless the law is invalid, the judgment in his favor must be upheld. This being a domestic or intrastate shipment, the commerce clause of the federal Constitution, and the various decisions construing it, do not affect the case, and the question presented, and which the defendant desired, and intended to present, is whether this legislation is in conflict with the provisions of the fourteenth amendment, guaranteeing to every citizen of the United States equal protection of the law. The statute has been passed upon by direct adjudication of this court in Cottrell v. Railroad, 141 N. C. 383, 54 S. E. 288, and we might well refer to that decision as conclusive of the matter without more. It was, however, earnestly urged on the argument of the present appeal that the law in question is in violation of the section of the Constitution referred to. And as the constitutionality of the statute was accepted, without debate, in Cottrell's Case, supra, we have deemed it well that the positions contended for by defendant should be more fully considered.

The right of the state to establish regulations for these public service corporations, and over business enterprises in which the owners, corporate or individual, have devoted their property to a public use, and to enforce these regulations by appropriate penalties, is now and has long been too firmly established to require or permit discussion. Harrill's Case, 144 N. C. 532, 57 S. E. 383; Stone's Case, 144 N. C. 220, 56 S. E. 932; Walker's Case, 137 N. C. 168, 49 S. E. 84; McGowan's Case, 95 N. C. 417; Branch's Case, 77 N. C. 347; Railway v. State of Florida, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175; Railway v. Humes, 115 U. S. 513, 6 Sup. Ct. 110, 29 L. Ed. 463; Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Munn v. Ill., 94 U. S. 113, 24 L. Ed. 77. As said by Associate Justice Fields in Humes' Case, supra: "The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple, the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages." And the right to establish such regulations for certain classes of pursuits and oc-

cupations imposing these requirements equally on all members of a given class has been made to rest very largely in the discretion of the Legislature. Tullis v. Railway, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Insurance Co. v. Daggs, 172 U. S. 562, 19 Sup. Ct. 281, 43 L. Ed. 552; Magoun v. Savings Bank; 170 U. S. 286, 18 Sup. Ct. 594, 42 L. Ed. 1037. In Tullis' Case, just referred to, Chief Justice Fuller, quoting with approval from the decision in Dagg's Case, supra, said: "The power of the state to distinguish, select, and classify objects of legislation necessarily has a wide range of discretion that it was sufficient to satisfy the demands of the Constitution, if the classifications were practical and not palpably arbitrary." There are limitations on the right of a State Legislature to impose these regulations, as indicated in Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and other cases of a like import, the exact nature and extent of which are not as yet fully or clearly defined. As said by Mr. Freunde in his work on the Police Power, § 550: "It has been shown that after some hesitation the courts have asserted and now fully exercise the power to control the legislative determination that a rate is reasonable. It has therefore become incumbent upon the courts to lay down the principles by which the question of reasonableness must be judged, and the federal Supreme Court alone can conclusively establish these principles in an affirmative manner. However, this important problem has not yet been finally solved." From the very nature of the case it would be difficult, perhaps impossible, to lay down a general rule so plain and precise that different cases could be readily referred to the one side or the other; and the United States Supreme Court has very wisely determined that the line shall be marked and the doctrine explained and applied by their decisions on the varying cases as they may arise.

This phase of the matter is not pursued further for the reason that the defendant does not assail the law, because the regulations thereby imposed are unreasonable in themselves, but because it establishes an unreasonable and arbitrary classification: (1) In imposing the regulation therein specified on corporations and companies engaged in the transportation of freight, while individuals engaged in like service are not included. (2) Because a penalty is imposed on corporations and companies mentioned for not paying their debts, and in this denying such companies the equal protection of the law; on the principle established more especially by the decision of the Supreme Court of the United States in Railway v. Ellis, 165 U. S. 151, 17 Sup. Ct. 255, 41 L. Ed. 666. In Ellis' Case it is held: "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." And, while this court gives full adherence to the principle there stated, we are of opinion that its proper application does not sustain the defendant in either position maintained by them.

As to the first, "That it denies to defendant equal protection of the law, in that individuals engaged in like occupation are not included in the term of the statute," even if the construction assumed as the basis of this position should be the true one, we are inclined to the opinion that the classification could be upheld, applying as it does to all corporations and companies engaged in the transportation of freight as common carriers. The terms are, we think, sufficiently broad and the regulations thereunder have such a reasonable relation to the occupation in which the companies are engaged that the Legislature in the proper exercise of its police power might well have determined that such a classification could be upheld on the principle established by the cases heretofore cited, and that, even if individuals were shown to have engaged in like occupations, their enterprises would necessarily be so restricted and of such little moment that their cases would not require that they should be embraced by the statute. But we are of opinion that the construction of the law assumed by the defendant is not the correct one. A perusal of the entire statute and its different sections, taken in connection with those sections of chapter 20 of the Revisal of 1905, which deal with cognate subjects and whereby the corporation commissions are given power to establish these regulations in reference to companies engaged in domestic traffic, lead us to the conclusion that the Legislature applied, and intended to apply, these provisions of the law to all corporations and companies engaged in the transportation of freight for the public; that it was the occupation which it had chiefly in mind, rather than the agency engaged; and that the term "company" was used and intended to include all corporations, companies, firms, or individuals who were engaged as common carriers in the transportation of freight. Many of the sections of the statute could be referred to in support of this construction, and this interpretation has been frequently applied to the word "company" in statutes passed in promotion of the public weal, in enforcement of the collection of revenue, in regulating the proper exercise of quasi public franchises and in other regulations of like character. This significance was given to the term "company" in the case of Sewing-Machine Co. v. Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497, where an occupation tax was collected from an individual engaged in a pursuit where only "companies" were taxed, and Lumpkin, judge

of the court, said: "The most serious question for determination as to the constitutionality of the law in hand, in view of the 'uniformity clause' above mentioned, is this: Is its language sufficiently comprehensive in meaning to embrace all manufacturers of sewing machines who sell at retail? Unless it is, the law must fail; because, when once a class is established, every member properly belonging to that class must be taxed, or else the uniformity required is destroyed. If the words 'every sewing machine company' are applicable only to corporations or partnerships, then individuals manufacturing and selling sewing machines would not be reached. It may be true, in point of fact, that there are no single individuals in Georgia answering to this description; but the law should be broad enough in its terms to include any person who may at any time, upon his own account, enter upon such business, for otherwise it would be possible for an individual to begin the transaction of this very business, and escape tax which corporations in the same business are compelled to pay. An omission of this kind in a taxing law might, in some instances, operate as an invitation to individuals to undertake business enterprises, because of an attendant nonliability for taxes, and a consequent advantage to be gained over competitors engaged in the same business who are specifically named and taxed. At any rate, such an omission makes a discrimination which the Constitution forbids. We think, however, that, so far as the law with which we are now dealing is concerned, the whole difficulty may be properly removed by simply holding that the words 'every sewing machine company' would apply to every sewing machine 'man' who undertook to engage in the manufacture and sale of such machines in this state. This construction, upon reflection, will be found not to be a strained or unreasonable one. On the contrary, we think it is entirely permissible, when reference is had to the object of the law in question; that object being, not to tax a company or person carrying on the business, but the business itself. Of course, if the tax be upon the business, it is entirely immaterial whether such business be carried on by an individual, a partnership, or a corporation. As has been seen, the power of the Legislature extends only to classifying business occupations into different branches, and laying upon each separate branch thus created such a tax as is deemed proper. The Legislature has absolutely no power to classify persons, natural or artificial, engaged in precisely the same occupation, laying a tax upon some of them and exempting others, or imposing a tax not operating uniformally upon all. Therefore it would certainly seem the most natural and reasonable inference that the General Assembly, in passing the law in question, attempted to accomplish what it had an undoubted right to do, rather than that which the Constitution expressly forbids. It should be the purpose of the courts to give effect to legislative intention, and, where the intention is not perfectly clear, the unbending rule is that such a reasonable construction of the statute as will render it harmonious with the constitutional restrictions should invariably be adopted. In the present instance we are quite sure the Legislature intended that this tax should apply to the business in question, no matter by whom the same might be conducted." And decisions of like import have been made elsewhere by courts of the highest authority. Mo. v. Stone, 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388; Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Manufacturing Co. v. Wright (C. C.) 33 Fed. 121. The statute in question does not make the discrimination complained of by defendant, and its first position, therefore, finds no support in the law as correctly construed.

And we hold that the second ground of defendant's objection to the statute is not well considered, being of opinion that it does not come within the principle of the decision relied on to support it. Ellis' Case, supra. That decision involved the validity of a statute of the state of Texas, which imposed a fee of $10 on claims against railroad companies, not exceeding $50, for personal service rendered or labor done, a damage for overcharge on freight, etc., which the company failed to pay for 30 days after demand was duly made, and which claimant was compelled to collect by action, etc. The statute was held unconstitutional, and a recovery by plaintiff denied. This, as we understand the opinion, was on the ground that the statute embraced claims for personal services rendered or labor done, as well as for damages for all overcharges of freight, etc., and, the Supreme Court of Texas having held the statute constitutional as a whole, the United States Supreme Court, accepting that construction of the statute, considered it as one imposing a penalty for the nonpayment of debts, and, as such, having no reasonable reference especially to a railroad, as distinguished from any other corporation, or the proper exercise of its franchise or the performance of its duties or the dangers incident to its operation, and held that such a classification was therefore arbitrary and colorable, and the penalty imposed pursuant to same was contrary to law. But the principle does not obtain where the law which establishes the regulations and imposes the penalties makes a classification resting on some reasonable ground, and having some real relation, to the privileges enjoyed or duties especially incumbent on all members of the class which it creates. Accordingly in several opinions determined since the Ellis Case, notably in the case of Railway v. Paul, 173 U. S. 404, 19 Sup. Ct. 419, 43 L. Ed. 746, and Railway v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909, the same high

court, the final arbiter in such questions, has upheld classifications for the reason indicated, and these opinions are, to our mind, controlling in the case we are considering, and decide the questions raised against defendant's position. In Matthew's Case, supra, a statute of the state of Kansas allowed an attorney's fee in case of recovery against railroad companies for damages caused by fires in the operation of the company's trains. The statute was upheld because the court was of the opinion that the classification established was not arbitrary as in Ellis' Case, but was made in reference to the damages from fires, peculiarly incident to the operation of trains. Mr. Justice Brewer, for the court, said: "Its monition to the roads is not: 'Pay your debts without suit, or you will have to pay for attorney's fee.' But rather: 'See to it that no fire escapes from your locomotives, for, if it does, you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fee of the owner of the property injured or destroyed.'" And so it is here. The penalty imposed is, not for the nonpayment of a debt, in the ordinary acceptation of that term, but it is for having made a extortionate charge, and failing to return the same within a reasonable time after demand was formally made, pursuant to law.

The regulation established in section 2642, applying, as we have seen, to all corporations and companies, including firms and individuals, engaged as common carriers in the transportation of freight, is one that the Legislature had the undoubted right to make. Its proper application and efficient enforcement is of supreme importance to shippers and the public. The Legislature could, no doubt, have imposed a penalty for making an extortionate charge, and its power of a certainty is not impaired or destroyed because in reasonable consideration of the carrier's interest it is allowed time to investigate the demand and inform itself of the facts. The penalty is imposed, as stated, not for the nonpayment of a debt, but for wrongfully withholding an amount charged contrary to law, and is in direct enforcement of the carrier's duties.

Since this opinion was prepared, our attention has been called to an opinion just delivered by the United States Supreme Court in the case of Seaboard Air Line Railway v. Seigers Bros., 28 Sup. Ct. 28, 52 L. Ed. ——, in which a statute of the state of South Carolina, similar to the one we are considering, was declared to be constitutional and valid. This opinion of the United States Court is decisive of the principal questions involved in this appeal, and the full and learned opinion of the South Carolina Supreme Court, reported in 73 S. C. 71, 52 S. E. 797, also gives convincing reason in support of the position.

There is no error in the defendant's appeal, and the judgment of the court below is affirmed.

No error.

(146 N. C. 129)

## EFLAND et al. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 20, 1907.)

1. CARRIERS—REGULATION OF—PENALTIES FOR VIOLATION OF REGULATIONS—DEMAND.

Revisal 1905, §§ 2642, 2643, 2644, regulating railroad rates, provides that, in case of an overcharge, the person aggrieved may file a written demand for a return of the amount, supported by the freight bill and original bill of lading, and prescribes a penalty for noncompliance. Plaintiff made two shipments, on which distinct overcharges were made and collected, and filed this claim: "Inclosed please find claim. Overcharge in freight to Lexington, N. C., $7.96: overcharge in freight to Salisbury, N. C., $1.39—total $9.35. Please let us have prompt adjustment." *Held*, that the claim filed, accompanied in each case with the freight bill and bill of lading, amounted to a separate written demand for each overcharge within the statute, even though the two overcharges were set out in one instrument, and demand was made for the total sum.

2. SAME.

The penalty not exceeding $100 prescribed by Revisal 1905, § 2644, for a railroad's failure to refund on proper demand an overcharge in freight, is not objectionable as disproportionate to a claim of $1.39, since it is not imposed to facilitate the collection of claims, but to enforce the performance of a carrier's duties.

Appeal from Superior Court, Orange County; Councill, Judge.

Action by John L. Efland and another against the Southern Railway Company for an overcharge of freight and the penalty for not returning the same within the time required by law. From a judgment for plaintiffs for the overcharge only, they appeal. New trial ordered.

Action to recover for an overcharge on freight bill and penalty for not returning same within the time required by law. The following appears in the record, as statement of case on appeal:

"This action was tried before the Honorable W. B. Councill and a jury at the August term of Orange county superior court. There were two causes of action joined therein: (1) For an overcharge on a car load of excelsior shipped by plaintiffs from Efland, N. C., to the Taylor Mattress Company at Salisbury, N. C., September 3, 1906; the freight for the same, including an overcharge of $1.39 having been paid by plaintiffs September 9, 1906. (2) For $100 penalty, under Revisal 1905, §§ 2642–2644, inclusive, the claim for said charge, accompanied by the proper papers, having been filed with the defendant September 20, 1906, and still remains unsettled.

"It appeared on the trial that the plaintiffs at the time of filing said claim, September 20, 1906, inclosed in the same envelope another claim for an overcharge of $7.96 on the shipment of a car load of excelsior to Lexington, N. C., on which judgment had been obtained at the same term of the court for $7.96 overcharge and $100 penalty for failure to settle claim within 60 days, Revisal 1905, §§ 2642–2644. In each case the claim was supported by the paid freight bill, a duplicate

bill of lading, and by an itemized statement on the billheads of the plaintiffs, as follows (in the Lexington case the letters and figures being changed only so far as to make them fit the case):

"'Efland, N. C., Sept. 20, 1906.

"'Southern Railway Co., Washington, D. C., Bought of the Orange Mfg. Co., Manufacturers of Excelsior and Lumber, Export Hardwood a Specialty.

"'Overcharge in Freight, $1.39, on Southern car No. 133420, excelsior shipped Taylor Mattress Co. Salisbury, N. C., September 3, 1906. This car contained 21,900 lbs. of excelsior, and the correct amount of freight is $22.70. We paid $24.09, making an overcharge of $1.39.'

"When filing these claims with J. J. Hooper, Freight Claim Agent of the defendant company at Washington City, the plaintiffs inclosed a letter of which the following is a copy:

"'M. P. Efland Jno. L. Efland.
"'The Orange Manufacturing Company.
"'Manufacturers of Excelsior and Lumber.
"'Export Hardwoods a Specialty.
"'Efland, N. C., September 20, 1906.

"'J. J. Hooper, T. C. A., Washington, D. C.—Dear Sir: Inclosed please find claim:

| | |
|---|---|
| Overcharge in freight to Lexington, N. C. | $7.96 |
| Overcharge in freight to Salisbury, N. C. | 1.39 |
| | $9.35 |

"'Please let us have prompt adjustment.
"'Very truly,
"'Orange Manufacturing Co.'

"Upon the cause of the action for penalty his honor charged the jury that the statute (Revisal 1905, § 2643) required a specific, written demand for each overcharge, as well as the lapse of time, to render the defendant liable for the penalty imposed thereby; that the letter of plaintiffs' to Hooper (set out in full above) did not constitute the specific written demand required by the statute, in that two overcharges set out therein were lumped together, and the demand was made for the total sum of $9.35, and not specifically for $1.39. They should answer the second issue 'No,' as the plaintiff is not entitled to the penalty in this case. To this charge the plaintiff excepted." Under the charge and on the testimony, the jury responded to the issues submitted as follows: "(1) Is defendant indebted to plaintiffs by reason of overcharge; and, if so, in what amount? Answer: Yes; $1.39. (2) Is defendant indebted to plaintiffs by reason of penalty; and, if so, in what amount? Answer: No."

Plaintiffs moved for a new trial for error in the charge on the form and sufficiency of the demand, which was overruled, and plaintiffs excepted. There was judgment for plaintiffs for $1.39, and they again excepted and appealed.

Frank Nash, for appellants. F. H. Busbee & Son and S. M. Gattis, for appellee.

HOKE, J. (after stating the facts as above). We are of opinion that there was error in the charge of the court on the question of plaintiffs' demand. The statute on the subject (Revisal 1905, §§ 2642-2644) provides that: (1) No railroad shall make a charge on a freight shipment greater than the rates appearing in the printed tariff of the company. (2) In case any overcharge is made, the person aggrieved may file with the agent of the collecting company a written demand, supported by a freight bill and original bill of lading in duplicate thereof, for refund of the overcharge. (3) That any company failing to refund such overcharge for more than 60 days shall be subject to a penalty. There was evidence tending to show that defendant company had made and received from plaintiffs, in the present case, an overcharge of $1.39 in shipment of freight from Efland, N. C., to Salisbury, N. C., and had failed to return same for more than 60 days after demand was made therefor. There was also evidence tending to show that defendant company had made and received at a different time, and for a different shipment, to Lexington, N. C., an overcharge of freight of $7.96 and had failed to return same for more than 60 days, and plaintiffs had recovered the amount of this last overcharge and a penalty for wrongfuly failing to return same in a separate action tried and determined at the same term of the court. The statute imposes the penalty for failure to return each overcharge. The two shipments were entirely distinct, and two distinct overcharges were made and received, and the statement of this overcharge in the form set out, accompanied in each case with the paid freight bill and a duplicate bill of lading, amounted to a written demand for each, and so complied with the statute. Breckenridge v. State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 363; Pa. Co. v. Railroad (C. C.) 69 Fed. 482. The mere fact that the plaintiffs inclosed these separate demands in the same envelope, and gave an aggregate of the amount in the accompanying letter, does not affect the result. The two overcharges, as stated, were entirely distinct, the statement as to each with the paid freight bill and duplicate bill of lading, amounted to a specific separate demand, complete in itself, and there was error in holding otherwise.

It was suggested on the argument that the penalty was objectionable, in that the same was entirely disproportionate to the amount of the claim. The point is hardly presented in the appeal of plaintiff, but we are of opinion that the position is not well considered. The statute provides that the penalty in no case should exceed $100, and it is imposed, as stated, not primarily to facilitate the collection of claims, but to enforce the perform-

ance of the carriers' duties, and it is in reference to these smaller claims that penalties are desirable and chiefly required. In larger matters the claimant can better afford the costs of litigation. Speaking of the statute, and the reasons for its efficient enforcement, the Chief Justice in Cottrell's Case, 141 N. C. 383, 54 S. E. 288, said: "This statute was enacted in pursuance of a well-known public policy and to remedy a well-known evil. It is common knowledge that there are countless cases of shortage in freights and of overcharge, either by freight collected on such shortage or otherwise. Errors will happen and sometimes are well nigh unavoidable, but, none the less, justice and sound policy require the prompt investigation of all claims, and prompt payment of those that are just. These sums aggregate very many thousands of dollars annually, but each amount usually is too small a sum to justify the expense of litigation. Unless the railroad companies will promptly investigate and refund in such cases, the aggregate loss to the public is very great, and the exasperation in the public mind at the injustice is greater still. To give the public a remedy by insuring speedy investigation and payment, this statute was passed requiring all common carriers, telegraph and telephone companies, to investigate all claims for overcharges and refund in 60 days, prescribing a penalty of $25 for the first day's delay beyond 60 days, and $5 for each day's delay thereafter, the total penalty, however, in no event to exceed $100. The companies that either voluntarily or in obedience to the law investigate promptly and refund all claims for overcharge which are found to be just within 60 days suffer no inconvenience from this statute. Those who are so inconsiderate of just claims as not to adjust them within 60 days are proper subjects of the penalty, and prove the necessity of this statute, without which those having claims for overcharges could not get payment of them without great delay and annoyance, if at all, when the sum is too small to justify payment of a lawyer's fee and advancement of court costs." The constitutionality of the act has been upheld in an opinion delivered at the present term on defendant's appeal. 59 S. E. 355.

There is error which entitles plaintiff to a new trial; and it is so ordered.

New trial.

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STATE ex rel. PEOPLE'S BANK OF GREENVILLE v. GOODWIN, County Sup'r, et al.

(Supreme Court of South Carolina. Nov. 26, 1907.)

Upon rehearing after dismissal of petition (59 S. E. 35). Petitioner allowed to traverse a return.

PER CURIAM. Upon petition for a rehearing herein, the respondents were required to show cause before this court at this time why the petitioner should not be allowed to traverse the allegations of the return herein; and, it appearing that respondents interpose no objection to the proposed order, now, on motion of Joseph A. McCullough, attorney for petitioner, it is ordered that the judgment heretofore rendered by this court be opened, and that petitioner be allowed to amend its petition by setting forth as exhibits thereto a copy of the claims listed in the petition; that respondents, within five days, are permitted to plead to the said amended petition as they may be advised, and, in case they file a return thereto, that petitioner have five days within which to file a traverse to the said return; that the proceeding will then be heard by this court; and, in case this court should deem any questions of fact thus raised material and should desire a reference thereon, that such questions of fact be referred to J. W. Gray, master in and for said county and state, to take the testimony and report the same to this court with all convenient speed.

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(78 S. C. 527)

COOK v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Aug. 15, 1907. On Rehearing, Nov. 28, 1907.)

RAILROADS—TRESPASSERS—PROPERTY ON TRESTLE.

A railway company is not liable to plaintiff for injury to a dog caused by a train striking it while plaintiff was taking it across the company's trestle, where there was warning against use of the trestle as a footway, and plaintiff supposed those who used it did so at their own risk; and where it does not appear the trainmen saw plaintiff's signals to stop or knew the dog was on the trestle; a railway company not being required to keep a lookout for trespassers on its track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1393–1399, 1476–1482.]

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by W. A. Cook against the Southern Railway Company. From a judgment of the circuit court for plaintiff, on plaintiff's appeal from a magistrate's judgment for defendant, defendant appeals. Reversed.

John T. Sloan, for appellant. Porter A. McMaster, for respondent.

WOODS, J. The plaintiff's action in the court of Magistrate Moorman was to recover of the defendant $40, the value of a hound, under this allegation: "That on the 31st day of August, 1906, while plaintiff was crossing a trestle, in county above-named, commonly known as Frost's, in the early morning, between the hours of 5 and 6 o'clock, plaintiff was preceded by his hunting dog, a white spotted hound, by name of Traveler, and hearing a train approaching, and seeing the

danger to the dog, plaintiff signaled to the engineer with a lantern, and commenced to signal at a distance where the engineer could have seen the danger that this plaintiff was in, but that defendants, its agent and servant, willfully, intentionally, and wantonly, and in utter disregard to plaintiff's property, refused to stop the train, and ran over the dog, dismembering the animal, that had no chance to escape from the trestle." The judgment of the magistrate in favor of the defendant was reversed on appeal, the circuit judge holding "that the overwhelming weight of the evidence shows both negligence and willfulness in running over the dog in question."

There is no evidence whatever that the railroad company assented to the use of its trestle as a footway. On the contrary, the evidence was uncontradicted that there was a warning against such use, and the plaintiff testified that he supposed those who went on it did so at their own risk. The plaintiff's case, then, depends on the claim that he had a right to deliberately take his property on the defendant's railroad trestle, and require the defendant to stop its trains, in order that he might transport his property over the trestle with convenience and safety. To sustain such a claim would be to make the use of its own property by the railroad company subordinate to its unlawful use by a trespasser. The law imposes no duty on the railroad company to keep a lookout for trespassers on its track. Smalley v. Railway Co., 57 S. C. 243, 35 S. E. 489; Jones v. Railway Co., 61 S. C. 556, 39 S. E. 758. There was no evidence that the defendant's servants saw the plaintiff's signals or knew that the dog was on the trestle. The difference between a case like this, in which the plaintiff asserts a right of way over the trestle superior to that of the railroad company, and those cases where liability attaches for the destruction of live stock wandering on the railroad, or of a dog seen by trainmen, disabled on the track from accident, is too obvious for discussion.

The judgment of this court is that the judgment of the circuit court be reversed.

GARY, A. J. (dissenting). The plaintiff testified: "Bennett and I and the dog were on Frost trestle of the Southern Railway Company, in Richland county. I saw engine headlight about half a mile from me. I waived my lighted lantern to make the train stop, but it came right on, did not even slow up; not running very fast. It ran over the dog, which was about 40 yards from me. I barely had time to get out of the way of engine." Ben P. Bennett testified: "I was with Mr. Cook on the trestle; saw the dog killed by train; saw the men on the engine, and saw Mr. Cook signaling with his lighted lantern." Cross-examination: "I was coon hunting. I slipped out on a sill to save myself. Trestle was a long one. Trestle was just above Frost's Station. Don't know just how long, but a real long one. Dog killed near middle of trestle. Could not have run to the end before he would have been struck." From the foregoing testimony, it could reasonably be inferred either that the servant in charge of the train saw the dog or that the failure to see him was due to a reckless disregard of duty; which is equivalent to wantonness and willfulness. Pickett v. Railway, 69 S. C. 445, 48 S. E. 466. As there was some testimony tending to sustain the finding of fact by his honor, the presiding Judge, and as this is a law case, such finding is not reviewable by this court. Conceding that the dog was a trespasser, the defendant did not have the right to inflict upon him a willful or wanton injury.

For these reasons, I dissent.

On Rehearing.

PER CURIAM. After careful examination of the petition for rehearing, we are unable to discover any issue that has been overlooked in the opinion of the court. The petition is therefore dismissed, and the order staying the remittitur is revoked.

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(78 S. C. 487)

## GUIGNARD et al. v. FLANAGAN et al.

(Supreme Court of South Carolina. Nov. 27, 1907.)

APPEAL—REVIEW—QUESTIONS OF FACT—CONCLUSIVENESS.

Where an issue is submitted to the court, the court's conclusion on matters of fact involved is conclusive where it does not appear that the conclusion was not supported by evidence or was controlled by any erroneous view of the law, or was influenced by any erroneous ruling on evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955–3969.]

Appeal from Common Pleas Circuit Court of Richland County; D. E. Hydrick, Judge.

Suit by Sarah A. Guignard and another against Agnes M. Flanagan, Kate F. Price, C. Wesley Frost, John D. Frost, and others. From the judgment, defendants Price, C. Wesley Frost, and John D. Frost appeal. Affirmed.

Andrew Crawford, for appellants. Thomas & Thomas, for respondents. J. S. Muller, for respondent Agnes M. Flanagan.

JONES, J. Uriah C. Frost died June 16, 1901, intestate, leaving as his heirs at law three sisters, Mrs. Sarah A. Guignard, Mrs. Mary F. Maxcy, and Mrs. Agnes M. Flanagan, and nine nephews and nieces, children of his deceased brother, John D. Frost, all of whom are parties to this action. The suit is brought, in part, to partition a tract of 474 acres of land in Fairfield county; it being alleged that Uriah C. Frost died seised and possessed of said land, and that each of

said sisters was entitled to one-fourth interest and each of the children of said brother, John D. Frost, to one thirty-sixth interest. The defendants, Kate F. Price, C. Wesley Frost, and John D. Frost made answer, claiming that John D. Frost, deceased, owned the whole tract in his own right, and they as his heirs at law were each entitled to one-ninth interest therein. All the other defendants answered, admitting the allegations of the complaint. By consent of all parties, it was referred to the master to take testimony upon the issues of title raised, the order requiring the master to report the testimony, and that the court shall try and determine said issue.

Upon the testimony as reported by the master, Judge D. E. Hydrick found the following facts: "On December 7, 1874, Uriah C. Frost bought the Fairfield tract at sheriff's sale, and had it conveyed by deed, of that date, to John D. Frost, his brother. The deed and plat were delivered to and kept by John D. Frost until his death, when they were found amongst his papers. I am fully satisfied that Uriah paid for the land. At the time of the purchase Uriah was in debt, a judgment had been obtained against him, and he had the deed made to his brother to shield the land from his creditors. It was not intended, therefore, either by Uriah or John that John should have the beneficial interest in the land. Uriah took actual and exclusive possession of the tract, and held it openly, adversely, and continuously from the date of the purchase until the date of his death. This was done with the knowledge and acquiescence of John, who, though he knew of the deed, never made any claim to or exercised any act of ownership over it or any part of it, but, on the contrary, always acknowledged Uriah's ownership. After the death of said John D. Frost in 1899, all his children, except Mrs. Kate F. Price, C. Wesley Frost, and John D. Frost, executed to Uriah a quitclaim deed to their interest in said tract. The three above named refused to do so, and claim an interest therein under the said deed to their father." Upon these facts the court held that Uriah C. Frost died seised and possessed of the land, and therefore he decreed partition of the land in accordance with the prayer of the complaint.

Where the issue of title is submitted to the court without a jury, the conclusion of the court on matters of fact involved is final. Peeples v. Warren, 51 S. C. 560, 29 S. E. 659; Johnson v. Jones, 72 S. C. 286, 51 S. E. 805; Gunter v. Fallow (manuscript decision filed November 8, 1907) 59 S. E. 70. It does not appear that the conclusion of fact by the circuit court was without evidence to support it, or was controlled by any erroneous view of the law, or was influenced by any erroneous ruling, in the admission or rejection of evidence.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

(78 S. C. 482)

## BROMONIA CO. v. GREENWOOD DRUG CO.

(Supreme Court of South Carolina. Nov. 28, 1907.)

1. TRIAL—RECEPTION OF EVIDENCE—EVIDENCE IN SUPPORT OF IRRELEVANT ALLEGATIONS.
Though a party cannot complain of the admission of testimony in support of irrelevant allegations he has allowed to remain in a pleading, yet the court has the right to exclude the same, and is not bound, because such allegations have been allowed to remain, to receive such evidence.

2. SALES—REPRESENTATIONS BY SELLER—ADVERTISING GOODS — FRAUD — WHAT CONSTITUTES.
Where the seller of a drug product, having contracted with the buyer to advertise to the extent of from 10,000 to 20,000 agate lines, did advertise to the extent of 10,000 agate lines, such advertising being within the range of the contract, it was immaterial, in an action for the price and damages from expenditures in advertising, that the seller had represented that it would expend a much larger sum than it actually did.

3. CONTRACTS—ACTIONS—PLEADING FRAUD — KNOWLEDGE OF FALSITY OF REPRESENTATIONS.
When fraud is relied on as a defense, scienter on the part of the party to be charged must be alleged.

4. SAME—DAMAGES FROM FRAUD.
Where fraud is relied on as a defense, resulting damage must be alleged.

Appeal from Common Pleas Circuit Court of Greenwood County; James Aldrich, Judge.

Action by the Bromonia Company against the Greenwood Drug Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Nicholson Bros., for appellant. Giles & Ouzts, for respondent.

JONES, J. The complaint in this case alleged two causes of action: First, for $140, the purchase price of a lot of Bromonia, a drug product of plaintiff company, sold and delivered to defendant; second, for $57.50 as damages resulting from expenditures in advertising, both causes of action being based upon a written contract between the parties, set out in the complaint. Plaintiff recovered judgment for full amount claimed. The defendant appeals solely upon exceptions to the rulings of the court in excluding certain testimony.

The facts alleged in the complaint and admitted in the answer are as follows: On the 15th day of January, 1906, the defendant executed and delivered to plaintiff an order for "20 doz. 50 cts. size, $80.00; 30 doz. 25 cts. size Bromonia, $60.00," under a contract containing a stipulation that plaintiff should advertise the said medicines in a Greenwood newspaper to the extent of from 10,000 to 20,000 agate lines during the 14 months following delivery of goods. A contract for advertising 10,000 agate lines was made with the Greenwood Index and the sum of $57.50 paid therefor by plaintiff, and the Index had entered upon the publication of the same. The

goods were delivered to defendant and the defendant upon demand refused payment.

The defendant, in addition to denying that plaintiff had performed all the conditions of its contract, set up the following defense: "Fourth. That, in reference to the allegations of paragraph 3 of the complaint, the defendant admits the execution and delivery of the contract and order mentioned therein, but, in reference thereto, this defendant alleges that the said contract and order were obtained from the defendant by the false and fraudulent representations of an agent of the plaintiff, made at the time of the execution and delivery of the said order and contract and for the purpose of obtaining the same, and this defendant further alleges that, had it not been for the said false and fraudulent representations of the said agent of the plaintiff, the defendant would not have given the said order and contract; that the said agent of the plaintiff represented to the defendant that the plaintiff had contracted for the expending of a much larger sum in advertising the goods and wares mentioned in the aforesaid order and contract than the amount actually contracted for; that the said agent of the plaintiff represented to the defendant that other parties in surrounding territory had been highly pleased with orders and contracts similar to the order and contract obtained from the defendant, and that there had been a great demand on the parties aforesaid for the goods of the plaintiff; that the agent of the plaintiff made other material representations to the defendant as to the merits of Bromonia; that all of the aforesaid representations of the agent of the plaintiff were false and fraudulent, and were made for the purpose of obtaining the aforesaid order and contract." For the purpose of proving this defense, witness A. A. Coleman, proprietor of defendant company, was asked the following questions, which, upon plaintiff's objection, were ruled incompetent: "(1) State whether or not the agent of the plaintiff made certain representations to you as to having contracted to expend a certain sum in advertising the goods of the plaintiff. (2) State whether or not you relied on these representations in making the contract. (3) State whether or not the agent of the plaintiff in making this contract made certain representations to you about the parties in surrounding territory being pleased with the goods, and having a great demand for them. (4) State whether or not agent of the plaintiff made certain representations to you as to the merits of Bromonia. (5) State whether or not you relied upon these representations of the agent of the plaintiff in making your contract. (6) State whether or not if these representations had not been made you would have entered into this contract." The grounds of objection and the grounds upon which the court ruled them incompetent do not appear in the case. Appellant contends that the questions were responsive to the allegations in the answer, the demurrer to which was overruled, and that under the cases of Ragsdale v. Railway, 60 S. C. 381, 38 S. E. 609, and Dent v. Railway, 61 S. C. 335, 39 S. E. 527, the testimony should have been admitted; but the later case of Martin v. Railway, 70 S. C. 11, 48 S. E. 616, shows that this rule applied when the appellant is the party who might have had the irrelevant or immaterial matter stricken out of the pleadings. In the last-mentioned case, it is declared that the circuit court has power to exclude testimony tending to support irrelevant or immaterial allegations allowed to remain in the complaint or answer, and that it is not bound to receive such evidence.

It is sought to be shown that the first two questions were in response to the allegations that "the agent of the plaintiff represented to the defendant that the plaintiff had contracted to expend a much larger sum advertising the goods and wares, mentioned in the said order and contract, than the amount actually called for." Plaintiff contracted with defendant to advertise to the extent of from 10,000 to 20,000 agate lines in a Greenwood newspaper, and it being admitted that 10,000 lines had been paid for by plaintiff, which was within the range of the contract for advertising made by the parties, the allegation that plaintiff had represented it would expend a much larger sum than it did actually expend is immaterial, and the exclusion of evidence tending to support such allegation was proper under Martin v. Railway, supra.

It is further contended that the answer alleged fraud and that under general allegations of fraud all testimony necessary to support it is admissible. As a general proposition, this is true, but actionable fraud must be alleged which includes the scienter on the part of the party sought to be charged (Gem. Chemical Co. v. Youngblood, 58 S. C. 59, 36 S. E. 437; Poag v. Charlotte Oil Co., 61 S. C. 190, 39 S. E. 345), as well as resulting damage or injury to the complainant (Ruberg v. Brown, 50 S. C. 399, 27 S. E. 873). A careful reading of the allegations as to fraud set out in the fourth paragraph of the answer shows that it is defective in these essential particulars. Hence testimony as to fraud was properly excluded, and, if the demurrer which was overruled by the circuit court had been limited to the defense of fraud alone, it should and doubtless would have been sustained. This is not inconsistent with the case of Hickson v. Early, 62 S. C. 42, 39 S. E. 782, for in that case the scienter was distinctly alleged in the defense, and the question whether there was injury or resulting damage charged was not involved, as the circuit court was not called on to consider that question.

The judgment of the circuit court is affirmed.

(78 S. C. 472)

## QUICK v. MILLFORT MILL CO.

(Supreme Court of South Carolina. Nov. 27, 1907.)

1. MASTER AND SERVANT—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

Evidence in an action by a carpenter who fell from a beam on the breaking of a timber being used by him as a lever to prize out the overlap in other timbers *held* to show that he himself adopted the particular method of work, which resulted in his injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 992.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

A carpenter who sat on a beam and used a timber as a lever to prize out the overlap in other timbers and fell when the lever timber broke under his pressure was guilty of contributory negligence barring recovery when no such danger would arise from the method in which he was directed to perform the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 759.]

3. SAME—SELECTION OF APPLIANCES BY EMPLOYÉ.

A servant cannot recover of the master for an injury resulting from an appliance which he selected and prepared for himself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 701, 702.]

4. SAME — APPLIANCES — CARE REQUIRED OF MASTER.

The master may adopt such reasonably safe appliances as he deems best suited for the work in hand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 173.]

5. SAME—PLACE TO WORK.

A master is not required to so arrange the place where his servant works that he shall be protected from the consequences of a casualty for which the master is not responsible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 179.]

Appeal from Common Pleas Circuit Court of York County; J. C. Klugh, Judge.

Action by B. B. Quick against the Millfort Mill Company. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

Wilson & Wilson, for appellant. Augustus M. Deal and G. W. S. Hart, for respondent.

JONES, J. The plaintiff brought this action to recover actual and punitive damages for personal injuries sustained by him while in the employ of defendant as a carpenter, assisting in the construction of an addition to defendant's mill. The complaint alleged that on the 11th day of July, 1904, plaintiff was directed by the vice principal of the defendant company to go upon the beams of the second floor of the addition to the mill and there press into position for them to be spiked certain pieces of timber which were being capped upon the beams in order to raise their height before the floor was laid thereon, and that while so employed, under the immediate direction of the vice principal, he was precipitated from the position in which he was working some distance to the ground below, and injured, through the negligence and willfulness of defendant "in not furnishing plaintiff a safe place in which to work or safe appliances with which to work, or direct the work to be done in a less dangerous and equally practicable manner." The defendant made answer, admitting that it was incorporated as alleged, and that plaintiff was in its employment as a carpenter, assisting in the construction of said building at the time alleged, and that he was required to work under the direction and control of the assistant superintendent of the mill, but denied the other allegations of the complaint, and alleged that plaintiff's injury was due solely to his own negligence, that he contributed thereto by his own negligence, that he received the alleged injuries while voluntarily doing or attempting to do something in a manner contrary to the instructions given him. The trial resulted in a verdict and judgment in favor of plaintiff for $1,342, and the defendant appeals therefrom, alleging that the court erred in refusing the motion for nonsuit, the motion for a new trial, and in submitting to the jury the question of punitive damages.

The refusal of the nonsuit and the new trial may be considered together, in so far as the exceptions involve the general question whether there was any evidence tending to show injury as the result of the failure of defendant to perform its duty as master.

The plaintiff was the only witness examined in his behalf. His testimony was to the effect that on July 11, 1904, at Ft. Mills, S. C., he was employed as a carpenter to assist in the construction of said mill building, and was working under the direction of Mr. McGregor, the assistant superintendent for defendant. In the progress of the work, it was found that, in order to make the second floor of the new addition on a level with like floor in the old mill, it was necessary to cap the floor beams or joists, which were 10 by 14, with other timbers 2 by 10, so as to raise them 2 inches higher. The plaintiff and another carpenter, Mr. Long, were directed by the superintendent to go upon the beams and spike the timbers on them. Other carpenters, Mr. Stevens and Mr. Lytle, were following behind, putting down the flooring upon the beams after they were capped, and Mr. McGregor was standing near. Some of the capping timbers had become warped and in places bulged over the edge of the beam one-half inch or more. We now quote plaintiff's own language, describing how the injury occurred: "Q. Now, Mr. Quick, when you found difficulty in putting these beams down on account of the warped condition of these pieces, you were capping on top of the beam. What did you do, you and Mr. Long? A. Well, we got one where it was not straight, wouldn't fit down straight. Mr. Long went to Mr. McGregor to see what to do about it. So he brought him back there, and Mr. McGregor said we would have to get a prizing lever and prize it back flush with the beam and spike it down. It wouldn't do to let it

lie that way. Q. Then, what did Mr. Long and yourself do? A. We went down to the waste pile, and picked us out some scantling, a couple of pieces two by four, and brought it back, and we first tried to drive it in—put the piece about the same distance between the two beams. It might have been a fraction longer, and put it crossways, and tried to spring it back by driving up, but, by the timber being so crooked and long, it would just spring. Every time we would drive it, it would bounce back. So, then, we cut off a little more of the scantling and put it in between, and put a prize. And Mr. Long sat on the other side and held it with a spike, and I prized for him to spike it. I just sat astraddle of the beam; had the plank drawn out so I could sit on the end of the beam and have my legs hanging down and the lever to my left shoulder. I had hold of the prize that went across with my left hand to keep it from slipping down, and holding to the beam with my right hand, and Mr. Long on the other side with a spike driving it in, and I was prizing for him to spike with, and it broke all at once and shocked me through." When asked to state again exactly how he was sitting and prizing the timber back into position, he said: "I had a piece of flooring plank run across and extended out a little beyond the beam, and was sitting on it right over the beam, with my legs hanging down, and had my lever down between my legs like and against this (left) shoulder, holding the two by four scantling that ran across to prize with, holding it to keep it from dropping down with my left hand, and holding the beam with my right hand, and Mr. Long was on the other side to spike it when I pressed it in flush with the beam. While I was pressing it he was driving it. The scantling broke, and dropped me right underneath."

With respect to the selection of the scantling after Mr. McGregor told them to get a lever and press the capping timber back, the case also shows the following: "Q. Where did you say you got that timber from? A. Me and Mr. Long went down to the waste pile. Q. You selected it at the waste pile? A. Where there was different kinds of pieces of scantling. Q. Do you remember now who selected that piece of timber, you or Mr. Long? A. No, sir; we both got one piece. I can't say who selected that piece." "That piece" referred to the piece which plaintiff held against his shoulder, and which broke as he pressed against it. The other piece of scantling was used between the beams, which were eight feet apart; Mr. Long sitting on the beam, holding one end of the scantling against the bulge in the capping timber, while plaintiff, sitting nearly opposite on the other beam, first endeavored to so drive between the beams as to press out the bulge with such single prize. According to plaintiff's testimony, it was only after repeatedly trying this single prize that he resorted to the method which resulted in his injury. Inasmuch as the only direction given plaintiff and Long was to get a lever and prize out the overlap, and pursuant to such direction the single prize lever was used, it is reasonable to suppose that plaintiff understood the direction to be to do the work in the method which was first tried. The cutting of the scantling so as to fit closely between the beams and the use of it as a driving prize between the overlapping timber on one beam and the solid beam opposite negatives the idea that it was the direction of the superintendent to use an additional prize between its end and the beam. Mr. McGregor testified, in effect, that he directed them to saw a piece just the distance between the beams and take a hammer and drive the warped timber in and nail it down, and that, instead of hammering this prize back, plaintiff cut it shorter and got a piece of plank, inserted it between the end of the prize and the beam, and threw his weight against it, when it broke and he fell to the ground, and this piece of plank was afterwards picked up and found to have been chopped with an ax at the place where it broke.

Mr. Lytle, who was working with Mr. Stevens, about 10 or 12 feet away, laying the floor, testified in effect that plaintiff did not do as he was instructed by the foreman, Mr. Stevens, which was to drive the single prize between the warped timber and the opposite beam, but picked up a piece of inch plank, and used it as a prize. Mr. Stevens testified, in effect, that he told plaintiff how to do the work (explaining the manner as already indicated); that plaintiff said he did not care to do that way, he could fix it other ways; that plaintiff then picked up the piece of inch plank and used it as a prize. Mr. Long, who worked with plaintiff, testified in effect that the superintendent instructed him (Long) to get a piece of scantling and saw it eight feet long; that he told plaintiff that he (Long) would go out on the timber and he (plaintiff) on the other; that he (Long) would hand him the end of the timber, a piece two by four, and that he (plaintiff) was to drive it in; that, instead of driving it, he went to the floor and got this piece of plank, stuck it in, and, as he bent on it, it broke and he fell. From the foregoing, whether the plaintiff's testimony alone is considered or whether the whole testimony is considered, it is manifest that the only reasonable inference is that plaintiff in the progress of his work voluntarily adopted the particular method which resulted in his injury. The testimony is undisputed that the method of prizing adopted by plaintiff was very dangerous, while the method of driving with the single prize was usual and safe. The work was afterwards finished by the method which plaintiff testified he first tried. It is true that plaintiff's counsel asked him the question: "Did you do the work you were directed to do in the manner that you were

directed to do it?" to which he replied, "Yes, sir." But this mere opinion of the witness cannot have the effect of modifying his positive statement of fact that the superintendent directed them "to get a prizing lever and prize it back flush with the beam, and spike it down," and there was no testimony that the superintendent gave any other direction. The plaintiff by his own testimony had been working as a carpenter by trade for four years, having begun to learn the trade 10 or 12 years before his injury. While he testified that he had never driven in warped timber before this occasion and apprehended no danger in applying the prize, it would be unreasonable to excuse a man of his age and experience from the ordinary use of his senses and faculties. As a man of ordinary intelligence and experience, he was bound to know that in the method of operation adopted by him there was danger of falling between the beams to the ground below if either of the prize sticks should slip away or break under his pressure forward, whereas no such danger would accompany the driving of the single prize. It further appears in plaintiff's own testimony that the scantling which broke was selected by himself or by himself and Long, a fellow servant, from a pile of different kinds of pieces of scantling. As there was no testimony tending to show that Long alone selected the piece that broke, and no testimony that Long was acting as representative of said master in selecting the scantling, there is no basis for an inference that the selection was made by the representative of the defendant, and the case does not fall within the principle of Koon v. Southern Ry., 69 S. C. 108, 48 S. E. 86, in which it was submitted to the jury to determine whether Koon was injured by the negligent operation of a sound appliance by a fellow servant or the negligent selection and repair of a defective appliance by a fellow servant under the direction of the master; the master being responsible in the latter case, and not in the former. In that case the party injured was charged with no duty to perform in connection with the selection of the material or in repair of the particular appliance. In this case the party injured was charged with the duty of selecting and operating the appliance. The appliance, too, was so simple, a mere piece of scantling, that it is unreasonable to suppose an adequate supply of suitable timber was not readily available about the building, and, indeed, it appears from plaintiff's testimony that the selection was made from a pile containing different kinds of pieces of scantling. The only possible inference from the plaintiff's testimony is that he assumed the duty of selecting the material and preparing the simple temporary contrivance for his own use in the prosecution of his employment. The law denies him any right of recovery for any injury resulting from the appliance which he selected and prepared for himself, within the principles stated in Keys v. Granite Co., 72 S. C. 97, 51 S. E. 549, and Green v. Catawba Power Co., 77 S. C. 432, 58 S. E. 147.

The plaintiff, however, was asked by his counsel in what way the place could have been made safe, and said that "there could have been a kind of temporary floor thrown over the place, two or three flooring plank, so, if my lever had broken and thrown me, I would not have gone through. But, of course, there was nothing said about fixing it that way. And, then, there could have been a tackle and block to draw it over from the ground, but Mr. McGregor spoke about fixing one to it, and Mr. Stevens said it was not necessary—"so he told me." The suggestion that block and tackle could have been supplied for use, instead of the scantling prize, is not deserving of serious consideration. The master is at liberty to adopt such reasonably safe appliances as he deems best suited for work in hand. The question was not what appliances could have been supplied, but whether there was any breach of the master's duty to furnish reasonably safe appliances. The burden was on plaintiff to show negligence of the defendant. There was no evidence tending to show that it was proper or usual to supply block and tackle in such circumstances, instead of the simple contrivance directed to be used. The suggestion of plaintiff that two or three planks could have been thrown over the place, so as to arrest his fall in case the lever broke, does not tend in the slightest to make out a case of negligence against defendant. In the first place, it appears that plaintiff used whatever flooring plank he considered necessary for his safety by securing one to sit on while on the beam driving the prize, and no reason appears why he did not procure or could not have procured other flooring planks near at hand, if he regarded such to be a proper precaution for his safety. In the next place, after scrutinizing the testimony, we find it impossible to conceive how planks could have been so closely thrown about him on the beam as to arrest his fall, and at the same time not have seriously interfered with or prevented the work he was attempting to do, the spiking down of timber along the beams and the use of a prize across the space between the beams. But, if it be true that such planks may have been so placed as to have arrested his fall, it does not follow that it was the duty of the defendant to take such precautions. "A master is not required to construct his instrumentalities, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible." 1 Labatt on Master and Servant, § 13; Jones v. Granite Mills, 126 Mass. 84, 30 Am. Rep. 661. It has been shown that

the place where plaintiff was working was not made unsafe through any negligence of the defendant.

The foregoing views render it proper and just that a new trial be ordered, and it is not necessary to consider the question as to punitive damages, even if it were otherwise proper to do so, in the absence of a motion for nonsuit as to the cause of action for punitive damages or a request to charge that there was no evidence of such damages. Jennings v. Mfg. Co., 72 S. C. 419, 52 S. E. 113.

The judgment of the circuit court is reversed, and a new trial ordered.

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(107 Va. 389)

## BOWLING, SPOTTS & CO. v. DAVIDSON et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS—VALIDITY—QUESTIONS FOR COURT.

Whether or not a deed of trust for the benefit of creditors is, as a matter of law, fraudulent because it contains a stipulation irreconcilable with an honest purpose, is for the court from an inspection of the deed itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments for Benefit of Creditors, § 1070.]

2. SAME—RESERVATIONS—EFFECT.

A stipulation in a deed of trust for the benefit of creditors, which, after authorizing the trustee to continue the business of the grantor, reserves to the grantor the power to require the trustee to close up the business and sell the property, is not inconsistent with the objects of an assignment for the benefit of creditors, and does not render the deed void as fraudulent, though a deed reserving power inconsistent with the avowed objects thereof is per se fraudulent.

Appeal from Circuit Court, Bath County.

Suit by Bowling, Spotts & Co. against J. Graham Davidson and others. From a decree for defendants, complainant appeals. Affirmed.

J. M. Perry, for appellant. Greenlee D. Letcher, for appellees.

WHITTLE, J. This appeal is from a decree of the circuit court of Bath county, whereby it was adjudged that a deed of trust executed by the appellee J. Graham Davidson for the benefit of creditors was not fraudulent per se and void.

The deed is admittedly free from the imputation of fraud in fact, and its provisions are characterized by commendable fairness to all parties concerned. It includes all the grantor's assets, and secures all his creditors ratably, and contains no clause releasing the debtor from such portions of his indebtedness as may remain undischarged by the trust fund. The administration of the trust is confided to a former clerk of the grantor, a man of exemplary character and thoroughly familiar with the business. It also appears that the grantor's mother, his largest creditor, has agreed to surrender all benefit under the deed to such of the creditors as may accept its terms. The fairness of the arrangement is, moreover, attested by the circumstance that out of 50 odd creditors secured by the deed the appellant alone challenges the correctness of the decree. The intention and acts of the grantor give a deed its character, and it is apparent that it was the purpose of the appellee, who was engaged in the mercantile business and failed, to avoid bankruptcy by making a full and fair surrender of all his assets for the benefit of creditors.

Though it is true that whether or not a deed is fraudulent as a matter of law (that is to say, whether it contains some stipulation irreconcilable with an honest purpose) is a question to be determined by the court from an inspection of the instrument itself, it is but just to the grantor that the foregoing statement of undisputed facts be made matter of record.

The deed empowers the trustee, should he deem it to the interest of the creditors, to continue the business for six months from its date, "and if at the end of that time the indebtedness is not paid and it is demonstrated that a continuance of the operation of the business will be to the advantage of the creditors, the said trustee may continue to operate the business for six months longer; but at any time he shall be requested in writing by any two or more of the creditors, holding in the aggregate over $2,000 of the debt, the said trustee shall forthwith proceed to close up the business with the most practicable dispatch, and at any time that the trustee deems it wise, or is requested so to do in writing by J. Graham Davidson, he will proceed to close up the business, * * * selling the remainder of the property * * * as authorized in this deed. After the expiration of twelve months after the date hereof, the trustee may, if he deem it best for the creditors, continue the business for twelve months longer, or less, if requested in writing by J. Graham Davidson and creditors holding a majority in amount of the debts secured by this deed."

There is striking similarity between this instrument and the deed, the validity of which was sustained in Hurst v. Leckie, 97 Va. 550, 34 S. E. 464, 75 Am. St. Rep. 798. But it is contended that the differentiating features of the two deeds, and the vitiating feature of this deed, are to be found in the stipulation contained in the latter, reserving to the grantor power at any time to require the trustee to foreclose.

The law has been settled in this state from the time of the decision in Lang v. Lee, 3 Rand. 410, that a deed which "reserves to the grantor power inconsistent with the avowed object for which the deed is made" is per se fraudulent. This principle, in varying form, has repeatedly received the sanction of this court; but no case has been cited, and we know of none, where a deed has been condemned as fraudulent which reserves to the grantor the power to require the trustee, at

any time, to foreclose the deed. Surely a reservation, the exercise of which must result in an immediate sale of the trust subject and application of the avails to the payment of debts, cannot be declared inconsistent with the objects of an assignment for the benefit of creditors, or be construed, in any just sense, as amenable to objection on the ground that it may be used to hinder or delay creditors.

This precise question has been decided adversely to the view of the appellant in Sipe v. Earman, 26 Grat. 563, and therefore a review of analogous cases would be unprofitable. The court in that case, at page 569, observes: "Nor is the provision which authorizes an earlier sale, if desired by the grantor, repugnant to and incompatible with the avowed object and purpose of the deed, so as to render it invalid and void."

For these reasons, we are of opinion that the decree of the circuit court is without error, and ought to be affirmed.

Affirmed.

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(107 Va. 588)

## VIRGINIA FIRE & MARINE INS. CO. v. J. I. CASE THRESHING MACH. CO.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. INSURANCE—INTEREST OF INSURED—CONDITIONS—BREACH.

Insured, by accepting a policy on incumbered property containing a condition that it should be void in case the property insured should be or become incumbered prior or subsequent to the date of the policy, was charged with notice of and bound by such condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 636–651.]

2. SAME—WAIVER.

Where a policy insuring certain incumbered personal property was issued without written application, knowledge, or notice on the part of the insurer or its agent that the property was incumbered, insurer did not waive a condition that the policy should be void in case the property was or should become incumbered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1028.]

3. SAME—RETURN OF PREMIUMS.

Where a policy insuring incumbered property was void from its inception, because of the incumbrance, the insurer was not required to return or offer to return premiums voluntarily paid before notice of the invalidity of the policy as a condition precedent to its right to avail itself of such defense in an action on the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1045, 1530.]

Error to Circuit Court, Clarke County.

Action by the J. I. Case Threshing Machine Company against the Virginia Fire & Marine Insurance Company. From a judgment for plaintiff, defendant brings error. Reversed.

Marshall McCormick, for plaintiff in error. Whiting & Smith, for defendant in error.

BUCHANAN, J. The policy of insurance upon which this proceeding is based contains the following provision: "This entire policy * * * shall be void * * * if the property hereby insured, or any part or item thereof, be or become incumbered by any lien by mortgage, deed of trust, judgment, or otherwise, either prior or subsequent to the date hereof."

There was a deed of trust upon the property insured at the date the policy was issued, and the question involved here is whether, upon the facts agreed, the whole matter of law and fact being submitted to the court, it erred in holding that the insurance company was liable.

The facts agreed are as follows:

"First. That C. K. Sowers, the assignor of the plaintiff, was approached by an agent of the defendant insurance company to take out a policy of insurance upon his machine, which said Sowers agreed to do, without making any verbal representation to said agent as to his title or ownership in said machine and fixtures; that no written application was presented to the insured, C. K. Sowers. None was signed by him. No questions were asked by the agents of the insurance company as to title or incumbrances.

"Second. That C. K. Sowers paid the premium for said insurance, and the policy sued upon was delivered to him.

"Third. That the insured, C. K. Sowers, complied with all conditions of said policy, and that the fire occurred as alleged in the plaintiff's notice without any fault on the part of C. K. Sowers.

"Fourth. That the amount sued for, $700, is not more than three-fourths of the actual value of said machine and fixtures at the time it was burnt, as stated above.

"Fifth. That the property insured was incumbered by a deed of trust to secure part of the unpaid purchase money due to the plaintiff, which trust was of record in the clerk's office of Clarke county. The compliance with the conditions of the policy referred to in the third clause of this agreement of facts does not refer to the condition, and was not intended to include the condition, that there should be no existing or after-created incumbrance; it still, however, being agreed that as to this condition no written application was made, that none was either presented to the applicant or signed by him, that no questions were asked by the agent of the company as to incumbrances, and no verbal representations were made by C. K. Sowers, the insured, as to incumbrances."

Upon these facts, under the decision of this court in the case of Westchester Fire Ins. Co. v. Ocean View Pleasure Pier Co., 106 Va. 633, 56 S. E. 584, the insured was not entitled to recover. In that case our decisions bearing upon the question under consideration were reviewed, and the conclusion reached that where the condition of a fire insurance policy is that it shall be void if the interest of the insured be other than unconditional ownership, or if the subject of

insurance be a building on ground not owned by the insured in fee simple, the insured by accepting the policy is charged with notice of its contents and bound by its conditions, and the company by issuing the policy without inquiry does not waive the condition as to title and ownership unless the facts were known to the company or its agent when the policy was issued, or the company was chargeable with such knowledge, and that the insurance company is not obliged to return or offer to return the premiums voluntarily paid before notice of the fact that the policy was not in force as a condition precedent to availing itself of its defense to an action on the policy. In that case the condition of the policy was that it should be void if the interest of the insured was other than unconditional and sole ownership, or if the building insured should be upon ground not owned by the insured in fee simple. In this case the condition of the policy is that it shall be void if the property insured, or any part thereof, was then or should become incumbered by any lien by mortgage, deed of trust, judgment, or otherwise. If a breach of the condition in the one case avoided the policy, there is no reason why a breach in the other should not do so, for the principle involved in both is the same, and the current of authority is that the policy in the one, as in the other, case stands avoided under the facts disclosed by this record. 19 Cyc. 701.

The judgment of the circuit court must therefore be reversed; and this court will render such judgment as that court ought to have rendered.

Reversed.

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(107 Va. 393)

## CLINCHFIELD COAL CO. v. POWERS.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

SPECIFIC PERFORMANCE—CONTRACT—SUBJECT—CERTAINTY—MEETING OF MINDS.

The agent of defendant's assignor procured an option to purchase from complainant a tract containing 500 acres, more or less, the acreage to be determined by survey. The option was accepted by defendant in accordance with its terms, after which complainant and his wife tendered a deed in execution of their contract as they understood it, describing only the western portion of the tract containing 411 acres, reserving more than 200 acres, which included the improvements and most valuable portions of the tract. There was some evidence that the agent, who was not a general agent, knew that complainant did not intend to sell the entire tract, but that information was not communicated either to defendant or its assignor. *Held*, that complainant was not entitled to enforce specific performance under the rule that such relief is granted only when the contract is certain; it not being established with certainty that there had been a meeting of minds as to the subject of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 61, 62.]

Appeal from Circuit Court, Dickenson County.

Bill by J. H. Powers against the Clinchfield Coal Company. From a decree for complainant, defendant appeals. Reversed.

J. Norment Powell, Ayers & Fulton, and W. H. Rouse, for appellant. A. A. Skeen for appellee.

KEITH, P. J. H. Powers filed his bill in the circuit court of Dickenson county, asking a specific performance of a contract alleged to have been made by him for the sale of a certain parcel of land to the Clinchfield Coal Company. The Clinchfield Coal Company filed its answer, denying the plaintiff's equity.

The facts of the case are as follows: One Owens, as agent for H. G. Morison, entered into negotiations with J. H. Powers, which resulted in a written contract, dated October 14, 1905, to the following effect: That Powers and wife, parties of the first part, bargained and sold to H. G. Morison, and covenanted to convey by deed of general warranty and free from all incumbrances and clouds upon the title, to the party of the second part, "the following tract or parcel of land situate, lying and being in the county of Dickenson, state of Virginia, on the waters of Frying Pan creek, adjoining the lands of Clinchfield Coal Company, J. P. Sutherland, S. D. Sutherland, and others, and bounded as follows: All coal heretofore sold and conveyed are excepted from this contract and all poplar trees branded are excepted from this contract, containing 500 acres, more or less, the acreage to be determined by actual survey and being the same acquired by the parties of the first part by deed from Henry Sutherland.

"The terms of this sale are $20.00 per acre for the said lands, as the acreage is determined by actual survey hereafter to be made, of which purchase price the sum of $25.00 is paid cash in hand, the receipt of which is hereby acknowledged, and the balance is to be paid in three equal payments, the first of which is to be made as soon as the title can be examined, a survey made and the deed herein provided for executed and delivered, and the remaining payments to be made in six and twelve months from this date.

"In further consideration of the sum of $25, this day paid, the receipt of which is hereinbefore acknowledged, it is agreed that the said party of the second part shall have the right for a period of 60 days from this date to elect whether he will purchase said land upon the terms herein stated and that if the said party of the second part, or his assigns, does within the said period of 60 days from this date notify the said parties of the first part of his intention to purchase the same, then the said parties of the first part shall be bound to convey and the said party of the second part or his assigns shall be bound to pay for and accept said land, upon the terms hereinbefore stated." The remainder of this

contract is omitted as not being material to the decision of the question before us.

On December 11th, and within the 60 days, the Clinchfield Coal Company, through W. H. Rouse, its attorney, sent the following notice to Powers:

"You are hereby notified that it is the intention of the Clinchfield Coal Company to take and pay for that certain tract of land lying in Dickenson county, Va., on the waters of Frying Pan creek, adjoining the lands of the Clinchfield Coal Company, J. P. Sutherland, S. D. Sutherland, and others, containing 500 acres, more or less, in accordance with the terms and provisions of a contract executed by you on the 14th day of October, 1905, to H. G. Morison, and by said Morison assigned to the said company. This 11th day of December, 1905.

"Clinchfield Coal Co.,
"By W. H. Rouse, Attorney."

On the 10th of July, 1906, Powers and wife tendered to the Clinchfield Coal Company a deed in execution of their contract, as understood by them, but, it appearing that by this deed the grantors did not convey the whole of that certain tract of land lying in Dickenson county, as described in the contract, but only the western portion thereof, containing 411 acres, reserving to themselves something more than 200 acres of the tract, upon which were the improvements and level land constituting the most valuable and desirable portions, the Clinchfield Coal Company refused to accept the deed; and thereupon this suit was instituted.

Owens, who conducted the negotiations with Powers, was in no sense a general agent either of Morison or of the Clinchfield Coal Company. His authority was limited to procuring an option upon certain property. The option contract of October 14, 1905, is upon its face a covenant to convey, should its terms be thereafter accepted, a "tract or parcel of land situate, lying and being in the county of Dickenson, state of Virginia, on the waters of Frying Pan creek, adjoining the lands of Clinchfield Coal Company, J. P. Sutherland, S. D. Sutherland, and others, * * * containing 500 acres, more or less, the acreage to be determined by actual survey, and being the same acquired by the parties of the first part by deed from Henry Sutherland." The written acceptance conformed to this offer in ipsissimis verbis. Owens had no authority as agent to bind Morison or the Clinchfield Coal Company by any verbal agreement or understanding not embodied in the paper of October 14, 1905; nor does he in his evidence claim that Morison or the company knew before the papers were signed that Powers did not intend to sell and convey the entire tract, except so far as that information may be inferred from his letter to Morison; to which we will presently advert.

"Q. 21. Then, in your letter to Morison, you did tell him that Powers did not want to sell all of his tract of land, but would sell a part, and asked him (Morison) what you should do about taking the contract. Is this correct?

"A. My letter to Mr. Morison I believe explained to him. I don't think I explained to him the part that he wanted to sell, but that he would sell 500 acres, more or less. I don't think I explained to him the part that he wanted to sell, or how the lines was to be run."

Morison in his deposition says: "I had absolutely no information from any one that the contract covered less than the entire boundary owned by Jas. H. Powers." And, upon being asked, "When and how did you first hear of such a claim as is referred to in the last question?" he answered: "Some time about the 1st of January, 1906, while at Clintwood, Mr. L. D. R. Owens in a conversation gave me to understand that James H. Powers was intending to or had withheld a valuable part of his tract of land on Frying Pan situated around his house, and taking in the forks of the creek."

The letters referred to are as follows:

"Bee, Va., Oct. 6th, 1905.

"H. G. Morison, Esq., Bristol, Va.—Tenn.

"My Dear Sir: I have been to see Mr. J. H. Powers, and have his promise for a contract for about 500 a. of his land crossing the creek just above his house and running to the top of the ridge on east side of Frying Pan, connecting with S. D. Sutherland tract at the mouth of Spruce Pine Branch. He now is willing to take $20.00 per acre. This land has very good cull poplar, and lots of nice oak. Advise me at once.

"Yours very truly, L. D. R. Owens."

To this letter Morison replied October 10, 1905:

"Dear Sir: I beg to acknowledge receipt of your letter advising that Mr. J. H. Powers is willing to trade his land. Please take a contract upon the five hundred acres as indicated in your letter, and then, if at all possible, obtain a contract from him upon the remainder of his land, allowing him to farm and use it during his lifetime at the best figure you can get, which I presume will be more than $20.00 per acre. Please close this matter just as quickly as you can, and advise Mr. Rouse. I think you have done exactly right in keeping this matter so well before you."

The pleadings do not make a case for the reformation of a contract upon the ground of fraud, accident, or mistake. There is, it is true, an allegation that by mutual mistake the land embraced in the option contract is described as adjoining the lands of J. P Sutherland, when such, as it seems, is not the fact; but this is immaterial to the issue before us. The bill is filed to compel the specific performance of a contract in writing, clear and explicit in its terms, which the defendant avers in its answer it is willing and

ready to perform in accordance with its obvious meaning, but which the plaintiff asks may be interpreted by the interpolation of the verbal understanding between the complainant and the agent of the defendant with whom he contracted, whose authority was limited to the procuring of an option, and who had no inherent power to bind his principal by any understanding, representation, or agreement not embodied in the written option contract, of which verbal representations the other parties to the contract had no notice, except such as might be derived from the correspondence heretofore given between Owens and Morison, which leaves the subject in the same obscurity in which it was found, for in it Morison instructs Owens to obtain an option upon the whole tract, if possible, and the contract actually entered into in obedience to this letter of instruction embraces the entire tract. The law in such a case seems to be plain.

"All applications to the court to compel specific performances are addressed to the discretion of the court—a sound judicial discretion, regulated by the established principles of the court—and the contract must not only be distinctly proved, but it must be clearly and distinctly ascertained. It must be reasonable, certain, legal, mutual, upon valuable or, at least, meritorious consideration, and the party seeking specific performance must not have been backward, but ready, desirous, prompt, and eager." Dunsmore v. Lyle, 87 Va. 393, 12 S. E. 610.

This case is well within the principle of Blanchard v. Railroad Company, 31 Mich. 43, 18 Am. Rep. 142, in which it is said: "Where the court is unable from all the circumstances of the case to say whether the minds of the parties met upon all the essential particulars, or, if they did, then cannot say exactly upon what substantial terms they agreed, or trace out any practical line where their minds met, specific performance will be refused."

For these reasons, the decree of the circuit court must be reversed; and this court, entering such decree as the circuit court ought to have entered, dismisses the bill of complaint.

Reversed.

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(107 Va. 553)

## SOUTHERN RY. CO. v. SMITH.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT — CONSTITUTIONAL PROVISION — ABOLISHING FELLOW SERVANT DOCTRINE—CONSTRUCTION.

A yard foreman of a railway company, in the discharge of whose duties it was customary and necessary for him to ride on a yard engine, and whose position on the step of the engine at the time he was thrown therefrom was the usual and proper place for him to be, is an employé "engaged in service requiring his presence" on an engine within Const. § 162 [Va. Code 1904, p. cclix], abolishing as to such an employé the doctrine of fellow servant so far as it affects the employer's liability for injuries to the employé resulting from another employé's acts or omissions, and authorizing a recovery for injury due to the act or omission of a co-employé in another department or in charge of a switch, signal point, or engine; that section not being limited to an employé actually engaged in the operation of the engine, but extending to others present in the reasonable and proper discharge of their duties.

2. SAME—"FELLOW SERVANTS"—WHO ARE.

All serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, though in different grades or departments, are fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 486–492.

For other definitions, see Words and Phrases, vol. 3, pp. 2716–2730; vol. 8, p. 7662.]

3. SAME.

A yard foreman who had no authority over a yard engineer, except to direct him when and where to move his engine, and who did not have the right of employment or discharge of the engineer, was not a vice principal as to such engineer, but a fellow servant, within Const. § 162, abolishing the doctrine of fellow servant so far as it affects the employer's liability for injuries to the employé resulting from another employé's acts or omissions as to every employé engaged in any service requiring his presence on a train, car, or engine, and authorizing a recovery by such an employé for injury due to the act or omission of a co-employé in another department or in charge of a switch, signal point, or engine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 493–514.]

4. WRIT OF ERROR — REVIEW — AMOUNT OF DAMAGES.

A verdict for $15,000 for the loss of an arm by a yard foreman will not be disturbed as excessive where there is nothing else to suggest that the jury was influenced by prejudice or acted under any misconception of the merits of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944–3947; vol. 15, Damages, § 379.]

5. SAME.

The Supreme Court will not disturb a verdict in a personal injury action as excessive, unless the damages are such as to warrant the belief that the jury must have been influenced by prejudice or misled by some mistaken view of the merits of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944–3947.]

Error from Circuit Court, Amherst County.

Action by N. J. Smith against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Horsley, Kemp & Easley, for plaintiff in error. Lee & Howard, for defendant in error.

HARRISON, J. This writ of error brings up for review the proceedings in an action, brought by the defendant in error, to recover damages for a personal injury alleged to have been occasioned him by the negligence of the plaintiff in error. There was a verdict and judgment in favor of the plaintiff for $15,000, which we are asked to reverse and set aside.

The essential facts established by the record are that the plaintiff was in the employ-

ment of the defendant railroad company as yard foreman and station agent at Monroe, a division terminal in Amherst county. His duties required him to superintend generally the operations in the yard, and among other things to go from point to point therein, switching cars, making up trains, and getting them in and out of the yard. In the discharge of these constantly recurring duties in an extensive yard, it was customary and necessary for the plaintiff to ride from point to point on the switching engine. He had been engaged with duties of this character on the evening of the accident, and was returning from the performance of his work in the direction of the yard office, standing, as was his custom, on the step of the engine, holding to the handholes placed there for the purpose with both hands. The position of the plaintiff on the step of the engine was within two feet of the engineman, who was then and there directed by the plaintiff as to the next point to take the engine, and further told to slow up as he passed the office, in order that the plaintiff might get off for the purpose of discharging certain duties there that demanded his attention. As the office was approached, the engineman, with full knowledge of the plaintiff's position, applied the steam in such manner as to cause the engine to suddenly and violently lunge forward, in an unusual and dangerous manner, thereby throwing the plaintiff to the ground and under the wheels of the engine, which crushed and destroyed his arm.

We are of opinion that the negligence of the defendant company is clearly established, and that the evidence is quite sufficient to justify the conclusion of the jury that the plaintiff was not guilty of contributory negligence.

The assignment of error chiefly relied on involves the relation existing at the time of the accident between the plaintiff and the engineer. The theory of the plaintiff, which was adopted by the trial court, is that at the time of the commission of the negligent act complained of he was a fellow servant of the engineer, with the same right to recover of the defendant that he would have had if such negligent act had been that of the defendant company itself in the performance of a nonassignable duty; it being insisted on behalf of the plaintiff that he comes within the provisions of section 162 of the Constitution, which abolishes the doctrine of fellow servant as to certain classes of railroad employés, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master. The contention of the defendant company is that the presence of the plaintiff on the engine was not required by the services in which he was engaged when injured, and therefore that the company is not liable, although the injury was inflicted by the negligence of the engineer. It is further contended, on behalf of the railway company, that the plaintiff was not a fellow servant of the engineer, but that, as yard foreman and station agent, he occupied the master's position as to the engineer, who was an inferior servant; and that as such vice principal, claiming for injury from his subordinate's act, the defense of assumed risk is not intended to be touched by section 162 of the Constitution.

Omitting such parts of section 162 of the Constitution as do not apply to this case, it reads as follows: "The doctrine of fellow-servant, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is * * * abolished as to every employé engaged * * * in any service requiring his presence upon a train, car or engine; and every such employé shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employé or employés of the common master that a servant would have * * * if such acts or omissions were those of the master himself, in the performance of a non-assignable duty; provided the injury so suffered by such railroad employé result from the negligence of * * * a co-employé engaged in another department of labor * * * or who is in charge of any switch, signal point, or locomotive engine."

The language, "every employé engaged * * * in any service requiring his presence on a train, car or engine," manifestly means every one who may be there in the line of duty. We cannot pick out the single word "requiring," and attach to it the restrictive meaning contended for by the railway company. This would exclude from the benefits of the constitutional provision every employé except those actually engaged in the operation of the engine, although the presence there of some other might be in the line of a reasonable and proper discharge of his duty. If his presence on the engine is in the usual and proper discharge of his duty, he is rightfully there, and is entitled to the benefit of the protection afforded him by the Constitution.

Looked at from the standpoint of a demurrer to the evidence, as this record must be, the undisputed facts are that the duties of the yard foreman required him to accompany and ride upon the yard engine from one point to another in the yard; that it was both proper and customary for him to ride on the engine as he was doing at the time of the accident; that his position on the step of the engine was, not only a reasonably safe place, but that it was the place at which it was usual, customary, and proper for him to be. There is no denial that the plaintiff had so interpreted the requirements of his position for years, and it does not appear that the railway company expected such duties to be discharged in any other way.

As to the contention that the yard fore-

man and the engineer were not fellow servants under the law as it was prior to the date on which the Constitution of 1902 became effective, it clearly appears that the yard foreman had no authority or power over the yard engineer, except to direct him when and where to move his engine in shifting and transferring cars on the yard. He possessed none of the power of a vice principal, such as the right of selection, employment, or discharge of the engineer, or any authority over him in the operation of the engine. He could only direct his movements on the yard as any other foreman or boss could do. If the engineer disobeyed or was for any reason unsatisfactory, the yard master could only report him to a common superintendent for his action.

All serving a common master, working under the same control, deriving authority and compensation from the same source, and engaged in the same general business, although in different grades or departments, are fellow servants, and take the risk of each other's negligence. N. & W. Ry. Co. v. Donnelly's Adm'r, 88 Va. 853, 14 S. E. 692.

In the case of N. & W. Ry. Co. v. Nuckol's Adm'r, 91 Va. 207, 21 S. E. 347, the principle is succinctly stated as follows: "The liability does not depend upon the fact that the servant injured may be in a different department of the service from the wrongdoer. The test is: Were the departments so far separated from each other as to exclude the probability of contact and of danger from the negligent performance of their duties by employés of the different departments. If they are so separated, then the servant is not to be deemed to have contracted with reference to the negligent performance of the duties of his fellow servant in such other department. The liability does not depend upon gradations in employment, unless the superiority of the person causing the injury was such as to put him in the category of principal or vice principal."

In the case of Richmond Locomotive Works v. Ford, 94 Va. 643, 27 S. E. 511, this court says: "Where the execution of work directed to be done by the master or his representative is entrusted to a gang or group of hands, it is necessary that one of them should be selected as the leader, boss, or foreman to see to the execution of such work. This sort of superiority of service, as has been said, is so essential and so universal that every workman in entering upon a contract of service must contemplate its being made in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of any other fellow workman. The foreman or superior servant stands to him in that respect in the precise position of his other fellow servant."

In the case of N. & W. Ry. Co. v. Houchins, 95 Va. 404, 28 S. E. 580 (46 L. R. A. 359, 64 Am. St. Rep. 791) this court says: "And the mere fact that another engaged in the same work or employment is, by the rules of the master for the direction and government of those in his employ, made a leader, boss, or conductor, or by whatever name he might be designated or known, to see to the execution of the work, and by the neglect of this leader, boss, or conductor one engaged in the same common work of the master is injured, does not of itself place the one so put in authority in the category of principal or vice principal." And again, on page 406 of 95 Va., page 581 of 28 S. E. (46 L. R. A. 359, 64 Am. St. Rep. 791), it is said: "The running of trains by a railroad company is work of such a character as to make it essential that one of the crew on each train be selected as a leader, boss, or conductor, as he is always known, to direct the execution of the work, and this kind of superiority, it may be said, is as essential and universal in the moving of trains upon a railroad as in other pursuits when the employés work in squads, gangs, or crews. Every man in entering upon a contract of service upon a train as fireman, engineman, or brakeman must contemplate its being run under the orders and direction of a conductor, who, though designated as conductor, with authority to control and direct the men under him, is but a co-laborer, or coworkman, with the other members of the crew, engaged in a work of mere operation, a common employment, under one and the same common employer, from whom all derive their authority and compensation." See, also, Moore Lime Co. v. Richardson's Adm'r, 95 Va. 326, 28 S. E. 334, 64 Am. St. Rep. 785; Eckle's Adm'x v. N. & W. Ry. Co., 96 Va. 69, 25 S. E. 545; Southern Ry. Co. v. Mauzy, 98 Va. 692, 37 S. E. 285; Trigg Co. v. Lindsay, 101 Va. 193, 43 S. E. 349.

In view of the evidence in this case, and under the law as it was when the present Constitution became effective, as shown by the authorities cited, the relation existing between the yard foreman and the yard engineer in question was that of fellow servant.

The presence of the plaintiff in this case being, as we have seen, required upon the yard engine at the time of the accident, and the relation existing between himself and the engineer being that of fellow servants, he comes clearly within the protection afforded such an employé by the provisions of section 162 of the Constitution, which abolishes the fellow-servant doctrine, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master. This provision of the Constitution makes no distinction between superior and inferior servants. The language is: "Abolished as to every employee of a railroad company engaged in any service requiring his presence upon an engine" and "every such employee shall have the same right to recover," etc.

These considerations dispose of the material questions raised by the exceptions taken to the action of the circuit court in giving and refusing instructions. The instructions given conform to the view of the law herein expressed, and submit the case to the jury without prejudice to the rights of the plaintiff in error.

It is further assigned as error that the verdict is excessive.

It is true that $15,000 is a larger verdict than we usually encounter as an award of damages for the loss of an arm; but this furnishes no warrant for our interference with the finding. The question to be considered is not whether this court, if acting in the place of the jury, would give more or less than the amount of the verdict, but whether the damage awarded by the jury is so large or so small as to indicate that the jury has acted under the impulse of some undue motive, some gross error, or misconception of the subject. There is no rule of law fixing the measure of damages in such cases, and it cannot be reached by any process of computation. It is therefore the established rule, settled by numerous decisions extending from Farish & Co. v. Reigle, 11 Grat. (Va.) 697, 62 Am. Dec. 666, to the recent case of N. & W. Ry. Co. v. Carr, 106 Va. 508, 56 S. E. 276, that this court will not disturb the verdict of the jury, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. The record in the case at bar furnishes no suggestion that the jury were influenced by partiality or prejudice, or by any misconception of the merits of the case; nor is there anything to indicate that they were not moved to their conclusion from a sense of right and justice.

The circuit court did not err in refusing to set the verdict aside, and its judgment must be affirmed.

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(107 Va. 400)

## CRAMER et al. v. SENGER & TUMER.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—GIFT TO WIFE.

H., who was indebted to C., agreed in writing to give to C.'s wife a specified tract of land. He died in 1896 without having carried out such agreement, whereupon his heirs executed another agreement with C. that he should take possession of the land on condition that he was to have the refusal of the premises at $20 an acre, and, if he declined to buy at that price, whenever the property was offered for sale, he should pay out of the proceeds any debts which he might hold against H.'s estate and any other just claims that he had paid for the estate, with the cost of improvements, etc., such claims to be liens on the property until satisfied. After this agreement was made C. incurred a debt to complainants, which, while existing before, was not put in judgment until after the land had been conveyed by the widow and heirs of H. to C.'s wife in consideration of claims against H.'s estate in accordance with the agreement between C. and the heirs. *Held*, that the conveyance to the wife was not pursuant to such agreement, but was fraudulent as against C.'s creditors, and, he having in fact furnished the consideration, the wife having no claims against her father's estate, she held the property in trust for her husband which was properly subject to his debts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 345.]

2. SAME—ACCRUAL OF CLAIM.

Where a husband was indebted to complainants long before a fraudulent conveyance of property to his wife was executed, it was immaterial to complainants' right to subject such property to their judgment subsequently recovered that there had been no adjustment of the account between the parties until after the conveyance.

Appeal from Circuit Court, Augusta County.

Bill by Senger & Tumer against Lucinda K. Cramer and another to subject certain land to a judgment recovered by plaintiff against Ambrose Cramer. From a decree in favor of complainants, defendants appeal. Affirmed.

Patrick & Gordon, for appellants. F. B. Kennedy, for appellees.

CARDWELL, J. Emanuel Hise on the 17th day of March, 1891, in writing under seal, agreed to give to his daughter, Lucinda Catherine Cramer, wife of Ambrose Cramer, 10 acres of land, situated in the county of Augusta, adjacent to other lands owned by him, the said 10 acres of land to be around about the old Shaffer mansion, and to include the mansion and outbuildings. Emanuel Hise died in 1896 without having carried out the said agreement, and, in pursuance thereof, the heirs of Emanuel Hise executed another agreement, to the effect that Ambrose Cramer should take possession of certain property belonging to the estate of Emanuel Hise, which was the same property mentioned in his agreement with Catherine Cramer, upon the terms and conditions that he was to have the refusal of the premises and boundary of land at $20 per acre, and, if he declined to buy at that price, whenever the property was offered for sale, he should pay out of the proceeds of the sale thereof any debts which he might hold against the estate of Emanuel Hise, deceased, and any other just claims that he had paid for the estate, and also the cost of any improvements he might have made upon the property before the date of sale, such claims to be liens upon the property until satisfied.

Upon the reading of both of the above-mentioned agreements together, it is clear that the last-named was but an attempt by the heirs at law of Emanuel Hise to establish a lien in favor of Ambrose Cramer for whatever amount might be due to him from Hise's estate, in the event the 10 acres, including the mansion house and outbuildings, was not conveyed to Catherine Cramer as was contemplated by the first-named agreement. The agreement between the heirs of

Emanuel Hise and Ambrose Cramer has no date other than "the ——— day of ———, 1896," but by an addendum on the margin thereof, signed by "A. Cramer, Administrator," bearing date August 5, 1896, it is clear that the agreement of the heirs must have been executed prior to this last-named date.

On the 26th day of September, 1896, Senger & Tumer made a contract with Ambrose Cramer for the purchase of certain timber, the contract being made by Cramer as agent for the Shenandoah Land & Anthracite Coal Company. This contract ran from its date down to November 5, 1900, when, upon an account stated between the parties thereto, Cramer was found to be indebted to Senger & Tumer in the sum of $450.18, it having turned out that Cramer was not, in fact, at any time the agent of the Shenandoah Land & Anthracite Coal Company for the sale of the timber upon its lands. Thereupon Senger & Tumer brought their action at law upon the account stated between them and Cramer in the circuit court of Augusta county, and recovered a judgment for the principal sum of $250, with interest thereon from May 21, 1902, and costs.

In the meantime, to wit, on the 25th day of February, 1899, the widow and heirs of Emanuel Hise other than Catherine Cramer, by deed duly executed, acknowledged, and recorded, conveyed the 10 acres of land before mentioned to Catherine Cramer, for and in consideration of the sum of $200, to be paid in the following manner, viz.: "The said party of the second part (Catherine Cramer) holding claims which are to be properly authenticated against the estate of Emanuel Hise, deceased, is to have credit on the purchase money in part payment of said claims at the date of these presents, in accordance with articles of agreement made and entered into heretofore by the parties of the first part [the widow and heirs of Emanuel Hise, deceased, other than Catherine Cramer]."

Senger & Tumer, having, as stated, obtained judgment against Ambrose Cramer, in October, 1902, filed their bill in equity in the circuit court of Augusta county to subject to the lien of said judgment the tract of 10 acres of land which had been conveyed as stated on the 25th day of February, 1899, by the heirs of Emanuel Hise, deceased, to Catherine Cramer, on the ground that said conveyance was made to hinder, delay, and defraud the complainants and other creditors of Ambrose Cramer. In other words, the bill charged that, if any consideration whatever was paid for the conveyance of the said land to Catherine Cramer, it was paid by her husband, Ambrose Cramer, and that Catherine Cramer should be considered as holding the land in trust for the use and benefit of Ambrose Cramer, etc.

Upon the hearing of this cause upon the bill, the joint and several answer of Ambrose Cramer and Catherine Cramer, two reports of the commissioner to whom the cause had been referred to take and state certain accounts, and the depositions of witnesses taken on behalf of both the complainants and the defendants returned with the reports of the commissioner, the circuit court, overruling all exceptions to the said reports, in effect decreed, in accordance with the prayer of complainants' bill, that the conveyance of the 10 acres of land by the heirs of Emanuel Hise to Catherine Cramer was fraudulent and void as to the debts reported in the cause against Ambrose Cramer, and further decreed that unless the said debts were within 60 days paid by Cramer and wife, or some one for them, certain commissioners appointed for that purpose should proceed to make sale of the real estate mentioned and described in the bill and proceedings in the cause, etc. From that decree Ambrose Cramer and Catherine Cramer, his wife, obtained this appeal.

The two questions requiring determination are: (1) Was the consideration for the conveyance of the land in controversy in this cause to Catherine Cramer paid by or with the means of Ambrose Cramer? And (2) was the debt due from Ambrose Cramer to appellees, Senger & Tumer, on which the judgment sought to be enforced against said real estate, contracted at the date of said conveyance to Catherine Cramer?

As reported by Commissioner Holt, the evidence shows that Emanuel Hise was indebted to Ambrose Cramer certainly to the extent of $183.56 at the time that Hise made the agreement to convey the 10 acres of land in question to Catherine Cramer, March 17, 1891, while the agreement to convey the land in controversy, executed by the heirs of Emanuel Hise to Ambrose Cramer, made in 1896, sets forth that he should be entitled to buy the same at $20 per acre, or be paid out of the proceeds of the sale thereof any debts that he might hold against the estate of Hise, deceased. This agreement was witnessed by Ambrose Cramer himself, and to it is attached this memorandum: "It is further agreed between the heirs of Emanuel Hise and A. Cramer that he is to pay rent on said Hise in merchandise to the amount of interest that will accumulate on my account up to day and date above stated, supposed to be about $12.00 against rent Aug. 5th 1896. A. Cramer, Admr."

It thus appears that A. Cramer had actual knowledge of this agreement to convey, and that it was an agreement to convey to himself, and not to his wife, while the conveyance from the heirs of Emanuel Hise of February 25, 1899, of the property was to Catherine Cramer; and this deed recites that it is "in accordance with articles of agreement made and entered into heretofore by the parties of the first part." It is also clear from the evidence that this deed was made in accordance with the original contract made between the heirs of Emanuel Hise and A.

Cramer, and that Hise was not indebted to his daughter, Catherine Cramer, at any time, while the only inference which can be drawn from the facts proven in the case is that Emanuel Hise was indebted to A. Cramer, and that the heirs of Hise agreed, in consideration of the cancellation of this indebtedness, to convey to him this land which belonged to their father, and that, when the parties in interest came to execute the deed, it was executed at A. Cramer's request, not to himself, but to his wife.

From this state of facts no other conclusion could have been reached than was reached by the commissioner and the circuit court, that the consideration for the conveyance to Catherine Cramer moved from A. Cramer, and not from herself; in other words, that the land having been conveyed to Catherine Cramer at the request of her husband, A. Cramer, it was nothing more than a gift from him, and void as to his creditors.

But, say appellants, at the time of the said conveyance Ambrose Cramer was indebted to his wife to the amount of $500, evidenced by a bond for that amount executed to J. G. Fellers by A. Cramer, secured by a deed of trust, and assigned by Fellers to Catherine Cramer; and, since A. Cramer was indebted to his wife on this bond, he directed that the deed to the 10 acres of land be made to his wife, and she, in consideration therefor, was to credit on the Fellers bond the value of the land thus conveyed to her.

The answer to this contention is that there is nothing in the record to sustain it. The assignment of the Fellers bond to Catherine Cramer is in blank, and, whatever may have been intended by Cramer and his wife as to the value of the land being credited on the Fellers bond, the intention was never carried out. In fact, there is nothing in the record upon which it could be successfully claimed that there was any such intention. On the contrary, the deed to Catherine Cramer from the heirs of Emanuel Hise was recorded along with the contract between said heirs and A. Cramer, in which it is specifically stated that "the said parties of the first part, for and in consideration of the sum of $200, to be paid in manner as follows, viz.: 'The said party of the second part (A. Cramer) holding claims which are to be properly authenticated, against the estate of Emanuel Hise, deceased, is to have credit on the purchase money in part payment of said claims at the date of these presents, in accordance with articles of agreement made and entered into heretofore by the parties of the first part,'" etc. The "parties of the first part" in the contract and in the deed are the same persons, and Catherine Cramer presents no other contract between her and the parties of the first part except the one attached to and recorded with the deed to her, which contract is made not with her, but with her husband, A. Cramer. That Emanuel Hise was indebted to A. Cramer is admitted in the answer in this cause, and there is not the slightest testimony to show that Emanuel Hise was ever indebted to Catherine Cramer. She never at any time presented a claim against the estate of Emanuel Hise, deceased, but her husband, A. Cramer, did present a claim in his own favor, and in his settlement as administrator of Hise there is a debt reported in his favor for $185.56, and no funds with which to pay it. It also appears, which is significant, that in a chancery suit brought to sell the lands of Emanuel Hise, deceased, A. Cramer did not present his claim for payment at all, the said suit having been brought after the deed for the 10 acres of land had been made to his wife. It appears from the evidence of the parties of the first part to that deed that they never received any consideration whatever from Catherine Cramer for the conveyance, but that it was fully understood that it was made in settlement of the claims that A. Cramer held against their father, Emanuel Hise, deceased, and in pursuance of the contract they had made with A. Cramer.

It thus appearing that the consideration for that conveyance was the satisfaction of the indebtedness of Emanuel Hise's estate to A. Cramer, there is no ground left upon which Catherine Cramer could rest her contention that she, in fact, paid the consideration for that land by crediting the value thereof upon the Fellers bond, A. Cramer at the same time surrendering his claim against the estate of Emanuel Hise. The deed being, therefore, voluntary as to Catherine Cramer, the consideration therefor having been paid with the means of her husband, it was rightly decided by the court below that the land it conveyed was liable for the debts of A. Cramer.

The further contention is made that, even if the consideration for the conveyance was given by A. Cramer to his wife, the gift was before the indebtedness to appellees arose, and therefore the land is not subject to the lien of the judgment of appellees. But this contention is also without facts in the record to sustain it. The indebtedness of A. Cramer to appellees grew out of the contract of September 26, 1896, wherein he fraudulently represented himself to be the agent to sell the timber of the Shenandoah Land & Anthracite Coal Company, and pursuant to that contract A. Cramer became indebted to appellees long before the deed of conveyance from the heirs of Emanuel Hise to Catherine Cramer, by reason of the fact that he had received money from appellees fraudulently and wrongfully, which appellees had a right to demand and recover of him. True, there was no adjustment of the account between the parties until after the deed from the heirs to Catherine Cramer, but that would not change the fact that A. Cramer was the debtor of appellees prior to that conveyance.

It seems clear from the evidence that the

effort to secure the title to the 10 acres of land in question in Catherine Cramer was purely an afterthought, and the effort on the part of Cramer and his wife to show the bona fides of that transaction utterly fails.

The decree of the circuit court must be affirmed.

Affirmed.

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(107 Va. 476)

## MILLER v. SIMPSON.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. PARTNERSHIP—CONTRACT—CONSTRUCTION.

In order that defendant might obtain complainant's services as manager of a "ready to wear" department, a contract was executed that, in consideration of $1,000 paid by complainant to defendant, they should share in the profits of the department. Complainant agreed to furnish her entire time, and pay expenses of alterations, while defendant was to furnish a like amount of capital, part of which consisted of goods then on hand, also storeroom and the use of clerks to sell goods. Expenses were to be charged to the department separately, the stock was to be taken and profits determined on January 1st of each year. Complainant was to have a drawing account not to exceed $15 a week, which was to be credited with the amounts drawn by complainant, and the amounts used to defray alteration expenses to defendant and all other expenses were to be borne jointly; the remaining profits undivided being credited to the accounts of both parties to be further used in the business, and, in case the department was abolished, the stock on hand was to be sold and an equal division made. *Held*, that the contract constituted a partnership, and not an agreement by complainant to purchase a right to share in the profits of the business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 6.]

2. SAME—REQUISITES OF AGREEMENT—PARTICIPATION IN PROFITS.

It is not essential to constitute a partnership that the parties agree to share losses, but it is sufficient if they engage in an undertaking with a view to gain under an agreement that there is to be a community of interest in profits as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 26.]

3. SAME—ACCOUNTING—RIGHT.

In a partnership in a department in a retail business, one partner was entitled to an accounting against the other to ascertain the result of the enterprise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 129.]

4. SAME—CAPITAL AND SERVICES.

An agreement by which one party is to furnish the capital and the other his services to an enterprise, the profits to be divided between them without any special agreement as to losses, constitutes a partnership.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 15.]

Appeal from Corporation Court of Staunton.

Bill by C. J. Simpson against H. Clay Miller. From a decree in favor of complainant, defendant appeals. Affirmed.

J. M. Perry, for appellant. Quarles & Pilson, for appellee.

CARDWELL, J. In the year 1901, H. Clay Miller, appellant, entered into a partnership with one Bradley, for the establishment and conduct of a retail dry goods business in the city of Staunton, Miller contributing the capital to conduct the business, and Bradley his labor and services. In the same store they had a "ready to wear" department from the inception of their business, and the business proved successful. In the fall of 1903 Miller bought out Bradley's interest in the entire business, and thereafter conducted it, including the "ready to wear" department, under the style of H. Clay Miller & Co., and this business also proved successful.

During the fall months, viz., September, October, November, and December, of the years 1901 and 1902, Miller & Bradley employed appellee, Mrs. Cornelia J. Simpson, an expert dressmaker, at a salary of $12 per week, placing her in charge of the "ready to wear" department; and during the corresponding months of the year 1903 Miller & Bradley, and then H. Clay Miller & Co., employed her in the same capacity at a salary of $15 per week. She was not employed either by Miller & Bradley or H. Clay Miller & Co., except during the four months named, when the "season" was on. During her employment, first with Miller & Bradley, and then with H. Clay Miller & Co., appellee became fully acquainted with the details of the business of the "ready to wear" department, knew the cost and selling prices of all goods handled, and the daily sales thereof, and in this way was fully acquainted with the profits of the department.

According to Miller's own testimony, appellee was unwilling to come back to the store for the season of 1904 for employment for only four months, and some new arrangement between the parties was therefore necessary if they were to remain together. Looking to have appellee remain with him in business, appellant entered into negotiations with her during the summer of 1904, which resulted in her agreeing to continue with him in charge of the "ready to wear" department; and on the 12th of September, 1904, their contract was reduced to writing, though it appears not to have been signed by the parties until September 21, 1904. This contract is as follows:

"(1) It is hereby mutually agreed between H. Clay Miller, party of the first part, and Mrs. C. J. Simpson, party of the second part, witnesseth:

"(2) That in consideration for the sum of $1,000.00 paid by party of the second part to party of the first part, of which this agreement is receipt in full, party of the second part shall share and share alike in the profits of the ready to wear department of the business in Staunton, Va., of H. Clay Miller & Co., said ready to wear department consisting of suits, cloaks, separate jackets and skirts, and shirt waists, if deemed ad-

visable by both parties to add these last garments to the department.

"(3) That party of the second part agrees to furnish to the department her undivided time and attention, and to pay all expenses of alterations in garments incurred by the dept.

"(4) That all expenses of the dept. such as express, freight, etc., shall be charged to the department separately and that an accurate acct. of sales, purchases and expenses shall be kept of this dept.

"(5) That party of the first part shall furnish storeroom and the use of his clerks to sell the goods in this department, and shall furnish like amt. of capital for running said dept., $1,000.00, of which the stock on hand at Sept. 1st shall be considered a part as mutually agreed, in value.

"(6) That at the 1st of each Jany. stock shall be taken in the dept. and profits determined

"(7) That during the year party of the second part shall have a drawing account from the dept. not to exceed $15 a week, and same to be charged to her acct.

"(8) That after profits are determined the acct. of party of the first part shall be credited with the amounts drawn by party of the second part, and the amounts used to defray the expenses of alterations, all other expenses being borne jointly.

"(9) That if after the above has been done there shall be profits undivided, the amount shall be equally credited to the accts. of both parties to be further used in the business.

"That if ever the dept. proves unsuccessful and it is agreed to abolish same the stock on hand shall be sold and equal division made. Witness the seals this ——— day of Sept. 1904.

"H. Clay Miller & Co. [Seal.]
"Cornelia J. Simpson. [Seal.]"

That appellee paid to appellant the $1,000 stipulated for in the contract is conceded, and for the reason that it was agreed between the parties that appellant was to handle the finances of the business to be conducted, pay all bills, etc.

This "ready to wear" department, in charge of appellee, was conducted with success until the summer of 1906, when, for reasons satisfactory to her, and after a correspondence with appellant, it was terminated, and she sought to have an accounting from appellant as to the assets, etc., of the business, contending that it was a partnership in which she had contributed a part of the capital and appellant the residue, while appellant took the ground that the $1,000 paid him by appellee was for a share in the profits of the business only, and that no partnership ever existed between him and appellee. Whereupon appellee filed her bill in this cause, making the contention above mentioned, and praying that an account be taken of the assets of the partnership, and of all its dealings and transactions, from the commencement thereof, and that all other things be done necessary to wind up and finally settle, the affairs of said partnership in accordance with the respective rights and interests therein of herself and the appellant.

Appellant answered the bill, making the contention, as stated, that no partnership ever existed between him and appellee other than a partnership in the profits of his "ready to wear" department; that the only money wherein appellee was in any wise interested which he had at any time in his possession was the profits of his "ready to wear" department, from which appellee had drawn largely, and that on any settlement of the affairs of the said partnership in profits appellee would be found largely indebted to him, etc.

Upon the bill, the answer, a general replication to the answer, and depositions taken and filed, both for appellant and appellee, each having testified in their own behalf, the corporation court, without passing upon the question as to when the partnership between appellant and appellee was formed, or when they commenced business, made its decree of which appellant complains, holding that according to the true construction of the contract between the parties, bearing date September 12, 1904, a partnership was created and existed between them; that according to a true construction of the contract, and especially the second, fifth, and ninth clauses thereof, considered together, appellee was required to contribute the sum of $1,000 towards the conduct of the partnership business, and the sum of $1,000 paid by her to appellant, as shown by the contract, was a payment of her share of the capital of said partnership. It was further adjudged, ordered, and decreed that the cause be referred to a master commissioner, who should take, state, and settle necessary and proper accounts, to the end that the partnership affairs be finally wound up and settled.

The simple question presented is: Does the contract of September 12, 1904, create a partnership, or is it simply the written evidence of the sale and purchase of a one-half interest in the profits of an already established and going business?

It appears from the proof in the cause that appellant regarded the arrangement between him and appellee as a partnership, and so spoke of it. The correspondence between the parties in an attempted settlement out of court proceeded upon that idea; and all the facts and circumstances surrounding these parties prior to and after the contract was entered into, if more than a reading of the contract as a whole were needed, leave no doubt that it established a partnership, and that both parties to the contract so understood it. Not that appellee was merely a partner in the profits of the business, but a partner who had contributed to the capital employed therein and was also to contribute her services, etc., and be entitled to share in

the profits of the business, and liable, as well as appellant, for losses, if any.

It is only necessary, we think, to consider some of the uncontroverted facts and circumstances which are of vital importance to show that this is the fair and equitable construction of this contract. In the first place, appellant had theretofore only run his "ready to wear" department about four months in any one year, and it could not therefore be considered an established business, while the contract provided for the conduct of the business all the year round—an undertaking new not only to appellee but to appellant.

The question naturally arises: Why should appellee have been willing to pay $1,000 for the privilege of sharing in the profits of this undertaking, when she could not know what the profits would be, if any, and when a partnership in the profits only might, by the death of either party or other cause, be terminated the next day, or, if still later, before any profits were made, whereby, in either event, she would have paid appellant her $1,000 and could get back no part of it? According to appellant's view, appellee borrowed the money and put a deed of trust on her property, in order to pay him $1,000 for the privilege of sharing equally with him the profits of a business conducted on a capital of $1,000 only, of which $588.95 was old stock. Appellee had been successful in her calling, and had accumulated some property; and it is unreasonable to suppose for one moment that she, or any one else with any sort of business capacity, would have agreed to enter into a business arrangement so uninviting. On the other hand, appellee's version of the transaction is entirely reasonable, viz., that she agreed to contribute $1,000 to the capital to be employed in the undertaking, also her time and services, and bear herself "the expense of altering garments," while appellant was to furnish a like amount of capital, the storeroom in which the business was to be conducted, "the use of his clerks to sell the goods," all other expenses to be borne jointly, and the profits of the business were to be shared equally by both. If appellee was only purchasing the right to share equally with appellant the profits of his "ready to wear" department, why the provision in the contract that he should "furnish a like amount of capital for running said department"? And for what reason was the second paragraph of clause 9 inserted, viz., "that if ever the department proves unsuccessful, and it is agreed to abolish the same, the stock on hand shall be sold and equal division made"? If the parties were not to contribute an equal amount of capital, it is inconceivable that appellant would have inserted in the contract (written by himself) a provision for a sale of the stock on hand, and equal division on dissolution, as the capital went to the purchase of the stock, and an equal division would embrace a division of the capital, profits, and all other assets of the partnership. He admits in his answer that stock on hand represented "not only cash capital advanced by defendant (appellant), but accrued and undivided profits." Clearly appellee would not be entitled to a division of the proceeds arising from the stock on hand at dissolution, if she was only admitted as a partner in profits. It was agreed "that at the first of each January stock shall be taken in the department and profits determined," and if appellee only purchased an interest in profits, and was not to furnish a part of the capital to run the business, it is again inconceivable that, when such an accounting was had and it was found that there were profits undivided, such undivided profits were to be "equally credited to the accounts of both parties to be further used in the business."

The theory of appellant as to what was intended and understood between him and appellee, when they entered into their agreement and after, is wholly inconsistent with the provisions of their written contract.

In order that persons may be partners in the legal acceptation of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business, engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement, is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term. Jones v. Murphy, 93 Va. 214, 24 S. E. 825, and authorities there cited.

It is not essential to constitute a partnership that the parties are by agreement to share in the losses of the business. It is sufficient if they are to have a community of interest in the profits as such, and that, where a party to the agreement was entitled to an interest in the profits, this would entitle him to an account to ascertain the result of the enterprise. Cothran v. Marmaduke & Brown, 60 Tex. 370, cited in Jones v. Murphy, supra.

It has been repeatedly held that where the parties entered into an agreement by which the one was to furnish the capital and the other his services, the profits to be divided between them, and no special contract was made as to the losses, that this constituted a partnership, and a court of equity was a proper court for either party to apply to for a settlement of the partnership accounts. Lengle v. Smith, 48 Mo. 276.

Here appellee furnished $1,000 of the capital, her services, and paid the "expenses of altering garments," and appellant the residue of the capital employed in the business, the storeroom, and paid the hire of the clerks who sold the goods, "all other expenses being borne equally." The undivided profits on the 1st of January of each year, during the

continuance of the business, remained for further use in the business, and the parties became equal owners in the resulting profits.

It is true that a mere participation in profits does not always constitute the participant a partner, but the principles of the law of partnership lead to the conclusion that if a trader makes an arrangement in regard to a commercial business with another, by reason of which that other becomes interested as owner in the resulting profits, while they are undivided and remain as profits, the two are partners; the general rule being that to constitute a partnership there must be a community of interests inter sese, and that the parties should share the profits and losses. Jackson v. Haynie's Adm'r, 106 Va. 365, 56 S. E. 148.

Had not the eighth clause of the contract before us been inserted, it would not have affected the residue of the contract, for the reason that, if an agreement be entered into by two or more parties constituting a partnership, each partner would be entitled to share in the profits, and would have also to share the losses in the business, without a provision to that effect in the agreement, as the law would impose that burden upon him. Were such a provision in the agreement necessary to constitute a partnership, the eighth clause of the contract in this case was clearly sufficient to hold appellee liable for losses, if any, in the business to be conducted under the contract.

We are of opinion that any other construction of this contract than that put upon it by the learned judge of the corporation court would be inconsistent with its terms; and that the construction contended for by appellant would be unfair, unjust, and inequitable. The decree complained of is therefore without error, and must be affirmed.

Affirmed.

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(107 Va. 428)

## GRASTY v. LINDSAY.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. TRIAL—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

An instruction asked by defendant in an action for drilling a well, predicated on the fact that he had instructed the contractor to stop boring after a specified depth had been reached, was properly refused, where defendant himself testified that he never directed the contractor to stop work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596, 597, 604.]

2. CONTRACTS—ACTIONS—INSTRUCTIONS.

Where, in an action for drilling a well under a contract which gave the owner the right to stop the contractor at any time, the owner testified that he did not stop the contractor because of reliance on representations made by him, an instruction that the burden was on the owner to prove that a representation made by the contractor was untrue, and that the owner was misled thereby, was not objectionable as imputing to the owner a theory of defense which he did not entertain and which there was no evidence to support.

Error to Circuit Court, Augusta County.

Action by Samuel Lindsay against Thomas P. Grasty. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Fitzhugh Elder, for plaintiff in error. Timberlake & Nelson, for defendant in error.

KEITH, P. This was an action in assumpsit brought in the circuit court of Augusta county by Samuel Lindsay against Thomas P. Grasty to recover the sum of $325. The defendant pleaded nonassumpsit, and a jury being impaneled found a verdict in favor of the plaintiff for $325, to which a writ of error was allowed by one of the judges of this court.

Lindsay and Grasty entered into a written contract on the 28th day of April, 1905, by which Lindsay undertook to bore a well on the premises of Grasty. So much of the contract as is material to the issue before us is as follows: "* * * The said Lindsay agrees to begin the work at once and to carry it on continuously to completion and to the production of a satisfactory flow of water, unless the work shall be stopped by the party of the first part; the party of the first part agrees to pay for said work at the rate of $2.50 per foot in cash upon the completion of the work, whether the same shall be stopped by the party of the first part or shall be continued to completion and agrees to pay the amount above stipulated in cash upon the completion of the work."

After the well had been bored to a depth of nearly 500 feet, at a cost of $1,250, all of which has been paid, Grasty began to doubt whether or not a supply of water could be obtained at that point. He thereupon consulted Charles Catlett, a geologist of repute, who advised him, after an inspection of the premises, that the inclination of the limestone rock at that point was such as to render it exceedingly improbable that water would be found. Grasty went then to Lindsay, and had some conversation with him upon the subject, informed him of his fears and of the opinion of Mr. Catlett, and said to him that he did not care to go beyond the 500 feet. Lindsay continued to bore, and informed Grasty that in his opinion they had gotten through the inclined strata of rock, and had reached flat rock. Grasty it seems was doubtful whether or not this conclusion was correct, and so expressed himself, according to his testimony, to Lindsay, who replied to him: "I know that the drill is now in flat rock."

Grasty, in his cross-examination, in reply to the question, "Did you ever at any time exercise your right, under the contract, and stop Lindsay from the work?" replied: "No; I cannot say that I stopped him. He came and said, 'Mr. Grasty, I have another job over in Albemarle.' And I said, 'You had better take it.' I was willing for him to resume drilling on his return if he could prove to me definitely that he was in flat rock."

And, further, in the course of his examination, the defendant testified that the plaintiff never did at any time in express terms agree that the boring of the well beyond the depth of 500 feet was to be at the risk and cost of plaintiff, and without charge in the event the rock beyond that depth could not be shown to be flat or horizontal to defendant's satisfaction; but that this was the inference drawn by defendant from the statement of plaintiff that he had struck flat rock, and that he was willing to risk his reputation as a well digger upon it. Defendant further testified on cross-examination that "his position in this case is just this: That he expected the plaintiff to stop when he reached a depth of 500 feet; that he did not stop plaintiff at the depth of 500 feet, because at or about the time the well reached that depth plaintiff told him that he had struck flat rock; that relying upon this representation, which he now believes to have been untrue, he forebore to stop plaintiff and allowed him to continue; that, but for such representation by the plaintiff, he would have stopped him, as he had the right to do under his contract, at the depth of 500 feet."

The plaintiff testified that the point at which he began boring was designated by the defendant; that the first stratum of limestone rock which he encountered was slanting; that this was readily determined by the way the bit struck upon it; that there is no difficulty whatever in telling how rock lies—whether flat or slanting at an angle—as the bit used in boring is constantly turned and the edge only bites into the rock when it is first encountered, and it is only when the hole has gotten a good start that it begins to strike squarely; that Mr. Grasty was present frequently during the drilling operations, and asked a great many questions, which he, the plaintiff, always answered gladly; that the well was frequently tested from time to time in the presence of the defendant; that when he, the plaintiff, had bored through two strata of rock, he got a supply of water which he thought would probably be sufficient; that the well was tested with a pump, and the defendant said that he desired more water and wanted the well drilled deeper; that the depth of the well at this time was nearly 500 feet; that the drilling was accordingly continued into the next or third stratum of limestone rock; that, when this last stratum of rock was encountered, the bit struck it squarely all around, thus indicating that the rock presented a flat surface at the point of the bit; that he told Mr. Grasty that the bit had struck flat rock; that it was, of course, impossible for him or any one else to tell the extent of the flat rock, or to tell anything about its slope, except at the point of the bit; that when the well reached a depth of 630 feet, or about that time, he, the plaintiff, received a letter from a gentleman in Albemarle—a Mr. Patterson—requesting him to drill a well for him at his place near Charlottesville; that plaintiff told defendant of Mr. Patterson's request, and asked defendant if he would allow him to move his machinery to Albemarle and bore this well for Mr. Patterson, and then return and complete defendant's well; that defendant said that he would permit plaintiff to do this, provided he would return as soon as possible and complete his well; that plaintiff thereupon went to Albemarle and bored Mr. Patterson's well, and when he returned he notified defendant that he was ready to complete the work on his well; that defendant said that he had installed a gasoline engine and pump and wanted to test the supply of water already obtained before he had any more work done; that some time after this, the defendant having paid only $1,000, plaintiff asked him to pay the balance; that defendant stated that he had no money on hand, but would give a note for $250, which he would pay in a short time; that plaintiff agreed to this, and the note was taken and discounted and was paid when it fell due; that up to this time plaintiff had never heard one word from the defendant as to any dispute about the well or the amount due, or any claim on the part of the defendant that he, the plaintiff, had made any untrue statement or representations as to the character of the rock in which he had bored; that the first intimation he had of any trouble was when the note was given; that the note was not given or accepted in full payment of the balance due on account of the well; that the amount paid him was $1,250, which was paid in three payments; that the balance due is $325; and that he tried repeatedly to get defendant to pay this balance, but defendant refused to do so, saying that he would pay it when it was proven to him that the last stratum of rock was flat.

Upon this evidence, defendant asked the court to give the following instruction: "The court instructs the jury that if they believe from the evidence that the defendant, Thomas P. Grasty, instructed the plaintiff, Samuel Lindsay, to stop boring the well on the Grasty premises after a depth of 500 feet had been reached, as he had a right to do under the contract relating to the boring of said well, and that said 500 feet of well had been paid for, and that the boring after said depth of 500 feet had been reached was upon the guaranty by the said plaintiff, Lindsay, to the defendant, Grasty, that he, the said Lindsay, was then boring in a horizontal or flat strata of rock, then they must find for the defendant, unless they further believe from the evidence that said Lindsay, as a matter of fact, after said 500 feet had been reached, was actually boring in a horizontal or flat strata of rock.

This instruction was rejected by the court. It could not have done otherwise. It is predicated upon the fact that Thomas P. Grasty instructed the plaintiff to stop boring after a

depth of 500 feet had been reached, in the face of Grasty's own testimony that he had never directed Lindsay to stop the work.

The court gave to the jury the following instruction: "The court instructs the jury that, under the contract between the plaintiff and the defendant in issue in this case, the defendant had the absolute right to stop the plaintiff from boring the well at any time he saw fit to do so. And, if the defendant claims that he would have exercised this right and stopped the plaintiff, but for a representation made to him by the plaintiff, the burden is on the defendant to prove by a preponderance of evidence to the satisfaction of the jury that such representation was as a matter of fact untrue, and that the defendant relied upon and was misled by such representation. Unless the defendant has proven both of these facts by a preponderance of evidence to the satisfaction of the jury, the jury must find a verdict in favor of the plaintiff."

We think there was no error in this instruction. Plaintiff in error complains that the instruction is grossly misleading and erroneous, first, because it imputed to the defendant a theory of defense which he never entertained, and which there is no evidence to support; and, second, because it instructs the jury erroneously upon such theoretical defense.

That there is evidence to support it appears from the testimony of the defendant himself, as follows: "That he did not stop plaintiff at the depth of 500 feet, because at or about the time the well reached that depth plaintiff told him that he had struck flat rock; that, relying upon this representation, which he now believes to have been untrue, he forebore to stop plaintiff, and allowed him to continue; that, but for such representation by the plaintiff, he would have stopped him, as he had the right to do under his contract, at the depth of 500 feet."

Upon this evidence, and guided by this instruction, the jury found a verdict for the plaintiff for the sum of $325, upon which the circuit court entered judgment.

We find no error to the prejudice of plaintiff in error, and the judgment of the circuit court is affirmed.

Affirmed.

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(107 Va. 592)

## WILSON'S EX'R v. KECKLEY.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—COUNTER AFFIDAVITS.

On a motion for new trial for newly discovered evidence, counter affidavits may be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 311.]

2. SAME—NATURE OF EVIDENCE.

The newly discovered evidence which will warrant the granting of a new trial must be such as ought on another trial to produce a different result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 226.]

3. SAME.

Newly discovered evidence which discredits witnesses of the successful party by showing that the witnesses testified falsely, and that it was impossible for them to have been witnesses to the fact testified to by them under the circumstances disclosed, does not require the granting of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 221, 222.]

Error to Circuit Court, Rockingham County.

Action by Wilson's executor against one Keckley. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Ed. C. Martz and D. O. Dechert, for appellant. Conrad & Conrad, for appellee.

BUCHANAN, J. The first question raised on this writ of error is whether or not, upon the motion to set aside the verdict on the ground of newly discovered evidence, it was error in the court in passing upon that motion to consider counter affidavits.

It was settled in Nicholas' Case, 91 Va. 741, 752, 21 S. E. 364, that such affidavits may be considered by the court in determining whether or not a new trial should be granted on that ground.

The motion to set aside the verdict and award a new trial because of the newly discovered evidence was overruled, and this action of the court is also assigned as error.

The only issue in the case was whether or not the bond upon which the motion for judgment was based had been paid. Upon the trial the defendant introduced, among others, two witnesses, Clatterbuck and Landes, who testified that they were present when the bond in suit, or one of like amount, was paid, the circumstances under which the payment was made, and that they were called upon by Capt. Wilson, the obligee in the bond sued on, to witness the fact that it had been paid, as the "note" was at the obligee's shop, and not at his house, where the payment was made, and that he was dressing and in a hurry to go to the Springs, and did not have time to get it, but would mark it satisfied and surrender it to the defendant. The plaintiff, in opposition to this, testified that in several conversations he had with the defendant in reference to the bond he claimed to have paid the note to the obligee in his barnyard while he was getting his buggy and horse to go to Sparkling Springs; that, as he understood the defendant, he did not claim that any one else was present at that time; and that the only person by whom he could prove the payment was a Mr. Leake, who took his place in the tannery where he was employed while he went out at the dinner hour to make the payment.

The newly discovered evidence upon which the plaintiff relies tends to prove, in the language of his petition for the writ of error:

"(1) That on the 9th day of August, 1901, when Wilson went to Sparkling Springs, and the only date upon which the payment claimed could have occurred at all with any of the attendant circumstances narrated by defendant's witnesses, Keckley (the defendant) was not at work at the tannery. * * * This disposes at once of Clatterbuck, who claims to have been obliged to wait to see Keckley until he should have stopped work for the noon hour, and to have actually joined him on his way from work at the tannery, and of Landes, who as claimed by him and Clatterbuck came from the tannery with Keckley.

"(2) That at the time when it is claimed by these witnesses the payment was made Wilson was at the home of Miss Points—not at his own house—and the payment could not therefore have been made.

"(3) That Wilson did not change his costume before leaving town, and therefore the testimony of Clatterbuck and Landes that he was dressing to go to the Springs when the alleged payment was made could not be true. * * *

"(4) That at the time of said alleged payment the witness Clatterbuck was not in the town of Harrisonburg at all. * * *"

The object of the newly discovered evidence was manifestly to discredit the witnesses Clatterbuck and Landes, who had testified at the trial that they were present when the debt sued for was paid. None of the newly discovered witnesses knew anything about the fact in issue. Their statements were as to other facts, which, if true, tended to show that Clatterbuck and Landes had testified falsely, as it was impossible for them to have been witnesses to the payment of the debt at the time and under the circumstances disclosed by their evidence. The object of this newly discovered evidence was not only to discredit Clatterbuck and Landes, but it is not at all clear that upon a new trial it ought to produce a different result, especially in the light of the counter affidavits —indeed, it could not do so unless the jury believed that those witnesses were willfully swearing falsely.

With respect to granting new trials on the ground of after-discovered evidence, there are certain principles of law which must be considered as settled. Among these are that the evidence must be such as ought on another trial to produce an opposite result on the merits, and that it must not be merely for the purpose of impeaching or discrediting a witness on the opposite side. Thompson v. Commonwealth, 8 Grat. 637, 641; St. John's Ex'r v. Alderson, 32 Grat. 140; Wynne v. Newman's Adm'r, 75 Va. 811; Nicholas' Case, 91 Va. 741, 21 S. E. 364.

Applying these principles to the motion for the new trial, we are of opinion that the circuit court did not err in overruling the same, and that the judgment complained of should be affirmed.

(107 Va. 383)

## BROWN v. GIBSON'S EX'R.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. WILLS—CODICIL—CONSTRUCTION.

Testatrix, by the fourth clause of her will, provided for the cancellation and surrender by her executor to the obligors of all notes, bonds, or other evidences of debt belonging to her and remaining unpaid at the date of her death, from whomsoever due. Testatrix executed a codicil, revoking such clause and providing in lieu thereof a direction that any note or other evidences of indebtedness remaining unpaid at the date of her death from certain specified individuals, including complainant, should be canceled and surrendered by her executor to the obligors in full satisfaction thereof. At her death testatrix held the obligations of all the persons named in the codicil, except complainant, who was not indebted to her, but was indebted to another on an unmatured obligation secured by a mortgage on her farm. Complainant was related to testatrix, but the other beneficiaries under the codicil were mere borrowers of her money. *Held*, that the codicil did not create an obligation on the part of the executor to purchase complainant's debt from the holder and cancel the same.

2. SAME—INTENT.

In the construction of a will, the inquiry is, not what testator intended to express, but what the words used do express.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 956.]

3. SAME—"SURRENDER."

Where a codicil directed that the executor should surrender certain evidences of indebtedness against specified legatees, the word "surrender" implied possession on the part of testatrix, so as to exclude debts which testatrix did not own.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6819–6821.]

4. SAME—"CANCEL."

The word "cancel" as used in a codicil directing cancellation of certain debts owing by legatees to testatrix, implied a forgiveness and obliteration of the debt, and excluded the idea of payment.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 949–951.]

Appeal from Circuit Court, Augusta County.

Bill by Margaret Gibson Brown against E. V. Gibson's executor. From a decree in favor of defendant, complainant appeals. Affirmed.

A. C. Braxton and Taylor McCoy, for appellant. Richard S. Ker and Hugh H. Kerr, for appellee.

HARRISON, J. This appeal involves an interpretation of the second clause of the codicil to the will of Miss E. V. Gibson, deceased, which reads as follows:

"And I do also hereby revoke the devises and bequests contained in the fourth clause of my said will, and desire to completely cancel and annul all the provisions of said fourth clause of my said will; and in lieu thereof, I direct that any note or notes, bond or bonds, or other evidences of indebtedness which may remain unpaid at the date of my death from the following named individuals, viz: Joseph M. Hogshead, N. D. McCormick, Wm. C. McKemy, George W. Jenkins, John A. Frenger, George W. Dice,

Fanny Dice, Wm. H. Cochran, Charles D. Whitesell, R. P. McPheeters, H. J. Williams and Margaret Gibson Brown, my executor shall cancel and surrender all such obligations to the obligors in full satisfaction and payment thereof."

This codicil, as shown on its face, was in lieu of the fourth clause of the testatrix's will, which was in these words:

"I direct that all notes, bonds or other evidences of indebtedness now due to me from any source whatsoever, and which may remain unpaid at the date of my death, either as to principal or interest, my executor hereinafter named shall cancel and surrender to the obligors in full satisfaction and payment thereof."

It appears from the record that the testatrix, at the time of her death, held the obligations of all the persons named in the codicil, except the appellant, Margaret Gibson Brown, who was in no way indebted to her, and that all of such persons, except the appellant, who was a second cousin, were in no way related to the testatrix, but were merely borrowers of her money. It further appears that at the time of the death of the testatrix the appellant was indebted to Washington & Lee University in the principal sum of $7,250, which was secured on her farm near Salem, Va., and had been so indebted for several years prior to that date.

The contention of the appellant is that by the terms of the codicil in question it is the duty of the executor, not only to cancel and surrender such obligations of the parties named therein as belonged to the testatrix, but to acquire out of the moneys of her estate all the evidences of indebtedness of all of the parties named in the codicil, whether belonging to the testatrix or any one else, and after acquiring such obligations to then cancel and surrender them to the obligors therein, and that it is therefore the duty of the executor to acquire the outstanding obligations mentioned of the appellant to Washington & Lee University, and to cancel and deliver the same to her; it being insisted that, unless the testatrix intended to make the appellant the beneficiary of her bounty, the mention of her name in the codicil was meaningless and useless.

It appears that the testatrix did not, in her lifetime, acquire or hold as part of her estate the obligations due from the appellant to Washington & Lee University. Indeed, those obligations were not then due, and are not now due, and therefore cannot be acquired, canceled, and surrendered by the executor to the appellant, except by and with the consent of Washington & Lee University, and of any such consent there is no intimation of record.

The fourth clause of the will is very broad, and involved the cancellation and surrender by her executor to the obligors therein of all notes, bonds, or other evidences of debt belonging to the testatrix and remaining unpaid at the date of her death, from whomsoever due. The codicil, which repealed the fourth clause, was evidently intended by the testatrix to withdraw this sweeping provision in favor of all of her debtors, and to limit such cancellation and surrender of indebtedness to those objects of her bounty specifically named in the codicil. The fourth clause of the will, in speaking of the debts to be canceled and surrendered, uses the language, "indebtedness now due to me from any source whatsoever, and which may remain unpaid at my death." The codicil, in naming the debts to be canceled and surrendered, omits the words "due to me," saying: "I direct that any note or notes, bond or bonds, or other evidences of indebtedness which may remain unpaid at the date of my death from the following named individuals," etc.

It is contended on behalf of the appellant that the omission from the codicil of the words "due to me," which had been used in the repealed fourth clause, shows that the testatrix intended to include in her benefaction, not merely such obligations as appellant might owe her at the time of her death, but all the indebtedness of appellant, to whomsoever it might be due.

Reading the first part of the codicil alone, there might be some ground for this contention, unreasonable and unusual as it seems; but, when the codicil relating to this subject is read as a whole, the ground for the contention disappears. The language of codicil, taken as a whole, is, we think, clear and unambiguous. This being so, it is always the safest mode of construction to adhere to the words of the instrument. The true inquiry is, not what the testator intended to express, but what the words used do express. Wootton v. Redd, 12 Grat. 196; Burke v. Lee, 76 Va. 386; Waring v. Bosher, 91 Va. 286, 21 S. E. 464.

By the terms of the codicil the parties therein named are given specific legacies of the obligations mentioned, and not merely general legacies of such portions of the testatrix's estate as would equal the amount of such obligations, and the executor is directed "to cancel and surrender all such obligations to the obligors in full satisfaction and payment thereof." The language, "my executor shall cancel and surrender" such obligations to the obligors, seems clearly to show that the purpose of the testatrix was to limit the provision to such obligors of the person named as were owing to the testatrix herself at the date of her death. The word "surrender" presupposes the possession or ownership of the thing to be surrendered. The testatrix neither possessed nor owned the Washington & Lee University bonds, and it cannot be held with any reason that she intended, by the use of the word "surrender," to make a gift of something she had no interest in, and had no power or control over. If it were legally possible for the testatrix to devise obligations which formed no part of her

estate, yet, by giving the words she has used their ordinary and common meaning, no other conclusion can be reached but that it was her intention that her executor should cancel and surrender such obligations to the parties named in the codicil as were in the possession of the testatrix at the date of her death and constituted part of her estate. Not only does the word "surrender" imply possession, but the word "cancel" excludes the idea of payment; cancellation being the forgiving and obliteration of a debt. It not only is in no sense a payment, but it is the very thing that makes the payment unnecessary and impossible. Smith v. Yancey, 81 Va. 88.

It was clearly contemplated by the testatrix that not only the appellant but others named in the codicil might not be in debt to her at the date of her death, for she directs her executor to cancel and surrender such obligations of the parties named as "remained unpaid at the date of her death." She may also have anticipated that new obligations which did not exist at the date of the will might exist, as part of her estate, at the date of her death; her purpose being that, if any such new obligations of the parties named should come into existence before her death, they should be canceled and surrendered, like those already in existence were to be, if remaining unpaid. If, however, no such new obligations came into existence, the will contains no direction to her executor to create such obligations by acquisition or otherwise.

It may be, as contended, that the testatrix contemplated acquiring the Washington & Lee University bonds, and that such expectation caused her to name appellant in the codicil as one whose obligation was to be canceled and surrendered; but the fact remains that she did not carry out any such purpose. It is not the province of the court to speculate on the intention of the testatrix in opposition to her plain and unambiguous language. Such a course would only be productive of endless uncertainty and confusion.

For these reasons, the decree of the circuit court must be affirmed.

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(107 Va. 463)

## KLINE v. MILLER'S ADM'R et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

VENDOR AND PURCHASER — VENDOR'S LIEN — SATISFACTION—MERGER.

K. purchased an undivided moiety in the M. and B. tracts of land, executing five bonds for the unpaid price secured by a vendor's lien. Later K. purchased the other half of the tracts, defendant's intestate becoming surety for the unpaid portion of the price, which was also secured by a vendor's lien. K. conveyed this moiety to intestate, in trust to secure the price, and, being unable to pay for the M. tract, conveyed all the land to intestate for part cash and the residue in five annual installments secured by a vendor's lien on the land. Intestate then held the incumbrances on the B. tract, and, while his purchase money bonds for the M. tract were in excess of those liens, the bonds were not due. Thereafter intestate paid off for K. a bond for $910, and, after his death in a settlement, this amount was applied in payment of the deferred installments of purchase money on the M. tract, leaving undischarged the vendor's liens on the B. tract to the extent of the balance due from K. to intestate's estate. *Held*, that the conveyance by K. to intestate of the M. tract did not by its own force extinguish the incumbrances he held on the B. tract, because his liability on the purchase of the M. tract was in excess thereof; the rule that, when the holder of an incumbrance acquires the property on which it rests, the lien is extinguished, being inapplicable.

Appeal from Circuit Court, Rockingham County.

Action by Daniel Miller's administrator and others against John B. Kline. From a judgment in favor of complainants, defendant appeals. Affirmed.

George G. Grattan and John E. Roller, for appellant. Sipe & Harris, for appellees.

WHITTLE, J. We shall confine our inquiry to the bearing of the decree complained of on the rights of John B. Kline, who is the sole appellant.

The facts relevant to the matter in controversy are as follows: On September 1, 1873, D. B. Kline purchased of C. R. Branner an undivided moiety of two tracts of land, situated in Rockingham county, Va., one known as the "Meadow" tract, containing 103 acres, and the other the "Brush" tract, of 107 acres. The purchase price of Branner's interest in the properties was $3,650, of which sum $1,650 was paid cash, and for the credit installments the purchaser executed five bonds for $400 each, payable at one, two, three, four and five years, secured by a vendor's lien reserved in the deed. One year later Kline bought of Eliza A. Homan the other half of the two tracts for $3,919.45, on the same terms as to cash and credit payments, with his father-in-law, Daniel Miller, as surety, and a vendor's lien also reserved on the face of the deed. Kline conveyed this moiety of both tracts in trust to secure the amount of the purchase price to Miller; and, being unable to pay for the Meadow tract, on May 10, 1875, he sold and conveyed the entire tract to Miller for $5,961.67; the terms of sale being $3,000 cash and the residue in five annual installments of $592.23 each, secured by vendor's lien on the land.

At that time this was the status of affairs between the parties: Miller was the holder of the incumbrances on the Brush tract, while his purchase money bonds for the Meadow tract were in excess of those liens. It will be observed, however, that these bonds were not then due.

On June 21, 1875, Miller paid off for Kline what is known in the record as the "Sites bond" of $910, and died July 5, 1877, without change in the status quo between him and Kline. His son, J. P. Miller, qualified as his

administrator, and on January 1, 1878, entered into a written agreement with Kline (to which all the Miller heirs were parties) settling the transactions between him and the estate. In that settlement the amount of the Sites bond was applied in payment of the deferred installments of purchase money of the Meadow tract, the effect of which appropriation was to leave undischarged the vendor's liens on the Brush tract, to the extent of the balance ascertained to be due from Kline to Miller's estate. This settlement and application of payments was subsequently ratified and confirmed, and the balance due established as "a lien on the Brush tract," (at Kline's instance) by decree of the circuit court of Rockingham county of June 17, 1881, in a suit in equity brought by Kline to administer Daniel Miller's estate. It will, moreover, be observed that all persons then in interest were parties to the agreement, settlement, and suit, and that, at that time, no question was raised as to the fairness and propriety of the proceedings and result attained.

The appellant's interest in the subject-matter in controversy accrued March 1, 1887, when his brother, D. B. Kline, executed a deed of trust for his benefit on 71½ acres of the Brush tract, followed by an absolute conveyance of that property on September 31, 1889.

In 1896 this suit was brought by Miller's administrator against Kline and his alienees, to subject the Brush tract to the satisfaction of the amount due on the vendor's liens. The decree appealed from confirmed the finding of the master in chancery, to whom the question was referred, that the indebtedness from Kline to Miller's estate constituted a subsisting lien on the Brush tract.

The major premise of the appellant presents the narrow question, that the dealings between Kline and Miller, which culminated in the deed of May 10, 1875, conveying the Meadow tract from the former to the latter, operated ipso jure an extinguishment of the incumbrances on the Brush tract. The contention proceeds on the theory that, Miller being the holder of those liens, and his liability on the purchase of the Meadow tract representing an indebtedness to Kline in excess of the liens, they were, by operation of law, irrespective of the intention of the parties, eo instanti discharged. The principle invoked to sustain that proposition is that, when the holder of an incumbrance subsequently acquires the property upon which it rests, the lien is thereby extinguished.

The doctrine is illustrated by the case of Allen v. Patrick, 97 Va. 521, 34 S. E. 451, where a husband, having purchased his wife's contingent right of dower in his real estate, secured the purchase price, along with other debts, by a deed of trust on the land. On the death of the wife intestate, the husband took the debt as her distributee, and the court held that the debt and lien to secure it were extinguished.

The distinction between that case and this is obvious. Here the owner of the incumbrance was not the owner of the estate, and hence there was no such blending of interests as would occasion the merger of the lesser in the greater. Moreover, there is no evidence in the record of any stipulation between the parties, at the date of the sale of the Meadow tract, that the purchase money should be applied in discharge of incumbrances on the other tract; but a contrary intention is plainly to be inferred from the circumstance, that the sale, as we have remarked, was not for cash, and the fund which it is said was applied by operation of law in liquidation of the liens was not available for that purpose, because, by express agreement, it was payable at one, two, three, four, and five years from that date. The bare statement of the proposition would seem to proclaim its fallacy.

In Allen v. Patrick, supra, the court also held: "If a court of equity finds it to be to the interest of a mortgagor who has acquired the mortgage that a merger should not occur, it will keep both alive, but the interest must be one the promotion of which commends itself to a court of conscience. It must be for an innocent purpose, and in order to work a substantial justice." See, also, Rorer v. Ferguson, 96 Va. 411, 31 S. E. 817.

In this case, at the date of the application of what was due from Miller's estate on the purchase price of the Meadow tract in payment of the Sites bond, the appellant was a stranger to the transaction, and his rights in no manner affected by it. It was competent, therefore, for Kline to make the application that was made, and in appropriating the payment to the least secured debt he only did what the law would have done in the absence of action by the parties. Pope v. Transparent Ice Co., 91 Va. 79, 20 S. E. 940.

In Coles v. Withers, 33 Grat. 186, the court (page 203) observes: "The general rule is subject to but few exceptions, and this is not one of them: That the court cannot go outside of the case, or see how third persons may be affected by the application. In Gordon v. Hobart, 2 Story, 243, Fed. Cas. No. 5,608, Judge Story said that the right of appropriation of payments was one strictly existing between the original parties, and no third person had any authority to insist upon any appropriation of such money in his own favor, where neither the debtor nor the creditor had required it."

We are of opinion that, both on principle and authority, the decree in this aspect of the case is plainly right.

Subordinate assignments of error were not pressed, and, being without merit, need not be noticed.

For these reasons, the decree must be affirmed.

Affirmed.

(107 Va. 424)

## DICE et al. v. SHERMAN.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. EMINENT DOMAIN—PUBLIC USE—HOW DETERMINED.

When the power of eminent domain is invoked, it must be made clearly to appear that the property sought to be condemned is useful to the public, and the existence or nonexistence of a public use in any given case must be determined by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 51, 525.]

2. SAME — PROCEEDINGS — PETITION — SUFFICIENCY — TAKING PROPERTY FOR PRIVATE USE—CONSTITUTIONAL PROVISIONS.

Code 1904, § 1347, provides that a person having, upon lands owned by him on a water course, or proposing to build on such lands, a water mill, or other manufactory, etc., useful to the public, and desiring leave to erect a dam across such water course, etc., may apply for such leave to the circuit court, etc. *Held*, that a petition for leave to erect a dam on a creek for the purpose of securing power to operate "a public cider mill and the machinery of a certain public telephone exchange" then on land owned by petitioner, and praying for condemnation of certain land, did not show that the purpose for which the property was sought to be taken was for a public use, and a judgment of condemnation based on such petition was a taking of private property for a private purpose and unauthorized by the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 512.]

Error to Circuit Court, Augusta County.

Application by John W. Sherman, under Code 1904, § 1347, for leave to erect a dam and seeking the condemnation of lands belonging to M. C. Dice and others. From a judgment condemning the lands, defendants bring error. Reversed.

Charles Curry and Turner K. Hackman, for plaintiffs in error. Timberlake & Nelson, for defendant in error.

HARRISON, J. The foundation of this proceeding was an application, under section 1347 of the Code of 1904, to the circuit court of Augusta county by the defendant in error for leave to erect a dam. The petition is brief and in these words:

"Your petitioner, John W. Sherman, respectfully represents that he is the fee-simple owner of a certain tract of land, situated at Burktown, in Augusta county, Va., on the waters of the stream commonly known as 'Naked Creek.' On the opposite side of said creek is another tract of land belonging in fee simple to M. C. Dice, Mrs. K. Landes (formerly Dice), Miss Cornelia Dice, and Miss Annie C. Dice.

"Your petitioner desires to erect a dam across and in the said stream for the purpose of securing the necessary power to operate a public cider mill and the machinery of a certain public telephone exchange now on the said land belonging to the undersigned, and he prays that the court may grant him leave to erect such a dam, and to appoint five disinterested freeholders as commissioners, in the manner prescribed by law, to ascertain what will be a just compensation to the several owners of said land arising by reason of the erection of said dam and to perform such other duties as may be required of them by law in this regard."

The proceedings had under this petition resulted in a judgment in favor of the applicant, condemning the lands of the plaintiffs in error, and authorizing the erection of the dam for the purposes set forth in the petition. The right to this judgment was vigorously contested in the circuit court, chiefly upon the ground that the erection of the dam in question would practically destroy the use of a mill a very short distance above, on the same creek, owned by the plaintiffs in error, which had been established and in operation for nearly 100 years.

In the view we take of the case, this phase of the controversy need not be considered, for we are met at the threshold with a vital question, which arises on the face of the proceeding; that is, whether or not the judgment complained of is a taking of private property for a private purpose, which is not authorized.

It will be observed, as shown by the application to the circuit court, that the defendant in error desires to secure the necessary power to operate a cider mill and the machinery of a telephone exchange now on the land belonging to him. It is true that in his petition he calls the structure or structures a "public cider mill, * * * and the machinery of a certain public telephone exchange," but there is nothing on the face of his petition, and not a word in the record, to show that the public has the slightest interest in either.

This court, in the recent case of Fallsburg, etc., Co. v. Alexander, 101 Va. 98, 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855, citing Lewis on Eminent Domain, and other authorities, says: "The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn by the owner." It is there further said: "Strictly speaking, private property can only be said to have been taken for public uses when it has been so appropriated that the public have certain well defined rights to that use secured, as the right to use the public highway, the public ferry, the railroad, and the like. But, when it is so appropriated that the public have no right to its use secured, it is difficult to perceive how such an appropriation can be denominated a public use." Jordan v. Woodward, 40 Me. 317.

In his work on Constitutional Limitations (page 654), Judge Cooley says: "The public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and the due protection to the rights of private property will preclude the government from seizing it and

turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it."

The Fallsburg Case, supra, was much stronger than the case at bar for upholding the right to condemn, and this court affirmed the judgment in that case dismissing the proceeding as an attempt to condemn private property for private uses.

When the power of eminent domain is invoked, it must be made clearly to appear that the property sought to be condemned is useful to the public, and the existence or nonexistence of a public use in any given case must be determined by the court. Fallsburg Case, supra; Varner v. Martin, 21 W. Va. 550.

The purpose for which the property is sought to be taken in the case at bar does not clearly appear to be for a public use or public purpose. On the contrary, the grounds of public benefit upon which the taking is proposed are vague, indefinite, and uncertain, and the use which the public is to have of the property, or the manner in which it is to be benefited by such use, is by no means fixed and definite, and may be gainsaid, denied, or withdrawn, so far as the record shows, at the will of the defendant in error.

As said in the Fallsburg Case, supra: "The private benefit too clearly dominates the public interest to find constitutional authority for the exercise of the power of eminent domain, and is the equivalent of taking private property for a private use against the will of the owner, which cannot be done in any case."

The judgment complained of must therefore be reversed; and, this court proceeding to enter such judgment as the circuit court ought to have entered, it is ordered that the petition there filed by the defendant in error be dismissed.

Reversed.

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(107 Va. 505)

## NORFOLK & W. RY. CO. v. DEAN'S ADM'X.*

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. RAILROADS — INJURIES TO PERSONS ON TRACK—DISCOVERY OF DANGER.

Where a railroad company knows of the dangerous position of a person on its track, and that such person is unconscious of his peril and will take no measures for his own protection, it is its duty to do all that can be done, consistent with its higher duties to others, to avoid running such person down, regardless of his own negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1275.]

2. SAME—QUESTION FOR JURY.

Where, under the evidence, reasonable men may differ as to whether a railroad did all that was required of it to avoid running a person down after discovery of his peril, the case is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1375.]

3. SAME—RIGHT TO PRESUME THAT PERSONS ON TRACK WILL LEAVE.

A railroad company has the right to assume that a grown person, in the apparent possession of all his faculties, seen on its track will get out of the way of an approaching train, and is not liable unless, after the company in the exercise of ordinary care could have discovered that he was not going to get off the track, it could have avoided running him down.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1280.]

4. SAME—SUFFICIENCY OF EVIDENCE.

Evidence in an action for the death of plaintiff's intestate on the track *held* to show that the railroad did all that was required of it to avoid running him down after discovery of his peril.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1359.]

Error from Circuit Court, Tazewell County.

Action by one Dean's administratrix against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Henry & Graha and S. D. May, for plaintiff in error. Wm. H. Werth and Chapman & Gillespie, for defendant in error.

KEITH, P. Dean's administratrix sued in the circuit court of Tazewell county to recover damages for the wrongful death of her intestate, and filed a declaration containing two counts, to which the defendant company demurred, and the court sustained the demurrer to the first, but overruled it to the second count. Thereupon the plaintiff filed another count, which was demurred to, and the demurrer overruled. A trial was then had, which resulted in a verdict of the jury, subject to the defendant's demurrer to the evidence. Upon that verdict the court rendered judgment in favor of the plaintiff, and the case is before us upon a writ of error awarded by one of the judges of this court.

The circuit court filed a written opinion in support of its judgment, in which it says that the first count in effect charges that the place on defendant's track where plaintiff's intestate was killed was daily used by a large number of people, which fact was known to the defendant company, and thereby it became and was the duty of the defendant company to keep a lookout for persons on its track, so as to discover and not to injure them; that it neglected this duty, and by reason of this neglect plaintiff's intestate was killed.

"The second count," continues the court, "avers, in effect, that after the crew in charge of the defendant company's train had discovered intestate was on the track in front of said engine, and that he was unconscious of his danger and would take no measure to protect himself from the danger, the said crew in charge of said engine failed to use any measures whatever to prevent injuring plaintiff."

The circuit court was of opinion that there could be no recovery upon the first count, because of the contributory negligence of the

* Rehearing denied.

person injured, but rests the case solely upon the second count in the declaration, in which the case presented is that, after it became apparent to the crew in charge of defendant company's train that intestate of plaintiff was on the track in front of the engine, that he was unconscious of his danger, and would take no measures to protect himself, the crew failed to use any measure to prevent the accident. Such being the issue to be determined, it is needless to consider so much of the evidence as relates to the use of the track as a public passway, or as to whether or not the person injured was a licensee or a trespasser. He was a human being, and when his dangerous position was seen and known, and that he himself was unconscious of his peril and would take no measures for his own protection, it became the duty of the railroad company to do all that could be done consistent with its higher duties to others to save him from the consequences of his own act, regardless of whether he was guilty of contributory negligence or not. Seaboard & Roanoke R. Co. v. Joyner's Adm'r, 92 Va. 355, 23 S. E. 773.

This being the narrow issue to be decided, it becomes necessary to consider the evidence bearing upon it with care, and if, as a result of that inquiry, it shall appear that there is room for a difference of opinion among reasonable men, then, in accordance with the decision of the Supreme Court of the United States in Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, and with Kimball & Fink, Rec'rs, v. Friend's Adm'r, 95 Va. 125, 27 S. E. 901, which have been so frequently followed in this court, the case is one proper for a jury, and the demurrer to evidence should have been overruled.

At the point of the accident the railway is double-tracked; one track being used by trains moving toward the west, and the other by trains moving toward the east. It was the habit of pedestrians who used these tracks for a passway to walk upon them in a direction opposite to that in which trains were accustomed to move, so that the train using the track would be in front of the person upon the track and moving toward him. A man walking west, therefore, would be upon the track used by east-bound trains, while a man going toward the east would be upon the track used by trains going in the opposite direction. But, while this was the customary and usual way of moving the trains upon the tracks, it not unfrequently happened that a train going west would be upon the east-bound track, or a train going east upon the west-bound track. In other words, the tracks were used at this point as was most convenient in the shifting and movement of trains, in order to perform the various duties of the railroad company. Upon the morning of the accident there was a freight train, consisting of 55 or 60 cars, drawn by two engines, moving west upon the west-bound track; and there was a light engine and tender, moving tender in front, and also going west, upon the east-bound track. As they approached a bridge over Bluestone river, Dean, the man who was killed, was seen walking upon the east-bound track in front of the tender and near the west end of the bridge.

The first witness examined by defendant in error was A. W. Tabor. He did not see the accident, and his evidence bears only upon the locality, which we have endeavored to describe, its use by people, and the result of certain experiments which he tried, tending to show how far down the track a man sitting upon the bumper of the tender of the engine that caused the accident could have seen a man standing on the track; but his evidence is not very material, because, as has been already said, there is no doubt that the trainmen saw the deceased, and it may be conceded that they saw him at such a distance as that the engine might have been stopped without doing him any injury, if it further appears that he was then in apparent danger and was not likely to take any measures for his own protection.

The first witness for defendant in error who saw the accident was Whitworth. He says that on the day in question he was in charge of a coal train that works at Pocahontas at night; that he came to the Flat Top yards and got instructions to take his train to Mullin's Siding, which is about a mile toward the east from Falls Mills, the station near which the accident occurred. Having put his train at Mullin's Siding, as directed, he was returning, in accordance with his orders, to Flat Top yards, and was sitting on the back end of the tank when he noticed a man walking down the track. The engine was moving, it will be remembered, tender in front. The witness, continuing, says: "When I first saw the man I wasn't thinking about his being run over, and I didn't pay much attention to him until I got closer, and then I hollered, and signaled to the engineer to stop; but it didn't do any good, as he didn't pay any attention to it at all, and we ran over him and killed him." Dean was within two or three steps of being off the bridge when first seen by this witness at a distance of about three telegraph poles, or in the neighborhood of 180 feet. Witness says that he cannot say exactly how far the engine moved while he was watching the man; that he was expecting him to step off the track; that it was a matter of daily occurrence that people walked on the railroad track until the engine was in 8 or 10 feet of them, when they would step off; and that "if we stopped the train every time we see a man on the track it would take us from now until next Christmas to get to Bluefield"; but that probably it was half the distance between two and three telegraph poles "before I made any alarm, or something like that; I couldn't say exactly." The first signal which he gave

to the engineer, when he found that there was danger of injury to Dean, was what the witness denominates as the "steady" signal. "I didn't waive him down, I just held my hand out." He was then examined rigidly as to what the result of the signal was—as to whether or not the engineer put on the emergency brake; but in reply to this line of examination the witness said that he could not tell whether the emergency brake was put on or not, but that the brake was applied after he had given the signal. It appears, further, from his testimony, that what is known as the "service brake" differs from the emergency brake only in degree. If the full force of air is turned upon the brake, that is an "emergency brake." In ordinary cases less than the full force is turned on, and that is the service brake. In other words, there is only one set of brakes, and the difference consists in the amount of air pressure which is applied.

The sum of this witness' testimony is this: That he first discovered Dean upon the track at a distance of about three telegraph poles, or 180 feet; that at the moment of his discovery he did not consider him in danger; that it is a very usual thing for people to walk on the railroad track, and by stepping to the right or left they reach a place of safety, and that oftentimes this is not done until the train has approached within a few feet; that he had passed over about half the distance which had intervened between him and the man when he first saw him—that is to say, 90 or 100 feet—when he gave the engineer the signal to "steady"; that he could not say exactly at what point this signal was given; and that after he had passed over about half the remaining distance, it then appearing to him that the man was in danger, the engineer was given the second signal to stop his engine. It appears that during this time the bell was being rung by the fireman in the cab.

The next eyewitnesses to the accident examined testified on behalf of plaintiff in error, and their testimony is not to be considered upon a demurrer to evidence, if it be in conflict with that of the witnesses for defendant in error.

R. B. Ferguson was the engineer in charge of the engine which did the injury. After leaving his train at Mullin's Siding, he says: "I was on the east-bound track going west, and there was a train going west on the west-bound track when we struck Dean. We came around a little curve, and the fireman sitting up in the window and ringing the bell. He hollered to me to look out, or hold her, or something to that effect. I slammed the brake in the emergency, and reversed my engine, and we ran down about a couple of engine lengths, and he said we ran over a man, and I think we ran about two engine lengths after he hollered at me before I came to a dead stop, and there was a man laying in the middle of the track." The engineer did not see the man before he was killed. He was running at the rate of about 15 or 18 miles an hour. He is positive that he put on the emergency brake and reversed his engine at once. Again he says: "I gave her the whole braking power she had. She slid about two engine lengths—I couldn't tell you how far—and the wheels locked."

W. D. Tabor was the fireman on this engine. He says: "I saw some one walking in front of the engine on the track, and I called Mr. Ferguson's attention to it. Just as soon as I did, he threw the air in the emergency and stopped as quick as he could. We had done run over the man, though, before he stopped." When witness first saw the man he was about 60 feet away, and just getting off the bridge on the west end. This witness also states that he was at the time ringing the bell, and had been ringing it for nearly three-quarters of a mile; that the whistle was blown at the crossing above Falls Mills, and was also sounded by the engineer after the fireman called his attention to the man upon the track. Being asked whether there was anything else that could have been done to stop the engine and save the man, he replied: "No, sir. Q. What was the man doing when you saw him. A. He was walking along the middle of the track, and paid no attention, and didn't seem to know we were coming."

Defendant in error relies in great measure upon the statement of the witnesses that Dean did not seem to be paying any attention. It must be remembered that his back was to the witnesses. They could not see his countenance, and their opinion would, therefore, seem to be of little value. The positive evidence, by the sole eyewitness of the accident who testified on behalf of defendant in error, is that he had his eye upon the man; that when he first saw him he did not consider him in danger; that as soon as he felt any apprehension as to the situation he gave the engineer the signal to "steady," and immediately followed it with the signal to stop; that it was a matter of frequent occurrence to see men walking upon the track and remain upon it until the engine came close upon them.

Reliance is placed by defendant in error upon the fact that the freight train was passing at the time, and that the noise it occasioned prevented Dean from hearing the train approaching him from the rear; but that circumstance would be of value only in dealing with the question of contributory negligence, and not with the duty of the railroad company after it actually saw Dean on the track.

So, too, the custom of the company to run its west-bound trains upon the west-bound track, and its east-bound trains upon the other track, is of no value in the determination of the precise point in issue here; the sole question being whether or not, after Dean's peril was discovered, the agents of

the railroad company did all that was required of them to save him from injury.

There is no conflict of evidence here. If the statement of Whitworth, the conductor, be taken alone, all was done that should have been done under the circumstances of the case. If the emergency brake had been applied at the instant Whitworth discovered the presence of Dean upon the track, the accident would have been averted; but in the honest exercise of his discretion, in the light of his long experience, he did not at that moment consider Dean in a position of peril. He appears to have been an intelligent and capable official; and there is no reason to suppose that his conduct was not controlled by an honest purpose to do his duty, or that he did not give the signal to "steady" and then to stop to the engineer as soon as the danger of Dean's position became apparent to him.

If the testimony of Tabor, the fireman, and of Ferguson, the engineer, be looked to (and there seems to be no reason why their testimony should not be considered, being in support and not contradictory of the statements of Whitworth, who testified on behalf of the defendant in error), then the case is all the stronger for the plaintiff in error, for they show very clearly that the accident was due to no failure of duty upon their part, but that with the light before them they did all that careful and reasonable men could have done to save Dean from the consequences of his own temerity.

The law upon the facts as here presented is well settled.

In N. & W. Ry. Co. v. Harman's Adm'r, 83 Va. 577, 8 S. E. 258, it is said that "if the person seen upon the track is an adult, and apparently in the possession of his or her faculties, the company has a right to presume that he will exercise his senses and remove himself from his dangerous position; and if he fails to do so, and is injured, the fault is his own, and there is, in the absence of willful negligence on its part, no remedy against the company for the results of an injury brought upon him by his own recklessness."

The same doctrine is stated in Tyler, Receiver, v. Sites, 90 Va. 539, 19 S. E. 174.

In Rangeley's Adm'r v. Southern Ry. Co., 95 Va. 715, 30 S. E. 386, it is said that a railroad company has the right to assume that a grown person seen on its track will get out of the way of an approaching train, and the company is not liable unless it is shown that after the company, in the exercise of ordinary care, could have discovered that he was not going to get off the track, it could have avoided the injury.

And in Savage v. Southern Ry. Co., 103 Va. 422, 49 S. E. 484, it is said: "It may be that, had the engineer applied the brakes at the moment he came in sight of Savage upon the track, the accident could have been avoided. But such was not his duty. Seeing a man upon the track, in the apparent possession of all his faculties, the engineer had a right to presume that he would exercise reasonable care for his own protection. A step or two would have placed Savage in a position of safety. The duty devolved upon the engineer to stop the train only when he saw that Savage was in danger; that is to say, when he saw, or ought to have seen, that Savage was himself unconscious of his peril and would take no measures for his own protection. This proposition has been decided in numerous cases by this court."

The only witnesses in this case bearing directly upon the point in issue show that the trainmen, in the exercise of their best discretion, measured up to the duty imposed upon them by the law.

We are of opinion, therefore, that the demurrer to evidence should have been sustained, and the judgment of the circuit court must be reversed.

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(107 Va. 413)

## COFFMAN v. LIGGETT'S ADM'R et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. ASSIGNMENTS—RIGHTS OF SUBSEQUENT ASSIGNEES.

A subsequent assignee of a thing in action for value and without notice of a prior assignment takes in equity a right superior to a prior assignment without transfer of the legal title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, §§ 149, 150.]

2. SAME—ESSENTIALS.

An assignor of a chose in action must part with the power of control over the chose assigned, and the assignment must be so delivered as to be irrevocable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 61.]

3. INSURANCE—ASSIGNMENTS—PRIORITIES.

An assignment of so much of the assignor's life policy as would be sufficient to pay his indebtedness to the assignee was not delivered, and the assignee had no knowledge thereof until after the death of the assignor, when it was found among his papers. The assignee did not know that the assignor was indebted to him because of misappropriation of funds intrusted for investment. *Held*, that a subsequent assignee of the policy for value and without notice, in the manner prescribed by the policy, took in equity a right superior to the assignment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 493; vol. 4, Assignments, §§ 61–84.]

Appeal from Circuit Court, Rockingham County.

Suit by W. S. Lurty and another against one Liggett's administrator and another. From the decree, defendant Maggie G. Coffman appeals. Affirmed.

Harnsberger & Harnsberger, for appellant. Sipe & Harris, for appellees.

HARRISON, J. The life of Winfield Liggett was insured, for his own benefit, by policy No. 2,996 in the Life Insurance Company of Virginia for the sum of $3,000, which has been paid, and is now under the control of

the circuit court of Rockingham county in this suit. The matter in controversy is the right of priority in the distribution of this fund between certain creditors of Winfield Liggett, the insured, each of whom claims under an assignment of the policy from which the fund was derived, made by the insured in his lifetime.

The record shows that on the 29th day of November, 1901, while the policy was still in his possession and under his control, the insured assigned and transferred the same to W. S. Lurty as collateral security for the payment of a bond for $1,000 executed by Liggett to Lurty. It further appears that on the 12th day of September, 1904, the entire policy was, for value received, assigned and transferred by the insured to W. S. Lurty, subject only to a debt of $274 and its interest, borrowed money due from the insured to the company. The completeness of Lurty's purchase of the policy, under the assignment and transfer last mentioned, cannot be questioned. Due notice of this assignment, acknowledged before a notary public, was given in writing to the company, and recognized and accepted by it in writing. Prior to this assignment to Lurty of September 12, 1904, the policy had been, in January, 1904, assigned by the insured to N. W. Berry to secure him as indorser of a negotiable note for $670.

After the death of Winfield Liggett, which occurred on the 16th day of February, 1905, there was found with his papers in his office safe the following paper, dated February 26, 1895, signed by him under his hand and seal:

"I hereby transfer and assign to Maggie G. Coffman so much of my life insurance policy, in the Life Insurance Company of Virginia, as will be sufficient to pay to her whatever amount I may owe her at the date of my death."

It appears that several years before the date of this paper Maggie G. Coffman had placed in the hands of Winfield Liggett, who was a practicing attorney of the Harrisonburg bar, certain funds to be invested by him as her attorney. These funds were invested at first, but were afterwards collected by Liggett and appropriated to his own use; he thereby becoming the debtor of Maggie G. Coffman, which relation he continued to occupy until his death.

The sole question to be determined is whether, under the circumstances disclosed by the record, Maggie G. Coffman, the appellant, is entitled to priority in the distribution of the fund arising from this policy; it being insisted that she has the first right, because the assignment in her favor was prior in time to that under which the appellee Lurty claims.

It is contended on behalf of the appellee that there was no complete assignment of this policy to the appellant, that the alleged assignor retained the power of revocation by retaining the paper relied on in his possession and never delivering the same, and that, having this power of revocation, he had the power to make a subsequent valid assignment of the policy. On the other hand, it is contended on behalf of the appellant that the assignor, Liggett, was her trusted attorney and agent to invest her funds; that when he wrote the assignment of the policy for her benefit, and placed the same with her papers in his safe, it was a constructive delivery; and that he thereafter held the paper as her agent, without power to impair her rights in the policy by a subsequent assignment thereof.

So far as the record shows, the existence of the paper under which the appellant claims was never known to any one but its author until after his death, when it was found by his administrator, together with a statement of his indebtedness to the appellant and a letter relating to her investments, in a filing envelope in the decedent's office safe. It is not clear from the record that appellant knew that Liggett had reduced her investments to money and was himself her debtor. She does not appear to have ever demanded any security of Liggett as her debtor, nor does he appear to have ever promised to furnish any security, nor was any mention or intimation with respect to the policy in question ever made to her by him, although he appears to have written her letters with respect to her investments. The paper relied on as an assignment was kept within its author's own knowledge, and within his own exclusive power and control. There was never a moment that appellant had any power or control over the paper.

It is true, as insisted, that delivery is a matter of intention, and that the form of the assignment is not material. Skipwith's Ex'r v. Cunningham, 8 Leigh, 271, 31 Am. Dec. 642; Tatum v. Ballard, 94 Va. 370, 26 S. E. 871. But the evidence does not show that Liggett ever intended to deliver the alleged assignment to the appellant. He does send her word not to be uneasy about her investments —that her money was safe; but all of his communications studiously avoid any mention of the policy, or any intention to deliver the alleged assignment. The absence of intention to deliver the paper in question is further shown by the fact that Liggett retained possession of the policy, used it as collateral security, borrowed money upon it, and finally transferred and assigned it to the appellee for full value received. Whatever may have been Liggett's purpose when he first wrote the paper now in controversy, that purpose was never consummated because of his power to recall it; and, when the absolute assignment was made to Lurty, the purpose theretofore existing, if any, to assign to appellant, was abandoned.

The rules of the insurance company require that an assignment of its policies shall be made in duplicate and sent to the company for acknowledgment, when one is returned to the assignee of the policy and the other retained by the company. This was

never done with respect to the alleged assignment under which appellant claims. The appellee acquired, for value received, the complete legal and equitable title to the policy, giving the company due notice of the assignment to him, without any notice or knowledge of the paper under which appellant claims, and without any means of ascertaining that such a paper was in existence.

In Pomeroy's Equity it is said that a subsequent assignee takes superior to a prior equity, when the second assignee, in good faith and without notice of a prior outstanding equity, protects or supports his own interest by obtaining a legal title or legal position, and that in such a case the general doctrine that an assignment is subject to outstanding equities of third persons does not apply. 2 Pom. Eq. § 698, and note.

The Supreme Court, considering the same subject, points out that the general rule, "First in time, best in right," has exceptions, and that a subsequent assignee of a pure thing in action will be protected by a court of equity in any advantage which he has gained by his own diligence, or by the neglect of a prior assignee. In a well-considered case the court says: "Corcoran's assignment was fair, and accepted on his part without knowledge of Judson's; nor is the contrary alleged in the bill. And assuming Judson's to be fair also, and that no negligence can be imputed to him, then the case is one where an equity was successively assigned in a chose in action to two innocent persons, whose equities are equal, according to the moral rule governing a court of chancery. Here Corcoran has drawn to his equity a legal title to the fund, which legal title Judson seeks to set aside, and asks an affirmative decree in his favor to that effect. Now, nothing is better settled than that this cannot be done. The equities being equal, the law must prevail." In this case it is further said: "The assignment was held up, and operated as a latent and lurking transaction, calculated to circumvent subsequent assignees, and such would be its effect on Corcoran, were priority accorded to it by our decree." Judson v. Corcoran, 17 How. 612, 15 L. Ed. 331. See, also, Bayley v. Greenleaf, 7 Wheat. 46, 5 L. Ed. 393; Graham Paper Co. v. Pembroke, 124 Cal. 117, 56 Pac. 627, 44 L. R. A. 632, 71 Am. St. Rep. 26; Palmer v. Merrill, 6 Cush. 282, 52 Am. Dec. 782.

The decisions of this court are, we think, to the effect that the assignor of a chose in action must part with the power of control over the thing assigned, and that the evidence of assignment must be so delivered as to be irrevocable by the assignor. Tatum v. Ballard, supra.

The case of Spooner v. Hilbish, 92 Va. 333, 23 S. E. 751, involved the validity of the gift of an insurance policy by the insured to a third party. The doctrine was there announced with respect to a gift, which was without consideration, that there must be a delivery of possession of the thing given, or the means of obtaining it, so as to make the disposition of it irrevocable.

There is nothing more common in the business life of the present day than the assignment of insurance policies as collateral security for borrowed money. If a secret equity, such as that sought to be enforced by the appellant, could prevail against a bona fide purchaser of a policy, such as Lurty is shown to have been, the result would be disastrous to the use of these policies as a means of borrowing money.

We are of opinion that, under the facts and circumstances of this case, there was neither an actual nor a constructive delivery of the assignment in question to the appellant, or to any one for her benefit. The circuit court, therefore, did not err in holding that the transfer of the policy to W. S. Lurty was to be preferred in equity and right to the alleged assignment thereof to appellant, and its decree must be affirmed.

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(107 Va. 576)

## TROUT v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. EVIDENCE—DECLARATIONS OF AGENT—AUTHORITY.

In an action for breach of an alleged parol agreement to furnish plaintiff a passageway under defendant's railroad for his cattle as part consideration for a deed to a right of way, letters written to plaintiff by defendant's chief engineer and real estate agent were inadmissible, in the absence of proof that they were the authorized agents of defendant or had anything to do with the making of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 893–903.]

2. CONTRACTS—ACTION FOR BREACH—EVIDENCE—IRRELEVANCY.

In an action for breach of a railroad's parol agreement to furnish plaintiff an undergrade passageway for his cattle across defendant's right of way as a part consideration for a conveyance of a right of way, a letter, written by plaintiff's attorneys, declaring that the property embraced 22.22 acres as shown by a specified plat, which was attached to and made a part of the option, etc., which plat was shown to be the map exhibited with the deed and made a part thereof, and which did not indicate any claim for a private passway, was irrelevant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1792.]

3. EVIDENCE—PAROL EVIDENCE—VARIANCE OF DEED.

Where a deed to a railroad right of way referred to a plat and conveyed the land free from incumbrances, without mentioning an alleged parol agreement by the railroad company to furnish plaintiff a private undergrade crossing, parol evidence, in the absence of fraud or misconduct in the execution or procurement of the deed, was inadmissible to establish such agreement, under the rule that parol evidence is incompetent to add any covenant to a deed, or to enlarge or contradict a covenant, or to create a reservation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1719–1728.]

4. SAME — PREVIOUS OR CONTEMPORANEOUS AGREEMENTS.

Where a writing is clear and unambiguous, it must be regarded as the sole evidence of the contract between the parties, and all previous or contemporaneous understandings materially altering or varying the agreement are merged therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2030–2047.]

5. SAME—COLLATERAL AGREEMENTS—DIFFERENT SUBJECT.

While a separate oral agreement as to a matter on which the contract is silent, and which is not inconsistent with its terms, may be proved by parol, such agreement must not only be collateral, but relate to a subject distinct from that to which the writing applies, so that it shall appear that the parties did not intend the writing to be a complete and final statement of the whole transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1862.]

6. SAME—ACTIONS AT LAW.

The rule that parol evidence is inadmissible to vary or contradict a deed or other written agreement applies with more force in a court of law than in equity.

Error to Circuit Court of City of Roanoke.

Action by one Trout against the Norfolk & Western Railway Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Hunt & Staples, for plaintiff in error. Robertson & Wingfield and A. A. Phlegar, for defendant in error.

CARDWELL, J. This is an action of assumpsit, in which the plaintiff claims the right to recover the value of certain real estate which he had conveyed to the defendant company.

The declaration contains the common counts in assumpsit and two special counts. The first special count alleges that the plaintiff agreed to convey to the defendant certain parts of a tract of land, provided the defendant would pay him the sum of $2,999 in cash, and would also construct, open, and maintain across the land to be conveyed and under the defendant's railway tracks a roadway 30 feet wide, of which 24 feet was to be dedicated to the public use and 6 feet to the plaintiff as a means of access for his live stock from one side of his place to the other; that he did convey the land, by a deed which he makes a part of the count, and received the $2,999; but that the defendant refused to provide the 6-foot passway for his use, whereby he is deprived of access to water for his stock, and has suffered damages in the sum of $2,000. The second special count is practically the same as the first, except that it omits the statement that part of the roadway was to be dedicated to the public, and both counts claim that in addition to the consideration agreed to be paid in money there was the further consideration for the said deed of the promise and agreement on the part of the defendant that it would construct and maintain the 6-foot passageway across the land conveyed and under the defendant's railway tracks for the use of the plaintiff as a means of access for his live stock from one side of his place to the other, and both allege the breach of the contract or agreement of the defendant to construct said passageway.

The defendant pleaded nonassumpsit, and at the trial the plaintiff was introduced as a witness on his own behalf, described the location of his tract of land, testified that he entered into a contract with the defendant for the sale of a portion of that tract, then introduced the deed made a part of the declaration and proposed to testify that the contract between him and the defendant was that, if he would convey 11 and a fraction acres of land more than he had formerly agreed to convey, defendant would for the additional land provide him a cattle pass as stated in the declaration. To the introduction of this parol evidence the defendant objected, which objection was sustained by the court, and the plaintiff excepted to the ruling and tendered his first bill of exception, which was duly signed and made a part of the record. The plaintiff was then permitted to state, with the understanding that the defendant could move to exclude the statement, that the defendant was, in addition to the $2,999 mentioned in the deed, to give him a passway along the culvert to be built over the county road for a cattle pass from one side to the other of his land, and that such passway was to be through the land conveyed by the deed. On the motion of the defendant this evidence was excluded, and to this ruling the plaintiff also excepted and took his second bill of exceptions. Thereupon the plaintiff offered a letter written by his attorneys to the chief engineer of the defendant, his reply thereto, and a letter from Theo. Low who signs himself "Real Estate Agent," to said chief engineer, which on defendant's objection were excluded, and the plaintiff took his third bill of exceptions.

The verdict was then rendered for the defendant, motion to set it aside was overruled, and the plaintiff filed his fourth bill of exceptions. Whereupon judgment was rendered for the defendant, to which judgment this writ of error was awarded.

The four bills of exceptions may be considered together, as the underlying question in the case is whether or not the court erred in excluding the evidence offered by the plaintiff above mentioned.

The deed, mentioned in the declaration and exhibited by the plaintiff while on the witness stand, states a consideration in money paid in cash: and he was attempting to prove what was the real consideration for the deed. A plat, designated as "No. 7,087, Revised," referred to in and made a part of the deed, shows the 22.22 acres of land conveyed as lying along the main railway track of the defendant, and embracing the proposed center line of a proposed new east-bound track, all the space between the two tracks, and

two certain triangular parcels of land between the defendant's two lines of railway and the county road and also shows a proposed new county road from an old county road on the one side across the lands conveyed and the defendant's two lines of railway to a county road on the opposite side. The statement as to the location of his land made by the plaintiff shows that he owned about 124 acres of which about 100 acres lay on the south side of the old railway right of way, and 24 acres on the north side thereof, upon which there was water for cattle, while there was none on the 100 acres south of the railway. The purpose of the parol evidence and the letters which the court below excluded was to show that, as claimed in plaintiff's declaration, while the deed stated upon its face a consideration of $2,999 "cash in hand paid the receipt whereof is hereby acknowledged," the real consideration for the conveyance was, not only this sum of money, but an agreement of the defendant to provide for the plaintiff a passway along the culvert to be built on the side of the proposed new county road shown upon the map, for a cattle pass from the south side of plaintiff's land to the north side thereof; that the agreement between the plaintiff and the defendant originally was that the former would convey to the latter only the land necessary for its proposed new line of railway, which would require only about 11 acres, at the price of $3,000, of which $1 was paid when the agreement was made and the $2,999 to be paid subsequently; that afterwards plaintiff had another agreement with the defendant that if he would embrace in his deed all of his land occupied by the proposed new line of railway and lying between the two railway tracks of the defendant, and also the two triangular pieces of land before mentioned, which together contained an aggregate of 22.22 acres, the defendant would construct the passway for his cattle to pass from the land on the south side of the tracks to that lying on the north, as above mentioned; that the deed from the plaintiff to the defendant was executed in accordance with this last-mentioned agreement, but while the defendant paid to the plaintiff the money consideration for the conveyance, when it began to construct its culvert for the passage of the county road under its tracks, it proposed to lay out the same to a width of 24 feet, instead of 30 feet, as shown upon the map, providing no passway whatever for plaintiff's cattle according to what he contends was the agreement, and a part of the consideration for the land conveyed other than the mere right of way for the defendant's proposed new line of railway; and that, upon plaintiff's demand that the passway for his cattle be constructed in accordance with the agreement, the defendant refused to construct it.

The objection of the defendant to the introduction of the parol evidence offered on behalf of the plaintiff, and excluded, was on the ground that it tended to alter and contradict the legal import of the deed, and that the plaintiff was seeking to prove that there were two contracts between him and the defendant, while his declaration alleged and his deed showed but one.

We are of opinion that the letters of Churchill, chief engineer, and Low, the real estate agent, offered by plaintiff in error, were inadmissible. They were not only written after the deed exhibited with the declaration was executed and delivered, but there had been no proof that the writers of the letters were the authorized agents of defendant in error, or that they had anything to do with the making of the contract between the parties. The only point made by the letter to which Churchill's is a reply is that the county road should be located at a particular place, and it would seem that Low's letter was merely intended to express the view that defendant in error's claim that the county road shown on the map made a part of the deed was to be an undergrade crossing was well founded; that it was his (plaintiff in error's) intention to use the county road as a passway for his cattle; and that this plat, showing the road as it did, influenced plaintiff in error in selling the land conveyed by the deed, instead of the 11½ acres, for $3,000.

Nor was the letter of Robertson, Hall & Woods at all relevant, and therefore it was also properly rejected. Neither the map with the deed, nor either of these letters, intimated any claim for a private passway, or of two contracts, while Robertson, Hall & Woods' letter says: "An option for this land was obtained from Mr. Trout by Mr. C. C. Taliaferro, representing the railway company, on November 6, 1905. * * * The property in question embraces 22.57 acres, as shown by 'Plan 7,087, Revised,' which was attached to and made part of the option," etc. The "revised" plan referred to was shown to be the map exhibited with the deed as a part thereof.

The trouble with plaintiff in error's case is that in his declaration, under the guise of enforcing payment of the purchase money for the land conveyed in the deed, he sets up a claim for an easement over the land conveyed, an incumbrance on the land of which no mention is made in the deed, and the parol evidence offered by him was for the purpose of showing that he was entitled to recover of defendant in error damages for the nonperformance of its contract to establish for the plaintiff in error the easement, when in point of fact the last expression of the parties as to the contract is to be found in the deed itself.

No fraud or misconduct is alleged in the declaration in the execution or procurement of the deed in question, and therefore this parol evidence was for the purpose of set-

ting up a prior contract between the parties different from that contained in the deed.

It is true it is settled law that the consideration actually paid, or promised, can be shown to have been other than that recited in the instrument, or the fact of payment of the consideration agreed upon may be contradicted in an action for its recovery; but it is equally as well settled that parol evidence is inadmissible to alter or contradict the legal import of a deed. Its legal import may no more be contradicted by parol evidence than its actual expressions. Calhoun & Cowan v. Wilson, 27 Grat. 649; Sulphur Mines Co. v. Thompson's Heirs, 93 Va. 293, 25 S. E. 232; Watkins v. Robertson, 105 Va. 269, 54 S. E. 33, 5 L. R. A. (N. S.) 1194.

"It is true that the deed need not contain all the stipulations of the parties. For example, agreements as to the consideration and mode of payment need not be embraced in the deed, for the instrument purports to be the deed of but one of the parties; but it does purport to contain the covenants of the grantor in respect to the property conveyed. To add a new covenant by parol proof would be a palpable violation of the familiar rule that written contracts are not to be varied by oral testimony. Such a parol stipulation, it has been held, could not be proof in respect to an ordinary bill of sale of personal property." And the same will, of course, apply to a conveyance of land. Browne on Parol Ev. § 104; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313.

As well stated by the author of Browne on Evidence, supra: "Parol evidence is incompetent to add any covenant to a deed, or to enlarge or contradict any covenant or create a reservation."

The deed between these parties professes to convey from the grantor a fee-simple, unincumbered title to the land. It contains express covenants "that the grantor has done no act to incumber it, and that the grantee shall have quiet possession thereof free from all incumbrances"; while the proposed parol evidence offered was to show that the grantor reserved a passway six feet wide over the land conveyed, which the grantee promised so to construct and maintain as that the grantor's stock might pass over it at will, although the map attached to the deed, and made a part thereof, while it shows the change of location of the county road and places it across the land conveyed, contains nothing whatever to indicate that there was to be any such passway for cattle as plaintiff in error contends for. In effect, plaintiff in error is contending that by a contract, not proven or attempted to be proven to have been entered into prior to the deed, he reserved to himself a right which is wholly inconsistent with the terms of his deed.

In the case of Melton v. Watkins, 24 Ala. 433, 60 Am. Dec. 481, very similar to the case under consideration, the lower court had allowed proof of contemporaneous parol agreement that the grantor in a deed to land could remain in possession for a time; but the Supreme Court of that state held that this was error, the opinion saying: "It [the parol evidence] varied by parol the legal effect of the deed and took from the grantee an interest which the deed conveyed to him. The rule is too well settled to require the citation of authority that all previous or contemporaneous parol agreements or understandings between the parties materially altering or varying, by adding to or subtracting from, the written agreement, must be considered as merged in that agreement, and the writing must be regarded as the evidence and sole expositor of the contract of the parties, when it is clear and unambiguous."

The agreement for a passway over the land conveyed by plaintiff in error is not collateral, and does not relate to a subject distinct from the land, but is really a part and parcel of the subject conveyed. We can see no difference between reserving a right of way and reserving the right to possession of the land after the conveyance, which was held, in the case of Melton v. Watkins, supra, could not be done.

In Shaver v. Edgell, 48 W. Va. 502, 37 S. E. 664, the action was trespass quare clausum fregit against Edgell, who justified on the ground, among others, that he had conveyed the land to one Hall, under whom plaintiff claimed, with the agreement that he was to have a right of way over it, and that the trespass alleged was the use of the right of way. It was held that parol evidence to prove this agreement was not admissible; the opinion saying: "I think the court did not err in this. To admit such evidence would be dangerous in the extreme. The estate of man in land would be very precarious if such were the rule. His deed says he has absolute ownership, unincumbered by the great burden of a right of way; but slippery memory or perjury comes up to contradict the deed and place a heavy incumbrance upon the owner's estate, largely detractive from the value of that estate. * * * Here Edgell, granting all his right in land, seeks afterwards to detract from the legal effect of his conveyance by loading the land with the heavy incumbrance of a private right of way for all time."

It is not to be questioned that a separate oral agreement as to any matter on which a contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writ-

ing itself upon its face is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing." Seitz v. Brewers' Refrigerating Machine Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837.

The map exhibited with the deed in this case is as much the declaration of the plaintiff in error as the other written portions of the deed, and, as we have remarked, there appears nothing on the map which indicates the passway for cattle as contended for by him.

In Meade v. N. & W. Ry. Co., 89 Va. 296, 15 S. E. 497, the bill was filed to reform or cancel a deed granting the railroad company a right of way, because the parties had verbally agreed that a trestle with a passway under it should be erected across a ravine on the grantor's land, which agreement was not inserted because the parties deemed it unnecessary; but the relief was denied on the ground that parol evidence was inadmissible to show the agreement for the passway, such an agreement being inconsistent with the terms of the deed which was asked to be reformed or canceled.

In that case Shenandoah Valley R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239, is cited as conclusive that the relief sought could not be granted. In the case cited it is said: "The authorities all agree that equity has jurisdiction to reform written instruments in two well-defined classes of cases only, viz.: (1) Where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake; and (2) where there has been a mistake of one party, accompanied by fraud or other inequitable conduct of the remaining parties. But so great and obvious is the danger of permitting the solemn engagements of parties, when reduced to writing, to be varied by parol evidence, that in no case will relief be granted except where there is a plain mistake, clearly made out by satisfactory and unquestionable proofs."

This rule applies with more force in a court of law than in one of equity, and, in referring to the rule, Harrison, J., in Slaughter v. Smither, 97 Va. 206, 33 S. E. 545, says: "This court has manifested no disposition to fritter away the rule of evidence in question by nice distinctions to meet the hardships, real or supposed, of particular cases." It was there further said that it cannot be assumed that the written contract between the parties was designed as an imperfect expression of their agreement from the mere fact that it contains nothing on the subject to which the parol evidence offered is directed. "On that assumption, the rule which excludes parol proof as a means of adding to the written contract would be entirely abrogated. * * * Where parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance; and consequently all parol testimony of conversations held between them, or declarations made by either of them, whether before, after, or at the time of the completion of the contract, will be rejected. If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something is left out to be supplied, parol evidence to vary or add to its terms is not admissible."

In Naumberg v. Young, 44 N. J. Law, 331, 43 Am. Rep. 380, the action was trespass on the case, to recover damages for a breach of an alleged parol agreement between the parties, entered into at the time, or prior to, the execution of a lease of a certain brick factory; and the court held that parol evidence to establish this collateral agreement was inadmissible, for the reason that the written contract purported on its face to be complete and to contain the entire agreement of the parties, and that the parol evidence offered tended to add another term to the agreement, the agreement containing nothing on the subject to which the parol evidence was directed. The opinion in that case reviews a great number of decided cases, and declares, as this court did in Slaughter v. Smither, supra, that to admit parol proof to add to a written contract in such a case would be entirely to abrogate the rule of the common law that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument.

We find nothing in the case here which takes it from under the control of that rule of the common law, and therefore the judgment complained of is affirmed.

Affirmed.

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(107 Va. 408)

## CHESAPEAKE & O. RY. CO. v. PARIS' ADM'R.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. CARRIERS — INJURY TO PERSON ASSISTING PASSENGER.

A person accompanying passengers to assist them in entering a train, though not a passenger, is not a trespasser, nor bare licensee, as he has at least a tacit invitation from the carrier by virtue of the relation between it and the passenger, and the carrier must exercise at least ordinary care to avoid injuring him by defective stational facilities or approaches thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1242.]

2. SAME — PERSONS ASSISTING PASSENGER — DUTY TO HOLD TRAIN UNTIL THEY HAVE DISEMBARKED—NOTICE OF INTENT.

Though a person assisting a passenger in boarding a train has a right to enter the train in conformity with a practice acquiesced in by

the carrier, he should inform those in charge of his purpose; and, where they have no actual or constructive notice that he intends to disembark, they are not bound to hold the train, nor to notify him before it starts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1242.]

3. SAME—INJURY TO PERSON ALIGHTING FROM TRAIN—NEGLIGENCE.

Where a brakeman in good faith makes an unsuccessful attempt to prevent one who had assisted a passenger to board a train from alighting after it had started, the railroad is not liable for the person's injury, although he might have alighted in safety had the brakeman not interfered; the brakeman's act being one in an emergency, which will not create a liability on the master's part, though the result shows it to have been a mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1121, 1242.]

Error to Circuit Court, Augusta County.

Action for the death of his intestate by the administrator of James R. Paris against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

R. L. Parrish, for plaintiff in error. Charles Curry and Peyton Cochran, for defendant in error.

WHITTLE, J. The plaintiff in the circuit court (defendant in error here) brought this action to recover damages for the death of his intestate, James R. Paris, alleged to have been caused by the negligence of the plaintiff in error, the Chesapeake & Ohio Railway Company.

Treating the case as upon a demurrer to the evidence, the essential facts are as follows: The intestate, who at the time of the accident was 76 or 77 years of age, accompanied his daughter, an intending passenger, from their home in Staunton, Va., to the company's station in that city. On the arrival of the train the conductor and brakeman, as usual, stationed themselves at the front end of the rear coach to assist passengers in leaving and entering the cars. The intestate escorted his daughter into the rear car, carrying her hand baggage, and secured a seat for her about midway the coach. The train crew did not know, and there was nothing to lead them to suspect, that he was not a passenger, or that he intended to get off. That he had ample time, in the exercise of ordinary care, to have left the train in safety, is shown by the circumstances that it remained at the station five minutes, two minutes longer than the regulation stop, and that the conductor, after giving the leaving signal, boarded the train and went into the forward car to take up tickets before the intestate appeared on the front platform of the rear coach.

The account given by some of the plaintiff's witnesses of occurrences at the moment of the accident is that while the intestate was descending the steps the train was put in motion, and thereupon he was seized from behind by a brakeman on the platform of the car; that he turned his head and looked at the brakeman, and then either broke his hold or was turned loose and fell to the station platform below, and rolled thence under the moving train, between the rail and platform, and was struck by the step on the rear end of the coach and fatally injured. Though several witnesses expressed the opinion that the intestate could have alighted in safety, but for the interference of the brakeman, there is no suggestion that the latter was not acting in good faith in his effort to rescue the intestate from the peril of jumping off the moving train.

The rule of law regulating the duty of a railway company to persons coming to stations to assist passengers is correctly stated in 2 Hutchinson on Carriers (3d Ed.) § 991: "A person who comes to a railroad station to assist passengers in entering or leaving the train, though not a passenger, is not a trespasser, as he comes with at least the tacit invitation of the carrier. While so engaged he does not stand in the relation to the carrier of a bare licensee, but is deemed to have been invited to be there by virtue of the relation existing between the carrier and the intending or arriving passenger. The carrier, therefore, owes to him the duty of exercising at least ordinary care to see that he is not injured by reason of defective stational facilities or approaches thereto.

"So one who goes on a train to render necessary assistance to a passenger, in conformity with a practice approved or acquiesced in by the carrier, has a right to render the needed assistance and leave the train; and the carrier, in permitting him to enter with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. * * * But the duty of the carrier in this respect is dependent upon the knowledge of such person's purpose by those in charge of the train; for without such knowledge they may reasonably conclude that he entered to become a passenger, and cause the train to move after giving him a reasonable time to get aboard. He should, accordingly, notify some one in the management of the train of his presence, business, or purpose, so as to create some relation to the carrier, and thus make it its duty to care for him; and when the carrier's servants have no knowledge, or there are no circumstances tending to put them on notice, that a person who has boarded a train to assist another intends to alight before the train starts, they are not bound to hold the train until he has had time to disembark, nor to notify him before the train has started." See, also, Shearman & Redfield on Neg. (5th Ed.) § 492a; Little Rock, etc., Ry. Co. v. Lawton, 55 Ark. 428, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48, and notes.

Applying these just rules to the facts of this case, it is clear that the plaintiff has wholly failed to fix actionable negligence on

the defendant company. It was the brakeman's duty to have endeavored to protect the intestate from danger incident to his stepping off a moving train, and if, perchance, disaster attended his efforts in that regard, the master cannot be held answerable in damages for the fortuitous result.

"One who, by his own negligence, has placed another in an emergency cannot require of that other the wisest possible action in order to save him from the consequences of his own fault." Wise Ter. Co. v. McCormick, 104 Va. 400, 51 S. E. 731.

We are of opinion that the judgment complained of should be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed.

(107 Va. 636)

## HAMER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Sept. 19, 1907.)

1. WRIT OF ERROR—DISMISSAL—MOOT QUESTION.

It appearing, in a quo warranto proceeding involving the right to the office of judge of election, that since the writ of error was awarded the issue has become extinct by the term of office in question expiring, the case must be dismissed.

2. SAME — MOOT QUESTIONS — DISMISSAL OF CAUSE.

Where it appears there is no actual controversy between litigants, or that, if one existed, it has ceased, a court should dismiss the cause, since it is not their office to give opinions on abstract propositions of law, nor to decide questions upon which no rights depend.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3122.]

Error to Circuit Court, Alleghany County.

Quo warranto by the commonwealth against one Hamer and others. From the judgment, defendant Hamer brings error. Dismissed.

Geo. A. Revercomb and John T. Delaney, for plaintiff in error. The Attorney General, for the Commonwealth.

HARRISON, J. This quo warranto proceeding was instituted in September, 1906, by the attorney for the commonwealth, of Alleghany county, to have determined a conflict between certain parties claiming to be judges of election for the Second Ward in the town of Covington.

The plaintiff in error, together with two others, was appointed judge of election for said Second Ward by the electoral board for the county of Alleghany; and their contestants, three in number, were appointed to the same office by the council of the town of Covington. The circuit court of Alleghany county held that those persons appointed as judges of election by the council of the town of Covington were entitled to hold the office and discharge its duties. To that judgment this writ of error was awarded October 8, 1906, upon the petition of one of the parties who had been appointed by the electoral board.

It appears that the term of the office in question has, under the law, expired since this writ of error was awarded. This being so, the issue has become extinct. Neither party is now holding the office for the stated term, or can hold it for such term. There can, therefore, be no judgment of ouster, or the contrary, lawfully rendered, and the case must be dismissed.

Whenever it appears, or is made to appear, that there is no actual controversy between the litigants, or that, if it once existed, it has ceased, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case. It is not the office of courts to give opinions on abstract propositions of law, or to decide questions upon which no rights depend, and when no relief can be afforded. Only real controversies and existing rights are entitled to invoke the exercise of their powers. Franklin v. Peers, 95 Va. 602, 29 S. E. 321; Shumate v. Spilman, 1 Va. Dec. 604; Meyer v. Pritchard, 131 U. S. ccix, 23 L. Ed. 961; Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293.

In the case last cited, Mr. Justice Gray says: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of the lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. Lord v. Veazie, 8 How. (U. S.) 251, 12 L. Ed. 1067; California v. San Pablo & Tulare Railroad, 149 U. S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747.

The controversy in the case at bar having ceased to exist, leaving only moot questions, there can be no recovery for costs in this court, where such a judgment depends upon the substantial result of the litigation. The case must therefore be dismissed, without costs to either party.

(107 Va. 458)

## LENNIG v. HARRISONBURG LAND & IMP. CO. et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. QUIETING TITLE — REMOVAL OF CLOUD — RIGHT OF ACTION.

To sustain a suit to remove lien as a cloud on title, the bill must be against one who as-

serts an adverse title under the lien, the validity of which plaintiff denies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 4.]

2. SAME—VENDOR'S LIEN—BILL—IMMINENT DANGER OF IRREPARABLE INJURY.

Complainant alleged that he was the owner of 17 lots in defendant improvement company's addition to the town of H., for which he had paid; that he had held the same for 14 years without being able to sell them without sacrifice, and was still unable to do so, because of a vendor's lien on all the lots in the addition for the debts of the improvement company; that the interest on the lien debt was continually increasing; and that, while the improvement company still owned a large tract of valuable land and many valuable lots and improvements, which were primarily liable for and were at present amply sufficient to discharge the lien, yet, if the company continued in the future as in the past to default in the payment of interest on the debt, it would only be a question of time until the company's property would be inadequate and complainant's lots would be taken. *Held*, that the bill did not show that complainant was in imminent danger of irreparable injury, and was therefore insufficient to compel a present sale of the improvement company's property to satisfy the lien to remove the cloud from the title to complainant's lots.

3. PRINCIPAL AND SURETY—CREATION OF RELATION—VENDOR'S LIEN.

Where defendant improvement company sold certain lots to complainant, which, with the improvement company's remaining property, were subject to a vendor's lien, such transaction did not create the relation of principal and surety between complainant and the improvement company, in so far as the lien was effective against the land so conveyed; complainant having paid no part of the lien debt, and not being personally liable therefor.

4. COVENANTS—WARRANTY—SCOPE.

A covenant of warranty cannot be treated as a covenant against incumbrances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 43, 46.]

5. SAME—BREACH—REMEDIES.

On breach of a covenant of warranty, the covenantee has an adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 170.]

6. SAME—POSSESSION—EVICTION.

To constitute a breach of a covenant of warranty, the covenantee must have been prevented from taking possession of the premises, or there must have been an eviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 139, 157.]

Appeal from Circuit Court, Rockingham County.

Action by Thompson Lennig against the Harrisonburg Land & Improvement Company and another. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Charles Griffin Herring, for appellant. Conrad & Conrad, for appellees.

CARDWELL, J. The averments of the bill filed in this case by appellant against the Harrisonburg Land & Improvement Company and J. M. Snell, appellees, are that the appellant is the owner and in the possession of 17 certain lots of land, situate in the corporate limits of the town of Harrisonburg, in the county of Rockingham, giving the number of each lot, as shown on a recorded plat of the addition known as the Harrisonburg Land & Improvement Company's addition to the town of Harrisonburg; that appellant had purchased, paid for, and obtained deeds for said lots from the Harrisonburg Land & Improvement Company about 14 years theretofore, which deeds were made with the covenant of general warranty, and filed as exhibits with the bill; that there is a vendor's lien owing by and due from the said company for a large part of the unpaid purchase price (from $3,000 to $4,000) for the lands and lots now owned by said company, or at any time conveyed by the company to appellant and other purchasers; that said vendor's lien, represented by bonds, is now owned by said J. M. Snell, a stockholder in and director of the said company; that appellant's lots are very valuable, and could be sold at a good price, but for the cloud upon the title thereto occasioned by said unpaid vendor's lien; that appellant has been forced to hold his lots for 14 years, pay taxes thereon, lose the use of his money invested therein, and is now confronted with the equally ruinous alternative of continuing this condition of affairs indefinitely, with the interest on the vendor's lien debt continually increasing, or of sacrificing his property at the low prices it would bring with the said cloud upon the title; that the said Harrisonburg Land & Improvement Company still owns a large tract of valuable land and many valuable lots, with improvements thereon, and appellant is informed and avers that the lands still owned by the said company are in equity bound for, and will be first subjected and applied to, the payment of said vendor's lien; that the said real estate still owned by the said company is ample to pay off and discharge all the liens and incumbrances upon the said property now owned by the said company, if the same is applied thereto at once, but if the said company continues in the future, as in the past, to default in the payment of the interest upon the said vendor's lien debt, it will be only a question of time until the property of said company will cease to be adequate to pay off and discharge said vendor's lien debt, and appellant's lots will be taken for same and lost to him.

It is further averred that appellant has patiently waited 14 years for the said company to pay their debts and clear appellant's title, and that he has a right to resort to a court of equity to have said lien satisfied and the said cloud removed from his title; the prayer of the bill being that, upon the taking of all proper accounts, a sale of the lands still owned by the Harrisonburg Land & Improvement Company, or so much thereof as may be necessary to pay off and discharge said vendor's lien debt, be ordered, etc.

To the bill the defendants demurred upon several special grounds, stated in writing, in which demurrer the appellant joined; and

upon the hearing the circuit court sustained the demurrer and dismissed the bill.

The first ground of demurrer is a mere reiteration of the general demurrer, and of the remaining five it is only necessary for us to consider the second, viz.: "That the allegations of the bill are not sufficient upon which to base the relief sought."

"In order for a person successfully to invoke the interposition of equity to remove a cloud, he must not only establish the validity of his own title, but also the invalidity of his opponent's." 6 Am. & Eng. Enc. L. (2d Ed.) 156, and authorities cited in note; also Pomeroy's Eq. §§ 724, 725.

The authorities cited by appellant in support of the proposition that an unsatisfied mortgage will be decreed a cloud and relief granted do not sustain the view appellant contends for, but are in accord with the rule, established by the weight of authority, that the bill, to be maintained, must be against "one who asserts an adverse title under a mortgage, the validity of which is denied by the plaintiff." Clouston v. Shearer, 99 Mass. 209; Carter v. Taylor, 3 Head (Tenn.) 30.

It will be observed that the vendor's lien (by decree) is admitted by the bill, and it is not pretended that it is not a valid, subsisting, and enforceable lien. Were this valid, enforceable lien, with the knowledge of appellant and subject to which he took title to his lots, such a cloud upon title as equity would relieve, his bill does not aver such imminent danger of irreparable injury as is necessary to authorize a court of equity to grant the relief asked.

"The danger must be more than speculative." Sanders v. Village of Yonkers, 63 N. Y. 489; Torrent v. Booming Co., 22 Mich. 354.

The bill nowhere avers (as alleged in the petition for this appeal) that "the complainant is in imminent danger of losing his entire property." On the contrary, it is averred that the Harrisonburg Land & Improvement Company still owns a large tract of valuable lots, with improvements thereon, which lands still owned by the company are in equity bound for and will be first subjected and applied to the payment of the vendor's lien; and in the following paragraph it is admitted that the real estate owned by the company "Is ample to pay off and discharge all the liens and incumbrances upon the company's property if applied thereto at once." The necessity for applying the company's property at once, in order to shield appellant's lots from liability to the vendor's lien, is not made to appear by any facts stated in the bill; nor is it made to appear that the owner of this vendor's lien (appellee Snell) has been guilty of mala fides in not heretofore enforcing it. Non constat, but that by litigation or other sufficient cause he has been unable to do so.

It is not pretended that appellant, at any time before the filing of his bill, even requested the owner of this vendor's lien to enforce it, or the lien debtor to pay it, for the protection of appellant, and that the request was denied. Whether, if this had been averred, it would have been sufficient on demurrer to entitle him to maintain his bill in a court of equity, we are not to be understood as expressing any opinion. The averred necessity for the vendor's lien being enforced at once is but the expression of an opinion not founded upon facts stated, and is purely speculative. There is no averment that the land company is not reducing its debt, nor that it is defaulting in interest, nor that it in a short time will amount to more than the value of land still owned by the company, or first liable before appellant's land could be subjected; the nearest approach to such an averment being that, if the company "continues in the future as in the past" to default in the payment of the interest on the vendor's lien debt, "it will be only a question of time until the property will cease to be adequate to pay off the lien debt." Just how much time would be required to bring about this apprehended injury to appellant is left entirely to conjecture. Such indefinite averments are not sufficient to be construed into an immediate or reasonable apprehension of loss, justifying the intervention of a court of equity.

Much of the argument for appellant is directed to the right of a surety; but it is clear, we think, that the argument and the authorities cited to support it are wholly inapplicable—first, because the averments of the bill do not present that question; and, second, in no view of the facts averred could appellant be regarded as occupying the relation of surety for the payment of the vendor's lien in question. He has paid no part of it and is in no way liable personally for its payment, but is only a purchaser, with notice of the vendor's lien, and took his title subject to it, and without covenant against it. His case, therefore, falls under the control of that class of cases to which belong Marbury v. Thornton, 82 Va. 704, 1 S. E. 909, and Beale v. Selveley, 8 Leigh, 658.

In the first named of these cases it is held that a covenant of warranty can never be treated as a covenant against mere incumbrances. If there has been breach of the warranty, the party injured has adequate remedy at law; but to constitute such breach there must be an eviction, or the plaintiff prevented from taking possession of the premises. Appellant's bill admits that he is in possession, and has not been evicted or disturbed in his possession. Therefore, in order to afford him the relief he seeks, a court of equity would have to treat the covenant of "general warranty" in his deed as a covenant against a mere incumbrance, which would be to make a new contract for him.

After stating the rule as to executory contracts, Prof. Lile, in his notes to Merwin's Equity, § 740, says: "The rule, however, is wholly different in the case of an executed contract; that is, a conveyance of real es-

tate. Here, as a general rule, the vendee who has taken a conveyance must rely upon the covenants of title in the deed, and, if there be none, he purchases at his peril, in the absence of bad faith on the part of the vendor."

And in Merwin's Equity, § 429, it is said: "When the parties have made a definite contract, equity will not relieve against its consequences, because it has become less profitable or more onerous on account of some contingency against which the contract did not provide. A court of equity cannot make a new contract for the parties.

That appellant is not, upon the averments of his bill, entitled to the intervention of a court of equity, is very clearly and conclusively shown by the well-considered opinion by Tucker, J., in Beale v. Selveley, supra, in which he says: "He [vendor] may, therefore, be willing to give a general warranty, which cannot be enforced until eviction, but not a covenant for good title, which he may not have. Where he enters into a general warranty, without other covenants, he makes himself only responsible for eviction, and secures to himself the advantage of every doubt which hung over his title being removed by lapse of time. In these cases, therefore, the vendee is confined to the covenant of general warranty. He has chosen, or at least agreed upon, his remedy, and to that remedy he must be tied down. However bad his title, he cannot sue upon his warranty unless he be evicted; and if he cannot do so at law, upon what principle can equity make the vendor liable beyond the terms of his contract? How can equity make him responsible farther? * * * It cannot do so without making a new contract for the parties or interpolating a new and substantive principle into that already made. * * * I am aware of no case in which the rights of the party have been extended in equity beyond his covenants. * * * But after a deed has been made and accepted, though our courts have given relief in anticipation of an eviction which is impending, accompanied by the danger of insolvency, they have never gone one jot beyond the covenants, except where the fraud of the vendor gives rise to a distinct cause of action independent of the covenants."

Conceding, as counsel for appellant contends, that the object of the suit in that case was to avoid paying the grantor what grantee had contracted to pay, and that the opinion says: "If plaintiff had averred that defendant was insolvent, or in failing circumstances, he would have had the right to maintain his bill"—this does not help appellant's case, since there are no such averments in his bill. Instead of alleging the insolvency of the vendor's lien debtor, the averment is made, as already stated, "that the real estate owned by the company is ample to pay off and discharge all the liens and incumbrances upon the company's property," etc. Nothing whatever is said as to whether or not the company has other property than that covered by the vendor's lien held by appellee Snell, or that it owes other debts.

As to the company being "in failing circumstances," beyond the vague and indefinite averment, already adverted to, that if the company "continued in the future as in the past to default in the payment of the interest upon the said vendor's lien debt it will be only a question of time until the property of said company will cease to be adequate to pay off and discharge said vendor's lien," etc., the bill is silent.

We are of opinion that the decree appealed from is without error, and therefore it is affirmed.

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(107 Va. 548)

## SMITH v. LURTY et al.

## LURTY v. SMITH et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. ADMINISTRATORS—WITH WILL ANNEXED—APPOINTMENT—WIDOW'S RIGHTS.

Though, under the express terms of Code 1904, §§ 2637, 2639, on an executorship being declined, testator's widow had the preferable right to qualify as administrator with the will annexed, if she was a suitable person, it was proper to refuse to appoint her, where she was very hostile to and not upon speaking terms with the principal devisee and legatee, was litigating with the curator of the estate, and was asserting title to property which testator attempted to dispose of by his will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 108–111.]

2. SAME—NOMINEE OF DISTRIBUTEE.

Code 1904, § 2639, providing that a distributee may waive his right to qualify as administrator in favor of any other person to be designated by himself, does not entitle a distributee whose right to qualify has been denied to designate some other person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 57–59, 111.]

3. SAME—WHO ARE "DISTRIBUTEES."

Code 1904, § 2637, provides that, where an executorship is refused, administration may be granted with the will annexed to the person who would have been entitled to administration had there been no will; and section 2639 provides that where there is no will administration shall be granted to the distributees, and that any of them may waive their right to qualify in favor of any other person to be designated by them. *Held*, that "distributees," within section 2639, are those entitled under the statute of distribution to intestate personalty, and a devisee and legatee, not being a distributee, on the executorship being refused, has no preferable right to be appointed administrator, nor to designate another to be so appointed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 57–59.

For other definitions, see Words and Phrases, vol. 3, pp. 2133–2134; vol. 8, p. 7639.]

4. SAME.

Where an executor declined to act, testator's brothers and sister did not waive their right to qualify as administrator or to designate another by recognizing the prior right of testator's widow to qualify if the court thought she

was a suitable person, and, on her being denied the appointment, it was proper to appoint one designated by the brothers and sister.

Error to Circuit Court, Rockingham County.

Proceedings by Susie Smith against Annie S. Lurty and others, in which motions were made for grant of administration of Warren S. Lurty's estate. From orders in the respective proceedings, Susie Smith and Annie S. Lurty bring error. Affirmed.

E. B. Crawford and D. O. Dechert, for plaintiff in error Smith. Conrad & Conrad and A. B. Guigon, for plaintiff in error Lurty. Sipe & Harris, for defendants in error R. D. Lurty and others.

BUCHANAN, J. Warren S. Lurty died, leaving a paper, purporting to be his last will and testament, by which he disposed of a part of his real and personal estate. Pending litigation as to whether or not that paper was his last will, a curator was agreed upon by the parties in interest and appointed by the court. The result of the litigation was the establishment of the paper as the decedent's last will. The executor named therein qualified, but before acting was permitted to resign. Thereupon the widow moved the court to grant her letters of administration with the will annexed, and, in case it denied that motion, then, in the alternative, that letters of administration be granted to her nominee, whom she was ready to announce to the court.

That motion was opposed by Susie Smith, a devisee and legatee under the will, who moved the court to grant administration to H. W. Bertram, who was in charge of the estate as curator. The brothers and sister of the testator (he having died leaving no descendants), without opposing the claim of the widow to a prior or preferred right to have administration granted herself, moved the court to grant letters of administration to the husband of the testator's sister, in case the application of the widow for grant of administration to herself should be denied.

Upon the hearing of these motions, which were heard together, the court overruled the motions of the widow and Susie Smith, respectively, sustained the motion of the brothers and sister of the testator, and appointed the husband of the latter administrator with the will annexed. To that order the widow and Miss Smith each obtained a writ of error and supersedeas.

By section 2637 of the Code of 1904 it is provided that "if there be no executor appointed by the will, or if all the executors therein named refuse the executorship, or fail when requested to give such bond, which shall amount to such refusal, the said court or clerk may grant administration, with the will annexed, to the person who would have been entitled to administration if there had been no will, upon his taking such oath and giving such bond."

By section 2639 it is provided that, where a person dies intestate, "administration shall be granted to the distributees who apply therefor, preferring first the husband or wife, and then such of the others entitled to distribution as the court or clerk shall see fit. But any of the said distributees may at any time waive the right to qualify in favor of any other person to be designated by them. If no distributees apply for administration within thirty days from the death of the intestate, the court or clerk may grant administration to one or more of the creditors, or to any other person."

Conceding that the widow, under these sections of the Code, if she was a suitable person, had the preferable right to qualify as administrator of her husband with the will annexed, the court did not err in refusing to allow her to do so upon the facts disclosed by the record. She was very hostile to and not upon speaking terms with Miss Smith, the principal devisee and legatee under the will. She was litigating with the curator, both as plaintiff and defendant, and was asserting title to property which her husband had attempted to dispose of by his will. Under these circumstances the circuit court properly declined to appoint her as administrator. See Bridgman v. Bridgman, 30 W. Va. 212, 8 S. E. 580; 18 Cyc. 93, and cases cited.

Neither do we think the circuit court erred in refusing to appoint as administrator the person she proposed to name in the event the court refused to appoint her. The statute provides that any distributee may waive his right to qualify in favor of any other person to be designated by such distributee; but we do not understand it to mean that where a distributee has insisted upon his right to qualify, and the court has held, upon the facts disclosed in the proceeding, that he has no such right, he can then designate some other person to be appointed to a position which he himself has been adjudged not entitled to.

Neither do we think the court erred in refusing to sustain the motion of Miss Smith to appoint Bertram, the curator, as administrator. Section 2637 of the Code of 1904 provides that, where the executor refuses the executorship, the court or clerk may grant administration with the will annexed to the person who would have been entitled to administration, if there had been no will; and section 2639 provides, where there is no will, that administration shall be granted to the distributees, and that any of the distributees may at any time waive their right to qualify in favor of any other person to be designated by them. Miss Smith, while a devisee and legatee under the will, was not a distributee; for the word "distributees," as used in the sections quoted, clearly means those who would be entitled under the statute of distribution to the personal estate of the decedent if he had died intestate. Not being a

distributee, she had no preferable claim to be appointed administrator, nor preferable right to designate another to be so appointed under the statute.

The brothers and sister of the decedent, by their recognition of the prior right of the widow to qualify if the court thought she was a suitable person under the facts of the case, neither waived their own right, respectively, to qualify, nor their right to designate another person in the event the court declined to grant letters of administration to the widow. They were interested in the decedent's estate, were clearly within the meaning of the statute, and the court did not err in granting letters of administration to the person designated by them, under the facts of the case.

Its order must be affirmed.

Affirmed.

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(107 Va. 466)

## LURTY'S CURATOR v. LURTY.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. PRINCIPAL AND AGENT—CREATION OF RELATION—HUSBAND AND WIFE.

Where one sold property jointly owned by himself and wife, taking a note to himself for the purchase price, and before collecting it rendered an account in writing to her, showing her share due out of the note, the relation of principal and agent is established between them respecting the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 26–29.]

2. CONTRACTS — TO PAY MONEY — IMPLIED PROMISE.

Where, before collecting a note payable to himself and given for the price of property owned jointly by himself and wife, one rendered an account in writing to his wife over his signature, showing her share of the sale to be a fixed sum due her out of the note, and reciting the balance to belong to himself, there was an acknowledgment that when the note was collected he would owe her the sum indicated, from which a promise to pay is implied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 121, 122.]

3. LIMITATION OF ACTIONS — WRITTEN CONTRACTS.

There was a written contract, signed by the party to be charged thereby, the limitation on which is fixed at five years by the express terms of Code 1904, § 2920, where, before collecting a note payable to himself, and given for the price of property owned jointly by himself and wife, one rendered an account in writing to his wife over his signature, showing her share of the sale to be a fixed sum due her out of the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 118–123.]

4. SAME.

The three-year statute of limitations is inapplicable to an obligation evidenced by a writing under seal.

5. SAME.

Limitations on obligations evidenced by writings are not regulated by the fact that the antecedent indebtedness, upon which the writings are founded, were mere assumpsits, since an inferior liability is absorbed by one of higher legal degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 112.]

6. CONTRACTS—TO PAY MONEY—ACTION—EVIDENCE—ADMISSIBILITY.

In an action on decedent's implied promise to pay money upon collecting a note, the maker of the note could testify that he had paid it and fix the date of payment.

7. SAME—BURDEN OF PROOF.

In an action on decedent's implied promise to pay money upon collecting a note, the burden of proof was on plaintiff to establish such collection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1754–1780.]

8. SAME.

If plaintiff accepted and collected decedent's check, bearing upon its face a statement that it was "in full of all demands," it will be presumed that the check was received in discharge of all pre-existing liabilities, and the burden of overcoming the presumption rests upon plaintiff, if she would recover on a pre-existing debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1754–1780.]

9. WITNESSES—HUSBAND AND WIFE—PRIVILEGED COMMUNICATIONS.

Both under the common law and Code Va. 1904, § 3346a, subsec. 3, prohibiting husband or wife from disclosing communications made during marriage without the consent of the other, even after the relation has ceased, letters by a deeply wronged wife to her erring husband touching the cause of their estrangement were not admissible against her in her action on his death to recover on his implied promise to pay her money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 743.]

10. SAME.

A husband's written acknowledgment to his wife that, on the collection of a note payable to himself and received on the sale of their joint property, he would owe her a fixed sum, is not inadmissible as a privileged communication, under the common law or under Code Va. 1904, § 3346a, subsec. 3, since the rule of privilege does not apply to communications between husband and wife respecting a business matter in which he acts as her agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 734–743.]

Error to Circuit Court, Rockingham County.

Action by Annie S. Lurty against W. S. Lurty's curator. From a judgment for plaintiff, defendant brings error. Affirmed.

H. W. Bertram and D. O. Dechert, for plaintiff in error. Conrad & Conrad, for defendant in error.

WHITTLE, J. The judgment under review was recovered on motion by the defendant in error, Annie S. Lurty, against the curator of the estate of her deceased husband, Warren S. Lurty.

Five hundred and five dollars and eighty-nine cents of the recovery is the plaintiff's share of the price of cattle, the joint property of the husband and wife, sold by the former to Rodeffer, who made his note to the husband for the amount of the sale. This note was afterwards collected by the husband,

who before collection rendered an account in writing to the plaintiff, over his signature, showing that her share of the sale amounted to $505.89, "which is due you out of Rodeffer note bearing 6 per cent. interest from Oct. 18, 1901, at 120 days; bal. of the note when collected is W. S. Lurty's."

We are of opinion that this transaction establishes the relation of principal and agent between the plaintiff and her husband with respect to the sale of the cattle, and the language employed by him was an acknowledgment that when the note was collected he would be due his principal the sum indicated, from which the law implies a promise to pay.

The case is not distinguishable in principle from the class of which Cunningham v. Herndon, 2 Call, 530, Murdock v. Herndon, 4 Hen. & M. 200, Newby v. Forsyth, 3 Grat. 308, and Davis v. Mead, 13 Grat. 118, are types.

The facts in Davis v. Mead, supra, are as follows: "A paper contains a statement of account of rents collected through a number of years by an agent for his principal, and at the foot of the account there is a written statement setting out the gross amount of the rents received, certain deductions for commissions and expenses, leaving the net sum of $1,137.35; and it concludes: 'In the foregoing statement all errors to be corrected. As witness my hand and seal.' And it is signed and sealed by the agent." In that case, Judge Lee observes: "To constitute a good and valid obligation, the law does not require any particular set form of words to be employed. Any words which sufficiently declare the intention of the party and denote his being bound, or which expressly or impliedly acknowledge a debt as due from him to another, will constitute a good bond. * * * It was therefore an acknowledgment, under his seal, that so much was still due, * * * to pay which a promise is raised by implication of law."

It is clear, under the authorities, that the paper in question constitutes "a contract by writing signed by the party to be charged thereby," the limitation on which is fixed at five years by Code Va. 1904, § 2920. The plea setting up the three-year limitation was, therefore, properly overruled.

A fortiori, the three-year limitation was inapplicable to the item of $102, evidenced by writing under seal, which constituted another part of the judgment. We fail to appreciate the force of the argument that the antecedent indebtedness, upon which the writings in question are founded, were mere assumpsits, which ought to regulate the period of limitation. The contention loses sight of the doctrine of merger, whereby, by operation of law, an inferior liability is absorbed by one of higher legal degree.

The exceptions to the admission of the testimony of Rodeffer and the instruction given by the trial court as to the effect of the check drawn by the husband payable to the wife, purporting to be "in full of all demands," are both without merit. Rodeffer's evidence was admissible to show that he had paid the note and to fix the date of payment. The implied promise of Lurty to pay was conditioned upon his collecting the note, and the burden of proof rested upon the plaintiff to establish that fact.

The prayer complained of tells the jury "that, if they believe from the evidence that the plaintiff * * * accepted and collected the check * * * bearing upon its face the statement that the same was 'in full of all demands,' such acceptance and collection * * * raise a prima facie presumption that the same was in full payment and discharge of all previously existing liabilities, * * * and the burden of overcoming such presumption by direct or circumstantial evidence * * * rests upon the plaintiff, and, unless such presumption is overcome by a preponderance of the evidence, they must find for the defendant." This instruction propounds a familiar and correct proposition of law, and was relevant to the issues and evidence in the case.

The remaining assignment of error demanding notice arises in connection with the court's action in excluding certain letters, written by the wife to the husband, which it is alleged have material bearing upon the matters in controversy.

Admittedly, the exclusion of these letters would be proper according to the common-law doctrine; but it is said their admissibility follows as a necessary consequence to the statutory right of husband and wife to contract with and implead one another. But this argument is more plausible than sound. It would have been equally applicable to the common-law rule of exclusion of witnesses in civil cases on the ground of interest or of being parties—a rule which obtained in this state until abolished by statute.

Prof. Minor, in discussing the well-settled rule of the common law, rendering husband and wife incompetent, observes that it is "a rule of exclusion founded partly on the identity of their legal rights and interests and partly in principles of public policy, which lie at the basis of civil society; for it is essential to the happiness of social life that the confidence which ought to exist between husband and wife should be sacredly cherished in its most unlimited extent, not only during the continuance of the coverture, but, as to facts learned from the consort, even after its termination also." 4 Min. Inst. pt. 1, 690.

In the Revision of 1887, the revisers strongly recommended the entire repeal of the common-law rule in all civil cases and a modification of it in criminal cases; but the Code committee opposed the innovation and struck out the suggested changes. After the Code had been adopted, a bill embodying the views of the revisers was again introduced, but met

with the same fate. Subsequently two of the revisers, Judges Burks and Riely, pressed the matter with great force in addresses delivered before the Virginia State Bar Association, but without avail. See note by the editor, Judge Burks, to Pillow v. S. W. Va. Imp. Co., 1 Va. Law Reg. 673; also, 3 Va. Law Reg. 410.

The statute law on this subject is found in Code Va. 1904, § 3346a. Though the common-law rule has been greatly enlarged, subsection 3 distinctly prohibits husband or wife, without the consent of the other, being "examined in any case as to any communication made by the one to the other while married, nor shall either of them be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted: Provided, that this exclusion shall not apply to a criminal proceeding for a criminal offense committed by one against the other, but as to such proceeding the existing rules of evidence shall remain unchanged."

We are disposed to think that the excluded letters fall within the intendment of the statute; but, however that may be, the common-law inhibition must remain intact until removed by legislative, and not judicial, repeal.

The contention that the letters are admissible by authority of Bailey v. Bailey, 21 Grat. 43, Carr v. Carr, 22 Grat. 168, and Latham v. Latham, 30 Grat. 325, finds ready answer in the fact that these were suits for divorce, of which class of cases Prof. Minor remarks: "Neither the common-law ruling nor the statutory enactment [Code Va. 1904, § 2260] excludes proof of the admissions and statements of the parties. Their only effect is to prohibit a sentence from being founded wholly upon such admissions." 1 Min. Inst. (3d. Ed.) 297.

These letters were written with becoming moderation, dignity, and delicacy by a deeply wronged wife to an erring husband touching the unhappy cause of estrangement between them. They are, therefore, clearly within the privileged class, and ought not, in our opinion, to be subjected to public scrutiny.

The point is not well taken that this ruling would likewise exclude the communication from the husband to the wife with relation to the cattle transaction. If in any proper sense such statement of liability could be regarded as privileged, it comes within the exception "that the rule of privilege does not apply to communications between husband and wife with regard to a business matter in which he is acting as her agent." Schmied v. Frank, 86 Ind. 250; State v. Burlingame, 146 Mo. 207, 48 S. W. 72; Commonwealth v. Sapp, 29 Am. St. Rep. 420, note.

There is ample evidence in the record to sustain the verdict of the jury, and upon the whole case we are of opinion that the judgment ought to be affirmed.

(107 Va. 562)

## TIDEWATER RY. CO. v. SHARTZER.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. EMINENT DOMAIN — CONSTITUTIONAL PROVISIONS—DAMAGES TO PROPERTY NOT TAKEN.

The provision of Const. 1902, art. 4. § 58, prohibiting the General Assembly from enacting any law whereby private property shall be taken or damaged for public uses without just compensation, was not a grant of power, but a limitation; and the Legislature is clothed with full legislative authority, except as to the restriction. Hence a statute declaring that a corporation invoking the exercise of the power of eminent domain must make just compensation, not only for property taken, but for adjacent or other property of the owner, and also for damages to property of any other person, is within the legitimate scope of the legislative power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 239–244.]

2. SAME — COMPENSATION FOR PROPERTY NOT TAKEN—SMOKE, ETC.

In view of the terms of the prior Constitution and statutes, Const. 1902, art. 4, § 52 [Va. Code 1904, p. ccxii], inserting "or damaged" in the provision prohibiting the General Assembly from authorizing property to be taken without just compensation, and Code 1904, § 1005f, providing for assessing compensation for damages to adjacent property not taken, was intended to enlarge the rights to compensation, and embraces and gives a remedy for impairment of property by noise, smoke, dust, and cinders arising from the lawful operation of a railroad, and was not intended merely to cover such damages as would have previously formed the basis of an action at common law or under the general statutes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 278–281.]

3. SAME—CONSTRUCTION OF CONSTITUTIONAL PROVISIONS — PROBABILITY OF NUMEROUS CLAIMS.

The fact that a certain interpretation of the Constitution relating to the power of the Legislature as to eminent domain proceedings might lead to an indefinite number of claims for damages to property not taken is not a ground for giving it a different construction.

Error to Circuit Court, Roanoke County.

Condemnation proceedings by the Tidewater Railway Company against Julia A. Shartzer. From an order confirming an amended report of the commissioners appointed to ascertain the damages to certain property not taken, the railway company brings error. Affirmed.

Robertson, Hall & Woods and F. W. Christian, for plaintiff in error. A. A. Phlegar and McClung & McClung, for defendant in error.

KEITH, P. Upon the motion of the Tidewater Railway Company the circuit court of the county of Roanoke appointed commissioners to ascertain what would be a just compensation for "such part of the land, of the freehold whereof Jeremiah Shartzer is tenant, and for such other property as is proposed to be taken by the Tidewater Railway Company, and to assess the damages, if any, resulting to the adjacent or other property of said tenant or owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, re-

spectively, from the construction and operation of the company's works."

So much of their report as we are concerned with is as follows: "To the lands of Julia A. Shartzer, no part of whose land is taken: Damages to dwelling, land, and business conducted thereon, for annoyance from smoke, noise, dust, cinders, and danger from fire resulting from the construction and operation of the road in a lawful manner, $600. We did not allow anything to Julia A. Shartzer for damages for interference with means of access to her property, as we do not think she is damaged in this respect."

The Tidewater Railway Company excepted to this report as to the allowance made to Julia A. Shartzer, and thereupon, "the court being of opinion to sustain the exceptions and recommit the said report on account of the form thereof, and because the same included damages to the business of the said Julia A. Shartzer, by consent of parties it is agreed that the said report be amended and treated as if it read as to her property as follows: 'To the lands of Julia A. Shartzer, no part of which are taken, we fix the damages at the sum of $600, and in ascertaining said damages we took into consideration the proximity thereof to the said railroad, and find that the difference in the market value of said property before the construction and operation of said railroad and afterwards will be the sum of $600, and that said depreciation in said market value and consequential damages to said property will be caused by smoke, noise, dust, and cinders arising from the proper, ordinary, and lawful operation of said road.'"

To the report as amended by this decree the applicant again excepted, and on consideration of the said exception it was overruled by the court, and the report, as amended, confirmed. From that order a writ of error was allowed by one of the judges of this court.

The specific constitutional provision upon the subject of taking property for public uses, as it existed prior to 1902, is found in Const. 1869, art. 5, § 14, which reads as follows: "The General Assembly shall not pass * * * any law whereby private property shall be taken for public uses without just compensation."

It was uniformly held, under that provision and the statute which carried it into execution, that there could be no recovery for an injury or damage to property no part of which was actually taken. This construction resulted in much hardship, and was a denial of justice in cases where the use, the enjoyment, and the value of property were greatly impaired under conditions which were held not to amount to a taking within the meaning of the law as it then existed.

Influenced by these considerations, the convention which framed the Constitution of 1902 amended section 14, art. 5, which now appears as section 58, art. 4, of the Constitution of 1902, by which is prescribed certain prohibitions on the powers of the General Assembly, and among them that "it shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation"; and the General Assembly, when it came to legislate upon the subject and give effect to this constitutional provision in section 1105f, cl. 5, Code 1904, provided, where a corporation authorized to have land condemned for its uses has complied with the requirements of the preceding section, for the "appointment of commissioners to ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for its uses, and to award the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works. * * *"

With respect to the statute we shall first observe that, if the Constitution of the state were to be construed as a grant of power to the Legislature, the statute just quoted could be maintained as being a reasonable and proper exercise by the Legislature of the delegated power. But such is not the rule of construction, as applied to the Constitution of the state. The Legislature is clothed with full legislative authority, except so far as it is restrained by some provision of the Constitution, either expressed or necessarily to be implied from the terms of that instrument. When, therefore, the Constitution says that the Legislature shall not enact any law whereby private property shall be taken or damaged for public purposes without just compensation, a statute which declares that a corporation invoking the exercise of the power of eminent domain must make just compensation, not only for the land or other property proposed to be condemned for its uses and damages, if any, resulting to the adjacent or other property of the owner, but also for damages to the property of any other person, is within the legitimate scope of the legislative power.

Coming, then, to a consideration of the statute, it cannot be doubted that by the change of the law in the Constitution and statute it was plainly intended to enlarge the right to compensation.

"Of this," says Lewis on Eminent Domain, at section 232, speaking of similar amendments, "there can be no question. Any other construction would render the words nugatory. They are an extension of the common provision for the protection of private property. The words 'injured or destroyed' were not used in vain and without meaning. It was intended that they should have effect, and, unless they operate to impose a liability not previously existing, they are without operation. The Supreme Court of the United States, referring to the Constitution of Illinois, says: 'The use of the word "damaged,"

in the clause providing for compensation to the owners of private property appropriated to public use, could have been used with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property sought to be appropriated to public use than was guaranteed by the former Constitution.'" 1 Lewis on Em. Dom. (2d Ed.) § 232, and authorities there cited.

The same author says: "The words in question should be liberally construed. The provisions of the Constitution requiring compensation to be made for property taken, injured, or damaged for public use are intended for the protection of private rights. They are remedial in character. They should, therefore, be liberally construed in favor of the individual whose property is affected, and the authorities so hold. The language of the Constitution is to be construed liberally, so as to carry out, and not defeat, the purpose for which it was adopted." Section 232a.

It will be observed that in the discussion of this subject text-writers and adjudicated cases use the words "damaged," "injured," and "injuriously affected" as being equivalents and meaning in substance the same thing.

Considering the terms of the Constitution and of the statute as they stood prior to 1902, and recognizing that the changes then introduced were designed to enlarge the right to compensation and extend it to cases where, under the old law, compensation was denied, it would seem that the language employed in the existing Constitution and Code are not difficult of interpretation, and should be held to embrace and give a remedy for every "physical injury to property, whether by noise, smoke, gases, vibrations, or otherwise." Lewis on Em. Dom. § 236.

It is contended on the part of plaintiff in error that "the proper construction of the clause under consideration is to take away from public service corporations the immunity that they have heretofore enjoyed under legislative sanction, and place them on the same footing with individuals and private corporations. The words 'or damaged' mean actionable damages; that is, such damages as would form the basis of an action at common law or under some general statute, such as may be caused by the physical invasion of property or an interference with some right, public or private, appurtenant to the property."

To this proposition we cannot give our unqualified assent. A person, natural or artificial, who is asking nothing with respect to his property, is limited in the use of his own property only by the maxim that he must enjoy it in such a manner as not to injure that of another; or, less literally, but more accurately, perhaps, "so use your own property as not to injure the rights of another." Broom's Leg. Max. (7th Ed.) p. 364.

But in the case before us the Tidewater Railway Company was not the owner of the property. It had been unable to acquire what it needed because of its "inability to agree on terms of purchase with those entitled" to the land it desired, and therefore had invoked the exercise of the power of eminent domain; and the state has seen fit to prescribe upon what terms that power shall be exercised.

It appears that the language of our Constitution was taken from that of Illinois, which was adopted in 1870, and had been the subject of judicial construction by the courts of that state and of the United States.

In Rigney v. City of Chicago, 102 Ill. 64, the city had constructed a viaduct or bridge on a public street, near its intersection with another street, thereby cutting off access to the first-named street from the plaintiff's house and lot over and along the street intersected, except by means of stairs, whereby the plaintiff's premises fronting on the latter street and near the obstruction were permanently damaged and depreciated in value, by reason of being deprived of such access. It was held that the city was liable in damages for the injury, and in the discussion of the case rights as they existed under the Constitution of 1848 and those rights as extended by the Constitution of 1870 are compared; the court saying: "The restriction of the remedy of the owners of private property to cases of actual physical injury to the property was under the Constitution of 1848, which simply provided that private property should not 'be taken or applied to public use' without just compensation, etc. The Constitution of 1870, however, provides that 'private property shall not be taken or damaged for public use without just compensation,' thus affording redress in cases not provided for by the Constitution of 1848, and embracing every case where there is a direct physical obstruction or injury to the right of user or enjoyment of private property, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provision, give a right of action."

In Chicago & W. I. R. Co. v. Ayres, 106 Ill. 511, the court observes: "It is needless to say our decisions have not been harmonious on this question, but in the case of Rigney v. Chicago, 102 Ill. 64, there was a full review of the decisions of our courts, as well as the courts of Great Britain, under a statute containing a provision similar to the provision in our Constitution. The conclusion there reached was that under this constitutional provision a recovery may be had in all cases where private property has sustained a substantial damage by the making and using of an improvement that is public in its character; that it does not require that

the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question."

The Supreme Court of the United States, in Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, referring to the Illinois cases, says: "We concur in that interpretation. The use of the word 'damaged' in the clause providing for compensation to owners of private property appropriated to public use, could have been with no other intention than that expressed by the state court. Such a change in the organic law of the state was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former Constitution."

In Baker v. Boston Elevated Ry. Co., 183 Mass. 178, 66 N. E. 711, it is held that under St. 1894, p. 764, c. 548, § 8, providing for compensation for damage caused by the construction, maintenance, or operation of the lines of the Boston Elevated Railway Company, "noise which, operating with other causes, would constitute a private nuisance to abutting property, if it were not authorized, is special and peculiar damage, for the whole of which compensation can be recovered, without seeking to determine how much of the effect is due to that part of the noise which alone would not constitute a liability and how much to the excess." In the course of its opinion the court in that case says:

"In dealing with the question which is presented, we have a helpful analogy in the rules of common law. Noise is necessarily incident to the transaction of many kinds of business, and so long as it is not excessive it is not unlawful. But when it is so great as to become a nuisance to property in the vicinity it is actionable. It is judged by its effect, and not merely by its cause. In England, the difference in effect between damage which, as between private persons, would give a right of action for a nuisance, and that which is permissible in the use of land, is often treated as an important consideration, if not an absolute test, in deciding what shall be paid for by a corporation acting under public authority. * * * Disturbance which constitutes a private nuisance may be treated as causing damage different in kind, and not merely in degree, from that caused by disturbance which falls short of being a nuisance. Damage from noise, which is unlawful by reason of its excess, may well be considered unlike the detriment which is so slight as to be legally permissible in the ordinary use of property.

"In the case at bar it is found that, but for the statutory authority, the noise 'would constitute a private nuisance of a grave character to the petitioner's said estate.' At common law, in such a case, the rights of the owner of the property affected, and his relations to the cause of the disturbance, are treated as very different from those of the general public, who are also affected by it, and he is entitled to compensation in damages. * * * We are of opinion that noise, such as would constitute a private nuisance to abutting property if it were not authorized, should be treated as causing special and peculiar damage under this statute, which entitles the landowner to compensation."

In Swift & Co. v. Newport News, 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N. S.) 404, this court said: "Where private property has been simply damaged by a public improvement, but no part thereof has been taken, the measure of damages is the diminution in the value of the property by reason of the improvement—difference between the fair market value of the property immediately before and after the construction of the public improvement."

But, as was said by the Supreme Court of California, in Eachus v. Los Angeles Consol. El. R. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149, quoted with approval by Lewis on Em. Dom. § 236: "The Constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the Constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself, so much as an influence affecting its use for certain purposes. But whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation."

"A recovery has not been allowed," says Lewis on Eminent Domain (same section), "in any case, unless there was some physical injury to the plaintiff's property, or, by noise, smoke, gases, vibrations, or otherwise, an interference with the street in front of his property, or with some right appurtenant thereto, or which he was entitled to make use of in connection with his property. On the other hand, several cases have held that mere

depreciation, caused by the proximity of a public improvement, afforded no ground for redress."

No question is raised in this case as to the amount of damages allowed. The sole question is whether or not the depreciation in market value and consequential damages to property, caused by smoke, noise, dust, and cinders arising from the ordinary and lawful operation of a railroad, are the subject of compensation, under the provisions of our Constitution and laws.

"The operation of a railroad," says Lewis on Em. Dom. § 230, "the switching of cars to and fro, the use of coalbins, stockyards, etc., may be a serious annoyance to the occupiers of adjacent property, by reason of the noise, smoke, cinders, vibrations, smells, etc. The use and value of property may be greatly impaired thereby. The question whether such an impairment of property constitutes an independent cause of action is quite distinct from the question whether such annoyances may be taken into consideration when part of a tract is taken, or when a railroad is laid in a street or highway. In the latter case the annoyances referred to are mere incidents to what is in law the main grievance. But in the former case they constitute the principal and only cause of complaint. Whether the impairment caused by such annoyances constitutes a taking we have already considered. But, whether a taking or not, it would seem that such an impairment of property was a damage or injury within the purview of recent Constitutions. Where the use and operation of a railroad * * * depreciates the value of property by reason of the noise, smoke, vibration, etc., his property is damaged within the Constitution, and he is entitled to compensation."

Such being, as we think, the proper interpretation of the Constitution, the thought at once arises that it will give rise to an indefinite number of claims. We cannot state this proposition more satisfactorily than is done by the author from whom we have already quoted so extensively.

In section 227, Lewis on Em. Dom., it is said of this contention that it is without merit. "The Constitution guarantees compensation for property damaged or injured for public use. The right to compensation is coextensive with the damage or injury, both in space and in amount. This point was fully considered in the McCarthy Case (McCarthy v. Metropolitan Bd. of Wks., 8 C. P. 191), and in reference to it Justice Bramwell says: 'If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing place 10 miles away, if there was no other within 20 of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected, for present or other purposes or the man, whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were 1,000 claims of £1,000 each. If they are well founded, £1,000,000 of property is destroyed, and why is not that part of the cost of the improvement; and, if taken into account as such, why should not the loser of it receive it?'"

Lord Penzance, in the same case, observes: "It was asked in argument where are the claims to compensation to stop, if the rule is so applied? The answer, I think, is, that in each case the right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attaches to the premises in question by reason of their proximity to or relative position with the highways obstructed, and that this special value has been permanently destroyed or abridged by the obstruction. If this limit be thought to be a wide one, and the number of claimants under it likely to be numerous, that is only the misfortune of the undertaking; for the limit does not exceed the range of the injury. On the other hand, all claim for compensation will vanish as, receding from the highway, the case comes into question of lands of which (though their owners may have used the highway and found convenience in so doing) it cannot be predicated and proved that the value of the lands depends on the position relatively to the highway which they occupy." That case dealt with the obstruction of a highway, but its reasoning applies as well to the diminution in value occasioned by smoke, noise, dust, and cinders.

It is impossible to lay down any arbitrary rule upon the subject—certainly none based upon mere measurements. It will be for commissioners and juries, under the supervision of the courts, to determine upon the facts of each case whether or not there has been such damage to property as should be compensated. Of course, claims without merit will not be preferred; but it will be the duty of those intrusted with the administration of the law—commissioners, juries, and courts—to separate those deserving of compensation from those which are without merit.

For these reasons, we are of opinion that there is no error in the judgment of the circuit court, and it is affirmed.

Affirmed.

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(107 Va. 472)

## McCORMICK v. ELSEA et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. WILLS—CONTEST—ATTORNEY'S FEES — LIABILITY.

Except in rare instances the power of a court to require one party to contribute to the fees of the counsel of another party must be confined to cases where plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which inures to the common benefit; but the discretion should never be

exercised in a cause where the interests of the party whose funds are sought to be charged are antagonistic to the party for whose benefit the suit is prosecuted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 891–894.]

2. SAME.

Plaintiff, an attorney, was employed by the executor of a will to sue in the name of certain of the heirs, who claimed under the will as sole devisees and legatees, to establish the same; the remaining heirs being made defendants. The will was established, but left only land to the heirs plaintiff represented. This land had been sold by testatrix after executing the will, and no assets came into the executor's hands by virtue of his office; testatrix not having disposed of her personal estate by the will. *Held*, that plaintiff was not entitled, under his contract with the executor, to a fee out of the assets of the estate which passed to the defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 891–894.]

Appeal from Circuit Court, Clarke County.

Claim by Marshall McCormick against Robert E. Elsea and others, distributees of the estate of Letitia Elsea, deceased, for legal services in establishing the will of decedent. From a decree rejecting the claim, said McCormick appeals. Affirmed.

F. B. Whiting, for appellant. A. Moore, Jr., for appellees.

WHITTLE, J. This controversy arose out of a suit in equity brought by Mary E. Smallwood (one of nine distributees of the estate of her mother, Letitia Elsea, deceased) and her daughter, Lillian Smallwood, against the administrator and remaining distributees.

The objects of the suit will appear from the material allegations of the bill, which are as follows: That Albert Elsea died intestate in August, 1903, survived by his widow, Letitia Elsea, eight children, and a granddaughter, the child of a deceased son; that the decedent left a valuable estate, real and personal, and that W. W. Smallwood, the husband of Mary E. Smallwood, qualified as his administrator; that shortly after his death W. W. Smallwood, in his own right and as administrator, and the plaintiff, Mary E. Smallwood, brought suit against his widow and distributees for the purpose of administering his estate; that the widow died testate about one month after her husband, survived by the distributees above mentioned; that by her will the testatrix devised a tract of land and bequeathed her entire personal estate to the plaintiff, Mary E. Smallwood, for life, with remainder to her coplaintiff, Lillian Smallwood, in fee; that this real estate had been conveyed to Albert Elsea in trust for his wife, and that after the execution of the will the trustee sold the land, his wife uniting in the conveyance to the purchaser, and deposited the purchase money in bank to his individual credit; that this fund, together with the one-third interest of the wife in the personal estate of her late husband, constituted her estate and passed to the plaintiffs by the provisions of her will; that the administrator of Letitia Elsea had already asserted claim to the purchase price of the land as a debt against the estate of the husband; and that the will had been lost or mislaid, or abstracted, and could not be produced. The bill concludes with the prayer that the two cases be heard together and the will established; that, if necessary, a jury be impaneled for that purpose; and that the estate of the testatrix be administered in accordance with its terms.

The defendants resisted these contentions, and upon issues made the jury found that Letitia Elsea had executed a will, by the stipulations of which the land in question was devised to the plaintiffs, as alleged in the bill; but it appeared that no other portion of testatrix's estate was included in the will, and that the devise was revoked by the action of the testatrix in subsequently disposing of the land.

Thereupon the appellant preferred a demand against the distributees of Letitia Elsea for $861.54 (being 20 per cent. of the assets of the estate), for professional services in prosecuting the suit to set up the will.

The commissioner in chancery, to whom the matter was referred, allowed the claim; but this finding, upon exception, was overruled by the court. The court, however, awarded a fee to appellant of $150 out of the assets for services to W. W. Smallwood, as administrator of Letitia Elsea.

It moreover appears that the appellant had entered into a contract with the plaintiff Mary E. Smallwood, on behalf of herself and daughter, for a contingent fee of 25 per cent. of whatever might be realized by them under the will of Letitia Elsea. But the fee which is the subject of this controversy is founded upon an agreement with W. W. Smallwood, who had qualified as executor, and in that capacity had also retained the appellant to prosecute the suit to establish the will.

As we have observed, the contention of the plaintiffs that the will bestowed upon them the whole of the testatrix's estate was strenuously and successfully resisted by eight of the nine distributees, and no part of the estate passed by that instrument. Nevertheless, if the insistence of the appellant were to prevail, the anomalous result would follow that, as fruits of their victory, the appellees would be compelled to contribute one-fifth of their patrimony in compensation to counsel for services in a suit, the purpose of which was to deprive them of all interest in their mother's estate. The simple statement of the proposition vindicates the action of the court in rejecting the demand.

Except in rare instances, the power of a court to require one party to contribute to the fees of the counsel of another party must be confined to cases where the plaintiff, suing in behalf of himself and others of the

same class, discovers or creates a fund which inures to the common benefit of all; but the discretion vested in the court should never be exercised in a case where the interests of the party whose fund is sought to be charged are antagonistic to the party for whose benefit the suit is prosecuted.

The rule is thus stated in 4 Cyc. 1013, 1014: "While there is, strictly speaking, no lien on any fund which is within the custody or control of the court, the court may award attorney's fees out of the fund. Thus, counsel for a representative may receive remuneration out of the estate, especially if he procures property for the estate; but counsel for a beneficiary cannot claim payment out of the estate, though he may be paid out of his client's share, or from the portions of those beneficiaries who have joined in the proceedings, or have acquiesced in the attorney's exertions." See, also, Roller v. Paul, 106 Va. 214, 219, 55 S. E. 558.

In this case the appellant, who is admittedly a lawyer of high character, relies wholly on his contract with the executor of Letitia Elsea, apparently overlooking the effect on his contention of the material circumstances adverted to, namely, that no assets came into the hands of his client or under his control by virtue of his office of executor, and that the interests of his clients were opposed to those of the appellees, from whom he seeks compensation.

We are of opinion that the decree of the circuit court is plainly right, and it must be affirmed.

Affirmed

(107 Va. 435)

## GIVENS et al. v. CLEM.*

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. APPEAL — RIGHT OF REVIEW — PARTY AGGRIEVED.

In a suit to enforce a contract whereby an executor with power to sell real estate devised to testator's children contracted to convey the same to a purchaser, the widow, who has not renounced, has no interest, and cannot appeal from a decree of specific performance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 947-952.]

2. SAME.

In a suit against an executor and infant devisees to enforce a contract whereby the executor contracted to convey the lands devised, the infants, on the guardian ad litem failing to appeal from a judgment of specific performance, may do so by some one as their next friend; they being aggrieved by the decree, within Code 1904, § 3454, authorizing appeals by a person who thinks himself aggrieved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 947-952.]

3. TRUSTS — DISCRETIONARY POWER OF TRUSTEE—JUDICIAL INTERFERENCE.

Where a trust is discretionary, equity has no jurisdiction to interfere with its exercise so long as the trustee acts in good faith either in exercising or refusing to exercise the power vested in him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 231, 381.]

4. SPECIFIC PERFORMANCE—JUDICIAL DISCRETION.

Specific performance rests in the judicial discretion of the court, and it will grant or refuse relief according to the circumstances of each particular case, where the general rules do not furnish any exact measure of justice between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 17, 18.]

5. SAME.

Testator devised lands to his infant children, and authorized his executor during the minority of the youngest child to convey the premises, if in his judgment the interest of the children would be promoted thereby. The executor contracted to convey the premises to a purchaser. He did not act in bad faith, and in entering into the contract he thought the interests of the children would be promoted; but on discovering that he was mistaken he refused to perform his agreement. *Held*, that equity would not decree specific performance, but would leave the purchaser to his remedy at law against the executor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 17, 18.]

Appeal from Circuit Court, Augusta County.

Suit by one Clem against the executor, widow, and children of W. C. Givens, deceased. From a decree for complainant, defendants appeal. Reversed, and bill dismissed.

Bumgardner & Bumgardner, for appellants. Turner K. Hackman, for appellee.

BUCHANAN, J. The appellee instituted this suit against the executor, widow, and children of W. C. Givens, deceased, for the specific execution of an agreement for the sale and purchase of a parcel of land belonging to the estate of the decedent, entered into between the appellee as purchaser and the executor as vendor.

The decedent devised the said land to his five children, all of whom were infants, but authorized his executor to manage and control the same during the minority of his youngest child, and to that end directed that he should receive all the rents and profits arising therefrom and use the same in the maintenance and support of the children, and gave him the further authority to sell and convey the same at any time during that period, if in his judgment the interest of the children would be promoted thereby.

After entering into the executory agreement for the sale of the land, the executor refused to complete the sale by conveying the property to the purchaser. Thereupon the appellee instituted this suit.

The defense relied on by the children, who answered by guardian ad litem (no answer being filed by the executor), was that the executory agreement of sale should not be specifically instituted because it was prejudicial to their interests.

The circuit court directed one of its commissioners to make inquiry and report whether or not the complainant was entitled to a specific execution of the contract, and whether the confirmation of the sale by the court

* Rehearing denied.

would be advantageous or prejudicial to the interests of the infant defendants. The commissioner reported that the infant defendants would be prejudiced by confirming or specifically executing the agreement of sale, but that under the law, notwithstanding that fact, the purchaser was entitled to the relief sought by his bill. The circuit court decreed that the agreement should be specifically performed; and from that decree the decedent's widow and the infant defendants, by her as their next friend, presented their petition for an appeal, which was allowed.

The appellee asks that the appeal be dismissed as to the widow because she has no interest in the subject of the litigation, and as to the infants because their guardian ad litem alone had the right to appeal on their behalf.

We are of opinion that the appeal should be dismissed as to the widow, as she, under her husband's will, which she does not appear to have renounced, had no interest in the land involved in this case. The guardian ad litem might have taken an appeal in the name of the infants, by himself as such; but, if he did not, they had the right to do so by some one as their next friend. They were parties to the suit, the owners of the land contracted to be sold, and were prejudiced by the decree from which the appeal was sought, which was an appealable decree, and therefore come clearly within the provisions of section 3454 of the Code of 1904. See 22 Cyc. 706; 14 Am. & Eng. Enc. Pl. & Pr. 1058; Stewart v. Crabbin, 6 Munf. 280.

The only question involved in this appeal upon the merits is whether or not a court of equity will compel a fiduciary, vested with a discretionary power to sell lands devised to infants when in his judgment their interest will be promoted by a sale, to specifically perform an executory agreement entered into by him for its sale, when it appears that such agreement when entered into was prejudicial to their interest, and which he refuses to perform.

Where a trust is discretionary, as in this case, a court of equity has no jurisdiction to interfere with its exercise, so long as the trustee acts in good faith, either in exercising or in refusing to exercise the power vested in him. Dillard v. Dillard, 97 Va. 434, 34 S. E. 60, and cases cited; Trout v. Pratt, 106 Va. 431, 441, 444, 56 S. E. 165, 8 L. R. A. (N. S.) 398.

There is nothing in this case to show that the executor, in making the agreement of sale, was acting in bad faith. The most that can be said is that in entering into the contract which he thought would promote the interests of the infant owners of the land he was mistaken, and that when he discovered his mistake he refused to specifically perform his agreement.

It is well established that specific performance is not a matter of course—ex debito justitiæ—but rests entirely in the judicial discretion of the court; not an arbitrary or capricious discretion, dependent upon the mere pleasure of the court, but that sound and reasonable discretion, which governs itself as far as it may by general rules and principles, but which at the same time grants or refuses relief according to the circumstance of each particular case, where those general rules do not furnish any exact measure of justice between the parties. 2 Min. Inst. (1st Ed.) 948; Bryan v. Loftus, Adm'r, 1 Rob. 12, 16–17, 39 Am. Dec. 242; Shenandoah Val. R. Co. v. Lewis, 76 Va. 833; Fishburne v. Ferguson, 85 Va. 321, 328, 7 S. E. 361; Halsey v. Monteiro, 92 Va. 581, 588, 24 S. E. 258.

In Thompson v. Jackson, 3 Rand. 504, 505, 15 Am. Dec. 721, it was said by Judge Carr: "The application to equity is not ex debito, but merely presents to the sound discretion of that forum this question: Is it better for the furtherance of justice, considering all the circumstances of the case, to give the party specific execution or to leave him to his remedy at law?"

If the agreement were for the sale of the executor's own land, made under the circumstances of this case, it is clear, we think, that the furtherance of justice would require its specific execution; but, where one of the contracting parties is exercising a power in making sale of another's land, it does not follow that the agreement of sale will be specifically executed in all cases against the beneficiary, where it would have been so executed against the party acting for him if the latter had been selling his own property.

In Pomeroy on Contracts (Specific Performance), it is said: "Contracts whose provisions, if carried into operation, would constitute or require a breach of trust by the party performing, * * * will never be specifically enforced by a court of equity."

In Mortlock v. Buller, 10 Vesey, 292, Lord Eldon said, in discussing the questions involved in that case: "Next, are they [the trustees] bound by their subsequent conduct as if there had been antecedent authority? Clearly they are not. The trustees never had the approbation of the husband and wife. They never can be said to be bound by the drafts settled by the solicitor; and in the very nature of the subject of sale there were circumstances giving them locus penitentiæ the moment they were informed there was a question whether the price was reasonable. But, supposing they were bound, that will not help the plaintiff to the relief prayed, for I am clearly of the opinion that their conduct was a breach of trust, not meaning to throw any imputation upon them, as the transaction was very likely to happen; but their duty was not to execute their power of selling, unless they knew a discretion had been wisely and fully exerted upon the point of reasonable price, unless they were satisfied that upon that point no rea-

sonable objection could be made with reference to the interests of Mr. Buller, Mrs. Buller, or the children who might come into existence. If the court had been called upon in the life of Mrs. Buller for a specific execution, there is so little ground for it under those circumstances that, on the contrary, at the suit of the cestui que trust the trustees would have been restrained from executing. The question as to the interposition of the court between the plaintiff and Mr. Buller would have been different. But it would be impossible to decree a specific performance when on the very same day the court might be compelled to say it would be a breach of trust."

In the case of White v. Cuddon, 8 Clark & Fin. (H. of L. Rep.) 766, where it was held that if there was a substantial misdescription of the property a court of equity would not enforce specific performance against trustees with compensation, as being prejudicial to the cestui que trust and incapable of being ascertained, Lord Campbell, in his opinion, said: "In selling the trust property in such a manner and with such a result, the trustees would certainly be guilty of a breach of trust. The contract cannot, therefore, be specifically enforced against them, and the purchaser ought to be left to an action at law to recover damages from them adequate to the loss he can show that he has sustained by their breach of contract."

While in the case under consideration the agreement of sale, under the circumstances of the case, would not amount to a breach of trust if carried into effect, still we do not think it would be in the furtherance of justice to compel the executor to do what in his discretion he does not think he ought to do, and what the record shows would be to the prejudice of the infant owners of the land; but the purchaser should be left to his remedy at law against his vendor.

The decree appealed from must be reversed, and the complainant's bill dismissed, without prejudice to his right to proceed at law.

Reversed.

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(107 Va. 158)

## HUNTER'S ADM'R v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of Virginia. June 13, 1907. Rehearing Denied Nov. 30, 1907.)

1. WRIT OF ERROR—ASSIGNMENTS OF ERROR—WAIVER—RECORD.

Where the evidence on which an award in condemnation proceedings was made was not properly in the record on a writ of error, an assignment that the court erred in setting aside the award was waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2867–2869.]

2. EMINENT DOMAIN — TAKING PROPERTY — ELEMENTS OF DAMAGE — INJURY TO BUSINESS.

Where property on which the owner had conducted a large and successful business for several years, and which was peculiarly adapted to such business, was entirely condemned for the uses of a railroad company, the owner, under the Constitution and statute requiring payment of "just compensation," was limited to the reasonable market value of the property at the time of the taking, and was not entitled as an element thereof to damages resulting from injury to the business or loss of profits incident to its removal to another location.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 356.]

3. SAME—AWARD—REDUCTION—EVIDENCE.

Commissioners having been appointed to value property sought to be condemned for a railroad, the court correctly instructed them as to the method of procedure to be adopted in determining the question of value. The commissioners viewed the property and allowed $22,900. A number of leading business men testified that $25,000 would be necessary to compensate the owner for the property taken, and others fixed a value at more than that sum. After the award, the railroad company took possession and entirely changed the appearance of the property, and five years after the award examined the commissioners as to how they arrived at the amount. They, testifying from memory, aided only by some loose memoranda, were positive that they followed the instructions of the court as they understood them, and in making up the amount included $5,000 for injury to the owner's business. *Held* insufficient to establish that the commissioners had included $5,000 for injury to the business, and that they had only allowed $17,900 as the value of the land.

Error from Hustings Court of Richmond.

Proceedings by the Chesapeake & Ohio Railway Company to acquire certain land belonging to C. E. Hunter in the city of Richmond for railroad purposes. Hunter having died pendente lite, the proceedings were revived as against St. George R. Fitzhugh, his administrator, and, from an order reducing an award made by the commissioners, the administrator brings error. Reversed.

The following are the instructions by the court to the commissioners referred to in the opinion:

"The commissioners, acting under this order, are to inquire and ascertain what is just compensation to the owner of the property, C. E. Hunter—that is to say, its fair cash market value—and, in making up their award, they are to consider:

"(1) The fact that this is an old and established place of business, where a large and profitable business was transacted for more than half a century.

"(2) They are to consider that this building was erected and is adapted especially for the purposes for which it is used.

"(3) That this stand is so arranged as to give peculiar facilities for receiving and handling heavy machinery and agricultural implements, owing to the peculiar formation of the alley.

"(4) They are to consider the nearness to railroad depots and wharves.

"(5) They are to consider the expense of moving the large stock of goods carried by Mr. Hunter.

"(6) They are to consider that Mr. Hunter

is entitled to just compensation for his property. He is entitled to its full equivalent, and the value of the property in this case should be determined by its productiveness, the profit which its use brings to the owner; but the commissioners are not to consider the profits of the business conducted by the defendant, except in so far as they go toward showing that the defendant carried on a large and lucrative business.

"(7) They are to consider the adaptability of this property for railroad purposes, having reference to the topography of the city and any other use to which this property is plainly adapted."

To the giving of which instructions the plaintiff, by counsel, excepted, and tendered to the court, in lieu of same, another instruction which is in the words and figures following, to wit: "The commissioners are to inquire and ascertain what will be a just compensation to C. E. Hunter, the owner of the property, and, in arriving at said just compensation, they shall take into consideration the location of the property, its fitness and suitability for the business which is carried on thereon, and the length of time it has been used for such business, its fitness from location or otherwise for any other use for which it is plainly adapted and shall award such sum as they may deem just, not exceeding the fair cash market value of the property. The fair cash market value of the property is the price which it will bring when it is bought by one who desires, but is not obliged to sell it, and, is bought by the one who is under no necessity of having it. The commissioners shall not take into consideration the prices paid by the Chesapeake & Ohio Railway Company and the Richmond, Petersburg & Carolina Railroad Company, for the property in the vicinity of the property in question, in arriving at the fair cash market value."

Which instructions the court rejected, and the plaintiff, by counsel, excepted to such ruling.

A. W. Patterson and St. Geo. R. Fitzhugh, for plaintiff in error. H. T. Wickham and H. Taylor, Jr., for defendant in error.

CARDWELL, J. This writ of error is to a final judgment of the hustings court of the city of Richmond in a proceeding instituted by the defendant in error, the Chesapeake & Ohio Railway Company, against plaintiff in error's intestate, C. E. Hunter, to acquire title, by condemnation, to a certain parcel of real estate situated on Main street between Fifteenth and Seventeenth streets, in the city of Richmond, owned by Hunter and upon which for many years prior a large and profitable business had been conducted in receiving, handling, and selling heavy machinery, agricultural implements, etc.; the premises being peculiarly adapted by reason of location and otherwise to the purposes for which they had been used.

The whole of the premises being considered necessary, and therefore demanded, for the purposes of the railway company, commissioners, as provided by statute, were appointed to view the property, and, upon hearing such proper evidence as either party might offer, to report what would be a just compensation to Hunter. These commissioners filed their report on the 28th of October, 1899, ascertaining the compensation to be paid Hunter at $15,000, but upon exceptions taken by Hunter the court, by its order entered April 30, 1900, set aside the award; and by a further order entered May 7, 1900, new commissioners were appointed, the court giving to them minute instructions in writing to guide them in the discharge of their duties. To the giving of these instructions defendant in error objected, and tendered another instruction in lieu thereof, which was refused.

Three of these new commissioners acted, and filed on the 22d day of May, 1900, their award, ascertaining that a just compensation to Hunter for the property in question would be the sum of $22,900, and stating that, as the whole of the property was required for the purposes of the defendant in error, there was no question of damages as to residue of the tract, etc. To this report the defendant in error excepted on four grounds, stated in writing, and moved that the report be set aside.

After the filing of this report, Hunter departed this life, and, his death being suggested, the court, by its order entered on the 26th day of July, 1900, made plaintiff in error, St. Geo. R. Fitzhugh, administrator of Hunter, deceased, and Hunter's widow and children parties defendant to these proceedings, and directed that they thereafter proceed in the name of these defendants.

No action was taken on the report of the commissioners bearing date May 22, 1900, until March 22, 1905, when defendant in error introduced the three commissioners who made the report and examined them as to how they arrived at the amount awarded Hunter. They had not furnished the court any information as to how they arrived at the amount awarded, and when examined as witnesses, about five years afterwards, it appears from their testimony that while they could not, with any degree of certainty give the grounds of the award made, they were positive that they had followed the minute instructions of the court as they were understood at the time. Testifying from memory, aided only by some loose memoranda kept, they further say in effect that in making up the amount of the award of $22,900 the sum of $5,000 was included for injury to the business of Hunter. In other words, according to their memory as to what occurred five years before, $5,000 was allowed for damage, interruption, etc., of Hunter's business—

i. e., for "taking a man's business away from him"—whereupon the court entered its order to which this writ of error was awarded, reducing the amount of the award from $22,900 to $17,900.

The ruling of the court setting aside the award of the first commissioners was assigned by counsel for defendant in error as cross-error under rule 9 of this court (57 S. E. XV), but the assignment was waived as the evidence upon which the award was made is not properly a part of the record brought before us.

The first question for our determination is: What was the true rule under the constitutional and statutory inhibition, that private property shall not be taken for public uses without just compensation, governing in ascertaining the damages to Hunter when his property was taken?

It is most earnestly and ingeniously argued by counsel for plaintiff in error that, as the Constitution forbade the taking of any private property whatever without just compensation being made to the owner thereof, in construing our statute in relation to the exercise of the power of eminent domain by a private corporation, the court should give to the language employed in the Constitution and the statute a meaning sufficiently broad to enable the owner of property to demand and receive just compensation for, not only the property taken, but for any property rights sacrificed or impaired by the taking, which would include injury to the business theretofore conducted on the property, and the consequential costs incurred in changing the locality of the business. In other words, the business conducted by Hunter on the property taken was a property right—private property—coming within the protection afforded by the Constitution and the statute, which could not be interrupted or damaged without just compensation.

Of the numerous decisions of other states cited in the petition for this writ of error, we need only say that they do not support the contention of counsel when the whole of the decision is read, or else were rendered under Constitutions and statutes different from the Constitution and statutes controlling in the decision of this case, or are cases where part of a tract was taken and damage to the residue was the point considered, or cases of temporary suspension of business where the loss was capable of being estimated. It is a matter of course that where the Constitution and statutes of a state provide, not only for just compensation for property taken, but for all damages that the owner may suffer by reason of the taking, the rule governing in ascertaining the amount of damages to be awarded the owner would be very different from the rule so long established in this state, and followed by the lower court in this case, where the whole property is taken and no question arises as to damages beyond the fair market value of the property.

In a note to Hamilton v. Pittsburg, etc., R. Co., 51 L. R. A. 330, reviewing the decisions of other states on the subject, it is said: "Some of the cases have permitted evidence of and recovery for profits lost by the suspension of business where it has to be moved during the time required for obtaining another situation and for moving. This allowance is based upon the theory that, as the loss of profits from the suspension of business while moving would enter into the consideration of the price to be charged by an owner voluntarily selling, it should be considered in determining the market value in case of a compulsory sale under eminent domain proceedings."

Those cases are authority for the proposition that where property is taken for a public use, requiring a removal of a business conducted on it theretofore, the owner, apart from the value of his property taken, the expenses incurred in moving, etc., is entitled to recover for loss of profits from the suspension of business while moving; but this rule of law finds no sanction in our own decisions, nor is it regarded as the established rule by the weight of authority in this country.

We are called upon also to consider a line of decided cases supporting the proposition that the owner of property is entitled by law to the undisturbed and exclusive enjoyment of his estate, and to keep out all trespassers, this being a part of his property in his estate; but clearly they do not apply, as defendant in error was in no sense a trespasser upon the property of Hunter or his property rights, when proceeding by authority of law to acquire title to his property by condemnation for a public use.

Citation of another line of cases is also made in support of the contention that the quiet use and enjoyment of property is to be separated and distinguished from the property itself, so as to entitle the owner to just compensation for both when the property is taken in the exercise of the power of eminent domain; but, again, we have to say that the cases do not apply to this case. The leading case in that line of cases is B. & P. R. Co. v. First Bap. Church, 108 U. S. 331, 2 Sup. Ct. 719, 27 L. Ed. 739. In that case the judgment of the lower court in favor of the church was upheld on the ground that the engine house and repair shop, as they were conducted by the railroad company, were a nuisance in every sense of the term, and for the annoyance and discomfort of the congregation in the enjoyment of their church edifice for religious exercises, prayer, and worship courts of law would afford redress by giving damages against the wrongdoer, and, when the causes of annoyance and discomfort are continuous, courts of equity would interfere and restrain the nuisance. That is by no means the case we have before us.

With respect to our own decisions, we are told in the argument that, while the measure of damages in many cases may be the mar-

ket value of the property condemned, in ascertaining that value, it is competent to prove any use, the highest and best use, for which it is adapted, but the most enlightened courts have never held that the market value is the only standard, and that cases may not and do not arise where a proper observance of the constitutional provision, that private property shall not be taken for public use without just compensation, may require the award of damages actually sustained other than those measured by the market value of the property taken.

By an unbroken line of decisions of this court, in harmony with the text-writers and the decisions of other states having a constitutional provision similar to our own, the rule governing in ascertaining the damages to the owner of property taken as in this case is that he shall be paid the fair market value of the property at the time of its taking; but no effort has ever been made to fix beforehand all of the things which may go to make up the market value of property, while it has not been so difficult to say that a particular element of damage or loss does not enter into the market value and should not be included. In other words, what elements properly enter into consideration in determining the market value of property is necessarily an open question in every case of this character; but it is not necessary to consider that question at length in this case.

The authorities agree that loss of profits in a business destroyed or damaged, where property is taken in the exercise of the power of eminent domain, is not an element for consideration in determining the market value, because a matter of speculation and conjecture, while the profits earned in a business conducted on the property taken are proper to be considered in determining the market value of the property. If "the cost of reproduction is the very lowest amount which should be awarded a person whose business is taken away from him by the strong arm of the law," and this amount should be increased by other considerations, such as the disturbance of business, incidental expense in storing merchandise, etc., as is contended by the learned counsel for plaintiff in error, the question naturally presents itself: Why did not the framers of our constitutional and statutory provisions against taking private property for public use without just compensation so declare?

How far the reasoning in support of the view contended for by counsel would control where only a part of the owner's property is taken, and the damage to the residue is also to be ascertained and paid him, or where, as under our present Constitution, it is provided that private property shall not be taken or damaged without just compensation, we are not called upon to consider, as the rights of Hunter are fixed by the provisions of our old Constitution, which was superseded by the new on July 10, 1902.

Counsel would have us disregard the decisions of this court, and follow the reasoning of other state courts conflicting more or less with our own decisions upholding the rule that the market value of property taken as in this this case is the guide in ascertaining the just compensation to be paid the owner; but, as we have said, we are unable to find that our decisions are out of harmony with the great weight of authority in this country.

In Richmond, etc., R. Co. v. Chamblin & Scott, 100 Va. 401, 41 S. E. 750, it is said: "In determining the value of land appropriated for public purposes, the inquiry must be: What is the property worth in the market from its availability for valuable uses, both now and in the future? * * * The authorities we have cited from the adjudicated cases and text-writers seem to us sufficient to justify the commissioners in taking into consideration the use to which the property has been devoted by Chamblin & Scott as an element entering into their estimate of its market value." But it was there also held that "damage to trade or business is generally too remote to be a subject of damages."

With reference to that case, counsel point to the fact that only a text-writer and an encyclopedia are cited in support of the last proposition, but fail to point out wherein the decision itself is out of harmony with the long line of decisions by this court to which it belongs.

In Richmond & P. R. Co. v. Seaboard, etc., Co., 103 Va. 399, 49 S. E. 512, the opinion says: "It is the present actual value of the land, with all its adaptations to general and special uses, * * * that is to be considered." And, again, quoting from Lewis on Eminent Dom.: "The conclusion from the authorities and reason of the matter seems to be that witnesses should not be allowed to give their opinion as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. * * * But, when all the factors and circumstances have been shown, the question at last is: What is it worth in the market?"

Without attempting to review the authorities further, the established rule of this court, recognized and approved by text-writers and by the Supreme Court of the United States, is that the full and perfect equivalent for the property taken in proceedings of this character is what the law contemplates as the market value thereof, and no sufficient reason or authority is brought to our attention which would justify us in departing from that established rule in this case.

It remains, however, to be determined whether or not the court below erred in holding that $5,000 of the award made to Hunter was for damage to his business, and properly struck that amount out of the award.

The undisputed facts are that the property taken was erected for the identical business

which Hunter was conducting at the time; that the property had been devoted to that business for more than 40 years; that Hunter had conducted the business at that stand since January, 1891; that the building was large, strong, and thoroughly adapted to storing and handling heavy machinery, such as farming implements, wagons, etc., which was the business being conducted by Hunter; that the alleyway afforded facilities for receiving and shipping stock which could scarcely be duplicated in the city of Richmond; and that the annual profits of Hunter's business conducted on the property had been from $4,300 to $4,500 until 1899, when the annual profits were $6,000, and there had been a steady growth in the business. A number of leading business men, speaking from experience, testified that no amount less than $25,000 would compensate Hunter for having his property taken from him, and some of them say that they, if in Hunter's place, would not part with the property for $25,000, and still others fix the value of the property at more than that amount. In other words, they regarded the property, by reason of the uses made of it, its convenience, and advantages, and yielding a profit from the business conducted thereon as above stated, as worth in the market the sum of $25,000. It is true that other witnesses, mainly engaged in the real estate business, do not agree in the views of the witnesses testifying for Hunter, and therefore do not estimate the market value of the property as high, nor did the commissioners allow Hunter the full amount to which his witnesses, by a consensus of opinion, considered he was entitled.

In Richmond, etc., R. Co. v. Chamblin & Scott, supra, the court expressly disclaimed an intention of considering all the elements that go to constitute the value of the property, saying that "the best that can be done is to appoint capable and upright commissioners to go upon the land, examine and hear testimony, and consider all the facts and circumstances surrounding the situation and likely to enter into the value of the land to be taken, and the effect of such taking upon the residue of the tract." In discussing the elements of damage which the commissioners should have taken into consideration in ascertaining the compensation to which Chamblin & Scott were entitled, the opinion says: "In any business, and especially such as involves the movement of heavy freight, ease of access to and from the place where it is conducted, and facility in reaching lines of transportation, must be important, if not controlling, factors, and, as the value of property consists in its fitness for profitable uses, its market value must be influenced in large measure by locality. There is no evidence in the record showing the profits of the business of appellees, and this is as it should be, but it is shown that the movement of freight from the premises to the railroads and from the railroads to the land in question would be very much more difficult and costly, and those causes would affect any business, by whomsoever conducted, at that place."

The report of the commissioners in this case did not afford the court any information as to how the amount of the award to Hunter was arrived at, and, as has been remarked, it was about five years after their report was made, and made in accordance as they testify with the instructions of the court, before the commissioners were called upon to state the grounds of their award, and this after all vestige of the property condemned had been destroyed and the ground on which Hunter's business had been conducted appropriated for railroad purposes, rendering another view of Hunter's property as it was when taken impossible. The testimony of the commissioners as to what were the elements they considered in making up their award is, in the very nature of the case, vague and unsatisfactory, and they, in fact, admit that after that lapse of time they could not say positively anything, except that they followed the explicit instructions of the court as to the elements of value. True, they each, aided only by some memoranda furnished by one of them, undertake to say that $5,000 was allowed for damage, interruption, etc., to the business; that is, "for taking a man's business away from him."

The vagueness and unsatisfactory character of this testimony, given at so late a day after they had made their award and filed it with the court, is made all the more apparent when read in connection with the evidence to which we have adverted, going to show that the market value of Hunter's property when taken was at least the amount of the award, without any sort of reference to damage to his trade or loss of profits in his business.

It has been again and again declared by this and other courts that, in the very nature of things, the finding of the commissioners is entitled to great weight, and is not to be disturbed unless it is shown to be erroneous by clear proof. Richmond & Petersburg R. Co. v. Seaboard, etc., R. Co., supra, and authorities cited.

In Cranford Paving Co. v. Baum, 97 Va. 501, 24 S. E. 906, this court said: "When it becomes necessary to ascertain what is just compensation for land taken for public use, as in the present case, the statute directs that the court shall appoint five disinterested freeholders as commissioners to perform this duty, and requires that in its performance they shall themselves view the land so taken. The law lays great stress upon the matter of the view, and justly attaches great weight to the report of the commissioners They are greatly aided, as they were in this case, by the evidence of their own senses. They have the advantage of seeing the land itself which is taken, and judging as to its

value. * * * They have, as they also had here, after having their attention especially drawn to the element of damage relied upon, the opportunity to apply the evidence produced before them to the subject of the controversy, and to determine the weight to be given to its several parts. We are without the benefit of their opportunities and of what they saw and were the judges, and it should be a very clear case, indeed, of inadequate compensation to justify the court in disturbing their sworn, deliberate, and disinterested judgment as disclosed in their report."

In Shoemaker v. United States, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170, the opinion, quoting from Mills on Em. Dom., says: "An appellate court will not interfere with the report of commissioners to correct the amount of damages except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of commissioners in arriving at the amount of damages there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions." See, also, the recent case of Tidewater Ry. Co. v. Cowan, 106 Va. 817, 1 Va. App. 177, 56 S. E. 819.

While, on the face of the report in this case, which was borne out by the evidence returned therewith, there appears nothing going to show that any improper elements of damage entered into the award, these commissioners, long after the award and when the whole matter had gone entirely out of their minds, each undertakes to speak for himself as to what elements of value were considered, although each of them had signed the report at the time it was made. We find nothing in the instructions of the court to justify the conclusion that the commissioners were misled to take into their consideration improper elements of damage.

When testifying from memory, confessedly uncertain by reason of the lapse of time, they, in effect, agree that $5,000 of the award was "for taking a man's business from him," but whether this and other like considerations had influenced them only in agreeing upon the fair market value of Hunter's property, or had induced them to allow $5,000 for taking Hunter's business from him in addition to the fair market value of his land and buildings taken, does not clearly and satisfactorily appear, and under the conditions then existing no reasonably fair test could be made as to whether the market value of the property of Hunter taken was or not as much as the amount awarded him, considering only proper elements of damage in such cases, as every vestige of Hunter's property, except the land itself, had been removed, and the land occupied by buildings or other structures of the defendant in error. The record shows that these commissioners were capable and upright men of business experience, and with large business interests requiring their constant attention, and doubtless, when they had discharged the duties required of them by the court's order, signed, and filed their report, the whole matter was discarded from their minds, so that, when called on to testify touching the considerations that influenced their award, it was quite natural that they could not, upon their oath, be positive as to anything, except that they had followed the instructions of the court in reaching their conclusion. Upon the face of the report there appears no infirmity, and, as has been stated, there was evidence taken which, besides the view of the property by the commissioners, would have justified them in fixing the market value of Hunter's property at the amount of their award.

The established rule that the finding of the commissioners is entitled to great weight, and is not to be disturbed unless it is shown to be erroneous by clear proof, is not to be disregarded or even affected by the mere fact that the evidence relied on to show that the finding is erroneous is given by the commissioners themselves. The question in such a case is whether or not the proof can be considered as sufficiently clear and satisfactory to warrant the setting aside of the award of the commissioners made upon evidence before them at the time, aided, and greatly aided in the majority of cases, by the evidence of their own senses, they having the advantage of seeing the property itself which is taken, and judging as to its value.

In view of the facts and circumstances which have been narrated, we do not consider that the proof relied on as justifying the lower court in striking from the award made by the commissioners of $22,900 as the value of Hunter's property taken in these proceedings the sum of $5,000, because improperly included in the award for damages to business, etc., is that clear and satisfactory proof which the established rules of law require. Therefore the judgment of the lower court will be reversed and annulled, and the cause remanded to that court to be further proceeded with in accordance with this opinion.

Reversed.

(107 Va. 527)

## ROLLER v. MURRAY et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. EQUITY—BILL—AMENDMENT—TIME.
If plaintiff misdescribes in his bill the contract sued on, or omits to mention a subsequent modification or a re-execution thereof, he can correct the error or omission by amendment before an answer is filed or evidence is taken; and even, after evidence is taken, he may be permitted to amend to conform to the proofs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 552–569.]

2. SAME — DEMURRER — HEARING AND DETERMINATION—INTENDMENT OF BILL.
Though a supplemental bill was intended to negative the idea that certain letters formed the original contract involved, the court need not on demurrer give effect to such intendment, if the contrary appears from plaintiff's exhibits, or from the case as a whole.

3. CHAMPERTY AND MAINTENANCE—CONTRACT WITH ATTORNEY.
A champertous contract was formed by a letter to an attorney stating that his client would give him one-fifth of the net proceeds of lands to be recovered, the attorney to pay all necessary expenses of litigation, so that the client should be required at no time to pay any money in the matter; by the attorney's letter accepting the proposition, on condition that the client would bear expenses outside of the state where the land was located, and would not sell the attorney's interest without his agreement to the price; and by a letter accepting the conditions—and the illegality was not obviated by a formal contract, made 2½ years later after half of the land had been recovered, covering the entire land in exact conformity to the original contract, and obviously intended as a reduction to formal writing of the original agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Champerty and Maintenance, §§ 22–51.]

4. CONTRACTS—ACTION ON—ILLEGALITY AS DEFENSE.
The rule that a stranger to a contract cannot set up its illegality as a defense does not apply when it appears on plaintiff's own showing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 689½.]

5. CHAMPERTY AND MAINTENANCE—CONTRACT WITH ATTORNEY — CLIENT'S GRANTEE — RIGHTS.
One who assumed a client's part of a champertous contract, to be bound as the client was, with the attorney's consent, and became his client, may assert the illegality of the contract in defense to the attorney's bill founded on it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Champerty and Maintenance, § 17.]

6. EQUITY—LEGAL RELIEF—RIGHT TO.
An attorney cannot recover in equity reasonable compensation for his services on a quantum meruit, where his bill to recover land under a champertous contract has been dismissed, the doctrine that, when equity takes jurisdiction of a cause, it will do full justice between the parties, even to the extent of administering the common-law remedies, not applying to a bill dismissed for want of equity.

7. CHAMPERTY AND MAINTENANCE—COMMON LAW EFFECTIVE.
Whether Act Dec. 8, 1792 (1 Rev. Code 1819, p. 558, c. 144), defining champerty and prescribing its punishment, impliedly repealed by its omission from the revisal of 1819, be regarded as declaratory of or as repealing the common law, the common law as to champerty, respecting the validity of champertous contracts, is still in force in Virginia.

8. SAME—LAWS GOVERNING VALIDITY.
Where champertous suits were to be brought in Virginia, the law of that state must govern the validity of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Champerty and Maintenance, § 2.]

9. EQUITY—PLEADING—AMENDMENT.
A bill having been twice amended, and the court having announced its decision after full argument, further amendments offered without explanation or excuse, and in the main unsubstantial and such as would not change the court's opinion, will be denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 558–560.]

10. SAME—JURISDICTION.
A court of equity in Virginia cannot decree a sale of land lying in West Virginia.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 95–102.]

Appeal from Circuit Court, Rockingham County.

Bill by John E. Roller against Mary H. Murray and others. From a decree sustaining a demurrer denying leave to amend and dismissing the bill, complainant appeals. Affirmed.

Sipe & Harris, for appellant. D. O. Dechert, for Chesapeake Western Co. and Pocahontas Co. Conrad & Conrad, for Mrs. Murray.

KEITH, P. In this case there was a demurrer to the bill in the circuit court, which was sustained and the bill dismissed. Appellant then asked leave to amend his bill, which the circuit court denied, and, in support of its decree dismissing the bill upon demurrer and rejecting the offer to amend, the judge of the circuit court filed two opinions, which deal with the subject in a manner so satisfactory that we feel that we cannot do better than to adopt them, making only slight verbal changes.

"This cause comes on to be decided on a demurrer filed by Mary H. Murray to the bill as amended by an amended bill filed in 1902, and as amended and supplemented by an amended and supplemental bill filed April 27, 1906.

"The grounds assigned for the demurrer go both to the character of amendment (it being objected that the new matter introduced by way of amendment makes a new and different case from that presented by the original bill) and to the merits of the case presented by the bills and the exhibits filed with them (it being insisted in this behalf that the contract set up by complainant and relied on as the foundation of the claim he invokes the powers of the court to enforce is champertous and void). In view of the opinion I have reached upon the latter question, it is hardly worth while to pass upon the question of pleading. I may say, however, that I consider the amendments made as well within the privileges of our practice with respect to amendments.

"All three of the bills assert, as the gravamen of the plaintiff's case, an equitable right to one-fifth of the purchase price arising on the sale of the Hollingsworth lands by Mrs. Murray to Geo. A. Wheelock (apparently relying on an equitable assignment, though without so naming the equity claimed), and to the benefit of the security of the deed of trust given by Wheelock upon the land to secure the purchase money; notice to Wheelock of the plaintiff's rights being alleged, and the prayer of all the bills being that these rights be established by the court, and that the Wheelock deed of trust be enforced for plaintiff's benefit, notwithstanding the subsequent release of that deed and of Wheelock by the act of Mrs. Murray.

"The averments relative to the contract with Miss Emily Hollingsworth, which constitutes the foundation of the equity asserted and the relief sought, do vary slightly in the various bills, but not, in my judgment, in any material respect affecting the character of the claim asserted or the relief sought. They each, if valid, result in giving the plaintiff the equity he claims, to wit, a right to a one-fifth share of the proceeds of the sale of the lands. If a plaintiff misdescribes his contract in his bill, or in his original bill omits to mention a subsequent modification, or a re-execution of the contract sued on, he can certainly correct the error or omission by amendment before an answer is filed or evidence is taken; and, even after the taking of evidence discloses the fact that the contract forming the subject-matter of the suit was different from that described in the bill, the plaintiff may be permitted to amend his bill to conform to the proofs.

"The argument of counsel was more particularly addressed at the hearing to the validity of the contract or contracts set forth in the plaintiff's pleadings and exhibits as the foundation of his claim, as affected by the question of champerty, and this question is one of more serious concern.

"I cannot agree with the idea suggested in the argument, that the whole law of champerty is obsolete and inoperative in Virginia. The latest legislative enactment relative to counsel fees is section 3201-a of Pollard's Code of 1904 (Acts 1904, p. 263, c. 147), the last paragraph of which is in these words: 'Provided, that nothing herein contained shall affect the existing law in respect to champertous contracts.' The old conception that a contract by an attorney for a contingent fee came under the ban of the law against champerty has been repudiated in many of the American states, and among these in Virginia. In very few, if any, jurisdictions, however, is it held that a contract by an attorney to undertake and carry on litigation at his own risk as to costs, in consideration of a share of the anticipated recovery, is not contrary to the policy of the law, champertous, and void.

"No question of this sort was decided or raised in the case of McDonald v. Logan, 2 Va. Dec. 687, 34 S. E. 490 (cited by counsel for complainants). That was not a suit to enforce a claim for counsel fees. It was a suit brought by the client (Logan) against his counsel to recover of them the proportion of the charges which had come out of his share of a certain fund administered by West Virginia courts in the course of litigation in that state; the belief being demanded by Logan against his counsel on the ground that under his contract with them his counsel were to receive 50 per cent. of the recovery, and out of it pay all costs and charges. The counsel had already received their compensation, and the suit was by the client to recover back a portion of it. No question of champerty was raised, but the recovery claimed was denied.

"The latest expression of our Court of Appeals on the subject of champerty is found in the case of Nickels v. Kane's Adm'r, 82 Va. 309, in which it is said: 'Champerty may be defined to be a bargain with the plaintiff or defendant in a suit for a portion of the land or other matters sued for, in case of a successful termination of the suit, which the champertor undertakes to carry on at his own expense; and champerty avoids the contracts into which it enters.' And it is expressly stated further on in the opinion that the principles of the common law with reference to champertous contracts remain in force in Virginia.

"So far from being obsolete law is it that there are many late cases in the various states of the Union, and in the federal courts, in which the law has been applied, and the cases and text-writers are practically uniform in holding, that a contract by an attorney to undertake and carry on litigation at his own risk, or without cost to his client, for a share of the recovery, is contrary to public policy, and void. The following are instructive cases on the subject: Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 927, 42 L. Ed. 302; Johnson v. Van Wyck, 4 App. D. C. 294, 41 L. R. A. 520; Geer v. Frank, 179 Ill. 570, 53 N. E. 965, 45 L. R. A. 110.

"The employment undertaken by the complainant in this case was the recovery of 52,000 acres of mountain land, known as the 'Hollingsworth survey,' which had been sold for taxes during the war, and was, at the time of the contract in question, held adversely by various claimants thereof under hostile titles. The complainant stated orally at the argument that the number of adverse holders was about 200.

"The original contract between complainant and his client, Miss Emily Hollingsworth, of Philadelphia, appears from the amended bill, filed in 1902, to have been made by correspondence, the letters evidencing the contract being Exhibits 1, 2, and 3 filed with that bill, and prayed to be read as part of it. The first of these letters is one from R.

C. McMurtrie, the attorney and agent of Miss Hollingsworth, in Philadelphia, to Gen. Roller, dated January 24, 1873, and it states the conditions of the proposed employment in distinct terms, saying: 'Miss Hollingsworth will agree to give you one-fifth of the net proceeds of all lands recovered, you paying all expenses of the litigation that may be necessary for that purpose, so that she is required at no time to pay any money for anything connected with the business.'

"To this letter the complainant wrote an answer (Exhibit 2) on February 1, 1873, in which he said: 'I regard your letter of the 24th as a substantial acceptance of my terms. I ask two limitations upon the proposition contained in your letter: First. That Miss Hollingsworth shall bear the expense of any proceedings that may be necessary in Philadelphia (it appears elsewhere that Miss Hollingsworth was not at that time the owner of the legal title, but had to acquire it). I will bear all expense in Virginia connected with the suit, but am not willing to pledge myself to any expenses outside of the state, because I can't anticipate the amounts of them. Second. That my interest in the land shall not be sold unless I agree to the price. As your letter reads, she could sell at any price, and I must be content with my share of the "net proceeds." By net proceeds, I presume you mean proceeds after deducting expenses of suit and sale.'

"On February 3, 1873, Mr. McMurtrie answered the letter of Gen. Roller, accepting the limitations or qualifications proposed by him. These letters evidence the consummation of a contract, which it is alleged was authorized and approved by Miss Hollingsworth.

"The contract effected by them fulfills completely the definition of champerty, and falls under the prohibition of the law. That the contract so evidenced was the original contract of complainant's employment, under which he acted and instituted various actions to recover the lands in question, is not negatived by the averments of the supplemental bill, as I construe them. If the supplemental bill were so intended, I conceive that the court would not be bound on demurrer to give effect to such intendment, if the contrary appeared from the plaintiff's exhibits, or from his case as a whole, but would interpret for itself the documents and contracts exhibited, in the light furnished by their own provisions and surrounding circumstances, and in the light of the other exhibits and the other allegations of the pleadings.

"The three letters filed as Exhibits 1, 2, and 3 themselves evince a contract, and the amended bill proceeds: 'Subsequently your complainant, acting as the attorney for the said Emily Hollingsworth, by the institution of suits and otherwise, recovered the whole of said tract of land from those holding the same adversely, and he thus became entitled to the compensation which had been agreed upon between him and the said Emily Hollingsworth under the contract aforesaid.' But in Exhibits Nos. 5 and 6 (filed with the amended and supplemental bill), being letters from complainant to Miss Hollingsworth, dated May 31, 1875, and June 3, 1875, the complainant refers to a tract of 10,075 acres which had at that time been recovered, and incloses to her a deed to be executed by her to convey to him a one-fifth interest therein, saying in the letter of June 3, 1875: 'As to the deed which I inclose to you, you will find that it is in exact accordance with Mr. McMurtrie's offer to me by letter of January 24, 1873, and my letter of acceptance Feb. 1, 1873.' And later, in the same letter: 'I agree with you in thinking there ought to be a regular contract in writing between us signed and acknowledged, and will prepare one if you wish it. I have rested content with Mr. McMurtrie's letters, knowing that he would do just what he had promised for you.' The amended and supplemental bill does seek to mitigate the force of the exhibits evidencing the original contract, and avers that the reference to them in the amended bill has been misunderstood, in that they have been supposed to 'embody the contract intended to be referred to in them, the contract upon which this complainant has brought this suit, when, in fact, it was subsequently made and entered into in writing between the said Emily Hollingsworth and this respondent.' I understand this averment to mean, not that the contract evidenced by the letters never existed, but that the contract was later reduced to the form of a written instrument, upon which latter complainant bases his claims. The written contract subsequently signed by the parties is filed as Exhibit No. 4 with the amended and supplemental bill. It bears date July 10, 1875, and is manifestly the contract to be drawn alluded to in Gen. Roller's letter of June 3, 1875 (Exhibit No. 6), in which letter Exhibits 1, 2, and 3 (the letters of 1873) are referred to as evidencing the contract existing between the parties, and the contract which it was proposed to reduce to the form of a signed instrument.

"Exhibit No. 7 is a letter from Gen. Roller to Miss Hollingsworth, dated July 7, 1875, in which he says: 'I inclose our agreement prepared in accordance with your request. I inclose duplicate copies. Retain one, and inclose the other to me. Please have Mr. McMurtrie to examine it in connection with our letters of Jan. 24, 1873, and Feb. 1, 1873, respectively.' Here the letters of 1873 are again invoked as the evidence of the contract existing between the parties, and to verify the correctness of the written instrument inclosed to be signed. The amended and supplemental bill alleges that the written instrument was signed, and that that is the contract on which this suit is brought.

"Is this contract free of the illegality of the original undertaking? If it is ambiguous in respect to the matter of costs and expenses, it is to be construed in the light shed upon it by Exhibits 1, 2, and 3, and the correspondence attending its preparation and execution, and these, I think, leave no room for doubt about the question. It is to be remembered, also, that the employment of the complainant, as evidenced by the letters, took place about February 1, 1873, while Exhibit 4 is dated July 10, 1875, so that nearly 2½ years had elapsed between the commencement of his connection with Miss Hollingsworth as her counsel and the execution of Exhibit 4, and in this interval of time much had been done in the performance of his undertaking to recover the land.

"Exhibit 4 recites that of the 52,000 acres of land there had already been recovered the Loose tract of 13,800 acres, the Davis tract of 2,700 acres, and the Gray J. Peyton tract of 10,075 acres, aggregating in all 26,575 acres.

"With respect to costs and expenses, Exhibit 4 contains the following provisions: 'Emily Hollingsworth agrees to pay * * * all expenses which may be incurred in the expected litigation outside of Virginia, all expenses in Virginia of the litigation that may be necessary, and expenses of any sale that may be made are to be paid out of the proceeds of the lands recovered. Emily Hollingsworth is to be at no time required to pay any money for anything connected with the litigation in Virginia. If these expenses are paid by John E. Roller, he is to be reimbursed out of the proceeds of the land recovered.' The contract in terms covers the whole 52,000 acres of land, applying to those portions which had at that time already been recovered, as well as to those portions yet in controversy, and I am disposed to agree with counsel for complainant that the lands already recovered furnished the means, under the terms of the contract, to the extent of their value, for the payment of costs attending the unfinished litigation, as well as the costs of that which was ended. Yet, if this is so, it is in exact conformity with the original contract evidenced by the letters of 1873, by which it was agreed that Gen. Roller should have one-fifth of the net proceeds of the land, meaning by net proceeds, as stated, 'proceeds after deducting expenses of suit and sale.'

"Under the circumstances recited, I am unable to perceive how the signed writing of July 10, 1875, can be considered a new contract, purged of the illegality that inhered in the old. It was obviously intended as a reduction to formal writing of the agreement evidenced by the letters, and it conforms to and ratifies that agreement. Under the original agreement, the complainant was to be reimbursed his outlay for costs and expenses, in the event of success, out of the lands recovered, and the paper of July 10, 1875, recognizes this fact, and applies it to the existing situation. There are other considerations affecting the paper of July 10, 1875, which bring about the same result. If it were the only evidence of the contract between the parties, the first and last, would it not be open to the same objection of illegality? In it Gen. Roller distinctly undertakes to institute and carry on litigation to recover the 52,000 acres of land, and in it he and his client distinctly stipulate that the latter 'is to be at no time required to pay any money for anything connected with the litigation in Virginia. If these expenses are paid by John E. Roller, he is to be reimbursed out of the proceeds of the land recovered.' Here the client is distinctly indemnified against costs by the counsel, and such a contract is no less champertous than one in which it is affirmatively provided that counsel shall stand the costs. 6 Cyc. p. 858 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) 829.

"It is urged by counsel, against this construction, that the contract made the land recoverable liable for costs and charges, and that enough has already been recovered at that time (July 10, 1875) to answer this purpose. But the client was none the less indemnified against liability, and the land might prove inadequate for the purpose. This was sufficiently within the range of possibility to make the matter of the client's exemption the subject of an express stipulation. It appears that the land was wild mountain land, having only a speculative value, while the suits to be brought were of a kind attended with heavy expense. Moreover, if this contract is to be construed as having relation in date to the commencement of complainant's connection with Miss Hollingsworth as her counsel (as argued in his behalf), then at that time no land had been recovered, and the whole undertaking was at complainant's risk as to cost by the clause exempting Miss Hollingsworth from liability.

"Viewing Exhibit No. 4 again from the standpoint of its own date (July 10, 1875), it binds Miss Hollingsworth to compensate Gen. Roller with one-fifth of the lands, of all the 52,000 acres recovered or to be recovered. For what? Certainly not only for the services to be rendered in the future in connection with the unsettled controversies affecting those portions of the land then not yet recovered—aggregating about 25,000 acres—but manifestly in consideration of his services rendered and risks assumed under the contract of 1873, and in and about the recovery of the 26,575 acres which on July 10, 1875, had already been recovered, and his services rendered and risks assumed under the provisions of the same contract in and about the proceedings looking to the recovery of those portions of the land which has not yet been recovered in 1875, as well as the services still to be rendered when Exhibit 4 was signed.

"A bond given for a fee due under a champertous contract is void, and so likewise is

any other contract for such a consideration. Neither is the contract of July 10, 1875, severable so as to distinguish the valid from the illegal parts, even if it were held to be an independent contract without vice of its own, so far as future transactions were concerned. It would be impossible to determine to what extent the services rendered and the risks assumed by the complainant under the contract of 1873 operated as the consideration for the promise to pay him one-fifth of the lands yet unrecovered in 1875. The contract of 1875 is an entire thing, and the illegality of the original contract is inseparably a part of it. Trist v. Child, 21 Wall. (U. S.) 441, 22 L. Ed. 623.

"As a further argument against the demurrer, it is insisted by counsel for complainant that the demurrant, Mrs. Murray, is a stranger to the contract, and that a stranger to an illegal contract cannot set up the illegality as a defense.

"The abstract proposition of law, as stated, is doubtless correct, but I do not think the authorities sustain the application of the principle to the situation of this case. The rule applies when the illegality does not appear on plaintiff's own showing, but is brought into the case in an affirmative way by the defendant as matter of defense, as by plea or answer, or where the illegal contract is collateral to the matter in suit. When the illegal contract is the substance of his suit, and the illegality appears by the plaintiff's pleadings, and a demurrer is interposed, or the question is otherwise brought to the attention of the court, the law is, I think, that the illegality thus appearing will defeat the suit.

"The case of Johnson v. Van Wyck, 4 App. D. C. 294, 41 L. R. A. 520, decided by the District of Columbia Court of Appeals, is a learned and instructive authority on this question, and on pages 528 and 529 a number of eminent judges are quoted at length in support of the decision. The case of Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 927, 42 L. Ed. 302, also illustrates the rule; and this result would seem to follow necessarily from the general principles of equity relative to illegal contracts. 2 Pom. Eq. Jur. (3d Ed.) §§ 936–939.

"If Miss Hollingsworth had conveyed the land to Mrs. Murray in consideration, or on condition, that she should pay to Gen. Roller one-fifth of the proceeds realized on a sale of it, or that the grantee should hold a one-fifth interest as trustee for Gen. Roller's use, Mrs. Murray could not have pleaded to a suit by Gen. Roller to enforce the provisions of this deed for his benefit that the benefit accruing to him under a deed was the result of a former champertous contract between Gen. Roller and her grantor. In that case he would rely upon the deed and the contract evidenced by it, and the consideration which moved Miss Hollingsworth to make these provisions would not appear, and Mrs. Murray would not be allowed to bring it in as affirmative defense for the purpose of relieving herself from the obligations of a legal contract between herself and her grantor.

"I do not regard Mrs. Murray, however, as a stranger. On the contrary, she is a privy in estate to Miss Hollingsworth, her grantor, and a privy also to the contract with Gen. Roller. The bills allege (original and amended) that Miss Hollingsworth made a deed of gift of the land to Mrs. Murray, the latter 'agreeing to carry out the contract' between complainant and Miss Hollingsworth. In Exhibit No. 52, with the supplemental bill, being a letter of Nov. 18, 1892, to Gen. Roller, Mrs. Murray says that, when Miss Hollingsworth deeded the land to her, it was with the distinct understanding that the contract with Gen. Roller was to be 'as binding upon me [Mrs. Murray] as it had been upon her [Miss Hollingsworth],' and continues: 'I would suggest that you prepare a simple statement showing that we stand in Miss Hollingsworth's place as regards the former contract, and we will submit such paper to Mr. McMurtrie for approval, and, if he thinks it the thing for both sides, we will then sign it.' And in Gen. Roller's reply of December 19, 1892, to Mrs. Murray (Exhibit No. 53), he says: 'You say that you have heretofore given me assurance that you had received the deed with the distinct understanding that my contract with Miss Emily should be as binding upon you as upon her. You are simply mistaken. Such assurance would have been acceptable to me, and would have satisfied me for a reasonable time, and perhaps until now, but what seemed a studied refusal on your part to acknowledge the fact in a formal way was far from satisfactory. If you are to take the shoes (as we lawyers say) of Miss Emily Hollingsworth, all right.' It furthermore appears that at the time of the conveyance to Mrs. Murray the litigation involved in the recovery of the land had not ended. The bill says this conveyance was made on or about April 1, 1889. In the letter of Gen. Roller of December 19, 1892 (Exhibit 53), after expressing his satisfaction for the present with Mrs. Murray's assurance as to his contract being as binding upon her as it was upon Miss Hollingsworth, he says: 'I shall at once push the Nelson Case to trial, and, when that is ended, shall demand a formal deed.' That is, the deed for the one-fifth interest he had repeatedly asked for. And in Mrs. Murray's letter to Gen. Roller of November 18, 1892 (Exhibit 52), she speaks of Gen. Roller as her counsel, and makes inquiry about the Nelson Case. It would seem, therefore, that Mrs. Murray is not only a privy in estate to Miss Hollingsworth, with the right to make any defense to Gen. Roller's demand that Miss Hollingsworth could have made (Green v. Kemp, 13 Mass. 515, 7 Am. Dec. 169, and notes); but that she expressly took over the contract to be bound as Miss Hollingsworth was, taking Miss Hollings-

worth's shoes in the contract with Gen. Roller's consent, and became his client, under the terms of the contract, before the litigation was ended.

"It is also urged on behalf of complainant that, even if he cannot recover on the contracts alleged in his pleadings, he is entitled to recover reasonable compensation for his services on a quantum merult.

"There are authorities both for and against this proposition; but the question is not one to be decided in this case. Any claim upon a quantum merult is a legal demand, to be asserted at law. The doctrine that, when a court of equity once acquires jurisdiction of a cause, it will do full justice between the parties, though in doing so it has to administer and decide rights properly pertaining to the common law jurisdiction, does not apply to the case of a bill which goes out of court on a demurrer for want of equity.

"It is incidentally mentioned as a matter of evidence in the amended and supplemental bill, and alluded to in the briefs for complainant, that Gen. Roller obtained a deed of conveyance from Miss Hollingsworth for a one-fifth interest in a certain tract of 10,075 acres lying in West Virginia, part of the 52,000 acres, and that this deed was returned to Miss Hollingsworth for certain purposes, and never returned to him.

"I do not understand that this circumstance is brought forward as an independent ground of relief as to the one-fifth interest in the particular land concerned. The pleadings are not framed with a view to relief on that account, and this court would be wanting in territorial jurisdiction.

"The court is of opinion to sustain the demurrer and dismiss the bills, and that the injunction heretofore awarded on the prayer of the amended and supplemental bill be dissolved."

When the opinion of the circuit court was rendered upon the demurrer to the amended and supplemental bill, appellant offered another amended and supplemental bill, which offer resulted in a reargument of the cause, upon which the circuit court filed a second opinion, as follows:

"On the reargument of this case, two grounds, not before advanced, were urged by the complainant to induce the court to change its decision. The first was that the act of December 8, 1792 (1 Rev. Code 1819, p. 558, c. 144), defining the offense of champerty and prescribing its punishment, was repealed by its omission from the revisal of 1849, and that the effect of this repeal by implication was, not only to repeal the statute, but to repeal the common law of which the statute is claimed to have been declaratory only; and therefore that there is no law against champerty in Virginia to-day. The opinion of Judge Tucker in Gallego's Ex'rs v. Atty. Gen., 3 Leigh, 476, 24 Am. Dec. 650, is cited in support of this proposition.

"In that case Judge Tucker said that, if there was any common-law doctrine giving validity to indefinite charities, it was completely covered by the provisions of 43 Eliz.; and that, therefore, although it should be admitted that certain indefinite charities were recognized at common law, yet, as the statute also comprehended them and was itself repealed, the common law was repealed eodem flatu with the statute. None of the other judges touched upon this question, and it would seem from an examination of the whole case that the decision of the court rested upon the proposition that the gift in question was void at common law, and not by reason of the repeal of the common law. Certainly this has been the view taken of that decision by both courts and law writers.

"In 2 Minor's Insts. (3d Ed.) p. 1056, it is said: 'In England very much more indulgence is manifested to indefinite charities than to other indefinite gifts and devises; and this diversity was long attributed not to the common law, of which some thought the statute of 43 Eliz. c. 4, merely declaratory, but to the terms of that statute, which most supposed to have introduced a new doctrine. It was under this latter view of the law that the earlier Virginia cases (mentioning Gallego's Ex'rs v. Atty. Gen., 3 Leigh, 450, 24 Am. Dec. 650, and also Baptist Ass'n v. Hart, 4 Wheat. [U. S.] 1, 4 L. Ed. 499) were adjudicated. But, upon an investigation of the ancient records in the Tower of London, it was discovered that in very many cases prior to the statute of 43 Eliz. c. 4, a similar discrimination in favor of charities had prevailed in equity, and that 43 Eliz. was little more than affirmatory of the common law. Virginia, notwithstanding this development of the mistake upon which her earlier cases had proceeded, yet did not think fit to recede from the doctrine those cases had established.'

"This same view, as to the ground upon which the decision in Gallego's Ex'rs v. Atty. Gen. vested, was taken by the Court of Appeals in the case of Fifield v. Van Wyck's Ex'r, 94 Va. 570, 27 S. E. 446, 64 Am. St. Rep. 745, in the Churchman Case, 80 Va. 718, and in the Guthrie Case, 86 Va. 125, 10 S. E. 318, 6 L. R. A. 321, and also, by the Supreme Court of the United States in Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127, 11 L. Ed. 205, and in Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397.

"From all these authorities, and others that might be cited, the opinion is manifest that, but for the error which the Supreme Court of the United States fell into in the case of Baptist Ass'n v. Hart, and which the Court of Appeals of Virginia fell into in Gallego's Ex'rs v. Atty. Gen., as to what was the common law, the decision of the latter case would have been different. In none of them is it conceded or considered that the repeal of 43 Eliz. would have operate a re-

peal of the common law with respect to indefinite charities.

"It may be true that the express repeal of a statute which is declaratory of the common law—which reduces the whole of the common law on a given subject to statutory form—would operate a repeal of the common law, but it would seem to be contrary to sound reason and to the usual rule of interpretation to allow that effect to an implied repeal of a statute arising out of the omission to embody the statute in a revision, and especially when the statute thus repealed was declaratory of the common law only in a partial sense. The act of 1792, relative to champerty, is a penal statute. It defines a criminal offense, and prescribes the punishment for it. In the sense that the offense it defines was champerty at common law and an offense at common law, the statute is declaratory of the common law; but it is not declaratory of the common law in the sense that it is a statutory expression of all the common law on the subject, for it modifies the common law and deals with only a branch of the subject. The statute is restrictive in its definition narrowing the common law, for the sale of pretended titles, the buying of choses in action, and many other forms of interference not included in the statute were champertous at common law, though they may not have amounted to a criminal offense. The statute was strictly a penal one, defining a criminal offense and fixing its punishment. Even if it be true that, by reason of the implied repeal of this statute, champerty is no longer a criminal offense in Virginia, which may fairly be regarded as doubtful, it would be an unwarranted extension of the doctrine of implied repeal to allow to the implied repeal of a criminal statute the effect of abrogating an important doctrine of the law of contracts as it existed at common law, exists now in nearly all the states of the Union, and has been supposed and held to exist in Virginia by the courts, the General Assembly, and the bar of the state.

"In the case of Nickles v. Kane's Adm'r, 82 Va. 312, the Supreme Court of Appeals of this state has distinctly declared that, whether the statute of 1792 be regarded as declaratory of the common law or as repealing the common law, the common law as to champerty with respect to the validity of contracts is the law of Virginia to-day; and this I conceive to be both a true and a binding declaration of the law.

"The other proposition urged on the rehearing was that the contract in question is a Pennsylvania contract, to be governed as to its validity by the law of that state, and that the law of another state is a fact to be proven like other facts, and cannot be known to the court on a demurrer.

"I cannot agree that the contract is to be governed by the law of Pennsylvania. The champertous suits were to be brought in Virginia, and the law of this state governs the validity of the contract. Minor on Conf. Laws, p. 404.

"The case of Blackwell v. Webster (C. C.) 29 Fed. 614, cited by counsel for complainant, on examination, is found to have turned on the particular form of the Maine statute, and is easily distinguishable without conflict with the rule as stated by Mr. Minor. Indeed, Mr. Minor refers to the case and approves it. The contract in question in the case at bar is, moreover, a contract relating to real estate, and it is well settled that such contracts are governed by the lex loci rei sitæ. 3 Minor's Insts. 144.

"With respect to the amendments tendered by complainant, the court is of opinion to reject them. The bill has been amended twice already, and, after these amendments, and after a thorough argument of the case on its merits, the court announced its decision. A due regard to the orderly procedure of the court and the rights of the opposing party require that some limit be set to the privilege of amendment. The amendments now presented are offered without explanation or excuse, and, in the main, are unsubstantial and would not change the opinion of the court on the merits of the case.

"Paragraph No. 1 sets out that, before the original contract between complainant and Miss Hollingsworth was made, it was understood and agreed that a compromise could be and was to be affected with the adverse claimants of 13,800 acres of the land in dispute, and that these adverse claimants had been advised by their counsel that their title was worthless, and that the agent of Miss Hollingsworth was so advised by complainant; and, further, that such a compromise would have furnished sufficient property belonging to Miss Hollingsworth to provide for the payment of costs. This was prior to the contract between Gen. Roller and Miss Hollingsworth, and not a part of that contract. Whatever may have been the expectation as to the case with which these adverse claimants might be induced to abandon their claims, they had not in fact been settled at the time of the complainant's contract of employment was entered into, and that contract dealt with all the 52,000 acres as in dispute, and looked to its recovery, and stipulated for the payment of costs by the counsel. The bill and the first amended bill allege that the complainant, acting under and in pursuance of his contract aforesaid, and for the compensation then stipulated, proceeded to and did, by actions and otherwise, recover the whole of the 52,000 acres of land which was the subject of the contract, and this, indeed, is the basis of the present suit.

"Paragraph 4 of the amendments alleges that Miss Hollingsworth conveyed to Mrs. Murray upon the consideration and condition that the grantee should pay to Gen. Roller one-fifth of the proceeds to be realized on a sale of the property. I take this to be but

a variation of the phraseology of the former pleadings, the facts being set out in the former bills, while in this amendment they are pleaded according to their legal effect as conceived by counsel. This view is fully verified by the brief filed by complainant himself, and by his oral argument, and by the brief of his counsel also, in all of which it was insisted that Mrs. Murray, in consideration of the conveyance to her, undertook to carry out the contract of Miss Hollingsworth with Gen. Roller, and that the only contract that she had knowledge of was the contract of 1875, and that the contract of 1875 was therefore the one as to which she undertook to stand in Miss Hollingsworth's place and to carry out. The views of the court on this question are fully set out in its former opinion, and it sees no reason to change them. The other amendments offered are mere amplifications of the former pleadings, and would not affect the result.

"The conveyance at one time by Miss Hollingsworth to Gen. Roller of a one-fifth interest in a certain portion of the lands lying in West Virginia, the deed for which was afterwards returned to her, is urged as a reason why the court should retain jurisdiction and grant relief as to that portion of the land; but this is a suit to enforce the sale of the land under the Wheelock deed of trust, and this court cannot decree the sale of land lying in West Virginia, even if such relief would be proper under the other facts of the case.

"The case of Brown v. Bigne, 21 Or. 260, 28 Pac. 11, 14 L. R. A. 745, 28 Am. St. Rep. 752, quoted in Johnson v. Van Wyck, 4 App. D. C. 294, 41 L. R. A. 520, has been much relied on by counsel for complainant in the argument of what constitutes a champertous contract, but I do not think it sustains their position. In that case Bigne was engaged in a necessary and meritorious suit, already begun, and found himself, pending the suit, without means to prosecute it further, and thereafter he entered into a contract with Brown, by which the latter furnished the funds to carry on the suit already begun to a termination for a share of the proceeds. The court upheld the contract under the circumstances of the case, but said: 'When such contracts are made for the purpose of * * * inducing suits to be begun which otherwise would not be commenced, * * * they come within the principles and analogy of that doctrine, and should not be enforced.' 4 App. D. C. 294, 41 L. R. A. 526.

"A decree can be drawn denying leave to file the amendments offered, sustaining the demurrer of Mrs. Murray, and also that filed by the Pocahontas Company and the Chesapeake Western Company, which was filed after the former opinion of the court was announced (sustaining the latter demurrer pro forma), and dismissing the bills, and also dissolving the injunction formerly awarded."

For the reasons given by the circuit court, we are of opinion that its decree should be affirmed.

Affirmed.

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(107 Va. 441)

## HOOVER v. NEFF et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. DEEDS — CANCELLATION FOR INVALIDITY — UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF.

Proof of undue influence such as to overcome the will of the grantor is necessary to justify the annulment of a deed, and the burden of showing such influence is upon his asserting it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 587–593.]

2. SAME—VALIDITY—UNDUE INFLUENCE—EVIDENCE.

Evidence *held* to show grantor's mental capacity to make a deed, and that the deed was the act of the grantor, not the result of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 638–641.]

Appeal from Circuit Court, Rockingham County.

Bill by one Neff and others against Emanuel Hoover and others to set aside a deed on the ground of undue influence. Decree for complainants, and defendant Hoover appeals. Reversed.

D. O. Dechert, for appellant. C. R. Winfield, for appellees.

CARDWELL, J. It appears that Emanuel Hoover, appellant, on or about the 1st day of January, 1903, intermarried with one Virginia C. Will, a widow, who then was and up to the time of her death remained without descendants. Her death occurred on the 16th day of March, 1904, about 15 months after her marriage, and in the early evening of the day preceding her death she executed a deed conveying to the appellant certain lands of value of about $1,000, the conveyance being made for the nominal consideration of $1, and the lands conveyed charged with the payment of $100 to Bessie Will, grantor's niece, when she became 20 years of age; and, in the event of the death of Bessie Will before she became 20 years of age, appellant was to retain the $100 as his own money.

The bill in this cause was filed by a portion of the next of kin and heirs at law of the grantor against the appellant and other parties named as defendants to have vacated and annulled the said deed, upon the alleged grounds that at the time of its execution the grantor was mentally incapable of engaging in the transaction, and that the same was procured by the exercise of undue influence upon her by appellant. Upon a hearing of the cause on the pleadings and the proofs taken for both the complainants and the ap-

pellant, the circuit court made its decree, finding that the grantor was entirely capable of executing the conveyance, but that the conveyance was procured by undue influence, and vacated and annulled the same, except as to the charge thereby created upon the lands in favor of Bessie Will, amounting to $100, as to which the bill itself prayed that the deed be not disturbed. From that decree, the appellant obtained this appeal.

The evidence discloses that at the time of the marriage of appellant with the grantor in said conveyance she had been for some years a widow, living alone in the country upon the lands in controversy, about a mile from the home of appellant, of whose first wife she was a relative; that her own kindred and heirs at law, or many of them, were of half blood only, and for the most part resided a considerable distance from her; that nearly all of her kindred ceased communication with her for some time prior to her intermarriage with appellant, and this situation seems to have existed for many years previous to that marriage; certainly during the entire period to which reference is made her kindred had wholly failed to render her any of those kindly attentions usually expected from relatives to one in her position, and had given her no assistance whatever in the conduct of her affairs. On the other hand, it is shown that appellant had been often prior to his marriage with the said Virginia C. Will of material assistance to her, aiding her in the cultivation of her lands, supplying her with firewood and other necessaries, and during the period of the marriage had completely discharged the duties owing from a husband to a wife, although, for reasons entirely satisfactory to themselves, they continued to reside at their respective homes. The disease which terminated in the death of the wife was pulmonary tuberculosis, with which she seems to have been affected for a period of two years and possibly somewhat longer, although she was never confined to her bed with it until Monday, the 14th day of March, the third day prior to her death. On that morning about 7 o'clock she had what the witnesses describe as a sinking spell, rallying therefrom after about half an hour or an hour, and her death did not occur, as before stated, until the night of Wednesday, the 16th of March. It further appears from the testimony of three of the principal witnesses for appellees that the grantor at all times after rallying from her sinking spell of Monday morning was fully aware of her impending dissolution; and that, recognizing her condition on Monday after the sinking spell, on Tuesday morning and on Wednesday, the day of her death, and at the very moment of the arrival of the scrivener, who prepared the deed in question, she was engaged from time to time in stating her desires as to the disposition to be made of sundry articles of her personal property. In fact, counsel for appellees admits that the evidence fails to "indicate any actual mental derangement" in the grantor; the contention being that at the time of the execution of the conveyance she was in such an extreme and desperate state of weakness as to be "a mere passive instrument in the hands of appellant." In other words, the sole question for our determination is whether or not this conveyance was obtained by appellant by undue influence. Here we have a capable grantor, as is admitted, and the inquiry is, what undue influence, if any, was brought to bear upon her to cause her to execute the conveyance in question. It may be said, by way of narrowing the issue further, that it is admitted, as well as proven in the record, that at no time prior to the Monday on which her final illness began, which was one day before the conveyance in question was executed, was the grantor's condition mentally or physically such as to admit of the successful exercise of undue pressure upon her, and there is no pretense that up to that time any had been attempted. It may be further said, in this connection, that the proof shows that the appellant had no opportunity to coerce the grantor in the execution of the deed between Monday morning and the moment of its execution other than his presence in the room at that moment and for a short while prior. The evidence wholly fails to show that for a single moment he was alone with the grantor; on the contrary, it is shown that the only time they were together in the room with the door closed Susan Hiser, a witness for the appellees, was in the room with them.

It is true that appellant telephoned to the scrivener about a week or ten days before that he wished him to come down and do some writing, and, the scrivener failing to come, the appellant, on the evening that the conveyance was executed, sent his son for the scrivener, and appellant met him at the house of the grantor and informed him that the title papers by which he would have to write the deed were down at appellant's house, and the deed was actually written at the latter place. Every one of those who were present when appellant was with the grantor, from the time of her sinking spell on Monday up to the time of the execution of the deed, has been introduced as a witness for appellees, and none of them testify that he endeavored in any way to coerce or even persuade her to convey the land to him in contravention of her own untrammeled desire.

We do not deem it necessary to consider at length the argument presented as to the burden of proof in such a case. In any case, whether the instrument sought to be overthrown and annulled, on the ground of undue influence or coercion, be a deed of conveyance or a testamentary disposition of property, the proof must be that the undue

influence or coercion was such as to overcome the will and control the judgment of the grantor, in the one case, or the testator, in the other, and the burden of proof in such a case, as in a case where fraud is charged, is always on him who charges undue influence. Wallen v. Wallen, 107 Va. ——, 57 S. E. 596.

In Griffin v. Birkhead, 84 Va. 612, 5 S. E. 685, a wife indirectly (the only mode by which conveyance could have been made at that time) conveyed her separate estate in lands to her husband, and the transaction was attacked upon the ground that the conveyance was procured by undue influence and coercion of the husband; the relation of husband and wife and the fact that the husband was the implied trustee for the wife's separate estate being relied on as raising the presumption of undue influence and coercion. Held "there is nothing in the fact that he (the grantee) was the husband of the grantor in the deeds, and that the subject of the grant was her separate estate for which he was her implied trustee, which constitutes per se evidence of imposition, fraud, or undue influence; nor is it material or indispensable that there should have been a valuable consideration for the deeds, if, in truth, there was none."

In Hartman v. Strickler, 82 Va. 237, supported by a large number of decisions of this court, it was ruled that, in order to invalidate a conveyance on the ground of undue influence or coercion, the proof must show that "the act was procured by coercion, by importunity which could not be resisted, and that the motive was tantamount to force or fear."

A deed containing an entire disposition of the estate of the grantor stands in the nature of a testamentary disposition of his property, especially so when it appears that the grantor himself so regarded it. Greer v. Greer, 9 Grat. 330.

In the case of Wallen v. Wallen, supra, the opinion by Keith, P., reviews a number of leading authorities bearing upon the subject, and it was there held that the lower court erred in refusing the following instruction: "The court instructs the jury that the influence which will vitiate a will must amount to force and coercion, destroying free agency. It must not be the mere desire of gratifying the wishes of another; that would be a very strong ground in favor of the testamentary act. Further, there must be proof that the act was obtained by coercion or importunity which could not be resisted; that it was done merely for the sake of peace so that the motive was tantamount to force and fear."

In Orr v. Pennington, 93 Va. 268, 24 S. E. 923, it is said: "Cases of this kind plainly turn upon the exercise of actual undue influence of the child over the parent, and not upon any presumption of invalidity." In that case Greer v. Greer, supra, is cited with approval, in which two deeds disposing of grantor's entire estate to one of his sons were attacked on the same grounds alleged in this case, and the proposition that a presumption of undue influence arose out of the relations of the parties to the transactions was denied.

A number of cases are cited by counsel for appellees in which a deed or will was annulled on the ground of undue influence, but all that need be said of those cases is that the proof was very different from that in this case.

The circumstances mainly relied on by appellees as showing coercion or undue influence on the part of appellant in the transaction under consideration are, first, that the appellant was the husband of the grantor, and that the deed was prepared at his house; second, that the scrivener, in going with appellant's son from his house to that of the grantor, went by a route leading across the fields, through rugged places, etc., instead of by a public road; third, that after their marriage appellant and his wife continued to reside at their respective homes; and, fourth, that the provisions of the deed are contrary to previous expressions of the grantor's intention.

As to the first, it need only be added to what we have already said that while the fact that appellant was the husband of the grantor is a circumstance to be considered in the determination of the question whether the conveyance was procured by undue influence, that fact alone would not justify the annulling of the conveyance; nor do we attach any importance to the fact, standing alone, that the deed was prepared at appellant's house.

As to the second, the scrivener, J. C. Cooper, and Phillip E. Hoover, who accompanied him, both agree that the only reason why they took the route across the fields instead of by the public road was because it was considered nearer, and there is nothing whatever in the record to suggest any other reason why they did so.

With reference to the third ground, viz., that the appellant and his wife continued to reside at their respective homes, any inference that might be drawn from that circumstance is overcome fully by the proof in the record that the relations between these parties were entirely amicable, and that appellant completely discharged the duties owing from a husband to a wife.

Coming then to the fourth ground, while there is some testimony tending to show that the provisions of the deed were contrary to the previous expressions of the grantor's intention, to the effect that she did not intend to "make her property over" to appellant, or that she "would never sign no paper for no man," these declarations were made some time before the execution of the deed, the latter before grantor's marriage with appel-

lant. Frederick Ritchie, a cousin of the grantor, testifies that about a month before her death grantor told witness that "Mr. Hoover [appellant] treated her all right and she got along fine now," and that "she was going to see that he [appellant] got everything she had, that she wanted him to have everything she had." This witness and others testify as to the feelings of the grantor towards her next of kin and her purpose that they should have no part of her estate.

Even if such evidence as that relied on were relevant upon an inquiry as to the substantive fact of undue influence, it is entitled to little or no weight, for it cannot be gathered from the statements as made whether or not the grantor had reference to making over her property during her life or its disposition upon her death. It is much more reasonable to interpret these statements as meaning that the grantor intended to retain control of her own property during her lifetime, than that they had reference to her disposition of it at her death.

In Stevens v. Vancleve, 4 Wash. (U. S. C. C.) 262, Fed. Cas. No. 13,412, cited in Wallen v. Wallen, supra, Mr. Justice Washington states the law as follows: "The declarations of a party to a deed or will, whether prior or subsequent to its execution, are nothing more than hearsay evidence; and nothing could be more dangerous than the admission of it, either to control the construction of the instrument, or to support or destroy its validity. If the evidence is offered in support of the instrument, it could only have that effect upon the supposition of a uniform consistency of those declarations, not only with the instrument itself, but with the secret intentions of the party at all times after those declarations were made; and yet how unsafe a criterion would this be, when most men will acknowledge the frequent changes of their intentions respecting the disposition of their property by will before they have committed them to writing. The uniform consistency of those declarations is the chief ground upon which the whole argument in favor of the evidence is rested; and yet, if the evidence be admitted at all, the plaintiff would be at full liberty to prove opposing declarations of the testator at other times, and thus a door would open to an inquiry in no respect pertinent to the main subject of investigation, but mischievously calculated to perplex and to mislead the jury. That such evidence has sometimes been given is proved by many of the cases read by the defendant's counsel; but it would be very unsafe to consider those instances as laying down a rule of law, since in none of them was an objection made to the admission of the evidence, so as to submit its competency to judicial inquiry and decisions. The general rule of law is against the evidence, and no case has been cited showing an exception to it, unless when it was offered to repel a charge of fraud or circumvention of the devisee in obtaining the will."

That the execution of the deed was in pursuance of a previous fixed intention of the grantor is shown we think clearly by the following testimony:

Cooper, the scrivener, who took the acknowledgment of the grantor, had been several times elected a justice of the peace in his county, and his reputation for truth and veracity is not questioned. He testifies that he first talked with grantor to satisfy himself "whether she was competent to acknowledge a deed or not," and then read the deed over to her word for word, "boundaries and all," and before signing it she declared that it was exactly the way she wanted it; and that after signing she said that she had been very poorly on Monday, but was better on that day (Tuesday), remarking that she was ready to go on Monday if the Lord called her, except for something, which the witness did not catch, but which is supplied by Phillip E. Hoover, who when she made the remark was closer to her than Cooper, and who states that after she remarked that she had been very ill on Monday she said, "Although I was ready to go, except one thing, now that is fixed I am ready to go at any time." Mrs. Sidney B. Hoover also states that on the day of her death the grantor told witness that she "had everything straightened up now and was ready to die"; and there is not a circumstance to show that she had reference to anything else that had been straightened up except the execution of the deed. Cooper further testifies that in addition to the grantor being mentally capable of understanding what she was doing, and in the free exercise of her own will and purpose, she gave him some information which clearly explained the location of a part of the land conveyed, with reference to the residue, and correctly stated the sources from which she acquired the title; also discussed intelligently the provision for Bessie Will, etc. Up to the arrival of Cooper, she was conversing with appellees' witness Susan Hiser, and directing the disposition of certain of her personalty. While Cooper noticed the weakness of grantor's voice, it is shown by appellees' evidence that her voice was for some time prior to her last illness so weak that it was difficult for her to talk at times so as to be understood, while her mind was always clear and unaffected, even up to the last hour of her life.

The undisputed evidence shows that the deed was not executed in any secret manner; on the contrary, the door between the grantor's sick room, where the deed was executed, and that adjoining it was left open, and Bessie Will (grantor's niece) and Susan Hiser, both witnesses for appellees, were in the adjoining room, and were not prevented by any one from entering the room, nor even requested to remain outside, and nobody denies that the entire deed. "boundaries and

all," was read over by Cooper to the grantor in a loud tone of voice. The fact that the paper was executed at night is fully explained by the fact that the scrivener was a school teacher, living seven or eight miles from grantor's home, and was prevented by his school duties from arriving at an earlier hour. In reply to a question, on cross-examination, as to the instructions given him by appellant, Cooper answered: "He only instructed me this far: He told me that that was Mrs. Hoover's desire to have the deed fixed up in that way, and he furnished me the deeds to write it by, and told me that Mrs. Hoover had said to him to put in the deed in regard to Miss Bessie Will $100 to be paid to her. Those are the instructions Mr. Hoover gave me."

Appellees introduced some evidence that for some time prior to her death the grantor had not had, except on the Monday preceding it, the attention of a physician, and doubtless the introduction of this evidence was for the purpose that an inference might be drawn from it that the relations between appellant and his wife were unpleasant and strained, and that, therefore, the provision by her for him in the deed was an unnatural one. That such an inference is not justified appears from the evidence introduced by the appellees themselves in the depositions of three of their chief witnesses. One of them, Dr. Geil, states that he himself some time prior to the final sickness of the grantor advised her to have a physician and take such medicines as were appropriate to her disease, but that she declined to do so. Bessie Will, who was for a considerable portion of the grantor's latter life an inmate of her house, testifies that the grantor positively refused to have a physician or to take any medicine, and that appellant frequently urged her to do so. Ritchie, a witness unfriendly to appellant, testified to the same effect. The last two witnesses named and another testify that the grantor herself told them on several occasions that appellant wanted her to reside with him at his home, but that she, for reasons stated, preferred to remain at her own house.

After his wife's death, appellant interposed no objection to Bessie Will and another, who testify for appellees, taking possession of the articles of personalty which she, during the last two days, in fact, during the last hours, of her life, indicated that it was her desire they should have; and without discrediting the honesty and intelligence of these witnesses it could not be supposed that they would have entertained the idea of receiving such benefactions at the hands of one whose condition was such as to preclude either intelligence or freedom of action in their bestowal. As appellant, sole distributee of these articles, voluntarily released them in accordance with the mere verbal expressions of the desire of his wife to these parties, it strongly militates against appellees' theory that he was animated by a desire to appropriate to himself the property of his wife, regardless of her own will and purpose.

In our view of the evidence, it not only shows that the grantor was mentally capable of executing the conveyance in question, but that this capable grantor, in making the conveyance, acted of her own free will, and was actuated by no motive other than her own purpose and design. Therefore, the decree appealed from will be reversed and annulled, and this court will enter the decree that the circuit court should have entered, dismissing appellees' bill, with costs to appellant.

Reversed.

(129 Ga. 590)

## PURDOM NAVAL STORES CO. v. KNIGHT.

(Supreme Court of Georgia. Nov. 16, 1907.)

1. LICENSES — TURPENTINE — DEEDS — CONSTRUCTION—"SEASONS."

A deed granting the right to work growing trees in this state for turpentine purposes, which provides that "the said timber is to be boxed during the season of 1905 or 1906," and that "the said right for turpentine purposes is to run for a period of four years from the time each lot is boxed," must be construed in connection with section 496 of the Penal Code of 1895 of this state. So construed, the boxing season of 1905 commences November 15, 1905, and ends March 15, 1906, and is separate and distinct from the boxing season of 1906, which begins November 15, 1906, and ends March 15, 1907.

(a) Where the grantee was engaged in boxing trees between the 1st day of January and the 15th day of March, 1907, he was within the terms specified in his lease, and could not be enjoined upon the ground that his time for boxing had expired.

(b) The period for boxing was restricted to the seasons of 1905 and 1906, and no trees could be worked except those which were boxed during those seasons.

(c) The plaintiff having set forth in his petition the contract, and having alleged facts making it affirmatively appear that the boxing complained of was within the term specified in the lease, the petition was open to general demurrer.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6376.]

2. WRIT OF ERROR—SCOPE OF REVIEW.

Where, upon the interlocutory hearing of an injunction had after the appearance term of the case, the judge overruled a general demurrer to the petition and granted an injunction, and the defendant by direct bill of exceptions assigned error upon each ruling within 20 days after the rendition of the judgment complained of, and the bill of exceptions was filed more than 30 days before the next term of the Supreme Court, it is within the power of the court at the call of the docket for "fast" writs to review both rulings of which complaint is made.

(a) In view of the construction given the contract as expressed in the first headnote, the judge committed error in overruling the general demurrer and also in granting the injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3307.]

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by W. C. Knight against the Purdom Naval Stores Company. An order was entered overruling a demurrer to the bill and granting an injunction, and defendant brings error. Reversed.

W. C. Knight instituted suit against the Purdom Naval Stores Company, seeking to enjoin that company from boxing and working the pine trees on certain described land for turpentine purposes. It was alleged in the petition that the defendant was attempting to box and work the trees under and by virtue of authority of a certain grant previously made by W. C. Knight, the plaintiff, to the defendant, wherein it was provided, among other things, that "the said timber is to be boxed during the season of 1905 or 1906," and that "said right for turpentine purposes is to run for a period of four years from the time each lot is boxed." It was further alleged that the defendant had not previously entered upon the lands for the purpose of boxing them, but that on the 12th day of February, 1907, an entry was made by the defendant for the purpose of boxing and commencing to work and box the trees and continuing the same for a period of four years thereafter. It was further alleged that this entry was not authorized for the reason that the time specified in the lease at which the Purdom Company should commence boxing had expired on the last day of December, 1906. This was the only contention made by the plaintiff directed against the right of the defendant to box the trees for turpentine purposes. The defendant filed a general demurrer and answer. After the appearance term of the court, there was an interlocutory hearing. At such hearing the judge overruled the defendant's demurrer, and granted an injunction. The defendant excepted to the order overruling the demurrer, and likewise to the order granting the injunction, and assigned error upon each ruling.

Hendricks & Christian, for plaintiff in error. Bule & Knight, for defendant in error.

ATKINSON, J. 1. From the statement of facts, it will be readily seen that the controlling question is upon the construction of the contract. If it affirmatively appears from the petition that the defendant did not overreach the terms of the contract, the plaintiff would have no right to the injunction, and a general demurrer should receive favorable consideration. In fixing the date at which the term should begin, the parties stipulated for no definite day, but provided that the time should begin "at the time each lot is boxed," and provided that the timber "is to be boxed during the season of 1905 or 1906." The word "season" is not limited to one day, but contemplates a longer time. Cases are cited in Words & Phrases, vol. 7, p. 6376, which construe the meaning of the word "season." In the present case the parties stipulated that the boxing should be accomplished either during the season of 1905 or during the season of 1906. The Purdom Company was at liberty to box upon any date during either season. There are instances, as will be observed from examination of the cases referred to in Words & Phrases, supra, where the word "season" is not defined by law. In all such instances it is proper to consider evidence to ascertain the limit of time expressed in a given season; but the case now under review contemplates the season for the boxing of trees for turpentine purposes and the period within which that can be done is fixed by statute. Being fixed by statute, the court knows as a matter of law the particular time contemplated by the use of the word "season" as employed in this case and may deal with it on demurrer. Pen. Code 1895, § 496, provides: "Any person who shall cut turpentine

boxes at any other season of the year than from the fifteenth of November to the fifteenth of March, on his own land or the land of another, shall be guilty of a misdemeanor. The fine shall be paid over to the county treasurer." It is thus made a penalty by statute to box trees for turpentine purposes at any other time than between the dates of the 15th of November of one year and the 15th of March of the succeeding year. By making it unlawful to box at any other time, the statute necessarily fixes the limit of the boxing season. Therefore, when reference is made to the boxing season, as in the present case, the parties can be understood to refer to no other time than that wherein they are permitted by law to box. The word "season," as used in the contract, has a definite meaning, so made by statute. The contract must be construed in the light of the statute, and it will be conclusively presumed that by the use of the word "season" the parties contemplated the period of time fixed by statute during which it is lawful to box. Under this view, a season will begin in one calendar year and end in the succeeding year. But the time is continuous. There is no break. When reference is made to the season of 1905, the entire season is contemplated. So, when it was provided that the Purdom Company should box during the season of 1905, that company was entitled to box for a whole season. The right could not be restricted to the period intervening between November 15, 1905, and the end of the year, because that would deprive the company of the remaining 2½ months of the season in which the boxing was authorized by law to be done. That would altogether defeat the intention of the parties who had contracted for a full season. The same may be said with respect to the season of 1906. We may therefore safely conclude that, in view of the statute, the parties while contracting contemplated that the season of 1905 would commence on the 15th day of November of that year and end on the 15th day of March, 1906, and that the season of 1906 would commence on the 15th day of November of that year and end on the 15th day of March, 1907. The use of the disjunctive "or" emphasized the fact that the parties contemplated the two seasons separately. Having provided that the boxing should be done during either season, the Purdom Company had all or any part of either season in which to box. After boxing the trees, the company had the right for the full term of four years thereafter to otherwise work for turpentine purposes the trees which were actually boxed during that season, but not any other trees. The intention is clear from the mandatory language, "the said timber is to be boxed during the season of 1905 or 1906," that no boxing was to be done thereafter. The plaintiff's petition sets forth the contract in full, and affirmatively shows all that has been stated, and, moreover, affirmatively shows that the defendant entered the premises for the purpose of boxing the trees at a date prior to the 15th day of March, 1907, during the boxing season of 1906 and at a time when such entry was authorized under the lease. It therefore affirmatively appears from the plaintiff's declaration that the defendant was clearly within its rights when it undertook to box the trees for the prevention of which the injunction was sought. The petition setting forth all of this alleged no cause of action against the defendant and the defendant's general demurrer should have been sustained, and the court should have refused to enjoin the defendant from boxing the trees.

2. The hearing was had after the return term of court had arrived. The demurrer was therefore ripe for determination. The presiding judge heard it; and no point was made as to the time and place when it was heard and determined, but exception was taken to the merits of the ruling. The application for injunction was also heard and decided. A bill of exceptions was filed which complained of both rulings, and assigned error on each. The bill of exceptions was certified and filed in the office of the clerk of the superior court more than 30 days before the beginning of the next term of the Supreme Court. It stated that it was tendered in 20 days from the decisions complained of; but the time of certification, service, and filing was such that it might have been treated either as a "fast" writ under Civ. Code 1895, § 5540, relating to the grant of injunction, or an ordinary writ under Civ. Code 1895, § 5539, relating to the ruling on the demurrer. It was here in due season to be heard at the present term of this court either way. Whether it should be heard speedily or wait for the arrival of the circuit to which it belonged was rather a technical matter of docketing than a matter of substance. Under these facts, we have allowed the case to be heard with "fast writ" cases; but there is no reason why the entire merits should not be determined. Indeed, the two exceptions involved are controlled by one point of law. To decide one determines the other. This presents a stronger case for deciding the law controlling the demurrer than that of Jordan v. Kelly, 63 Ga. 437.

We hold that the grant of the injunction was erroneous and so likewise was the order overruling the demurrer.

Judgment reversed. All the Justices concur.

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(3 Ga. App. 159)

## MAYOR, ETC., OF CITY OF AMERICUS v. TOWER. (No. 577.)

(Court of Appeals of Georgia. Nov. 27, 1907.)

1. MUNICIPAL CORPORATIONS—STREET GRADE—CHANGE—DAMAGES—EVIDENCE.

In a suit against a municipality for damages resulting to abutting property by raising the grade of the street in front of the property, testimony as to the value of other abutting lots

before and since the change in the grade of the street would be relevant, but testimony that a similar claim for damages to other abutting property had been settled would not be relevant. Hurt v. City of Atlanta, 100 Ga. 274, 28 S. E. 65.

2. EVIDENCE — OPINION — MARKET VALUE — COMPETENCY.

On the question of market value before and since the change in the grade of the street, any one possessing sufficient knowledge or information may express his opinion. Wharton on Ev. §§ 255, 449; Central Railroad Co. v. Skellie, 86 Ga. 693, 12 S. E. 1017.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2217, 2273.]

3. MUNICIPAL CORPORATIONS—STREET GRADE —CHANGE—DAMAGES—EVIDENCE—PETITION.

A petition of abutting property owners to the mayor and council asking that the grade of the street be changed is not relevant testimony in a suit brought by one not a party to such petition for damages alleged to have been caused to property abutting on said street by the change of the grade thereof. That all the abutting property owners, except the one whose property is alleged to have been damaged by the change in the grade, wanted the change made, furnishes no reason why the one should not be compensated, if, in fact, his property was so damaged; nor could the wishes of all the others affect the rights of the one, or in any manner illustrate the question of damage between him and the municipality.

4. TRIAL—EVIDENCE—REMARKS OF JUDGE.

That the court in ruling on the admissibility of testimony stated "that he would overrule the objection, as he had admitted other evidence in the same line, but that he thought there had been brought much evidence into the case that had no bearing or relevancy to the issue," was not a disparagement of the testimony admitted, and did not tend to destroy the value of such admitted testimony in the minds of the jurors.

5. MUNICIPAL CORPORATIONS—STREET GRADE —CHANGE—DAMAGES—EVIDENCE—VERDICT.

The evidence fully warranted the verdict.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Action by M. E. Tower against the mayor, etc., of city of Americus. From a judgment for plaintiff, defendant brings error. Affirmed.

Lane Maynard & Hooper, for plaintiff in error. Shipp & Sheppard and J. A. Hixon, for defendant in error.

HILL, C. J. Judgment affirmed.

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(3 Ga. App. 146)

JENKINS v. STATE. (No. 782.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. HOMICIDE — SHOOTING AT ANOTHER—PREVENTING ARREST—ASSAULT AND BATTERY.

Generally it is not murder, but manslaughter, to kill an officer or another person to prevent an illegal arrest. Consequently shooting an officer without killing him, if done to prevent an illegal arrest, is prima facie not an assault with intent to murder, but the statutory crime of shooting at another as defined in Pen. Code 1895, § 113, or assault and battery. Whether the person whose rights are thus invaded is guilty of any offense depends upon the facts of the particular case. If the force of resistance is not in excess of the force of invasion, and is used solely for the purpose of prevention, no offense is committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 79, 115.]

2. ARREST — LEGALITY — CITY ORDINANCES — WARRANTS—EVIDENCE.

The fact that a city charter contains no provision for the issuance of warrants for violations of municipal ordinances is not relevant or material in determining the legality of an arrest for such violation, and it was error to admit such testimony, and to instruct the jury that this omission could be considered by them in determining the legality of such arrest. The fact that the Legislature has not authorized a municipality to issue warrants for offenders against city ordinances affords no excuse for illegally depriving a citizen of his right of personal liberty. The legality of an arrest in such cases is to be determined by the provisions of Pen. Code 1895, § 896, which "is applicable alike to state and municipal arresting officers."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, § 144.]

3. HOMICIDE—SHOOTING AT ANOTHER—RESISTING ARREST—DEFENSES—INSTRUCTIONS.

Where the defense set up was lawful resistance to an illegal arrest, the law of self-defense was not alone applicable. The court should have instructed the jury as to the right of the defendant to resist an attempt to arrest him illegally, and not merely his right to defend himself against an attempt by violence or surprise to commit a felony on his person.

4. SAME—INCLUDED OFFENSES—INSTRUCTIONS.

On a trial for assault with intent to murder, an instruction that left it optional with the jury to convict the defendant of that offense or of shooting at another not in self-defense, although they might believe that, if death had resulted, the offense would have been manslaughter, was erroneous. If death had resulted and the offense would have been manslaughter, death not resulting, the offense would have been shooting at another not in self-defense or assault and battery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 610.]

(Syllabus by the Court.)

Error from Superior Court, Lowndes County; R. G. Mitchell, Judge.

King Jenkins was convicted of assault with intent to murder, and he brings error. Reversed.

Cranford & Wilcox, for plaintiff in error. W. H. Thomas, Sol. Gen., for the State.

HILL, C. J. King Jenkins was convicted of the crime of assault with intent to murder on substantially the following evidence: On December 28, 1906, Pressley and McIntyre, two policemen of the city of Valdosta, while on duty, heard the report of firecrackers from the direction of a negro barroom. They went to this barroom to investigate, and Pressley entered. He found the defendant in there with several other negroes, playing pool. The officer told the negroes not to fire any more crackers, as it was against a city ordinance. The defendant replied, "The man that done that has gone out," and the officer said, "I don't want any more of it," and started away. He was called back into the barroom by the bartender, but for what purpose does not appear. When he got back into the barroom, he again spoke to the

negroes, telling them that he did not want any more cannon crackers thrown out on the street, that it was against the ordinance, and they must stop it. The defendant again said, "The man that shot the cannon crackers has gone out," whereupon the following colloquy, according to the policeman, took place between him and the defendant: "I said, 'I have heard enough from you, be quiet'; and he kept on talking. I said, 'If you don't dry up, I will put you in the lockup'; and he said, 'You won't carry me nowhere'; and I said, I will show you.'" The officer took hold of the defendant, and he endeavored to jerk loose. During the struggle between these two, the other policeman came in and caught hold of the defendant and the pistol fired, the bullet going through the coat of the latter officer and striking his badge, going partly through it, but inflicting no wound. Pressley said that he struck the defendant over the head with his club before McIntyre came in; that he did not see the pistol in the hand of the defendant until after it was fired. McIntyre testified that he heard the defendant say, "I'll go with you nowhere," and, stepping up to the door, he saw the defendant "resisting arrest and fighting Pressley," but he saw nothing in his hand at this time. "When I got close to him, I saw him draw his pistol (I do not know from where), and try to shoot Pressley. When he drew it, I jumped at him, and grabbed the gun. I had my hand on the cylinder, and kept it from revolving for a while, but in the tussle I loosed up on it in some way. He was trying to get it on, and I was trying to keep it off. I could not wring it out of his hand. He was trying to shoot me. The pistol fired, and I wrung it out of his hand." Pressley was trying to arrest the negro, who was pulling back and telling him that he would not go with him anywhere. The defendant was beaten over the head by both officers, and was bloody when finally arrested. There was no warrant for the arrest of the defendant, and no evidence that he had violated any city ordinance or had committed any offense. Pressley testified: "I arrested him for impudence. He gave me back talk, and it appeared that he wanted to pick a fuss out of me. I did not arrest him for shooting firecrackers, and that had nothing to do with the arrest. I had no warrant for King Jenkins, nor did I try to get one for him." There was no evidence of a city ordinance forbidding the shooting or firing of crackers, and only the officer's statement that there was such ordinance. We do not think the existence of such ordinance material under the state's evidence that the arrest was not for a violation of any ordinance, but because of "impudent" talk to the arresting officer. The defendant relied for his defense upon the facts proved by the state that he had committed no offense either against the state or city, and that there was an attempt to arrest him without a warrant, claiming that he shot in resistance to this illegal arrest in which both officers participated, and that he used no more force than was necessary to resist such illegal arrest and clubbing, as he had a legal right to do. The theory of the prosecution was that the defendant drew a pistol from his person where he had it concealed, and was attempting to shoot Pressley with it; that both acts were offenses against the law, and McIntyre was justifiable under these circumstances in "laying his hands on the pistol," and in preventing the shooting of his brother officer, and, that this being justifiable, the defendant's act in shooting him amounted to an assault with intent to murder.

1. The law of arrest without a warrant has been so clearly and exhaustively enunciated by Mr. Justice Evans in Porter v. State, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730, as to make any further discussion of the subject unnecessary and profitless. It must be conceded that the arrest or attempted arrest of the defendant by the policeman Pressley was unauthorized and illegal. While "impudence" is sometimes sufficient provocation to anger, it can never furnish justification to an officer of the law for depriving a citizen of his sacred right of liberty. If in resisting such illegal arrest by Pressley the defendant had shot and killed him, his offense would not have been more than manslaughter. Where an officer attempts illegally to arrest a person, and such attempt is resisted, and the officer is killed in the attempt, the killing is extenuated from murder to manslaughter. This principle has come down to us unchanged from the birth of personal liberty, and will so continue until its death. 1 East, P. C. 310; 1 Russ. on Crimes, 798, 803; 1 Wharton, Crim. Law, § 414. Mr. Chief Justice Bleckley, in Thomas v. State, 91 Ga. 206, 18 S. E. 305, says: "Generally it is not murder, but manslaughter, to kill an officer or other person to prevent an illegal arrest. * * * Consequently shooting at an officer without killing him, if done to prevent an illegal arrest, is prima facie not an assault with intent to murder, but the statutory crime of shooting at another described in section 4370 of the Code [of 1882]." And see Porter v. State, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730; Croom v. State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179; Williford v. State, 121 Ga. 176.[1] Of course, although the arrest be illegal, if the killing is prompted by personal malice against the officer, and not in resistance to the arrest, it would be murder. Hawley's Law of Arrest, 56. Under the facts in this case, the defendant might have been justifiable in shooting the policeman Pressley, who was not only attempting to arrest him illegally, but was beating him over the head with his club. This would depend upon the character of the club, the extent of the beating, and the apparent danger to defendant's life.

2. The state contended that the arrest of

[1] 48 S. E. 962.

the defendant for a violation of a city ordinance without a warrant was legal because there was no provision in the city charter for the issuance of warrants for violations of municipal ordinances. The court permitted the introduction of evidence to show that there was no such provision in the charter, and in his charge instructed the jury that they might consider this omission in the charter in connection with the circumstances surrounding the arrest in determining whether the arrest of the defendant was illegal. The testimony on this subject was admitted over the objection of the defendant, and its admission is one of the errors assigned. The admission of this testimony was erroneous for two reasons: First, it was not relevant to the issues, it not being claimed that the defendant had violated any city ordinance, or that his arrest was for any violation or suspected violation of any ordinance; and, secondly, the fact that the charter of the city did not authorize a warrant for the violation of a city ordinance was a matter which neither the jury nor the court could properly consider in determining the legality of the arrest. As Mr. Justice Evans says in Porter v. State, 124 Ga. 303, 52 S. E. 286, 2 L. R. A. (N. S.) 730, in discussing the effect of a failure by the Legislature to make provision in charters of towns and cities for the issuing of warrants for the apprehension of offenders against municipal ordinances: "If this be true in point of fact, then the effect of such omission would be, not to abrogate the general law on the subject of arrest, or to deprive the citizen in any measure of his right of personal liberty, but to afford the municipality no means of bringing the offender to account other than those for which the general law makes provision." For the same reasons that made this testimony inadmissible, the court committed error in charging the jury on the subject. As we have stated, we do not think the question of the legality of the defendant's arrest was an issue in the case at all in view of the definite statement of the arresting officer; but we are sure that, if such fact was in issue, the court should have given to the jury, as the legal test by which to determine this question, section 896 of the Penal Code of 1895, which "is applicable alike to state and municipal officers." Porter v. State, supra.

3. If the arrest or attempted arrest by Officer Pressley was wholly unwarranted and illegal, and the defendant under the law had the right to resist by the use of necessary preventive force, and if the killing of this officer by him in the exercise of such necessary preventive force could not have been a greater offense than voluntary manslaughter, the question next arises as to his rights under the facts in shooting Officer McIntyre. If, when McIntyre came into the barroom, he saw his comrade engaged in a struggle with the defendant "who had a pistol in his hand and was endeavoring to shoot the officer," it was his duty to interfere and prevent the successful use of the pistol without regard to the merits of the difficulty between Pressley and the defendant. McIntyre required no warrant to arrest the defendant, for apparently some offense was about to be committed in his presence. If, however, the defendant at the time he shot McIntyre believed, and the facts as they then appeared to him reasonably justified his belief, that McIntyre was assisting Pressley in accomplishing his illegal arrest, he would have had the same right of resistance to the apparently unlawful act of McIntyre that he had to the actually unlawful conduct of Pressley. This theory of the defense arose from the facts, and should have been submitted to the consideration of the jury. In the excerpts from the charge set out in the twelfth and fourteenth grounds of the motion for new trial on which error is assigned the contention of the defendant that he shot Policeman McIntyre "in good faith, honestly believing, and was authorized by the circumstances to believe, that the policeman's purpose in seizing his weapon and undertaking to disarm him was to assist the other officer in making an illegal arrest and therein wrongfully deprive him of his liberty," seems to have been ignored. The court treated the case as one of self-defense, and not one of lawful resistance to an illegal arrest. The law of self-defense was applicable to that part of the evidence which indicated that both officers were using their clubs against the defendant, and was properly given in charge, but we are clear that the controlling question under the facts was lawful resistance to illegal arrest, and the defendant was entitled to have his defense as to this question submitted to the jury.

4. The fifteenth ground in the motion for new trial complains of the following charge: "If you believe that it would have been voluntary manslaughter, instead of murder, why, then, the defendant could not be convicted of an assault with intent to murder, but you would inquire whether or not it would have been an assault and battery, or shooting at another, not in his own defense. Then you will inquire if it would have been voluntary manslaughter whether you will find him guilty of shooting at another, or an assault with intent to murder." The error in the latter part of this charge is so palpable that it suggests an ellipsis; but we must decide from the record, and it is manifest that it was erroneous to leave it optional with the jury to find the defendant guilty of assault with intent to murder or of shooting at another not in self-defense, although they might have concluded that the offense would have been manslaughter if death had resulted. In this event, the only legal verdict would have been shooting at another as defined in Pen. Code 1895, § 113, or assault and battery.

For the reasons stated, we think the court should have granted a new trial.

Judgment reversed.

(3 Ga. App. 120)

WILEY v. STATE. (No. 605.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. LARCENY—EVIDENCE.

The verdict was authorized by the evidence, and no error is assigned which would require the grant of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 164–169.]

2. SAME—STOLEN PROPERTY—RECENT POSSESSION—BURDEN OF PROOF.

"The rule is too well settled to be disturbed that the possession of stolen property immediately after it is stolen puts upon the possessor the burden of proving that his is not a guilty possession."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 129.]

3. CRIMINAL LAW — INSTRUCTIONS — VERBAL INACCURACIES—NEW TRIAL—GROUNDS.

"A verbal inaccuracy in a charge resulting from a palpable 'slip of the tongue,' and which clearly could not have misled the jury, is not cause for a new trial," especially when this "slip of the tongue" occurred in immediate connection with correct instructions upon the same subject twice repeated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2210.]

4. SAME — EXCEPTIONS — REQUISITES — REQUESTS TO CHARGE.

An exception to a charge, not erroneous in the abstract, must point out its specific defect, and the attention of the court must be specifically directed to the error in an instruction alleged to be erroneous. A written request should be made where instructions on a special defense are desired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2025.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

John Wiley, alias West Stinson, was convicted of larceny from a house, and he brings error. Affirmed.

Payton & Hay, for plaintiff in error. J. H. Tipton, Sol., for the State.

RUSSELL, J. The plaintiff in error was convicted of larceny from the house. In his motion for new trial, which was overruled, he makes various complaints (as to the insufficiency of the evidence and as to certain alleged errors contained in the charge of the court), which are presented for our consideration by the bill of exceptions.

1. It is insisted that the evidence, while showing that the umbrella in question was stolen, fails to prove the defendant to have been the thief; that the circumstances attending the defendant's possession, its publicity and the bona fides of his claim of right, themselves afforded a sufficient explanation of his possession of the stolen property. The evidence does show that the accused was found with the umbrella in broad daylight on the streets of the city of Sylvester on the afternoon of the very day on which it was stolen, that he made no effort whatever to conceal it, and that, when the prosecutor accosted him about it, he told him from whom he had borrowed it, and insisted on his right to keep it and return it to the person from whom he had borrowed it. All of these circumstances, however, were subject-matter of consideration by the jury, and we cannot say that they did not attach proper importance to them in weighing the defendant's explanation of his possession and balancing it with the fact of the actual possession of the stolen property, especially as the record discloses that the defendant told the prosecutor that he got the umbrella from one William Johnson, who was not produced or accounted for, was unknown to any of the witnesses in the case, and the defendant in his statement said that he got the umbrella from John Wiggins, who appeared likewise to have been unknown to any one connected with the case.

A further contention of the plaintiff in error is that the evidence is silent as to the ownership of the house; that the location of the house is not as proved laid in the accusation; that the evidence does not show what kind of house it was and whose it was; that the umbrella was left in a house in course of construction, and the evidence, therefore, is not sufficient to support a verdict of guilty of larceny from the house, even though the defendant might be guilty of simple larceny. We found nothing in the evidence which would compel the conclusion that the house was in course of construction. If such was the fact, the defendant should have brought it out in the evidence. The testimony of the prosecutor was that he lost the umbrella at Mr. Strangward's new house, and that he had it in the china closet between the dining room and the kitchen, inside the house. We think this testimony sufficiently proves the ownership of the house, and that the house was such as that larceny from the house could be committed therefrom or therein, and that the testimony does not raise any inference that the house was incomplete, so incomplete, as to affect the question of the defendant's guilt of the offense as charged. In view of the fact that old houses are frequently remodeled or repaired, we do not think that the testimony of the prosecutor that he was working on the stairway compels the conclusion that the house in question, although it is testified to be a new house, was not sufficiently completed to be fit for use as a house. As we have heretofore held in Glaze v. State, 2 Ga. App. ——, 58 S. E. 1126, the offense of larceny from the house is complete when one steals from any house anything of value. Pen. Code 1895, § 178.

There was no evidence that the defendant was of unsound mind in the legal meaning of that term, and the charge of the court upon that subject was more favorable to the defendant than was required. The cases of Mitchell v. State, 103 Ga. 17, 29 S. E. 435, Williams v. State, 125 Ga. 268, 54 S. E. 166, and Calloway v. State, 111 Ga. 832, 36 S. E. 63, are cited by counsel for plaintiff in error, with the statement that the evidence in the case at bar is by far weaker than was the

evidence in any of the above-mentioned cases, and that in each of them the Supreme Court held the evidence to be insufficient. We do not think any of these cases in point. In the Mitchell Case the judgment was reversed entirely upon the evidence of the good character of the defendant. The conclusion of the court is summed up in the single sentence: "This case is an illustration of how valuable a good character is to an individual." The defendant in the case at bar did not put his character in issue. In the Williams Case the defendant was convicted of a burglary committed at Fitzgerald. In such a case the defendant is not obliged to show that he acquired the goods honestly, but only to show that they came into his custody in some other way than by burglary. Williams did this by proving that they were shipped from Fitzgerald by another person, and that his only connection with the goods was receiving them from the railroad in the city of Brunswick. In the Calloway Case a new trial was granted because the possession of the goods was not recent. There is nothing in what is here ruled which is in conflict with the decisions in Markham v. State, 25 Ga. 52, Trice v. State, 116 Ga. 602, 42 S. E. 1008, or Farlinger v. State, 110 Ga. 313, 35 S. E. 152, cited by counsel for plaintiff in error. The prosecutor testified that it was Strangward's house, and no question was raised by the evidence as to the possession or occupancy of the house.

2. When the evidence for the state showed the defendant in possession of the stolen property almost immediately after its loss the burden was imposed upon him of explaining his possession. He failed to carry this burden to the satisfaction of the jury. "The rule is too well settled to be disturbed, that the possession of stolen property immediately after it is stolen puts upon the possessor the burden of proving that his is not a guilty possession." Daniel v. State, 65 Ga. 200.

3. In one portion of his charge, after having twice explained very favorably to the defendant the rule with reference to accounting for the possession of stolen goods, the trial judge instructed the jury that "the defendant is not required to satisfactorily explain his possession of recently stolen property." In the sentence immediately preceding this the court had just correctly instructed the jury upon this subject. And immediately following the extract quoted, to which exception is taken, the judge used this language: "If, after considering all the evidence in the case, there appears a reasonable doubt of his guilt as charged in the accusation, then he should be acquitted." When we consider the language excepted to in connection with the absolutely fair and correct instructions of the judge immediately preceding it and his language immediately following it, we are compelled to conclude that the use of the word "not" was merely "a slip of the tongue." The language employed was certainly not harmful to the defendant; and, if it was so considered, the defendant should have called the attention of the court to the matter at the time. A mere slip of the tongue under such circumstances will not warrant the grant of a new trial. Wilson v. State, 66 Ga. 594 (1); Southern Bell Tel. Co. v. Jordan, 87 Ga. 69, 13 S. E. 202 (5); Hoxie v. State, 114 Ga. 19, 39 S. E. 944; Berry v. Clark, 117 Ga. 964, 44 S. E. 824 (2); Southern Ry. Co. v. Merritt, 120 Ga. 409, 47 S. E. 908; Blackshear v. Dekle, 120 Ga. 767, 48 S. E. 311 (3).

4. In the seventh ground of the motion for new trial exception is taken to the following charge of the court: "You take into consideration what you see in the case about his mental capacity to commit a crime, whether or not he knew it was or was not his property. Then, if you decide that he was mentally capable of committing the crime alleged against him, beyond a reasonable doubt, it would be your duty to find him guilty." The assignment of error is in these words: "Defendant submits and insists that this is not a correct charge to the jury of the law when it is contended that he is not of sound mind, and the defendant was entitled to have the law pertaining to his case submitted to the jury." The assignment of error was not sufficiently specific to present the error, if any, to the court, and to enable the court intelligently to decide the question. A charge may or may not be erroneous, dependent largely upon its connection, upon what preceded and followed it, and upon its analysis by comparison with the general charge. It may be erroneous because unauthorized by the evidence or inapplicable to the law of the case. There may be so many reasons why a charge may be erroneous that it is the duty of him who assigns error to point out exactly where the error lies. We do not think the excerpt from the charge quoted is error, and, if it is erroneous at all, it is because it is more favorable to the defendant than is justified by law, and certainly much more favorable to the defendant than was required by the evidence. The only hint which the testimony disclosed that the defendant defended upon the ground that he was of unsound mind is in two sentences in the testimony of two of the witnesses. The prosecutor, at the conclusion of his cross-examination, states that "the defendant appeared to be in the same mental condition then as now. I am not able to judge whether he acted as a foolish man or not." And the sheriff testified on cross-examination: "I don't remember much about his mental condition when I turned him out of jail, and have not paid much attention to him since." It does not clearly appear from the assignment of error or from any portion of the record that the defendant insisted, in the court below, upon insanity as an express defense, and certain it is that no witness testified to anything which would even indicate that the defendant was of unsound mind in the legal acceptation of that term. The de-

cision in Rouse v. State, 2 Ga. App. ——, 58 S. E. 416, which is cited by counsel for the plaintiff in error, is not in point. The court, without request, presented to the jury a defense which (in view of the presumption of sanity) must be established. It was presented more favorably to the defendant than he was entitled to expect, and certainly, in the absence of a written request for fuller instructions on this special defense, he cannot, under these circumstances, be heard to complain. Where a special defense is relied upon and explicit instructions are desired in reference thereto, or for any reason it is desired that the attention of the jury be especially directed to such special defense, a timely request in writing should be preferred. See Shaw v. State, 102 Ga. 660, 29 S. E. 477 (3). Where the judge presents the controlling issues, mere failure or omission to charge upon minor points to which his attention is not called at the time, is not ground for a new trial. Thomas v. State, 95 Ga. 485, 22 S. E. 315 (4).

Judgment affirmed.

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(3 Ga. App. 101)

## BARKLEY v. MAY. (No. 578.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. GARNISHMENT — ANSWER — TRAVERSE — REQUISITES.

A traverse of a garnishee's answer is sufficient if it merely denies the truth of the answer. The traverse may be amplified at the option of the plaintiff, but nothing more is necessary to bring in question the liability of the garnishee to a garnishing creditor than an unqualified, though general, denial of the truth of the garnishee's answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 292, 293.]

2. CHATTEL MORTGAGES — VALIDITY — STATUTES — APPLICATION — PRIORITY OF LIENS.

Section 2769 of the Civil Code of 1895 is a means provided for creditors (including those who have no lien) to test the validity and fairness of a mortgage which purports to have been executed by one of their debtors, and which may be injurious to their interest; but it has no application to a case where the controlling question is the priority of lien as between a certain judgment and a mortgage fi. fa.

3. GARNISHMENT — RULE ON OFFICER — STATUTES.

A judgment creditor, in the collection of his fi. fa., is not restricted to his right to rule the officer who has levied another process on his debtor's property, nor is a creditor required to anticipate that such a levy will be made. Section 4776 of the Civil Code of 1895 refers to money raised by legal process.

4. SAME — ANSWER — TRAVERSE — ISSUES — SCOPE.

The respective legal priorities of a judgment lien and of a mortgage fi. fa. may be determined and adjudicated on the trial of the issue made by the answer to a summons of garnishment and the traverse thereof. The case is not altered by the fact that the garnishee is a levying officer.

5. SAME — PAYMENT BY GARNISHEE.

A garnishee who applies money or property in his hands which may be subject to garnishment, according to his own judgment and without judicial direction, does so at his own risk. One who assumes to render judgment in his own case must be certain of the law and adjudge correctly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, § 451.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Garnishment by Clara May as a judgment creditor of the Columbia Supply Company against J. D. Barkley. A justice's judgment in favor of the plaintiff in garnishment was affirmed on certiorari, and the garnishee brings error. Affirmed.

R. S. Wimberly, Glawson & Fowler, E. W. Maynard, and W. J. De Loach, for plaintiff in error. C. J. Johnson, for defendant in error.

RUSSELL, J. Below we give the history of this case. Barkley was a bailiff. Clara May obtained a judgment against the Columbia Supply Company, and thereupon sued out summons of garnishment, which was served on Barkley. This constituted the introduction of the parties to each other. And Clara May politely asked, "have you anything of the company's?" When accosted by this judgment creditor, and in response to the salutation and inquiry of her summons of garnishment, Barkley answered that he would not sneeze when she snuffed (at least not with the Columbia 'Supply Company's snuff), because he was obliged to sneeze when one Taylor (a mortgage creditor) took (the) snuff. And said he "That's 'nuff, and I charge $5 for answering." Despite their slight acquaintance, Clara May flatly contradicted Barkley's answer. And straightway, as usual in such matters, they went to the justice's court. The justice must have found the lye in Barkley's answer, for he ordered Barkley to give to Clara May of the Columbia Company's goods, not only starch and chickens, tea, and teapot, tomatoes, flour, and snuff, but 51 boxes of Daisy lye on which he had levied. Barkley was not content, so to a jury went. They looked on Barkley, then on Clara May, and said, "We say amen to what the justice said." Barkley, still not satisfied, haled a certiorari, and rode to "big court," and, to be gallant, took Clara May with him in his certiorari. The big judge would not let Barkley stay in court, and overturned his certiorari, so that he could ride no more. So now Barkley has "writ" to us of error and we must answer.

1. It is not disputed that Clara May had obtained a valid judgment for $15.21, and that the summons of garnishment was properly sued out and served. The gravamen of Barkley's complaint is that the process of garnishment was ineffectual to reach property which has been levied upon by him as an officer, and that the traverse was not sufficient full or explicit in its statement to raise any question as to the superiority of liens, or to warrant any adjudication upon that point.

As a general rule, if the decision in the justice's court is lawful and proper, and the conclusion reached is right, we would not deem it necessary to pass upon the merits of the pleadings in that court, where no demurrer was filed to the traverse, or any other objection offered thereto in that court. But as a matter of law the traverse in the present case was all that it was required to be and the objections now raised are without merit. More than 50 years ago, in Turner v. Rosseau, 21 Ga. 240, it was held that "a traverse that merely denies the truth of the answer of the garnishee is sufficient"; and, if this decision has been overruled, we are not aware of it. In the Turner Case Judge Benning, delivering the opinion of the court, says: "Was the traverse sufficient? This is the only question. The court below, it seems, thought the traverse too general. * * * All that the plaintiff has to do is to 'traverse' the answer of the garnishee. To traverse is merely to deny. 1 Chitty on Pleading, 576, and note 'A.' To traverse the answer of a garnishee is merely to deny the truth of the answer—is merely to say that the answer is not true. * * * If, therefore, the plaintiff makes this denial, it is the duty of the garnishee to take issue on the denial; and that he may do no doubt by simply saying that the answer is true. Thus in a few words may the 'issue' to which the statute refers be 'made up.' We think, therefore, that the judgment of the court below ought to be reversed." See, also, Civ. Code 1895, § 4150.

2. The plaintiff in error further insists that process of garnishment was ineffectual to reach the property in question in this case, which he says he sold after he was served with summons of garnishment, and the proceeds of which he applied upon a mortgage fi. fa. Counsel for the plaintiff in error in their brief say that the defendant in error failed to follow the method prescribed by law for enforcing her lien. They say she should have filed with Barkley, the levying officer, an affidavit, with bond and security, and, on the issue thus formed, should have tested the superiority of her judgment lien in the court where the mortgage fi. fa. was pending, and they cite Civ. Code 1895, § 2769. This section is in no way applicable to the question in the present case. It was designed for those cases where a creditor of the mortgagor might desire to contest the validity and fairness of the mortgage, and not to settle the priority of conflicting liens. Such a creditor might not have, or claim to have even the shadow of a lien on the mortgaged property, but he might be able to convince a jury that the mortgage was the result of a fraudulent collusion between mortgagor and mortgagee, injurious to him as a creditor without a lien. The plaintiff in the court below might have been fully satisfied of both the validity and the fairness of Maynard and Guerry's mortgage, and unable and unwilling to contest either its validity or its fairness; but was she thereby debarred from showing that the property in the hands of the garnishee should be applied to her fi. fa. rather than to the mortgage fi. fa. in his hands? We think not; because section 2769 of the Civil Code of 1895 is inapplicable to the settlement of the priority between a judgment lien and a mortgage lien, and the evidence reduced this case to a mere question of priority between the plaintiff's judgment and the mortgage.

It is next insisted that the plaintiff, Clara May, should have deposited her judgment lien with Barkley and intervened, as provided in the Civil Code of 1895, § 4776. The plaintiff could have done this if the property had been reduced to money by a legal sale, because "money raised by legal process is not subject to levy." Section 4776 in terms only applies to cases "where money is in the hands of an officer." The evidence in this case shows that at the time when the garnishment was served there had been no sale. At the time the garnishment issued there had been no levy. The goods the plaintiff sought to subject to her fi. fa. were in the possession of one Mims. The plaintiff levied on the goods garnished Mims, and, perhaps not knowing whether the constable, Barkley, had levied upon the goods or not, served him also with summons of garnishment. We see no reason why Barkley was not subject to summons of garnishment, or how, merely because he was a bailiff, he could absolutely disregard it, except at his own risk. The case of Strickland v. Smith, 53 Ga. 79, cited by counsel, is not in point. The plaintiff in this case had a valid judgment, the lien of which had attached to the property, and, instead of serving the officer with a mere notice to retain money, she adopted one of the legal means for bringing up the question for judicial decision. Section 2769 of the Civil Code of 1895, which is cited, applies only to cases where the mortgagor fails to set up his defense by affidavit of illegality, and has no application here.

3. The truth is a judgment creditor, in the collection of his fi. fa., is not restricted absolutely to his right to place it in the hands of the officer, and, by rule, have determined the priority of his lien upon the proceeds of the legal sale. He might in some instances lose many substantial advantages by pursuing that course.

4. The respective legal priorities of a judgment lien and of a mortgage fi. fa. may be adjudicated by the determination of the issue made upon the answer of a garnishee and the traverse thereof. Pupke v. Meador, 72 Ga. 230. The garnishee, answering that he had had property of the defendant in fi. fa. in his possession, but that he had had it sold under a mortgage fi. fa. in his favor of superior lien to the plaintiff's judgment, would if the plaintiff traversed this answer, be bound to establish at his peril that his mortgage fi. fa. was really superior to the lien of

the judgment. When the answer is traversed, the burden of proof is upon the garnishee. Whenever it is shown that the defendant in the judgment was the owner of any goods of which the garnishee was in possession and from which the garnishee has realized a sum of money, this makes out a prima facie case for recovery by the garnishee, and the onus is cast upon the garnishee to show that the money is not subject to the garnishment, if he so claims. Smith v. Bondurant, 72 Ga. 232. We do not see that the case is altered, even if the garnishee be a bailiff. One who is a levying and collecting officer can be garnished, and, if the property is in custodia legis and he so answers, and the truth of his answer is established, he will be directed by the court as to disposition of the fund. He can proceed with the process which he is charged with executing, and bring to sale property levied on, but the proceeds must be held to await the final decision on the garnishment. But if his possession be personal instead of official, or if he has taken the risk of disregarding the process of garnishment, and it transpires that he has himself adjudged that the property or money of the defendant in his hands was not subject to the process of garnishment, and it happens that his judgment on the law and facts, or either, was erroneous, and he has disposed of the property or money despite his garnishment, he is liable to have a judgment entered against him and in favor of the garnishee. There is no trouble, however, in this case upon the subject of legal custody, for the bailiff not only wrongly judged the law, but, from the evidence before the jury, his possession of the property was personal, and not official. In this case the lien of the judgment was superior to that of the mortgage fi. fa. The judgment in favor of Clara May was rendered October 13, 1906, and, while the mortgage was foreclosed October 2, 1906, it had never been recorded. Thompson v. Morgan, 82 Ga. 549, 9 S. E. 534. The mortgage not having been recorded, the mortgage fi. fa. issued thereon was postponed to the judgment in favor of the plaintiff. Furthermore, the evidence showed, without contradiction, that her fi. fa. was levied on the goods on October 22d, and the jury was fully authorized to find, from the other evidence, as well as from bailiff Barkley's own entry of levy, in spite of his explanation in relation thereto, that his entry of levy spoke the truth. If so, the mortgage fi. fa. was not levied until October 29, 1906, which was a week after the levy of the other fi. fa., and, the property being already in custodia legis, the bailiff had no right to the possession of the property or to dispose of it. When he did take possession, it was as an individual; and, as he was served with summons of garnishment on October 31st, if he thereafter disposed of the property, he became liable to account to the plaintiff.

We think, therefore, that the judgment overruling the certiorari was right. We can only answer the writ of Barkley by saying, "Pay that thou owest. Go and sin no more."

Judgment affirmed.

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(3 Ga. App. 161)

ROLLESTONE v. T. CASSIRER & CO. (No. 656.)

(Court of Appeals of Georgia. Nov. 27, 1907.)

1. NEGLIGENCE — DANGEROUS PREMISES — DEATH OF LICENSEE.

Usually, as against the proprietor of a public place of business and in favor of those who come there to trade, the law will imply an invitation from the former to the latter to enter the premises, so as to render applicable the principles of section 3824 of the Civil Code of 1895, as follows: "Where the owner or occupier of land, by express or implied invitation, induces or leads others to come upon his premises for any lawful purpose, he is liable in damages to such persons for injuries occasioned by his failure to exercise ordinary care in keeping the premises and approaches safe." However, since in this state it is criminal for a barkeeper to sell intoxicating liquor to a drunk man, the law will not, in the absence of a showing of any contrary agreement or custom, or other similar reason, presume any invitation from a barkeeper to a drunk man to enter the saloon for the purpose of buying whisky.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 42–46.]

(a) A member of the general public of the class usually allowed to enter the barroom, who lawfully and peaceably goes in, although not a customer actual or anticipatory at the time, does not, unless admission has been forbidden him, thereby become a trespasser, but is a licensee.

(b) The allegations in this case show the deceased to have been at least a licensee in the saloon of the defendant.

2. SAME—DUTIES OF OWNER.

The owner or proprietor of the premises is not free from duty to a licensee. He must keep the premises free from pitfalls, mantraps, and the like.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 61.]

(a) The exact duty owing by the proprietor to the licensee is a matter determinable only by the specific circumstances of each case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 42–46.]

(b) If the proprietor knows that a pitfall or some similar secret danger lurks in his premises, and sees a licensee about to come into contact therewith, he should give warning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 65.]

(c) The duty of warning against such danger becomes the more imperative when the licensee has bad eyesight, is intoxicated, or is suffering from other infirmity known to the proprietor.

(d) Heavy articles which are apparently in stable equilibrium or which appear to be securely fastened, but which in fact are in unstable equilibrium and not fastened, may fairly be placed in the same category with pitfalls and mantraps.

3. SAME — PROXIMATE CAUSE — CONCURRING CAUSE—CONTRIBUTORY NEGLIGENCE.

The juridical or proximate cause of an injury is not necessarily the sole cause. The fact that, with the negligence of the defendant, conduct of the person injured or of a third person concurred, does not necessarily render

the injury a remote consequence of such negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69–82.]

(a) "Although an act of the plaintiff himself, intervening between the defendant's wrong and the injuries suffered, has concurred in producing the damages for which a recovery is sought, the defendant is not thereby excused, if such intervening act was the natural result of, or was naturally and reasonably induced by the antecedent act of the defendant. And the rule is the same where, though the plaintiff's act may not in strictness have been caused or induced by the defendant's act or omission, yet the latter caused or created a negligent and dangerous condition, upon which the plaintiff's act, harmless and innocent in itself, and of a nature which might have been anticipated, operated to produce the injuries received."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 76–82.]

(b) If the plaintiff's contributory conduct be negligent, a recovery is defeated only when such negligence amounts to a failure to exercise ordinary care; in other cases there is to be a comparison of the negligence of the respective parties and a diminution of the recovery. Civ. Code 1895, § 3830.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 84, 162–167.]

4. SAME—INTOXICATED PERSON—CONDUCT.

In viewing the conduct of a drunk man for the purpose of determining his negligence or contributory negligence, the state of mind produced by intoxication will be disregarded, and he will be judged as if the conduct were committed by him while in possession of his normal mental capacity. His physical state, though caused by drunkenness, is, however, a condition that enters in as one of the circumstances in judging the negligence of the respective parties to the transaction. In determining the negligence of a defendant for injuries received by a drunk man, both the mental and the physical condition of the latter, so far as it was known or reasonably ought to have been known to the former, are legitimate matters for consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 119, 120.]

5. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The proprietor of a barroom had therein a heavy bar counter, which was so constructed that it was top-heavy on the outer edge, and was therefore, in a state of unstable equilibrium and liable to topple as a result of any slight contact, and which ordinarily was securely fastened to the floor, but which on the occasion in question was unfastened. A drunk licensee entered the saloon and, approaching the counter, stumbled, and, to catch or steady himself, took hold of and pulled against the counter, which he supposed to be fastened as usual, but which fell upon him and killed him. *Held*, that the negligence of the defendant and the contributory negligence of the deceased were both questions for the jury, and that the court improperly sustained a general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 277–286.]

(Syllabus by the Court.)

Error from City Court of Atlanta.

Action by M. E. Rollestone against T. Cassirer & Co. From a judgment of dismissal, plaintiff brings error. Reversed.

For the negligent homicide of her husband, Mrs. Rollestone sued Cassirer & Co. on a petition which, omitting formal parts, is as follows:

"That said Cassirer & Co. were engaged on October 25, 1906, and for several years prior thereto, in the saloon business at No. 97 Whitehall street, city of Atlanta, said county. That said place conducted by defendants was and is a public barroom, openly run to furnish alcoholic drinks and other goods intoxicating contained therein to the general public. That said place was a public house, and the public were invited to go and purchase the goods furnished by defendants, and that said place was run for the personal profit of and benefit to said defendants. That said place was conducted under a license granted to said defendants by the city of Atlanta, the state of Georgia, and the United States of America, to run a barroom for public patronage at said place. That on October 25, 1906, petitioner's husband, H. A. Rollestone, went into the place of business, as aforesaid, of defendants, for the purpose of buying whisky and other merchandise sold by defendants. That at said time petitioner's husband was greatly under the influence of intoxicants, and that his condition was known to defendants and their agents in charge of said business. That he was intoxicated to that extent that he was unable to take care of himself, and his reason, judgment, discretion, and ability to know danger was entirely overthrown on account of said intoxicated condition, and that defendants and their agents in charge of said business were aware of said facts, and were put on notice of his said condition. That defendants had placed in their said place of business several weeks prior to the time aforesaid a barroom counter, so set in said place of business loosely and without being fastened to the floor or in any way to protect its falling over. That said counter was constructed of heavy wood, and was so constructed that practically the entire weight of the same was on the outside of said counter, and that said counter was constructed so that the outside of it hung over from its center of gravity. The other side of said counter was hollow and had no weight of any kind to counteract or weight against the outside and overhanging part of said counter. That said counter was constructed so that it would easily fall over. That in height it was about four feet, and its principal weight was at or about the top of said counter. That while petitioner was in said place, on the day aforesaid, he was near said counter, and in moving about on the floor of defendants' place he slipped or stumbled, and seized hold of said counter to steady himself or to raise himself up, and said counter, with all of its terrible crushing weight, fell over upon petitioner's husband, and mashed and crushed him, and broke his leg and shocked his nervous system. That on November 30, 1906, petitioner's husband died on account of the injuries received, as aforesaid, and said death was caused and produced by the in-

juries aforesaid, and said injuries received in defendants' place of business were the proximate cause of the death of petitioner's husband.

"That petitioner is the widow of H. A. Rollestone, who was killed as aforesaid. That her said husband was at the time of his death 54 years of age, and was earning $1,200 per year. That he was in the employ of Keely Company at said annual salary, and had been employed at said place for many years, and was one of their most trusted, capable, and efficient employés. That petitioner's husband had been accustomed for many years at long intervals to drink to excess. That he would drink heavily to drunkenness for a short period, and would then desist and resume his business duties, which he discharged without exception and to the full satisfaction of his employers, until the time of his next periodical drunkenness. That this custom of petitioner's husband was well known to his employers, and to the agents in charge of said place of business. That while petitioner's husband was drinking to excess, as aforesaid, he was incapable of taking care of himself in any way, and was incapable at the time of his injuries as aforesaid, and said fact was known to defendants and their agents in charge of said business. That said counter which fell upon petitioner's husband was a dangerous contrivance to be placed in said place of business. That it is the custom of the patrons of defendants, and the patrons of all similar places constructed as was their place of business, to take hold of counters and to steady themselves by said counters, and in stumbling and falling in said places of business to use said counters in assisting themselves in restoring their equilibrium, and in putting themselves steady on their feet. That there was nothing about said counter to indicate that it was not fastened in a firm, safe manner. That the counters in defendants' place of business were all fastened firmly to the floor by means of large strips of iron screwed to the floor of said place of business. That there was nothing about the appearance or position of said counter to indicate or put any one on notice that said counter was not firmly fastened so as to prevent its falling over. That it is customary in all places of business, constructed like defendants' place was, that had counters in it constructed as was this counter that fell upon petitioner's husband, to have the same firmly and securely bolted, screwed, or fastened so as to prevent its falling over. That petitioner's husband was a customer of defendants, and was in their place of business as a customer, and they owed him the high and sacred duty to protect him from injury, and see that no injury came to him by reason of any acts or omissions of theirs. That it was negligence in the defendants to have said heavy dangerous counter in their place of business without the same being securely bolted, screwed, or fastened so as to prevent it falling over. That it was negligence in defendants not to warn petitioner's husband of the condition of said counter and the danger of going near or touching the same. That it was negligence on the part of the defendants and their agents to permit petitioner's husband to go near said counter or touch the same or to use the same in steadying himself or in pulling himself up on his feet in falling or about to fall. That said counter was a dangerous and threatening trap, and it was negligence on the part of defendants to have said trap in their place of business."

Upon a general demurrer filed by the defendant, the court rendered the following judgment, to which the plaintiff excepts, to wit: "I do not think the defendants owed the duty alleged, nor, if they did, that the wrong complained of was the proximate result of the negligence charged; and the general demurrer is therefore sustained, and the case dismissed."

Jas. L. Key, for plaintiff in error. Konts & Austin, for defendants in error.

POWELL, J. 1. The different aspects in which the liability of the owner or proprietor of premises for injuries received by persons present thereon might be viewed were pointed out and discussed by this court at some length in the case of Mandeville Mills v. Dale, 2 Ga. App. ——, 58 S. E. 1060. If the deceased was on the premises by invitation, express or implied, the proprietor of the saloon was under a higher duty to him than if he was there as a bare licensee. It is conceded that ordinarily the opening of a public place of business is an invitation to members of the public to come in and transact that business; that customers in a place of business where goods are sold are ordinarily not bare licensees, but it is said that in this case no such invitation is to be implied, because, under the allegations of the petition, the plaintiff was a drunk man, and by Pen. Code, 1895, § 443, "any seller of spirituous liquors who shall sell or furnish liquors or other intoxicating drinks to any person who is at the time intoxicated or drunk shall be guilty of a misdemeanor." In the absence of an allegation that the defendant had been accustomed to sell to the deceased or others when they were drunk or any other allegation tending to show that the deceased had reasonable cause to believe that the defendants were willing to entertain his offer to buy on the occasion under consideration, we are led to hold, in the light of the statute quoted, that no invitation to the deceased to come for the purpose for which the petition says he came can be implied against the defendant. He was on the premises as a licensee; for members of the public, of the class usually allowed to enter, will not be considered as naked trespassers, when they are, without objection, peaceably in a public business house, though having no immediate business with the pro-

prietor. We are not to be understood as holding that one can be regarded as an invited person in a saloon only when he is approaching the counter to buy, or when he is actually drinking. On the contrary, a person who has no intention of drinking at all may stand in this relation. For instance, if the proprietor places pictures, baseball scores, free lunches, musicians, or other things in his saloon to attract persons there, with a view of advertising his business, and with the hope that some or all of them may drink at his bar, such persons as come in response to this implicit invitation are more than bare licensees. So, also, those persons who, having recently been customers or presently intending to be, with the proprietor's acquiescence and in accordance with common usage, sit or stand in the saloon, are more than licensees. Under this petition, however, the attempt to raise the implication of an invitation rests solely upon the fact that deceased entered to buy liquors—a thing he could not reasonably expect to do in his drunken condition.

2. The owner or proprietor of the premises is, however, not free from duty to a licensee. The premises must not contain pitfalls, mantraps, and things of that character. Mandeville Mills v. Dale, supra. "There is a class of decisions holding that it is actionable negligence for the owner of grounds, over which people are accustomed to pass, to expose thereon anything which is peculiarly dangerous. These decisions proceed on the ground that such conduct is a wanton violation of the obligations which, in a state of society, every individual holds to every other. * * * This is not a negation of the doctrine that the owner of a private building being erected on a private lot owes no duty to trespassers and idlers, or persons visiting the premises merely for their individual benefit or for curiosity, other than that he shall inflict upon them no willful or wanton injury. * * * The sound view seems to be that the owner or occupier of real property may become liable on the footing of negligence to persons who are injured in their persons or their property through the needless, wanton, or grossly negligent act of exposing other dangerous things upon his premises or upon the highway adjacent thereto, attracting children or animals, or endangering the safety of the unwary." 1 Thomp. Neg. (Ed. 1901), § 950. "Some courts, disregarding distinctions relating to trespassers, intruders, bare licensees, etc., place the doctrine on the broad and just ground that the owner or occupier of premises is bound to exercise ordinary care to the end of keeping his premises in such condition that they will not, by reason of any insecurity or insufficiency, injure any person rightfully in, around, or passing by them, at the same time holding that such owner or occupier is not an insurer against accidents which may happen from the condition of the premises. The distinction is that the person coming upon the premises to whom this duty of care is due must not come as a mere trespasser or wrongdoer, but for some purpose lawful in itself, and such as the owner or occupier might reasonably expect to bring him there. This being the rule, if the person injured is rightfully upon the premises, it will make no difference with reference to his right of action for the injury whether he is there as a licensee or by invitation." Id. § 969. We think that, while a difference exists between the elemental concepts upon which the respective liabilities arise in cases of licensees and of invited persons, also between the terms in which the respective duties are theoretically to be stated and while in theory the degree of care required in one case may differ from that required in the other, still frequently the actual quantum of diligence necessary to fulfill the legal duty, under the circumstances, owing to the licensee, is no less than it would be if he were an invited person. Theoretically the degree of diligence owing by the proprietor of premises who has a pitfall thereon to a licensee is less than that due his invited guest, yet, after the presence of the licensee is known, exactly the same acts of caution may be required of the proprietor to satisfy the legal duty as would be necessary if the licensee were invited. Indeed, we can conceive that the owner of lands on which dangerous things exist may be in legal duty bound to use a greater quantum of precaution in behalf of an infant licensee thereon than he would in behalf of an adult invited guest. The sum of the whole matter is included in the expression frequently enunciated, that "duties arise out of circumstances."

In the case of Newark Electric Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725, Judge Dallas, after referring to the general rule that, as to trespassers, the landowner may keep his premises in such condition as he sees fit, quotes approvingly from Hydraulic Co. v. Orr, 83 Pa. 332, as follows: "It is true that, where no duty is owed, no liability arises. * * * But, as has often been said, duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property, and its openness to accident, the rule will vary." And adds the following: "It makes no difference, where the circumstances give rise to duty, that the plaintiff was 'technically a trespasser.' Schilling v. Abernethy, 112 Pa. 437, 3 Atl. 792, 56 Am. Rep. 320. The true question is: Was he 'a trespasser there, in a sense that would excuse the defendant for acts of negligence, * * * whether the owner or occupant of premises is liable under any circumstances, and, if so, under what circumstances, for injuries received by a person while on such premises, and by reason of their dangerous condition?' In Railway Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, the question was thus stated, and, in answer-

ing it, the Supreme Court held that, under the circumstances of that case, the person injured could not be regarded 'as a mere trespasser, for whose safety and protection, while on the premises in question, against the unseen danger referred to, the railroad company was under no duty, or obligation whatever to make provision.' The fact that in all these cases the court gave due weight to the circumstance that, in each of them, the person injured was a child, would not justify us in restricting the application of the principle upon which they were decided to cases which present the same peculiarity. The doctrine of all of them is that a duty of care may, by reason of the circumstances, be due from the owner of property to one who is technically a trespasser upon it; and the youth of those most likely to suffer from a failure to discharge such duty is simply one of the circumstances which, when present, is to be considered with the rest. The opinion of the court in the case last cited cannot be read without perceiving that the matter was so viewed by the Supreme Court of the United States; and the Supreme Court of Pennsylvania, by which the two cases first cited were decided, has repeatedly held that a child may be such a trespasser as to be subject to the consequences of his trespass. It has never laid down one rule with respect to children and another respecting adults, but has many times said that the former, like the latter, when trespassers 'in every sense of the word,' are to be regarded as wrongdoers to whom the owner of the premises is under no obligation." In the case of Schilling v. Abernethy, 112 Pa. 437, 3 Atl. 792, 56 Am. Rep. 320, cited above, involving an injury to a licensee or trespasser, the court holds: "Where one has reason to apprehend danger from the peculiar situation of his property and its openness to accident, the rule that, where no duty is owed, no liability arises, will not prevail; but the question of liability must be submitted to the jury, to be determined upon all the facts of the case. Circumstances may beget duties which, under ordinary circumstances, cannot be implied; and, when such circumstances are shown to exist, the question arising therefrom is not for the court, but for the jury." Also, in Murray v. McShane, 52 Md. 217, 36 Am. Rep. 367, it is held that "a person lawfully passing along a street, who stops on the door sill of a house fronting on the street for the purpose of adjusting his shoe, and while thus occupied, his head being within the lines of the street, without any negligence on his part is injured by a brick falling on his head, in consequence of the dilapidated condition of the wall of the house, has a right of action against the owner of the house for the injury inflicted." In Kinchlow v. Midland Elevator Co., 57 Kan. 374, 46 Pac. 708, there is a holding that, "where an owner of premises has reason to apprehend danger from the peculiar situation and condition of certain of their appurtenances and their openness to accident, the question whether he has exercised due care or not, as well as that of the contributory negligence of a person injured thereon, becomes one for the jury, to be determined upon all the facts and circumstances of the case." In the case just cited a licensee stepped upon a cover apparently safe, but which, after the manner of a trapdoor, precipitated him into a barrel of hot water.

In Bransom's Adm'r v. Labrot, 81 Ky. 638, 50 Am. Rep. 193, the court, sustaining a recovery in favor of a licensee or trespasser, says: "As a general rule, the owner of land may retain to himself the exclusive use and occupation of it; but, as property in lands depends upon municipal law for its recognition and protection, the use and enjoyment of it are subject to conditions imposed for the welfare and rights of others." Also, to quote from the same case: "It is held that a party is guilty of negligence in leaving anything in a place when he knows it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third person. 1 Addison on Torts, § 11. And said a learned judge: 'It appears to us that a man who leaves in a public place, along which persons, and among them children, have to pass, a dangerous machine, which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act, or negligence of the defendant, has given occasion.' 39 B. Din. 339. * * * 'It would be a barbarous rule of law that would make an owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instinct, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child attracted to it and tempted to meddle by instincts equally as strong might thereby be killed or maimed for life. Such is not the law.' 9 East, 277." In Union Pac. R. Co. v. McDonald, 152 U. S. 279, 14 Sup. Ct. 619, 38 L. Ed. 434, where a boy stepped into slack lime which was spread upon the ground, but which upon its surface gave no indication of danger, Justice Harlan, speaking for the court, says: "Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pile made by it in the vicinity of its depot building. It could have forbidden all persons from coming to its coal mine for the purposes merely of curiosity and pleasure. But it did not do so. On the contrary, it permitted all, without regard to age, to visit its mine, and witness its operation.

It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to its depot building, at which the people of the village, old and young, would often assemble. It knew that children were in the habit of frequenting that locality and playing around the shafthouse in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind, or hail prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision." While the plaintiff in that case was a boy of tender years, yet this fact does not (as will appear by reading the entire opinion) affect the generality of the rule except upon the question of the plaintiff's contributory negligence. See, also, Penso v. McCormick, 125 Ind. 116, 25 N. E. 156, 9 L. R. A. 813, 21 Am. St. Rep. 211; Bennett v. Railroad Co., 102 U. S. 577, 26 L. Ed. 235. Of the decisions of the Supreme Court of this state, we call attention to the following: Augusta R. Co. v. Andrews, 89 Ga. 653, 16 S. E. 203, s. c. 92 Ga. 706, 19 S. E. 713 (distinguished in Mandeville Mills v. Dale, 2 Ga. App. —, 58 S. E. 1062); Atlanta Cotton-Seed Oil Mills v. Coffey, 80 Ga. 145, 4 S. E. 759, 12 Am. St. Rep. 244; Folsom v. Lewis, 85 Ga. 146, 11 S. E. 606. As to the duty of warning against pitfalls in such cases, see 1 Thomp. Neg. (Ed. 1901), § 993. The duty of warning against such danger becomes only the more imperative when the licensee or invited person has bad eyesight, is intoxicated, or is suffering from other infirmity known to the proprietor of the premises. Brown v. Stevens, 136 Mich. 311, 99 N. W. 12; White's Supplement to Thompson on Negligence, § 993. Heavy articles which are apparently in stable equilibrium, or which are usually found securely fastened, but which are, in fact, in unstable equilibrium and not fastened, may fairly be placed in the same category with pitfalls and mantraps. The counter in this case—to borrow an expression from the case of Newark Co. v. Garden, 78 Fed. 79, 23 C. C. A. 649, 37 L. R. A. 725, supra—was "not a trap, for there was no intention to ensnare, but was an unknown, an invisible, peril, to which he [the deceased] might unconsciously or involuntarily be drawn, and from which, by taking ordinary care, the defendant might have protected him." Compare Eton Co. v. Langston, 24 Can. S. C. 708, s. c. 21 Ont. App. R. 624, s. c. 25 O. R. 78, wherein the unfastened object which fell was a large mirror.

There is another general rule upon which the defendant relies with great confidence —that the owner is not responsible for an injury occasioned by putting one of his instrumentalities to a use for which it is not intended. In this case the petition alleges that one of the uses for which this counter was intended was that identical use the deceased attempted to make of it. Besides, the general rule is not so universal of application as to exclude a finding of negligence in those cases where the owner of premises, who has a reason to apprehend the innocent presence of persons thereon, knowingly allows his property to be or to remain in such situation that a visitor, although making no use of the premises other than a reasonably prudent person under like circumstances would be expected to make, is liable to be injured by coming in contact with what appears to be in its normal condition and safe, when, as a matter of fact, it contains a secret and hidden danger. See Mayor of Jackson v. Boone, 93 Ga. 662, 665, 20 S. E. 46. Suppose the proprietor of this saloon had purchased a keg of nitroglycerine for the purpose of doing some blasting, and had temporarily set it down in the middle of his saloon floor, where a casual passer was liable to kick against it, would he, in response to a suit by one who through inadvertence had run against it and exploded it, be heard to say as a complete defense that the deceased put the nitroglycerine to a purpose for which it was not intended? Compare Babcock v. Johnson, 120 Ga. 1035, 48 S. E. 438. Also, Schofield v. Wood, 170 Mass. 415, 49 N. E. 636.

3. The trial judge, in addition to holding that the defendant owed the deceased no duty, also held that the alleged negligence was not the proximate cause of the injury. We presume that he based this upon the view that the act of the deceased in stumbling and catching hold of the counter was the proximate cause. It took the concurrence of the act of the defendant in leaving the counter in a state of unstable equilibrium, and the act of the deceased in grasping it, to cause the harm. The counter, if the deceased had not touched it, would not have hurt him. His own stumbling and catching would not have killed him if it had not set in motion the not reasonably to be expected danger contained in the condition of the counter. Neither alone was sufficient to cause the homicide. "It is no defense in an action for an injury resulting from the negligence that the negligence or willful wrong of third persons, or an inevitable accident, or an inanimate thing, contributed to cause the injury, if the negligence of the defendant was an efficient cause without which the injury would not have occurred. A juridical cause need not be the sole cause." Jaggard on Torts, 67. "If the damage has resulted directly from concurrent acts or neglects of two persons, each of these acts may be counted on as the wrongful cause." Cooley

on Torts (3d Ed.) 119. "Although an act of the plaintiff himself, intervening between the defendant's wrong and the injuries suffered, has concurred in producing the damages for which a recovery is sought, the defendant is not thereby excused, if such intervening act was the natural result of, or was naturally and reasonably induced by, the antecedent act of the defendant. And the rule is the same where, though the plaintiff's act may not in strictness have been caused or induced by the defendant's act or omission, yet the latter caused or created a negligent and dangerous condition, upon which the plaintiff's act, harmless and innocent in itself, and of a nature which might have been anticipated, operated to produce the injuries received." Watson, Damages for Personal Injuries, § 75.

In the case of Postal Tel. Cable Co. v. Zopfi, 73 Fed. 609, 19 C. C. A. 605, before the United States Circuit Court of Appeals for the Sixth Circuit, where it appeared that the defendant placed a pole across a platform upon which the plaintiff had to walk from her house to the street, and the defendant, in stepping over the pole, slipped upon the platform, which was wet, the defendant contended that the slippery condition of the platform was the proximate cause; but Judge Lurton, speaking for the court, says: "Still, the fact remains that the facts and circumstances were such that either of two inferences might be made—one that the wet platform was the sole cause of her fall, the other that the pole proximately and efficiently contributed, in co-operation with the wet platform, to her fall. If the jury should be of opinion from all the facts that but for the pole she would probably not have fallen, then, though the pole was not the causa causans, it would be a cause without which the fall would probably not have occurred. Upon such a finding the liability of the plaintiff in error would be clear. McDonald v. Railway Co. (decided by this court April 14, 1896) 74 Fed. 104, 20 C. C. A. 322." In Barney v. Burstenbinder, 7 Lans. (N. Y.) 210, the negligent slipping of a case of nitroglycerine without indicating the contents of the package was held to be the proximate cause of the injury, though the explosion immediately arose by reason of the fact that the plaintiff (the carrier) was examining the package to see what it contained. In Walters v. Denver Consolidated Elec. Co., 12 Colo. App. 145, 54 Pac. 960, where the plaintiff came into contact with an unprotected live wire, it was held that the condition of the wire, and not the acts by which the plaintiff came into contact therewith, was the proximate cause of the injury. For further illustrative cases, see Rosenbaum v. Shoffner, 98 Tenn. 624, 40 S. W. 1086; Porcella v. Mutual Reserve Ins. Co., 50 App. Div. 158, 63 N. Y. Supp. 599; Prescott v. Connell, 22 Can. S. C. 147; Willis v. Providence Pub. Co., 20 R. I. 285, 38 Atl. 947. In this state, somewhat contrary to the general rule, we have provided by statute for recoveries in cases where the injury is the result of the concurrent acts of the plaintiff and of the defendant, even though those of the plaintiff be also negligent. If by ordinary care the plaintiff could have avoided the effects of the defendant's negligence, or if the injury would not have occurred but for the plaintiff's failure to use ordinary care, the defendant will not be held liable, though also negligent; "but in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained." Civ. Code 1895, § 3830. In cases where both parties have been negligent, and the plaintiff's negligence does not amount to a failure to use ordinary care, a comparison is made between the respective wrongs or neglects, and a corresponding diminution in the amount of the recovery results.

4. We will next take up the contention that the admitted voluntary drunkenness of the deceased precludes a recovery. That school of jurists who consider torts as akin to crimes apply to the case of a drunk man, as to his capacity both for negligence and for contributory negligence, the ancient maxim that drunkenness is no excuse for crime. The other school, although they do not base their theories of tort on the criminal law, just as uniformly hold the drunk man responsible for his conduct under a given state of circumstances as if he were sober. Irrespective of the various reasons given, all courts now hold that the drunk man, so far as his own conduct is concerned, is to be considered, in all matters of volition, judgment, caution, and general mental state, just as if he were sober. The state of mind produced by intoxication will be disregarded in viewing his actions, and he will be judged as if he possessed his normal capacities. The physical state produced by drunkenness is, however, a condition that enters in as one of the circumstances in determining the negligence of the respective parties to the transaction. Also, in determining the negligence of the other party to the transaction, not only the impaired physical condition, but also the vitiated mental state of the drunk man, if known to the other party, and not his normal state of mind and body, are to be considered. The maxim, "Volenti non fit injuria," is as applicable to a drunk man as to a sober man. Wherever on the transaction as it occurred a sober man could not recover, on account of his contributory negligence in having acted imprudently or rashly or in failing to use care to avoid injury, the drunk man will likewise be precluded. As against himself, the acts of a drunk man will afford the same concurrence with the negligence of the opposite party creating the juridic cause of his injury as if he were sober; and, to the same extent, his acts may so intervene as to interpose a proximate cause between the defendant's negligence and the injurious result, and this may make

the defendant's wrong juridically remote. For instance, in the recent case of Seaboard Air Line Ry. Co. v. Smith, 2 Ga. App. ——, 59 S. E. 199, this court held that the conduct of a drunken man in walking down the railroad track three miles to the place where he was killed by a train interposed such a proximate cause between his death and the negligence of the company in putting him off the train drunk as to render that wrong of the company juridically remote. These generalizations are deduced by logical necessity from such a large number of reported cases and text-books as to render a full citation tedious. Out of the large number that might be cited, see the following: Central R. Co. v. Phinazee, 93 Ga. 488, 21 S. E. 66 (3); Parish v. W. & A. R. Co., 102 Ga. 291, 29 S. E. 715, 40 L. R. A. 364; Georgia Southern & Fla. Ry. Co. v. George, 92 Ga. 765, 19 S. E. 813; Clay v. Macon & Birmingham R. Co., 111 Ga. 839, 36 S. E. 233; Macon, D. & S. R. Co. v. Moore, 125 Ga. 810, 54 S. E. 700; Forrest v. Georgia R. Co., 128 Ga. 78, 57 S. E. 98; Berry v. Northeastern R. Co., 72 Ga. 137; Southwestern R. Co. v. Hankerson, 61 Ga. 114; South Carolina R. Co. v. Nix, 68 Ga. 584; Central R. Co. v. Glass, 60 Ga. 442; Seymer v. Town of Lake, 66 Wis. 651, 29 N. W. 554; Fitzgerald v. Weston, 52 Wis. 354, 9 N. W. 13; Smith v. Railroad Co., 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287; Kean v. B. & O. R. Co., 61 Md. 154; L. C. & L. R. Co. v. Sullivan, 81 Ky. 634, 50 Am. Rep. 186; Werner v. Citizens' Ry. Co., 81 Mo. 368; Cassedy v. Stockbridge, 21 Vt. 391; Strand v. Railway Co., 67 Mich. 380, 34 N. W. 712; Little Rock R. Co. v. Pankhurst, 36 Ark. 371; Bradley v. R. Co., 8 Daly (N. Y.) 289; Jaggard on Torts 165, 166; Cooley on Torts (3d Ed.) 192; Wharton on Negligence, §§ 37, 196, 340, 341, 494.

5. We will now apply the principles above stated more specifically to the case at bar. If the defendants had reason to anticipate the presence of persons in their barroom, they were under the duty, toward such as were either expressly or impliedly invited there, to use ordinary care and diligence to see that the premises were safe, and toward licensees to use such diligence (not exceeding ordinary care and diligence) as the particular circumstances required in anticipating the likelihood of their coming, and, after they came and their presence was known, to use ordinary care not to injure them by anything done upon the premises, and not to expose them to other peril. The jury, under the facts alleged, would be authorized to find that the defendants might reasonably have anticipated that the deceased and other persons would come into the saloon and within range of the counter; and likewise that, by ordinary foresight and prudence, they should have anticipated, after they actually saw the deceased in the bar, that he, in his drunken condition, might stumble against, lean upon, catch hold of, or otherwise come into casual contact with the counter. If the jury should find that a reasonably prudent man, under these circumstances, would have apprehended the danger in which the deceased was thus placed, then the duty of using ordinary care to thwart that danger immediately devolved upon them. If the presence of the deceased was actually known, or, if not known, should have been anticipated under the circumstances, and the defendant did not take the care required to avert the threatened danger, negligence is established. The question as to whether the condition of the counter presented a hidden peril, so imminent as to require warning to the deceased in his condition and under the surrounding circumstances, is likewise a jury question. If negligence in the respects indicated should be found by the jury, it would likewise be for them to determine whether that negligence alone or in connection with the acts of the deceased was the proximate cause of the injury. If the conduct of the deceased in stumbling against or in catching hold of the counter was not negligent, but was casual and innocent, or was an accident unmixed with negligence, the defendant's wrong would, in a juridic view, be the sole responsible cause. If the acts of the deceased were in some wise negligent, but were not so much so as to amount to a failure to exercise ordinary care, the jury would have the right to compare the negligence of one party with the negligence of the other and to apportion the damages by diminishing the recovery. If the injury resulted solely from the negligence of the deceased, or from negligence on his part amounting to a failure to exercise ordinary care, or if, by the exercise of ordinary care and diligence, he could have prevented injury from the defendants' negligence, or if he put the counter to a use not reasonably to be anticipated, the plaintiff cannot recover.

In determining the negligence of the defendant, the circumstance that the deceased was drunk, and his condition, mental and physical, so far as disclosed to the defendant, or so far as under the circumstances the defendant reasonably should have known, are to be considered. As to the conduct of the deceased, his drunkenness is no excuse for any failure on his part to use all the judgment, knowledge, care, and discretion which would have been required of him if he were sober. As a part of this sober man's knowledge which he was called upon to exercise was a realization of the fact that he was drunk (this is not a bull, but a legal nicety), and that, being drunk, his physical and mental powers and faculties were impaired. It was his duty to conduct himself while in the saloon just as a sober man would have done if he had been in that physical condition as a result of illness or other innocent cause. If his stumbling was caused by physical weakness, though drunken weakness, and not from drunken misjudgment or drunken lack of care, and, having stumbled, he acted

as a reasonably prudent sober man in his physical condition would have acted, the fact of his intoxication will not make him guilty of contributory negligence. We can not say as a matter of law that it was not natural, prudent, and reasonably to be anticipated that one who had casually stumbled, fallen, or otherwise come into contact with a bar counter should lean against, catch hold of it or pull up by it. We have heard that one reason why bar counters are made in the style they are said to be made is that customers in places where such counters are found frequently feel a desire to lean against, catch hold of, or pull up by something, and the bar counter is so made as to accommodate them in these particulars, as well as in others. The petition was not so perfect as it might have been, but enough was alleged to pass general demurrer (which in this state is more limited in scope than in most jurisdictions), and to make a case for decision by the jury.

Therefore the judgment sustaining the demurrer is reversed.

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(3 Ga. App. 138)

## ABBEVILLE TRADING CO. et al. v. BUTLER, STEVENS & CO. (No. 636.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. BILLS AND NOTES — ACTIONS — DRUNKENNESS AS DEFENSE.

For one party to be affected by another's drunkenness, he must either have contributed to it or have had knowledge of it. That one indorsed an obligation while in a drunken condition will not affect the rights of a payee who had no knowledge of such drunkenness and no hand in causing it. The payee must have been cognizant of the fact. Civ. Code 1895, § 3654.

(a) There was no evidence that the payee acted through an agent in obtaining the note.

(b) In the absence of evidence that the plaintiff (the holder of a promissory note indorsed by one of the defendants) either caused or knew of the drunken condition of defendant at the time he indorsed the note in question, testimony that such indorser was, in fact, intoxicated when he signed his name as indorser, presented no defense to an action brought against him to recover on the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 945.]

2. PLEADING — PETITION — FAILURE TO DENY AVERMENTS.

Under the terms of Civ. Code 1895, § 4961, an averment which is distinctly and plainly made in a distinct paragraph of the plaintiff's petition shall be taken as prima facie true, unless it is denied by the defendant's answer, or it is stated therein that because of the want of sufficient information he can neither admit nor deny such averment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 270.]

3. NEW TRIAL—REFUSAL.

Inasmuch as no other verdict than that directed could properly have been rendered by the jury, there was no error in overruling the motion for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 130.]

(Syllabus by the Court.)

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by Butler, Stevens & Co. against the Abbeville Trading Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

M. B. Cannon and E. H. Williams, for plaintiffs in error. McDonald & Quincey and Hal Lawson, for defendants in error.

RUSSELL, J. Butler, Stevens & Co. sued the Abbeville Trading Company, as principal, and W. B. Fussell and R. S. Bell, as sureties, on two promissory notes, one dated April 4, 1905, for $1,046.89, with interest and attorney's fees, and the other dated May 15, 1905, for $1,040.89, with interest and attorney's fees. The Abbeville Trading Company admitted the allegations of the plaintiffs' petition as to jurisdiction and as to the death of Lasseter, one of the indorsers, and that written notice as to the claim of attorney's fees, as provided by law, had been given. It denied indebtedness, and that Fussell and Bell indorsed the notes, and set up certain payments which the answer averred should be allowed the defendants as credits. The defendant Fussell, for answer, alleged that he was so intoxicated at the time he signed the note that he was completely and wholly deprived of reason, and that he had no knowledge of having signed the note until notified by the service of the suit. He further alleged that the plaintiffs were instrumental in procuring said intoxication immediately before and at the time of the signature, through their agent one S. P. Lasseter. At the conclusion of the evidence the judge directed a verdict for the plaintiffs against the Abbeville Trading Company as principal, and against R. S. Bell and W. B. Fussell as sureties, for $1,207.58, principal, with interest and attorney's fees. The defendants made a motion for new trial, which was overruled; and exception is taken to the judgment refusing a new trial.

On the trial the plaintiffs introduced the two promissory notes above referred to, one due November 1, and the other November 15, 1905, and admitted that there should be a credit amounting to $905.78, dated February 24, 1906, placed on the note due November 1, 1905. The testimony for the defendants was to the effect that the indorser, Fussell, was drunk at the time he signed his name. As to the degree of his drunkenness, the opinions of different witnesses varied. According to Fussell's own testimony, he had been drinking very hard and continuously for 15 or 20 years, but could write his name as well as any man when full of whisky. The evidence further disclosed that S. P. Lasseter, deceased, was president of the Abbeville Trading Company, and that Fussell, Bell, and one Wootten were its stockholders; that Fussell was manager of the guano and wag-

on department; and that the notes were attached to a draft deposited in the Citizens' Bank of Abbeville, and the money proceeds were procured by the Abbeville Trading Company.

1. The main question presented by the record is, whether the indorser was relieved from liability if drunk at the time he entered into the contract. If his drunkenness was caused by any act of the holder of the note, it is certainly true that Fussell's contract of indorsement would be voidable at his option. It would not be absolutely void, because one who makes a contract when intoxicated may ratify it when perfectly sober; and, if he has obtained anything of value by reason of the contract, he must rescind and offer to restore that which he has received. It is not insisted in this case by the defendants that the plaintiffs themselves caused the intoxication of Mr. Fussell, nor was there any evidence that the plaintiffs knew of his drunkenness or that he was a drunkard. Section 3654 of the Civil Code of 1895 is in these words: "A drunkard, when actually intoxicated to such an extent as to deprive him of reason, can make no valid contract with any one cognizant of the fact of his condition. If the party contracting was at all instrumental in producing the state of intoxication, the contract is invalid, however partial the intoxication may be." There was no evidence whatever that Butler, Stevens & Co., or any member of their firm, were present at the time of the signing of the note, or that they were cognizant of the fact of Mr. Fussell's intoxication; but counsel for the defendants insists that Lasseter was their agent. While it appears from the record that Lasseter and Fussell took only one drink together immediately previous to Fussell's signing the note, yet, under the provisions of the Code section we have quoted above, the contract might be invalid if Lasseter was the agent of the plaintiffs. All the evidence adduced, however, contradicts and denies that Lasseter was in any sense the agent of the plaintiffs. Lasseter was one of the four stockholders of the Abbeville Trading Company. He was the president and Fussell was the manager of one of the departments. The Abbeville Trading Company was trying to procure advances of money from the plaintiffs for use in their business. The Abbeville Trading Company and the indorsers were in Abbeville. The notes, according to the testimony, were to be forwarded through the Abbeville Bank to the plaintiffs, presumably at Savannah, as the notes were payable in that city. The defendant failed absolutely to establish his contention that Lasseter was the agent of the plaintiffs. As remarked by Judge Bleckley, in Merck v. American Freehold Land Mortgage Company, 79 Ga. 231, 7 S. E. 268: "Implications of agency are easily overstrained, misapplied, or otherwise abused. * * * A debtor is not the agent of his creditor in procuring security, though the creditor designate the very security required, and furnish to the debtor the instruments in writing which he demands to be executed by third persons as condition precedent to granting indulgence on the debt." Campbell v. Murray, 62 Ga. 87. There was not a single fact proved in this case from which the agency of Lasseter could have been implied. If it be conceded that he induced or caused Fussell's intoxication and worked a fraud upon him, Fussell's only recourse would have been against Lasseter. Craig v. Herring, 80 Ga. 713, 6 S. E. 283. There was no evidence that the plaintiffs had any knowledge that Fussell was intoxicated when he signed the notes. We use the word "notes," though there was no evidence as to the note dated April 4th, and all of the evidence seems to have been directed to the note dated May 15, 1905.

For a party to be affected by another's drunkenness, he must either directly or indirectly have caused the intoxication, or must have had knowledge of it. To use the language of the Code, he must have been "cognizant of the fact." Of course, if Butler, Stevens & Co. had been bona fide purchasers, Fussell's defense would have been unavailable; but, even as to the payees of a promissory note, drunkenness of one of the makers is no defense, if the business is such that the notes must be forwarded by mail, express, or other intermediary, and the holder of the note has no knowledge or reason to suspect that the paper in question was executed by one who was intoxicated. In such case he is not "cognizant of the fact." In Bank v. McCoy, 69 Pa. 204, 8 Am. Rep. 246, the reason for this ruling is fully treated. It is based upon the familiar principle that of two innocent persons he who rendered a wrong possible should suffer rather than he who did nothing towards the creation of the wrong; which is merely an adaptation of the old saying of Lord Holt, in 1 Salk. 289: "Seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be loser than a stranger."

There is no similarity between the case of an indorsement by an insane person and that of an indorsement by one who is deprived of reason by intoxication. The insanity is an inscrutable visitation of Providence; the intoxication the voluntary act of the party himself. The drunkard gets drunk because he wants to get drunk. And, in the absence of evidence that the plaintiffs either caused or knew of the drunken condition of the defendant Fussell at the time he indorsed the note in question, and the evidence for the plaintiffs fully establishing their case without contradiction, there was no error in directing a verdict for the plaintiffs. The fact that one has indorsed an obligation while intoxicated cannot affect the rights of a payee who has no knowledge that the indorser was drunk when he entered into the

contract, and who had no hand in causing such intoxication.

2. The plaintiffs in error insist that the court erred in directing a verdict (if for no other reason) because there was no evidence upon the subject of attorney's fees. There is no merit in this contention. According to the undisputed evidence, these notes were payable in Savannah and provided for the payment of 10 per cent. attorney's fees. The fifth paragraph of the petition alleged that "more than 10 days prior to filing of this suit petitioners gave written notice to the Abbeville Trading Company and to R. S. Bell and W. B. Fussell of their intention to bring suit for the amounts hereinafter stipulated, returnable to the November, 1906, term of this court, as provided by law, in order to collect the 10 per cent. attorney's fees." In the answer of the Abbeville Trading Company this paragraph was admitted, and in the answer of Bell and Fussell it was not referred to. Under Civ. Code 1895, § 4961, "any averment distinctly and plainly made in a plaintiff's petition which is not denied by the defendant's answer shall be admitted as prima facie true unless the defendant states in his answer that he can neither admit nor deny such averment because of the want of sufficient information." No proof was needed upon the subject of attorney's fees, because the defendants admitted a prima facie case. Hight v. Barrett, 94 Ga. 792, 21 S. E. 1008.

3. Whenever a verdict is directed, it is at the peril of the presiding judge, for, if there be a single material fact in issue, the issue is for the determination of the jury. But, inasmuch as no other verdict than that which was directed could properly have been rendered by the jury in this case, the direction of the verdict was not erroneous; and for that reason there was no error in overruling the motion for new trial.

Judgment affirmed.

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(3 Ga. App. 73)

## WALTERS et al. v. PORTER.
## PORTER v. WALTERS et al.

(Nos. 496, 497.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. CORPORATIONS—INSOLVENCY — STOCKHOLDERS' LIABILITY—ACTION—RECEIVERS.

A suit for the benefit of creditors against the stockholders of an insolvent corporation, alleging individual liability under the provisions of section 1856 of the Civil Code of 1895, is properly brought by the receiver of such corporation under the direction of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2280½.]

2. SAME—PETITION.

The petition as amended set forth a good cause of action, and the demurrer thereto was properly overruled.

3. SAME—DEFENSES—SALE OF STOCK.

"Persons who organize a company and transact business in its name before the minimum capital stock has been subscribed for" cannot escape liability to the creditors of such company by selling their stock to the corporation itself before the debts were incurred. Such attempted sale is a device to evade liability under Civ. Code 1895, § 1856, and is ineffective and void as to creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 960–971.]

4. SAME.

A plea setting up the defense covered by the foregoing headnote should have been stricken on demurrer.

(Syllabus by the Court.)

Error from City Court of Moultrie; R. L. Shipp, Judge.

Action by G. K. Porter, as receiver of the Farmers' Trading Company, against J. W. Walters and others. A general demurrer to the petition having been overruled, defendants bring error and plaintiff assigned cross-errors to the overruling of their demurrer to a paragraph of defendants' answer. Judgment on defendants' bill of exceptions affirmed and reversed on plaintiff's cross-bill.

J. A. Wilkes and J. D. McKenzie, for Walters and others. T. H. Parker, for Porter.

HILL, C. J. Porter was appointed receiver of the Farmers' Trading Company by the superior court of Colquitt county. On investigation, he found that the corporation had never been legally organized nor the minimum amount of capital stock subscribed for, as provided by the charter and as required by the law under which the charter was granted. He found, while the minimum capital stock of the corporation was fixed by the charter at $10,000, divided into shares of the par value of $10 each, that as a matter of fact there had been subscribed and paid for only 152½ shares, amounting to $1,525; that the stockholders who had subscribed and paid for this number of shares had organized the corporation under its corporate name, and had transacted the business of the corporation before the minimum capital stock had been subscribed for. The receiver of the corporation, after taking possession of the assets of the corporation and selling them under the direction of the court of his appointment, and paying out to the creditors of the corporation the net amount realized by him from the sale, found that there was still a balance due by the corporation to its creditors amounting to $2,645.31 principal. On considering these facts, the judge of the superior court directed the receiver to file suit against the stockholders and organizers of the corporation, for the purpose of collecting a sufficient amount of the minimum capital stock which had not been subscribed for, to pay in full this amount of indebtedness of the corporation. Certain specific defects in the petition, as pointed out by special demurrers, were made by appropriate amendments, and a general demurrer was filed to the petition as amended, which being overruled by the court the defendants filed a direct bill of exceptions to that judgment. The plaintiff demurred to the answer of the defendants

and especially as to paragraph 3, on the ground that the averments therein set out constituted no defense. The court overruled this demurrer, and the plaintiff's cross-bill of exceptions assigns error on said judgment. We will first consider the case as made by the demurrer to the allegations of the petition.

The suit by the receiver against the stockholders and organizers of the corporation is brought under the provisions of section 1856 of the Civil Code of 1895, which declares that "persons who organize a company and transact business in its name before the minimum capital stock has been subscribed for are liable to creditors to make good the minimum capital stock with interest." Objection is made by the defendants' demurrer that the suit is brought in the name of the receiver, and should be brought by each individual creditor against the defendants individually as stockholders in the corporation. This objection, we think, is fully answered by the decision of the Supreme Court in Moore v. Ripley, 106 Ga. 557, 32 S. E. 647, where it is held that "when a banking corporation has been shown to be insolvent, and its assets placed in the hands of a receiver, and in pursuance of an order of the court the receiver undertakes to collect by suit the liability of the stockholders for the payment of the debts of the bank as fixed by the statute, all of the stockholders so liable may be joined as defendants in one action." And "in such a suit it is not necessary that the bank as a corporation shall be made a party defendant. * * * Courts of law have jurisdiction, on proper petition supported by proof, to render judgment in such a case." Receivers are charged with the duty, under the direction of the court, of collecting the assets of the corporation for the benefit of its creditors, and this right of the receiver to bring suit for this purpose is expressly given by Civ. Code 1895, § 1890. Each individual creditor is not required to bring a separate action for himself, but the receiver, acting for all the creditors, is the proper person, under Civ. Code 1895, §§ 1856, 1890, to sue for the amount of the unsubscribed minimum capital stock of the corporation, in order that the aggregate debts of the corporation incurred on the faith of such minimum capital stock shall be paid. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626 (13-22). The receiver represents in one sense the corporation, and in another sense the creditors of the corporation, and therefore the whole matter can be settled in one suit brought by the receiver. Moore v. Ripley, supra.

It is insisted that the defendants as stockholders are not liable to the creditors of the corporation, because these creditors contracted with the corporation as a corporation either de jure or de facto, and therefore cannot deny its corporate existence. Credit was given to the corporation, and not to the members of the corporation individually or as partners. In support of this position, the case of Planters' & Miners' Bank v. Padgett, 69 Ga. 159, is relied upon. We do not think that case is analogous to the one now under consideration. There the plaintiff had contracted with the company as a corporation, receiving its promissory note, and it was held that he could not afterwards deny the contract with the corporation, and sue the stockholders individually or as partners. Here the suit is against those who organized the corporation and transacted business in its name to make good the minimum capital stock for the benefit of creditors. Creditors have the right to presume that the minimum capital stock allowed by the charter has been subscribed from the fact that the corporation has commenced business. If this presumption is found to be untrue, then those who are responsible for the business of the corporation are liable for its debts, at least to the extent of the minimum capital stock, with interest. The provisions of section 1856 of the Civil Code of 1895 are explicit, and apply to all business corporations chartered under the laws of this state. The principle of the section is codified from the case of Burns v. Beck, 83 Ga. 471, 10 S. E. 121, where the Supreme Court holds as follows: "As a matter of law, when the stock of a corporation is not subscribed for up to the minimum amount of capital fixed by the charter, and none of it is paid in, if the corporators organize, elect themselves officers, proceed to business, contract debts up to and beyond the nominal capital, having paid in nothing whatever, they commit a legal fraud by so doing, and are liable to creditors to make good the minimum capital, together with interest thereon, should this be necessary to discharge the corporate debts." Of course, the same principle is applicable to those who carry on the business of a corporation when only a portion of the minimum capital stock has been subscribed for; the measure of liability being the difference between the amount subscribed for and the amount required by the charter to be subscribed for as the minimum capital before the transaction of any business where that amount or a portion thereof is necessary to the payment of the corporate debts. Without reference to the underlying principle, that until a corporation is legally organized the co-adventurers will be liable as partners for all debts contracted in behalf of the aggregate body, either express or implied, we think this suit was properly brought by the receiver, by order of the court, under the provisions of Civ. Code 1895, § 1856, and that the allegations of the petition, if proved as laid, constituted a case of liability under the terms of this Code section. We therefore affirm the judgment of the court on the main bill of exceptions.

The cross-bill assigns error upon the judgment of the court overruling the plaintiff's

demurrer to defendant's answer. As a special plea in avoidance of liability, the defendants say that "each of said defendants sold out their stock before the date of the debts, and transferred their certificates of stock in said corporation back to the corporation, and the same was done and shown on the stock-books." This plea was demurred to on the ground that "the defendants, nor either of them, in law or equity, had any right to sell their stock to the corporation, thereby reducing the minimum capital stock, not only from the amount subscribed, but from the amount advertised." The effect of the judgment of affirmance on the main bill of exceptions is to leave the case to be tried in the court below; and the question raised by the cross-bill is as to a material matter of defense, and a decision by this court on this question is properly invoked. Holmes v. Langston, 110 Ga. 862, 36 S. E. 251 (7); Thornton v. Travelers' Ins. Co., 116 Ga. 121, 42 S. E. 287, 94 Am. St. Rep. 99; Tucker v. Ball, 68 Ga. 814. Under the statutory law of this state, all persons who deal with corporations created under the laws of this state have at least four guaranties: (1) That no corporation shall commence to exercise the privileges conferred by the charter until 10 per cent. of the capital stock is paid in. (2) That no corporation can be organized and business transacted in its name before the minimum capital stock has been subscribed for. (3) That the full amount of the stock subscribed and not paid in constitutes a fund for the payment of corporate debts. (4) That all who organize a company and transact business in its name before the minimum capital stock has been subscribed for are liable to creditors to make good the minimum capital stock, with interest. Violations of the first two legal inhibitions always and necessarily create the two consequent grounds of personal liability for corporate indebtedness. Not only are those who deal as creditors with corporations protected by these express statutory provisions, but they have the further assurance in well-settled principle that the capital stock of a corporation, whether paid or unpaid, is a trust fund for the benefit of creditors; and in this state, under the provisions of Civ. Code 1895, § 1856, even when the stock subscribed for has been fully paid in, yet, if the corporation is organized and debts created in its name before the minimum capital stock has been subscribed for, those who have thus subscribed and paid their subscriptions are nevertheless liable individually for these debts to the amount of the difference between the actual subscription and the required subscription of the minimum capital stock. This doctrine must be maintained as to all the creditors of the corporation who are invited by the stockholders to give credit to the corporation on the faith of the capital stock. Stockholders who organize and transact business in the name of a corporation before its minimum capital stock has been subscribed for cannot, by selling their shares to the corporation itself rid themselves of individual liability to creditors who give credit to the corporation on the faith of such capital stock, which they have a right to presume has been fully subscribed for. It is universally recognized that a corporation cannot reduce its capital stock either by declaring dividends which infringe upon the capital, or by release of stockholders from installments to become due, or by accepting property or work at a false value, or in any like manner. Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Hill v. Silvey, 81 Ga. 508, 8 S. E. 808, 3 L. R. A. 150; Sawyer v. Hoag, 17 Wall. (U. S.) 610, 21 L. Ed. 731; 10 Cyc. 450, 451.

The plea in this case, made by all the stockholders who are sued for a violation of section 1856 of the Civil Code of 1895, is that they had sold their stock in the corporation back to the corporation itself before the debts were incurred by the corporation. This seems to be a scheme not only for reducing the capital stock, but for destroying it altogether. All the stockholders are sued. All have sold their shares to the corporation. Who are the purchasers, and what becomes of the corporation when there are no longer any stockholders? It is a "mere shadow without substance." Whose money paid for the stock? Reduced to its last analysis, the plea amounts simply to this declaration: "Before we created the debts as a corporation, we sold out as stockholders in the corporation to ourselves, as the corporation, and therefore we are not liable for the debts of corporation incurred after the sale." Besides, under the allegations of the petition, which were admitted by the demurrer, this corporation never existed except in name. Its minimum capital stock had never been subscribed for. These defendants were transacting business in its name without legal authority, and were liable for its debts as individuals. No artificial person was created by law that could buy their stock, and these necessarily occupied the dual position of vendor and vendee in the attempted sale.

Judgment on the main bill of exceptions affirmed; on the cross-bill reversed.

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(3 Ga. App. 125)

## TRADERS' INV. CO. v. MACON RY. & LIGHT CO. (No. 616.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

EXEMPTIONS—WAGES OF LABORERS—GARNISHMENT—CONTRACT TO WAIVE.

Under the laws of this state the wages of all journeymen mechanics and day laborers are not subject to process of garnishment. A contract, either specific or general, by which a debtor attempts to waive this exemption and to make his wages earned as a laborer subject to garnishment, is void and not enforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Exemptions, § 115.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by the Traders' Investment Company against the Macon Railway & Light Company. Judgment for defendant, and plaintiff brings error. Affirmed.

R. S. Wimberly, for plaintiff in error. M. R. Freeman and Roland Ellis, for defendant in error.

POWELL, J. The garnishee answered that he was indebted to the defendant, but that the money was not subject to garnishment because it was for wages earned by the defendant as a laborer. A part of the contract upon which the plaintiff sued was the following agreement signed by the defendant: "For and in consideration of the above note and as against this debt, I expressly and specially waive all exemption from garnishment to which, under the constitution and laws of Georgia, I may be entitled, relative to the wages I may earn in the employ of the Macon Railway & Light Company, as a dispatcher, between the 1st day of March, 1906, and the 1st day of July, 1906. I hereby authorize and request the Macon Railway & Light Company to recognize and comply with the specific waiver of garnishment in the sum of $42 out of said wages, between the 1st day of March, 1906, and the 1st day of July, 1906, made in favor of the said Traders' Investment Company. And I further request the Macon Railway & Light Company not to set up any right of exemption or garnishment as defense in any proceeding or suit of garnishment which may be brought against me by the Traders' Investment Company for the recovery of the above indebtedness, in case I should fail to meet said obligation promptly." The magistrate before whom the original hearing occurred held that this contract precluded the defendant and the garnishee from pleading an exemption of the wages from process of garnishment. The superior court on certiorari held this to be error and ordered a new trial. The case comes here on exception to the ruling last mentioned.

While our Supreme Court long ago held that a general waiver of exemption from garnishment was ineffectual, it expressly left open the question whether a special waiver, such as the one sub judice, would be valid and enforceable (Green v. Watson, 75 Ga. 471, 45 Am. Rep. 479), and this precise question has never as yet been decided by our Supreme Court. However, on January 20, 1904, in the superior court of Fulton county, in the case of Peter Mills v. Charles Colyer, the presiding judge, Hon. Joseph Henry Lumpkin, now a justice of our Supreme Bench, rendered a decision and an exhaustive opinion on this subject, which was noted and favorably commented upon by both the secular press and the law periodicals throughout the country. See 10 Case and Comment, 102; 7 Law Notes, 232. This opinion has never been officially published, and it is so able and so conclusive upon the subject that we feel that we can do the members of the profession who are interested in this question no better service than to incorporate herein and adopt as our own so much thereof as is material to the case under consideration. Omitting parts not germane here, Judge Lumpkin's opinion is as follows:

"Under the agreement upon which the case was tried, there is but one question to be decided conceding that Mills was a laborer, within the meaning of the statute, and that the fund sought to be subjected was due him for such wages as was not subject under the law, was it rendered subject by reason of the waiver contained in the instrument above set out? Counsel for Colyer contends that the waiver of exemption of wages was lawful and valid, and that, under it, the wages due Mills could be subjected. Counsel for Mills contends that such waiver was contrary to public policy, and did not prevent Mills from claiming such wages as exempt from garnishment. A very brief reference to the history of the garnishment laws of this state may throw some light upon the legislative purpose in regard to the exemption of wages. On February 18, 1799, an act was passed entitled, 'An act to regulate attachments in this state' (Prince's Digest of Laws, p. 30, § 1), and in the second section thereof provision was made for serving a summons of garnishment based upon an attachment proceeding. This act was amended on November 22, 1814 (Prince's Digest of Laws, p. 32, § 5), December 16, 1816 (Id., p. 34, § 13), and December 8, 1820 (Id. p. 35, § 16). On December 23, 1822, an act was passed entitled, 'An act to authorize parties plaintiffs to issue summons of garnishment in certain cases as in cases of attachments' (Laws 1822, p. 53), and this was amended on December 20, 1823 (Laws 1823, p. 85). Several other amendments were made to the attachment and garnishment laws from that date to February 21, 1850 These various acts will be found in Cobb's New Digest, pp. 69–88, inclusive. Only one of them need be set forth as bearing directly on the question in issue.

"On December 27, 1845, an act was passed entitled, 'An act to exempt journeymen mechanics and laborers in this state from garnishment of their wages,' which provided that 'from and after the passage of this act all journeymen mechanics and day laborers shall be exempt from the process and liabilities of garnishment on their daily, weekly or monthly wages, whether in the hands of employers or others.' Cobb's Dig. 88. On August 23, 1872, an act was passed entitled, 'An act to amend the garnishment laws of this state.' It provided that 'from and after the passage of this act the wages of no person in the employment of another shall be exempt from the process of garnishment when the consideration of the debt is provisions for the use of the employé or his family, or when the consideration of such debt is for the board of himself or family.' Acts 1872, p. 43.

On February 24, 1875, an act was passed entitled, 'An act to amend section 3554 of the Code of 1873.' It provided that 'from and after the passage of this act, section 3554 of the Code of 1873, be and the same hereby is amended, by adding to the proviso of said section the following words, to-wit "or when the consideration of said debt is services rendered by any physician, or surgeon, druggist, or apothecary, to said employé or his family."' Acts 1875, p. 21. On February 7, 1876, an act was passed entitled, 'An act to exempt from process of garnishment the wages of journeymen mechanics and day laborers.' It provided that 'from and after the passage of this act, all journeymen mechanics and day laborers shall be exempt from the process and liabilities of garnishment on their daily, weekly or monthly wages, whether in the hands of their employers or others, provided that this act shall in no way effect, or operate upon, contracts made prior to the passage of the same.' And this identical language (omitting the proviso) was incorporated into the Civil Code of 1882 (section 3554) and the Civil Code of 1895 (section 4732). It will thus be seen that, after temporarily allowing the wages of laborers to be garnished for certain debts, this permission was repealed, and the Legislature returned to and re-enacted the act of 1845, completely exempting such wages from garnishment. And the right to garnishment depends on the statute.

"The exemption thus created did not provide for a privilege to be exempt upon doing certain things, or taking certain action, but was a positive statutory exemption, complete and perfect in itself, and to obtain its benefits, when he set up a claim to exemption, the laborer had nothing more to do than to show that he was of the class described and point to the law itself. In such a case, can the laborer, by executory or prospective agreement, as in a promissory note, waive the positive statutory exemption so as to render his wages subject? It is contended that, under section 10 of the Political Code of 1895, such a waiver is valid and binding. That section reads as follows: 'Laws made for the preservation of public order or good morals cannot be done away with or abrogated by any agreement; but a person may waive or renounce what the law has established in his favor, when he does not injure thereby others or affect the public interest.' The exact question, therefore, is whether the exemption of the daily, weekly, or monthly wages of a laborer from garnishment is merely such a personal privilege, or thing established 'in his favor,' as may be waived by him by an executory or prospective agreement, or whether it involves the preservation of public order or good morals, or affects the public interest; in other words, whether such a waiver is contrary to public policy, and therefore void. If such a contract is contrary to public policy it cannot be enforced. Civ. Code 1895, § 3668. Section 10 of the Political Code of 1895 is a codification of the law as it stood before the original Code was adopted, and does not introduce any new or peculiar statutory rule. In effect, it merely declares what would be the law without it.

"Does the exemption from garnishment of the daily, weekly, or monthly wages of a laborer involve, or is it based upon, any public policy of this state, or is it merely a personal privilege which may be waived by prospective agreement? There have been many decisions as to who was a laborer within the meaning of the law, and there was no little conflict in them until a general rule was laid down in the case of Oliver v. Macon Hardware Co., 98 Ga. 249, 25 S. E. 403, 58 Am. St. Rep. 300, which has since been followed by the Supreme Court of this state. It will therefore be unnecessary to undertake to discuss or reconcile the decisions on this subject, but the point to which I shall address myself is whether, if a person be conceded to be a laborer within the meaning of the law, the exemption of his daily, weekly or monthly wages from garnishment involves any question of public policy. In Caraker v. Matthews, 25 Ga. 574, it is said: 'The family of an overseer is entitled to this subsistence from his hands before any creditor, I care not how meritorious his demand may be. Women and children must have bread. * * * Right or wrong, the Legislature has indicated its policy in this respect. It should not be restricted when sought to be applied to a class quite as needy, and meritorious, too, as others who are confessedly exempt.' This decision had been frequently cited as authority, and while in Kyle & Co. v. Montgomery, 73 Ga. 343, it was said that the meaning of the terms 'journeyman mechanic' and 'day laborer' was sufficiently enlarged when they were made to embrace the overseer of a plantation, who not only directed the operations of the hands employed, but labored with them, and also clerks employed in stores, the criticism went merely to the question of who fell within the designated class. I nowhere find any reversal or criticism of the statement of the judge delivering that opinion as to the public policy involved. In Claghorn & Cunningham v. Saussy, 51 Ga. 576, 577, it is said: 'The object of this statute, being for the benefit of the laboring class of small means, should be liberally construed so as to effect the intention of the Legislature.'

"On December 7, 1898, an act was passed prohibiting creditors from assigning and transferring or sending out of this state claims, accounts, or debts against a resident thereof for the purpose of having the same collected by proceeding in attachments or by garnishment in another state, with intent to deprive a resident of Georgia of the right to have his wages exempt from garnishment. In this act occurs the following language: 'Thereby seeking to evade this law and de-

feat the public policy of this state.' Acts 1898, p. 90. On December 18, 1901, an act was passed to make it lawful for any railroad company or other corporation doing business in this state, upon the death of any employé leaving a surviving widow or minor child or children, to pay over whatsoever wages that may be due said employé, not to exceed $100, to his widow or minor child or children, or guardian thereof, without any administration upon his estate, and to exempt said wages to the amount of $100 from garnishment. In the body of the act it is said: 'Said fund to the amount of one hundred dollars, after the death of said employé is hereby exempt from any and all processes of garnishment.' Thus, again, the legislative purpose to protect wages from garnishment, even after the death of the laborer or employé (for this act is not limited to laborers, unless 'employé' be taken to mean 'laborer') is shown. If the laborer or employé could waive the exemption of his wages from garnishment, how could this act be carried into effect? Acts 1901, p. 60. In Green v. Watson, 75 Ga. 471, 45 Am. Rep. 479, it was held that 'where the laborer made the following general waiver in a note, viz: "And I hereby contract and expressly waive the exemption of my wages or salary from the process of garnishment under the laws of Georgia, or exemption of my daily, weekly, monthly or yearly wages or salary from the operation of the garnishment law, in case this note is not paid promptly at maturity,"—such waiver was not binding on him, and was void.' And this was put on grounds of public policy. The last paragraph of the opinion in that case will be discussed presently. Here, then, both by the decisions of the Supreme Court and by the direct words of the Legislature the exemption of wages from garnishment is recognized, not merely as being a personal privilege, but as involving and constituting a public policy of the state.

"In other states the great weight of authority is to the effect that such a direct statutory exemption is based on public policy, and cannot be waived by executory or prospective agreement so as to prevent the laborer from claiming his exemption. In Rood on Garnishment, § 86, occurs the following: 'Unless the statute creating the exemption so provides, no valid waiver of its benefits can be made in advance by executory agreement.' The statute of this state creating the exemption does not provide for any waiver of it, and section 10 of the Political Code of 1895, which existed long prior to the act of 1876, was merely a codification, and does not modify or limit the terms of the act. In Firmstone v. Mack, 49 Pa. 387, 393, 394, 88 Am. Dec. 507, it was held that a waiver of 'all and singular the rights, benefits, and privileges of the act of the Assembly which exempts money due labourers for labor done from collection by attachment' was void, as contrary to public policy. In the opinion it is said that to hold otherwise would place temptation before 'weak debtors to beggar their families in behalf of sharp and grasping creditors. * * * It is to be observed that the garnishee has rights in the premises, and he is under the act of the Assembly, but is not a party to the agreement which his labourer makes with the creditor. Why should he be annoyed and subjected to costs, his work hindered, and his hands deprived of their daily bread, by an agreement between others to which he is not a party, and of which he had no notice? Why should such an agreement be made a rule of law to garnishees, instead of a statute which they knew of when they made their business arrangements and employed their labourers, and which they had a right to expect would be administered as written?' In Kneettle v. Newcomb, 22 N. Y. 249, 78 Am. Dec. 186, the exemption under consideration was one of property from levy, but it was a direct statutory exemption quite similar in its terms to the exemption of wages from garnishment in this state. The court says: 'Every honest man who contracts a debt expects to pay it, and believes he will be able to do so without having his property sold on execution. No one worthy to be trusted would therefore be apt to object to a clause subjecting all his property to levy on execution in case of nonpayment. It was against the consequences of such overconfidence, and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the Legislature has undertaken to interpose. One object of the Legislature was to promote the comfort of families, and to protect them against the improvidence of their head.' On page 253, of 22 N. Y. (78 Am. Dec. 186) it is said: 'The law does not permit its process to be used to accomplish ends which its policy forbids, though the parties may, by prospective contract, agree to such use.'

"Counsel for plaintiff in certiorari [Mr. Walter McElreath of the Atlanta bar] puts his argument strongly when he says in his brief: 'The protection of the family of the debtor, the common benefits flowing to the entire community from the encouragement of persons to engage in laborious occupations, the immunity of industries and large enterprises, dependent upon the employment of labor, from garnishments and from having their labor driven off by garnishments, is within the policy of the law of this state.' While it is impracticable to enter into a detailed discussion of things which may be waived and those which may not be, a few illustrations of the latter class will show that all exemptions are not waivable. A debtor is exempt from arrest or imprisonment for debt in this state. He cannot waive that exemption and confer upon his creditor a right to imprison him. An agreement not to take the effect of the bankruptcy laws would hardly be held binding. Although a deed or contract given as security may provide in express

terms for a forfeiture in case of nonpayment at the time specified, courts of equity frequently grant relief. In Moxley v. Ragan, 10 Bush. (Ky.) 158, 19 Am. Rep. 61, it is said: 'The right to plead the statute of limitations is a personal privilege, but will it be contended that an agreement or promise never to plead the statute is binding?' In Curtis v. O'Brien, 20 Iowa, 376, 89 Am. Dec. 543, it is said: 'In the case of a judgment creditor applying to the court or its officer for an execution, the court, by its clerk, following the language of the law, says to him, "You may have the execution, but no exempted property is to be sold under it." The creditor, however, says to the court, "I will take your execution, but the debtor and myself have made a law for this case which will control your writ, and make it do what the law says it shall not do." No court will permit parties thus to control its process so as to defeat the statute or render nugatory its most beneficent provisions.'

"In regard to exemptions of property or homesteads, there is some conflict in the decisions, but the weight of authority is in accordance with the rulings above referred to, and some of the cases which seem to hold otherwise will be found to rest on statutory provisions. 28 Am. & Eng. Ency. Law (1st Ed.) 575. In Pennsylvania it was held that an exemption of property from levy might be waived, but later the Supreme Court of that state appears to have regretted such decision and declined to make a similar ruling in regard to waiving exemption of wages from garnishment. See Case v. Dunmore, 23 Pa. 94; Shelly's Appeal, 36 Pa. 373, 380; Firmstone v. Mack, supra. See, also, Mills v. Bennett, 94 Tenn. 651, 30 S. W. 748, 45 Am. St. Rep. 763 (involving wages); Carter's Adm'r v. Carter, 20 Fla. 558, 51 Am. Rep. 618.

"It is sought to draw an analogy between the waiving of a right to obtain a homestead or exemption under the laws of this state and the waiving of the statutory exemption of wages from garnishment, but the analogy is very imperfect. Prior to the Constitution of 1877 it was held in Stafford, Blalock & Co. v. Elliott, 59 Ga. 837, that 'a general waiver of the right of homestead of all the property of a debtor, in esse and to be acquired, in a promissory note, without words which create any lien or describe any particular property, will not estop the debtor from taking a homestead, though he may have owned and possessed the property set apart at the time he gave the note.' In the opinion it is said that 'the policy of the law, as exhibited in the Constitution and statutes, is undoubtedly that women and children should have a home set apart out of the father's and husband's property, if he, as the head of the family, would secure it to them.' In Flanders & Sons v. Wells, 61 Ga. 195, it was held that 'where, in 1876, a debtor mortgaged two mules, waiving expressly all right of exemption, and afterwards disposed of one before the setting apart of either as exempt, the wife of the debtor cannot protect the other from levy and sale under the mortgage fi. fa. by having it set apart under section 2040 of the Code (Civ. Code 1873).' And this followed the decision in Simmons v. Anderson, 56 Ga. 53. So that, prior to the Constitution of 1877, a general waiver was not good, but a waiver contained in a mortgage on specific property was valid. The difference, however, between the right to have a homestead or exemption set apart in property and the statutory exemption of a laborer's wages from garnishment is clear. The constitutional provisions and statutes in regard to homestead and exemption of property from levy in this state did not complete the exemption proprio vigore. They confer upon the person entitled to have exemptions set apart the right to obtain the same by complying with certain statutory requirements. To do so or not is optional with the owner of the property. He may comply with the statutory requirements and exempt certain selected property, or he may decline to do so and allow it to remain unexempted, and even his wife cannot compel him to obtain an exemption against his will. Davenport v. Alston, 14 Ga. 271–275; Simmons v. Anderson, 56 Ga. 53; Bowen v. Bowen, 55 Ga. 182. Under the present Constitution waivers of homestead or exemption rights, except to a limited extent, are provided for. The statute exempting wages from garnishment requires no action on the part of the laborer such as filing or making application to the ordinary, or the taking of other steps similar to those required to obtain a homestead or exemption. This difference is recognized by Chief Justice Jackson in Green v. Watson, 75 Ga. 473, 45 Am. Rep. 479, when he says: 'There being nothing in the Constitution of 1877 permitting the waiver of the garnishment law, the principle then ruled [referring to the case of Stafford, Blalock & Co. v. Elliott] covers a fortiori this case; or, if the debtor could not waive a right which required an application to the ordinary, or, in other words, which required suit by him to assert and set apart homestead, much less can he waive a right which he need not sue for, but, standing on the law which has already set apart for him all his wages, he need do nothing but defend by citing that law.' The last clause in the opinion in the case referred to is greatly relied upon by counsel for the defendant in certiorari. It reads as follows: 'Whether any special waiver of these laws upon specific wages in a certain employment and for a certain time, by specific orders on employers contained in such specific waiver, would be good, we do not decide, it not being necessary to do so, because the ruling as it stands meets the case made, and "sufficient unto the day is the evil thereof."' The court distinctly refused to decide whether such waiver would be good or not, and therefore,

at most, counsel for defendant in certiorari can draw no further comfort from the statement than the negative inference that, because the court did not decide the point, they might have decided it in his favor. This is, at best, weak authority.

"The chief justice rendering that decision closes with the Biblical quotation 'Sufficient unto the day is the evil thereof.' The day has now arrived and surely the 'evil thereof' is amply sufficient. A money lender has prepared forms in which, relying upon this paragraph of the decision, he seeks to subject the wages of a laborer to garnishment in spite of the statute which declares that he shall not do so. Two cases of a similar character are already before me. How many others are to follow the future will determine. In regard to what was said in this paragraph of the opinion, two things occur to my mind. In the first place, if the statutory exemption of a laborer's wages from garnishment involves a public policy of the state, and a general waiver is contrary to public policy, as has been held by the Supreme Court, I am unable to see how a waiver less than general or universal would be in accord with public policy. In this case the waiver relied on affects 'all exemption from garnishment of my wages to be earned in the employment of the same, or the Southern Railway Company, for the months of the years 1901 and 1902.' Now, a laborer or his family may starve quite as effectually in two years as in any other time. If, on a $12 debt, the right of exemption from garnishment of the wages of a laborer for two years can be waived, why not for five, ten or twenty, or any other number of years? If I have succeeded in showing that such waivers are obnoxious to public policy, how are they any the less so because some number of years is stated? If it is contrary to public policy generally to waive exemption from garnishment of the wages of a laborer, but it is not so contrary to public policy to waive the exemption for one year or two years, where can the line of demarcation be drawn? Can a court lay down as a rule applicable to all cases of laborers that they may lawfully waive the exemption for a certain number of days, or a certain number of months, or a certain number of years, but beyond that they are prohibited from waiving? Or can the courts take up each individual laborer and undertake to say that sometimes he may lawfully waive the exemption, and sometimes he may not? If so, when could he waive and when could he not? To follow the statute is a plain and simple procedure. To attempt to make exceptions to it by construction would be more like legislation than adjudication. If the Legislature desires to permit waivers in such a case, that is for them to say. * * * Upon a consideration of the entire case, I am of opinion that the waiver was invalid and did not prevent Mills from claiming his wages as exempt, and the verdict of the jury in the justice's court finding to the contrary was erroneous."

We shall only add that on August 15, 1904, since the rendition of the above opinion, the General Assembly passed the act forbidding the assignment of unearned wages, which is further indicative of the public policy of this state upon the question at bar. See Acts 1904, pp. 81, 84.

Judgment affirmed.

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(3 Ga. App. 43)

## BUSH v. FOURCHER. (No. 384.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. WRIT OF ERROR—VERDICT—REVIEW.

The verdict of a jury should not be set aside upon the assignment of error that it is without evidence to support it, if there is any evidence to support it, unless it be further made to appear (a) that some ruling of the court improperly withheld evidence from the jury; (b) or illegally permitted the jury to consider testimony which should not have been submitted to them; or (c) that the court's instructions, as applied to the evidence, were erroneous, inapplicable, or misleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3928.]

2. WORK AND LABOR—VERDICT—EVIDENCE.

The evidence authorized the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 55.]

3. EVIDENCE — BOOKS OF ACCOUNT — FORM — FOUNDATION—PRESUMPTIONS.

Books of account may be introduced in evidence, even though it may not have been shown that the merchant or other proprietor kept no clerk. Such books may tend to support the credit of the plaintiff before the jury, and, for the purpose of corroboration, they may be admitted. The mere fact that a book is kept in ledger form is not a valid objection to its admission as a book of original entries, and, even if the ledger in this case was not a book of original entries, its admission was harmless to the defendant, as the entries thereon tended only to prove facts already submitted to the jury by other means in the testimony. The books contemplated by Civ. Code 1895, § 5182, are permanent books. Irregularities in books of account sought to be introduced in evidence "should be exceedingly gross and palpable to justify the court in arresting the evidence from that tribunal whose peculiar province it is to judge of the credibility of testimony." Bower v. Smith, 8 Ga. 77. Where it appears from the record that prior to the admission of the books the plaintiff and his clerk and bookkeeper were thoroughly examined in the presence of the court with reference to them (the nature of such examination rendering a thorough examination of the books necessary in view of the court), and that the judge had ample opportunity to inspect them, he will be presumed to have seen and to have been satisfied that they were free from any suspicion of fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1443, 1455, 1628; vol. 3, Appeal and Error, §§ 3735, 4161, 4162.]

4. TRIAL—REQUESTS TO CHARGE.

A trial judge is not required to give in charge to the jury the contents of a written request if any portion thereof is erroneous. No complaint can be made where the judge presents to the jury that portion of the request which is legal, and omits and declines to charge the portion of the request which is not in accordance with law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 660.]

5. BAILMENT—USE OF PROPERTY—DAMAGES—EVIDENCE.

One who claims that another was liable for the hire of his automobile, used without his knowledge and consent, is only entitled to recover reasonable hire for its actual use as found by the jury. In the absence of any contract between parties, the fact whether he who used the automobile did or did not make a practice of doing so would be immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bailment, §§ 87, 88.]

6. TRIAL — INSTRUCTIONS — CONSTRUCTION AS WHOLE.

The charge excepted to in the fifth ground of the motion, while inapt in expression, is not sufficiently erroneous, when considered with other instructions of the court upon the same subject, to require the grant of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703–717.]

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by H. E. Fourcher against W. E. Bush. From a judgment for plaintiff, defendant brings error. Affirmed.

C. E. Dunbar, for plaintiff in error. Oswell R. Eve, for defendant in error.

RUSSELL, J. The defendant in error, a locksmith and repairer of bicycles and automobiles, sued the plaintiff in error upon an open account, and the jury returned a verdict for the plaintiff for $181.65. The verdict was less than the account sued for. The original petition of plaintiff alleged an indebtedness of $152.75, but was subsequently amended to read $186.65. The alleged indebtedness was claimed to be due on account of certain repairs and material furnished in the repairing of the defendant's automobile and bicycle during a period of seven months of the year 1905. He filed an answer, denying the indebtedness and setting up a counterclaim for $600 for hire and damages to the automobile. After the verdict in favor of plaintiff, the defendant filed a motion for a new trial, which was overruled, and he excepts to the judgment overruling the motion. The evidence for the plaintiff shows that he was authorized and instructed to repair defendant's automobile and bicycle; that the defendant placed the automobile with him, with direction to put the machine in repair and sell it; that he, following the instructions, put the machine in working order and endeavored to dispose of it. He testified (and his testimony was corroborated by other witnesses) that Bush knew that the repairs were being made upon the machine, and that they were done with Bush's full knowledge and consent. Plaintiff's witnesses testified that the repairs upon the bicycle were done on instructions from Bush's office by telephone and messenger, and from time to time bills were presented to Bush without his objecting to any items thereon or to their correctness.

1, 2. The first and second grounds in the motion for new trial aver that the verdict is contrary to law and the evidence, and contrary to justice and equity. There was conflict in the evidence. The jury settled the issues of fact by preferring the testimony for the plaintiff, and it was sufficient to authorize their finding. In a court for the correction of errors, the verdict of a jury should not be set aside upon the assignment of error that it is without evidence to support it, if there is any evidence to support it, unless it be further made to appear (a) that some ruling of the court improperly withheld evidence from the jury; (b) or illegally permitted the jury to consider testimony which should not have been submitted to them; (c) or that the court's instructions, as applied to the evidence, were erroneous, inapplicable or misleading. We held in a former automobile case from Augusta (Murphy v. Meacham, 1 Ga. App. 155, 57 S. E. 1046): "The case depending upon disputed issues of fact arising from conflicting evidence, the settlement which is solely for the jury, and the verdict having been approved by the trial judge, the judgment of the court below will not be disturbed."

3. The third ground of the motion for new trial alleged the improper admission of the books of account of the plaintiff, under section 5182 of the Civil Code of 1895. The books were properly and legally admitted. The conclusion of the opinion in Petit v Teal, 57 Ga. 148, cited by plaintiff in error, itself sustains the ruling; the language of Judge Bleckley, who delivered the opinion, being as follows: "As a party to the suit, though competent, is nevertheless liable to be discounted by the jury in credibility by reason of his interest, and as his books may tend to support his credit, there may be use for them for that purpose; and for that purpose, if for no other, there may be reason to admit them." The plaintiff had a clerk and bookkeeper who was qualified to testify, and who was introduced as a witness by him, and who testified as to the books and the nature and manner in which they were kept, and as to each item as it appeared charged upon the books to the defendant, as to who made the entries, who sold the goods, etc. Consequently there was no necessity of proof upon the part of the plaintiff that he kept no clerk, or that his clerk was dead or otherwise inaccessible, or that for any reason his clerk was disqualified from testifying. The introduction of the clerk answered the requirement, showing that the plaintiff did have a clerk, and that he was neither dead nor inaccessible. The fact that the plaintiff kept a clerk and bookkeeper, and that the clerk and bookkeeper testified, did not preclude him from introducing the books of account for the purpose of corroboration. 2 Cyc. Ev. 662 (g). The introduction of the clerk and bookkeeper and of the books themselves was proper. It was held in Bagley v. Roberson, 57 Ga. 148, that, though the person who kept the books is or can be examined, the books themselves

can also be admitted; and in Day v. Crawford, 13 Ga. 510, it is said: "Let the clerk prove the books, who made the entries in the due course of business."

In the case at bar all the parties to the transaction were present at the trial and testified as to their connection therewith, and the correctness of the same. The machinist who did the work, the clerk who sold the goods, the party who charged the items, the bookkeeper who sold some of the goods and kept the books, all testified. There were no missing links in the evidence. It cannot be maintained that because the clerk, the proprietor, the machinist, and the bookkeeper were all present and testified the books themselves cannot be introduced. The books in such cases as this may not be immediate proof of the correctness of the account, but may be corroborative evidence of the other testimony as to the correctness of the account, and are admissible as a part of the res gestæ. 1 Greenleaf, Ev. (15th Ed.) § 117. See Dunlap v. Hooper, 66 Ga. 211. The account was made up of numerous items, covering a period of nearly a year, of goods furnished and work done by numerous persons and charged upon the books by different persons; and in the interest of fairness and justice to the defendant it was proper that the history of each item be placed before the jury. That could not be done better than by introducing the books. A number of the plaintiff's customers testified as to the correctness of the books—even one of the jurors trying the case.

In the case of McDaniel v. Trulock, 27 Ga. 366, the clerk and the proprietor testified, and the books were admitted also. The ruling in Hinkle v. Smith, 127 Ga. 437, 56 S. E. 464 (3), is based upon the decision in the Trulock Case, and our ruling accords with that in each of these cases. The book presented in evidence was a book of original entries. Both the daily memorandum books and the book in which the items were transferred were introduced. In fact, all of the books connected with the transaction were introduced for the jury's consideration. The witness for the plaintiff swore that the book of original entries was introduced. See Dunlap v. Hooper, 66 Ga. 214 (2). A number of witnesses testified as to the correctness of the books.

In Bracken & Ellenworth v. Dillon & Sons, 64 Ga. 250 (1), 37 Am. Rep. 70, cited by counsel for plaintiff in error, the Supreme Court says: "Mere temporary memorandum books used by the salesmen, and transferred nightly from penciled entries of theirs to the permanent ink book of the daily sales, are not the books of original entries so as to exclude such permanent book, but the latter is the book contemplated by the statute." In some instances a ledger may be one's only permanent book. The book introduced was the "permanent ink book," the "book contemplated by the statute." The other books were also introduced to prove the correctness of each item. In Dodd v. Mayson, 39 Ga. 608, it was held that the blotter was the book of original entries, and the court stated that the blotter and also the ledger should have gone to the jury in that case, together with the evidence of all the witnesses who had sworn. A book of original entries may be kept in any form. Memoranda on shingles have been admitted. "The mere fact that a book is kept in ledger form is not a valid objection to its admission as a book of original entries." 9 Am. & Eng. Enc. of Law (2d Ed.) 922.

The books were properly presented to the court for inspection, and the court admitted them. Consequently the court deemed them free from any suspicion of fraud. Prior to the admission of the books, the plaintiff and his clerk and bookkeeper were closely cross-examined by counsel for defendant as to the books, and a thorough examination of the books was made in the presence of the court. Not the slightest suspicion of fraud was shown, and the court was convinced of their regularity, and permitted them to be introduced. The court was given ample opportunity to inspect the books, and did so to his satisfaction. Even if there were slight inaccuracies in the books, that would not have excluded them from introduction as evidence. In the case of Bower v. Smith, 8 Ga. 77, it was said that "the irregularities in the books should be exceedingly gross and palpable to justify the court in arresting the evidence from that tribunal whose peculiar province it is to judge of the credibility of testimony."

4. The court properly refused the request to charge as set out in the fourth ground of the motion for new trial. The court gave the correct portion of the instruction requested relative to Fourcher's alleged unauthorized use of Bush's automobile, and as to his liability for reasonable hire for its use, provided the evidence disclosed any unauthorized use of the machine by Fourcher, but declined to add the following: "And it would not be necessary for you to find that Fourcher used the machine every day, if you find he made a practice of using it." The evidence disclosed no contract for hire of the machine; on the contrary, the counterclaim was for its unauthorized use. As well put by counsel for defendant in error in his brief: "Had this language been used, the jury would have been justified in making Fourcher liable for the entire amount of hire claimed, if they found that Fourcher made a 'practice of using it.' What would he have been liable for, had he made a practice of using it say once a month for the seven months which it was in his care? Under the above language he would have been liable for $50 a month for the entire period, which would have been palpably wrong and unlawful." The question of hire for the alleged unauthorized use of the automobile was also fully and completely dealt with by the court in several other parts of the charge. There was no error on the part

of the court in eliminating this language. In order for the refusal of a request to charge to be a ground for a new trial, the entire request must be correct. If a part be good and a part bad, the court will not be required to separate the two, but may refuse the request. 7 Encyc. Digest, 629. The charge of the court clearly indicates that the plaintiff would be liable for the hire for any unauthorized use he made of the machine. He clearly would not be legally liable for a month's hire if he used the machine for only two or three days.

5. The fifth ground of the motion for new trial complains of a portion of the charge of the court upon the question of ratification by the defendant of work done upon his bicycle. The charge excepted to is inapt in expression, and, if it had been the only reference to this subject, might have misled the jury; but we do not think that the use of the words complained of, "or accepted the property," in the court's charge, in the connection in which they were used, could not have misled the jury, and the alleged harmful effect that it might have had upon the jury is forced and strained when all of the sentence containing these words is considered. The sentence containing the alleged error is as follows: "If you find the charge reasonable and that authority was given, or, if authority was not given, that it was ratified by defendant, that he, after knowing it, agreed to it or accepted the property, then he would be liable." In other words, the court stated that, if the work done was ratified by the defendant accepting it with the property, knowing that it had been done, he would be liable. The question of ratification is clearly explained in the charge of the court a number of times in other language than that above quoted. When the whole sentence, to say nothing of the entire charge, is taken into consideration, it is not probable that the jury misunderstood the law upon the question of ratification. Brown v. Matthews, 79 Ga. 11, 4 S. E. 13; Wilson v. State, 69 Ga. 226; Smalls v. State, 105 Ga. 669, 31 S. E. 571 (4). Although the principal may expressly declare that he will not sanction the unauthorized act, a ratification may be shown from his act of acceptance. Byrne v. Doughty, 13 Ga. 53 (4); Haney v. Hightower Institute, 113 Ga. 295, 38 S. E. 761. It is well settled in Georgia that it is not essential that the principal should expressly ratify by word or writing. It may be done by implication or by the subsequent acts or conduct of the parties. "A ratification may be express or implied from the acts or silence of the principal. A ratification once made cannot be revoked." Civ. Code 1895, § 3019. "Slight circumstances and small matters will sometimes suffice to raise the presumption of ratification." Byrne v. Doughty, supra; Strong v. West, 110 Ga. 387, 35 S. E. 693; 1 Am. & Eng. Enc. Law (2d Ed.) 1195; Noble v. Burney, 124 Ga. 964, 53 S. E. 463. Our Supreme Court in dealing with the question of ratification in the case of Noble v. Burney, supra, adopts the following language from Graves v. Horton, 38 Minn. 66, 35 N. W. 568: "It is true that agency may be proved from the habit and course of dealing between the parties; that is, if one has usually or frequently employed another to do certain acts for him, or has usually ratified such acts when done by him, such persons become his implied agents to do such acts." See, also, McDowell v. McKenzie, 65 Ga. 630; Wilkes v. McClung, 32 Ga. 510 (2); Weaver v. Ogletree, 39 Ga. 588.

Fourcher had been doing this kind of work for Bush for a number of years, and receiving the orders to do the work in a manner similar to that used in connection with the bicycle. The work was done on Bush's bicycle and he received the benefit.

Judgment affirmed.

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(2 Ga. App. 557)

## SOUTHERN RY. CO. v. ROWE. (No. 93.)

(Court of Appeals of Georgia. May 9, 1907.)

1. REMOVAL OF CAUSES—DISMISSAL — SUBSEQUENT ACTION.

Though the plaintiff in a suit which had been properly removed from the state to the federal court having concurrent jurisdiction of the cause of action in which suit was founded voluntarily dismissed his case in the United States court, it was nevertheless his right to bring another suit on the same cause of action in the state court at any time within the statute of limitations applicable to such action. This is true notwithstanding the damages in the second suit were laid in an amount which would prevent another removal to the federal court.

2. COSTS—DISMISSAL—PAYMENT BEFORE SECOND ACTION.

A cause of action dismissed in the United States court may be renewed in the state court without payment of the costs accrued in the federal court. Civ. Code, 1895, § 5043, imposing a penalty upon those who nonsuit or dismiss their cases, is not applicable to cases in the United States court. The words, "the plaintiff may recommence his suit," refer to a suit between the identical parties that were involved in a former controversy in a court of the state of Georgia.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 1048.]

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

Where, with apparent full knowledge of the existence of a ditch in a public road, and without any emergency requiring it to be crossed, one endeavors to pass such an excavation, he will be treated as having voluntarily assumed all the usual risks incident to the attempt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 86.]

4. SAME—PETITION—DEMURRER.

Where it is clear from the allegations of the petition that the plaintiff's injuries might have been avoided by the exercise of ordinary care on his part, a proper demurrer to the petition should not be overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 84.]

5. PRINCIPAL AND AGENT—MISFEASANCE.

Misfeasance is the improper doing of an act which the agent might lawfully do. Where an agent fails to use reasonable care or diligence in the performance of a duty, he will be person-

ally responsible to a third person who is injured. His liability on such cases is put upon the ground that he is a wrongdoer, and, as such, responsible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 606, 607.

For other definitions, see Words and Phrases, vol. 5, p. 4535.]

6. MASTER AND SERVANT—TORT OF SERVANT—JOINDER OF DEFENDANTS.

The railway company and its section boss may be jointly sued for damages resulting from the negligent and improper discharge of his duties by such boss. The boss as a wrongdoer is personally responsible to the party injured by his misfeasance resulting from failure to use reasonable care and diligence in the performance of his duty, and the company is responsible for the misfeasance of its agent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1238.]

7. SAME.

The section boss and a railway company can be jointly sued when the sole ground of the liability of the railroad company is the act of the section boss alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1238.]

(Syllabus by the Court.)

Error from City Court of Hall County; G. H. Prior, Judge.

Action by J. E. Rowe against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jno. J. Strickland and Ed Quillian, for plaintiff in error. R. R. Arnold and F. M. Johnson, for defendant in error.

RUSSELL, J. The defendant in error brought an action against the Southern Railway Company in the city court of Hall county for the recovery of $10,000 damages, returnable to the February term, 1906, of that court. This action upon petition was removed to the Circuit Court of the United States upon the ground that the defendant was a nonresident, and that the sum in controversy exceeded $2,000. The order of removal was granted by the judge of the city court of Hall county February 2, 1906. The case was duly transmitted to the Circuit Court of the United States for the Northern District of Georgia, and on the 3d of March, 1906, the case was stricken from the docket of that court upon the ground that there had been no proper service upon the defendant. The dismissal was ordered by his honor, Judge Newman, "without prejudice to the plaintiff to bring the case over again." The action for $10,000 damages thus concluded was against the Southern Railway Company alone. On the 12th of March, 1906, the defendant in error brought an action in the city court of Hall county against the Southern Railway Company and one A. C. Collier, a section boss of the defendant company, alleging that the defendants had endamaged him in the sum of $10,000.

The allegations of the petition, so far as pertinent to the negligence and misfeasance of the defendants, are as follows:

"(4) The defendant Collier is in the employment of the defendant the Southern Railway Company as its section boss, and the injury hereinafter described occurred on account of the joint negligence of the defendants; the negligence being that of the defendant Collier in the capacity of section boss, and the railway company in negligently cutting the ditch, as hereinafter described.

"(5) At said Green's crossing the defendant had caused to be dug a deep ditch right across the public road and over a part of said crossing after it left the railroad tracks, and on the defendant railway company's right of way, and upon the approach to said crossing."

"(7) The cutting of said ditch across said public road was done by and under the superintendence of the defendant Collier, acting on behalf of said Southern Railway Company, and the said ditch was about eight inches deep, and extended all the way across the road and formed a dangerous obstruction to travel, and was negligence.

"(8) After cutting said ditch the said defendant Collier, acting as the agent of the defendant railway company, together with the section forces under him, negligently left the same open, and negligently failed to cover the same in any way with plank or other covering so that travelers upon the highway with vehicles could pass. Said ditch was in the middle of the road, and formed a dangerous obstruction to travel."

"(10) The defendants were negligent in all the particulars aforesaid. Said ditch was cut upon the approach to the crossing, and was intended to run the water away from the track and roadbed of the defendant railway company. The cutting of said ditch was part of the railroad work for which said section boss was employed, and was part of the defendant railway company's road work to keep its roadbed free from water and dampness, and to prevent the water from ponding. But the said section foreman was negligent in that he cut said ditch too deep, and in that he failed to cover the same and failed to protect it and left it open as a menace to travelers.

"(11) It is further shown that as to travelers upon said road the same was the only way provided for travel, and there was no way around said ditch."

The connection of the plaintiff, his actings and doings at the time of the alleged injury, is stated in paragraph 9 of his petition, which is as follows: "On the 19th day of September, 1905, and about 2 o'clock in the afternoon, plaintiff was driving his wagon along said public road, and, when the same got upon said crossing and road and reached the ditch, the effect of said wagon striking into said ditch, which was deep and abrupt, was to cause the pole of the wagon to break, and as it broke the wagon was partly wrecked, and plaintiff was thrown to the ground and caught in parts of the wagon, and the break caught his leg, and he was thrown to the

ground, his leg broken, and he was greatly and permanently injured."

At the appearance term the defendants demurred to the petition and also filed a plea in abatement. The demurrer is as follows: "(1) There is no cause of action set out in plaintiff's petition. (2) Plaintiff shows by the allegations in its petition that, if there was any negligence on the part of the defendants, it was known to the plaintiff, and he could have avoided the same by the exercise of ordinary care. (3) By its petition plaintiff shows that the alleged ditch which he says was negligently cut was in full view and the existence, condition, and depth known to him, and that he took the risk when he drove over it, and cannot recover. (4) From plaintiff's petition it is apparent that plaintiff's injury was the result of an accident from causes unknown and from no negligence on the part of the defendants. (5) Plaintiff does not allege any act against these defendants which was joint. He alleges no act against the defendant Collier, except an act of mere negligence, and no act against the defendant the Southern Railway Company, except its own responsibility for the negligence of its employé, and alleges no overt act of misfeasance against either, and for that reason the joint action will not lie." This demurrer was overruled. The defendant's plea in bar was by consent, submitted to the presiding judge, who refused to sustain the same, holding that it was unnecessary that the costs due in the United States Circuit Court for the Northern District of Georgia in the former suit, which was dismissed, should be paid before the institution of the pending suit. Exception is taken to the order overruling the demurrer and to the refusal of the court to sustain the plea in abatement. We shall first consider the questions presented by the exception to the judgment on the plea in bar.

1. In this case the plaintiff, J. E. Rowe, brought his suit each time for $10,000, so that evidently it was not his purpose to lay his damages in such an amount as would prevent removal to the federal court. But the joinder of Collier, the section boss, a citizen of Georgia, under the ruling in the Grizzle Case in 124 Ga. 737, 53 S. E. 244, in any event prevented a removal of the suit to the United States court. The decision of his honor, Judge Prior, of the city court in refusing to sustain the plea in bar, was right. In McIver v. Fla. R. Co., 110 Ga. 223, 36 S. E. 775, 65 L. R. A. 437, the Supreme Court decided that: "Though the plaintiff in a suit which had been properly removed from the state to the federal court, having concurrent jurisdiction of the cause of action in which suit was founded, voluntarily dismissed his case in the United States court, it was nevertheless his right to bring another suit on the same cause of action in the state court at any time within the statute of limitation applicable to such action. This is true notwithstanding the damages in the second suit were laid in any amount which would prevent another removal to the federal court." McIver v. Fla. R. Co., 110 Ga. 223, 36 S. E. 775, 65 L. R. A. 437. The plea in abatement was necessarily based on the idea that, because the costs were unpaid, the former suit was still pending, for the order of the United States judge in striking the former case from the docket expressly allowed the plaintiff (if the cause of action be the same) to recommence his action. And it was recommenced in six months.

But in the case now before us the defendants were not the same as in the prior case. The Southern Railway Company was the sole defendant in the case dismissed in the United States court, and the Southern Railway Company and A. C. Collier are joint defendants in the case now under investigation. The plea in bar from its very nature was founded upon the maxim, "Nemo debet bis vexari si constet curiæ quod sit pro una et eadem causa." No one ought to be annoyed twice if it appears to the court that there is only one and the same cause of action. When we consider that the reason for the rule (that the pendency of a prior suit is good cause of abatement) is that a second suit is unnecessary and therefore oppressive, it must be plain that the parties must be the same, although the maxim only uses the term "cause of action." It will not often happen where the parties are not the same that the cause of action can be said to be identical.

2. Was the payment of the costs due in the United States court in the former suit brought by J. E. Rowe against the defendant Southern Railway Company a necessary prerequisite to the prosecution of this case? Or, to state the question differently, is there ever any obligation on one whose action has been either voluntarily or involuntarily dismissed in a United States court to pay the costs therein accrued before recommencing practically the same cause of action in the state court? We think not. We state the question broadly, so that the answer will be general and apply to any and all cases brought in a foreign jurisdiction. The trial judge could well have overruled the plea in bar upon the ground that there was no identity of parties in the two cases, and no identity of cause of action, but he put his ruling entirely upon the ground that it was unnecessary to pay the costs in the federal court before recommencing the suit in the state court. And we think his decision in this regard was correct.

Section 5043, Civ. Code 1895, which requires the payment of the costs in suits recommenced in the state courts, is a measure for the benefit of the state courts and their officers, and is, perhaps, required as a pledge of the good faith of the suitor. A cause of action dismissed in the United States court may be renewed in the state court without

payment of the costs accrued in the federal court, because the courts of the United States —as are those of a sister state—are courts of a foreign jurisdiction. The provisions of Civ. Code 1895, § 5043, imposing a penalty upon those who are nonsuit or dismiss their cases, is not applicable to cases in the United States court. The words, "the plaintiff may recommence his suit," refer to a suit between the identical parties that were involved in a former controversy in a Georgia court. In so far as anything said in the Cox Case (Cox v. Railroad Co., 68 Ga. 448) may appear to rule to the contrary, it was obiter and "is not binding authority" (McIver v. Railroad Co., 110 Ga. 227, 36 S. E. 775, 65 L. R. A. 437). With the payment or collection of the costs in the courts of foreign jurisdictions our courts are not concerned. The nonpayment of the costs in the United States court was therefore immaterial, and the finding of the judge of the city court of Hall county against the plea was correct. The federal courts derive their power and jurisdiction from a different sovereignty from that of the state courts. "In that sense they are foreign jurisdictions in like manner as the courts of different states are foreign to each other. Therefore the pendency of a prior suit in a federal court will not abate a suit subsequently brought in a state court between the same parties and for the same cause of action, although the two courts may sit in the same state, and have the same territorial jurisdiction." International & G. N. R. Co. v. Barton, 24 Tex. Civ. App. 122, 57 S. W. 292. Therefore, even if the prior suit had been between identically the same parties and had still been pending in the United States court, the plea in bar would not have been good. See 1 Cyc. 36, 2; Cooper v. Newell, 173 U. S. 355, 19 Sup. Ct. 506, 43 L. Ed. 808; Gordon v. Gilfoil, 99 U. S. 169, 25 L. Ed. 383; Hyde v. Stone, 20 How. 170, 15 L. Ed. 874; The Kalorama, 10 Wall. 204, 19 L. Ed. 944; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Insurance Co. v. Harris, 97 U. S. 331, 24 L. Ed. 959; Short v. Hepburn, 21 C. C. A. 252, 75 Fed. 113; Latham v. Chaffee (C. C.) 7 Fed. 520; Logan v. Greenlaw (C. C.) 12 Fed. 10; Weaver v. Field (C. C.) 16 Fed. 22; Hurst v. Everett (C. C.) 21 Fed. 218; Briggs v. Stroud (C. C.) 58 Fed. 717; Coe v. Aiken (C. C.) 50 Fed. 640; Pierce v. Feagans (C. C.) 39 Fed. 587; Beekman v. Railway Co. (C. C.) 35 Fed. 3; Rejall v. Greenhood (C. C.) 60 Fed. 786; Merritt v. Barge, 24 C. C. A. 530, 79 Fed. 228; Zimmerman v. SoRelle, 25 C. C. A. 518, 80 Fed. 419; Hughes v. Greene, 28 C. C. A. 537, 84 Fed. 833; Bank v. Bonney, 101 N. Y. 173, 4 N. E. 332; Litchfield v. City of Brooklyn (City Ct. Brook.) 13 Misc. Rep. 693, 34 N. Y. Supp. 1090; Checkley v. Steamship Co., 60 How. Prac. 511; Wood v. Lake, 13 Wis. 84; Wurtz v. Hart, 13 Iowa, 518; Caine v. Railway Co., 12 Wash. 596, 41 Pac. 904.

3, 4. According to the allegations of the ninth paragraph of this petition, the plaintiff is not entitled to recover from the defendants for any injury he may have received because the result (if not directly traceable to his own negligence) could have been prevented by the use of ordinary care and diligence for his own protection. The plaintiff says he was riding along the road, and, when he reached the ditch and drove into it (instead of even pausing to examine its size and depth), it appears that he drove right on, and was thrown out of his wagon and his leg was broken. No reason is given why he could not see it, nor is it stated that he could not or did not see the danger. There was nothing, so far as appears in the record, which prevented him from stopping his team, and thereby avoiding the ditch, and no emergency is suggested which rendered the crossing of the ditch imperative. We do not know the purpose of the plaintiff's drive, but it is plain from the allegations of the petition that, whether it was business or pleasure, it can only be inferred that he knowingly, deliberately (and, if the ditch was as dangerous as alleged, recklessly) assumed all the risk incident to his undertaking. The allegations of the petition make a case very similar to, but certainly not as strong a case upon the fact as, that of Sheats v. City of Rome, 92 Ga. 535, 17 S. E. 922, in which the judgment dismissing the petition because it set forth no cause of action was affirmed. In the Sheats Case the Supreme Court held that: "Although it was gross negligence for the municipal authorities of a city, after causing a ditch five feet wide and three or four feet deep to be cut across a public sidewalk, to leave it open in this condition for several weeks, a female who was perfectly aware of the existence, width, and depth of the ditch, and who either attempted to jump across it, or stepped into the bottom of it on a rock and tried to step out, and was thus injured, has no right of action against the city. It is clear that by the exercise of ordinary care on her part the injury might have been avoided." In the Kent Case cited below, where the greater portion of the danger was concealed by the peculiar manner in which the ditch was cut and was not apparent to the plaintiff, the Supreme Court held that the petition set forth a cause of action because these allegations took it out of the rule declared in Sheats v. Rome, supra, and Cook v. Atlanta, 94 Ga. 613, 19 S. E. 987, but reaffirmed the doctrine of those cases by saying that the plaintiff could not recover "if she knew what was before her. * * * If with full knowledge she had assumed the risk, she could not put the injurious consequences upon another, even though that other had been at fault in creating the condition out of which her damage arose. But the petition does not make such a case." And in the first headnote the court held that: "Where, with full knowledge of the exist-

ence of a ditch in a highway, and without any emergency requiring it to be crossed, one endeavors to pass over the excavation he will be treated as having voluntarily assumed all the usual risks incident to the attempt." We are not prepared to hold that a comparison can be instituted dependent on sex between the degree of care chargeable to man as compared with woman, but it is worthy of note that the plaintiffs in both the Sheats and the Kent Cases were women, and, if there be a presumption either way, it would seem that we should expect to find more coolness, discretion, and prudence in man than in woman. And while, in our opinion, all issues of negligence or diligence should be referred to the jury, still, where, under the allegations of the petition itself, the contributory negligence of the plaintiff is so apparent and so complete as to render a recovery a legal impossibility, a timely demurrer should be sustained, and taxpayers and litigants be saved from useless expense and annoyance. Where, with apparent full knowledge of the existence of a ditch in a public road, and without any emergency requiring it to be crossed, one endeavors to pass such an excavation, he will be treated as having voluntarily assumed all the usual risk incident to the attempt. We think, therefore, that the court erred in not sustaining the demurrer upon its first three grounds. It is apparent from the allegations of the petition, which we have quoted, that the plaintiff could, by the exercise of ordinary diligence, have avoided the injury of which he complains. There is no allegation that, on account of darkness or blindness or for any other reason, the plaintiff or any other person could not have seen the ditch cut by the defendant company and its section boss, nor is any emergency requiring the crossing of the ditch alleged. The judgment upon the demurrer should have been controlled by the decision in Kent v. Telephone Co., 120 Ga. 980, 48 S. E. 399, and numerous other decisions of our Supreme Court to the same effect.

5, 6, 7. In the fifth paragraph of the demurrer, it was insisted specially that the petition should be dismissed because no act is alleged against these defendants which was joint, no action alleged against the defendant Collier, except an act of mere negligence, and no act against the defendant the Southern Railway Company, except its responsibility for the negligence of its own employé; that the allegations of the petition make, at best, only a case of nonfeasance against the defendants, and do not charge any act of misfeasance against either defendant, and consequently the joint action will not lie. In the case of Southern Ry. Co. v. Grizzle, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191, in which the judgment of the writer (who was then upon the circuit bench) upon the same points as are involved in the present demurrer was affirmed by the Supreme Court, every phase of the questions involved is so lucidly presented in the opinion which was delivered by Justice Cobb, and the decision is so amply supported by authorities as to leave no open question as to what is the law. Measuring the petition by the requirements of the decision in the Grizzle Case and its citations, it can well withstand the fifth paragraph of the demurrer. The learned counsel for plaintiff in error asserts in his brief that "no case has yet gone far enough to hold a railroad and its employé jointly liable for an act of this character, where there was no claim of there being any joint action or any misfeasance on the part of either defendant," and contends that even the decision in the Grizzle Case, supra, confirms this statement. We cannot concur in this view. That the employer may be jointly liable for the misfeasance of an employé was decided in Central of Ga. Ry. Co. v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250. In that case it was held that the railway company and a passenger with whom the conductor participated in an assault on the plaintiff could be jointly sued. And yet the liability of the company was entirely due to the act of the conductor. It is insisted, however, that while an act, such as an assault, is necessarily misfeasance, the allegations in the petition now under consideration, and especially that the section boss failed to cover over the ditch, only make a case of nonfeasance, and that an agent is not liable to third persons for mere nonfeasance. It must be remembered that misfeasance may be negligence merely. One distinction between nonfeasance and misfeasance, and that misfeasance may be due to neglect, is aptly pointed out by the judge in delivering the opinion in Gregor v. Cody, 82 Me. 131, 19 Atl. 108, 17 Am. St. Rep. 466: "A distinction exists between nonfeasance and misfeasance; the one being a total omission to do an act which one gratuitously promises to do, and the other a culpable neglect in the execution of the act. If a party makes a a gratuitous engagement, actually enters upon the execution of the business and does it amiss, through the want of due care, by which danger ensues to the other party, an action will lie for misfeasance." In Ellis v. McNaughter, 76 Mich. 237, 242, 42 N. W. 1113, 15 Am. St. Rep. 308, and Lough v. Davis, 30 Wash. 204, 70 Pac. 491, 94 Am. St. Rep. 848, it was held that misfeasance may involve, to some extent, the idea of not doing, as where an agent, while engaged in the performance of his undertaking, does not do something which it is his duty to do under the circumstances, as, for instance, when he does not exercise that care which a due regard for the right of the other party requires. Such negligence as would be actionable in any relation of life is misfeasance by not doing. Mechem on Ag. § 572. Another distinction drawn by Metcalf, J., in Bell v. Josselyn, 69 Mass. 309, 63 Am. Dec. 742, is that "nonfeasance is the omission of an

act which a person ought to do. Misfeasance is the improper doing of an act which a person might lawfully do."

In so far as the digging of the ditch in this case is concerned (if the plaintiff were not precluded from recovery by his own apparent negligence), it might be lawful to dig it, but the section boss would be guilty of misfeasance for which the employer would be liable if it were improperly dug or improperly guarded, or if, without regard to the right of others, it was negligently left in such condition as to endanger the public or passers-by. Misfeasance is the omitting to do an act as it should be done. Colte v. Lynes, 33 Conn. 109, 114; Minkler v. State, 14 Neb. 181, 15 N. W. 330; Ill. Cen. Ry. Co. v. Foulks, 191 Ill. 57, 60 N. E. 890; Commonwealth v. Williams, 79 Ky. 47, 42 Am. Rep. 204; Burns v. Petchal, 75 Hun, 437, 27 N. Y. Supp. 499, 503. The ruling in Osborne v. Morgan, 130 Mass. 102, 39 Am. Dec. 437, is squarely in point, and demonstrates that the allegations of negligence in the petition made a case of misfeasance for which the servant would be liable, and for which consequently the employer would be liable also. Says Chief Justice Gray, delivering the opinion in the Osborn Case, supra: "If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing, but it is misfeasance, doing improperly."

As a result of our investigation, we unhesitatingly conclude that the petition was not subject to demurrer upon the ground that no misfeasance was alleged, nor because the railway company and its section boss were not properly joined. So far as that portion of the demurrer is concerned, the trial judge did not err in overruling it. We summarize: Misfeasance is the improper doing of an act which the agent might lawfully do. Where an agent fails to use reasonable care or diligence in the performance of a duty, he will be personally responsible to a third person who is injured. His liability in such cases is put upon the ground that he is a wrongdoer, and, as such, responsible. Southern Ry. Co. v. Grizzle, 124 Ga. 737, 53 S. E. 244, 110 Am. St. Rep. 191. This court has also held (in the Miller Case, cited below) that a corporation may be sued jointly with its employé. So the railway company and its section boss may be jointly sued for damages resulting from the negligent and improper discharge of his duties by such boss. The boss, as a wrongdoer, is personally responsible to the party injured by his misfeasance resulting from failure to use reasonable care and diligence in the performance of his duty, and the company is responsible for the misfeasance of its agent. The section boss and a railway company can be sued when the sole ground of the liability of the railroad company is the act of the section boss alone. See Railway Co. v. Miller, 1 Ga. App. 616, 57 S. E. 1090; Morrison v. Railway Co., 34 Wash. 70, 74 Pac. 1064; Howe v. Railroad Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; Able v. Railway Co., 73 S. C. 173, 52 S. E. 962; Chesapeake & O. R. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. But, for the reasons already stated, we think the court erred in overruling the first, second, and third paragraphs of the demurrer, as it plainly appears from the allegations of the petition (which, indeed, should be most strongly construed against the petitioner) that the exercise of ordinary diligence by the plaintiff, as construed by the Supreme Court, would have obviated the injury of which he complains, in that it does not appear that he did not know of the ditch and could not see its condition, or allege any unusual emergency making it necessary for him to take the risk of crossing such a ditch. The petition avers that the road he was traveling was "as to travelers upon said road" the only way, but gives no reason why plaintiff had to travel.

The judgment of the lower court in overruling the demurrer is therefore reversed.

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(3 Ga. App. 99)

## SOUDERS v. CAROLINA PORTLAND CEMENT CO. (No. 570.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

PLEADING—BILL OF PARTICULARS—FAILURE TO FURNISH—AMENDMENT.

A suit was filed to the January term, 1905, of the city court of Atlanta. It was based partly upon account. No bill of particulars was attached. Prior to the first day of the return term, the defendant filed special demurrer, also a specific demand for a bill of particulars. At the first term no action was taken upon either the demurrer or the demand. At the second term the defendant moved a nonsuit or dismissal of the plaintiff's action for noncompliance with the demand. The court overruled the motion and the defendant preserved an exception pendente lite thereto. At a subsequent term the court sustained the special demurrer, and required the plaintiff to amend by attaching a bill of particulars as to that part of the suit based on account, and the plaintiff accordingly amended. More than a year after this amendment was allowed the case came to trial and resulted in a verdict for the plaintiff. *Held*, that a new trial will not be granted because of the failure of the court to nonsuit or dismiss the plaintiff's action for noncompliance with the demand for a bill of particulars; that, if the court erred in not sustaining the motion to dismiss, the error was cured by the subsequent amendment furnishing the bill of particulars.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Byron Souders against the Carolina Portland Cement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. & L. F. McClelland, for plaintiff in error. Ben. J. Conyers and J. H. Porter, for defendant in error.

POWELL, J. Rule 11 of the superior court (Civ. Code 1895, § 5642) provides: "In actions of assumpsit for the recovery of unliquidated demands, a bill of particulars shall be annexed to the copy served on the defendant; and in every case where the plea of set-off shall be filed, a copy of the set-off shall be filed at the time of filing the answer; and when the bill of particulars is not annexed to the declaration, the plaintiff shall lose a term; and if service of said bill of particulars is not effected upon the defendant by the succeeding term, a nonsuit shall be awarded." The term "nonsuit" as used in this rule is to be taken in the sense of the non pros. of the English practice or the dismissal of our practice. Kelly v. Strouse, 116 Ga. 883, 43 S. E. 280. Section 4963 of the Civil Code of 1895 says: "In suits on account a bill of particulars should be attached." This section is a codification from the Neel act of 1887 (page 64). Sections 5045, 5047, and 5048, which are to be construed in pari materia with section 4963, in substance, provide that special defects or omissions from the petition shall be reached by special demurrer; that, while usually such demurrers are to be heard at the first term, they may, when continued by the court or by consent of parties, be heard subsequently, and that upon the hearing the judge may give opportunity to amend so that a dismissal may be avoided. We are inclined to the opinion that, under the Neel act and the section of the Code cited above, so much of the rule of the court as apparently makes a dismissal at the second term mandatory (if, indeed, that is the intention of the rule) is not enforceable. See Ward v. Stewart, 103 Ga. 260, 29 S. E. 872. However, if the court erred in not requiring the bill of particulars upon the demand under the rule of court, the subsequent amendment by the defendant setting forth the bill of particulars cured the error. Taylor v. Chambers, 2 Ga. App. ——, 58 S. E. 369 (2).

Judgment affirmed.

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(3 Ga. App. 143)

## PACIFIC SELLING CO. v. ALBRIGHT-PRIOR CO. (No. 654.)

(Court of Appeals of Georgia. Nov. 25, 1907.)

1. PLEADING — ATTACHMENT — OBJECTIONS — MODE—DEMURRER.

A general demurrer to a declaration in attachment, on the ground that no cause of action is set forth, is not adequate to raise the question that the attachment is defective, in that the defendant is shown to be a nonresident corporation and there is no allegation that it transacts business in this state. If the point is good at all, it should be raised by some form of special appearance, or motion to dismiss the attachment, and not by a general demurrer to the declaration.

2. WRIT OF ERROR—HARMLESS ERROR.

Even if a declaration be subject to demurrer which is overruled, the plaintiff may render the error harmless by an amendment sufficient to cure the objection.

3. EVIDENCE — INSTRUMENTS — EXECUTION — PROOF.

The execution of an instrument may, when statute does not prescribe some special mode of proof, be shown by circumstantial as well as by direct evidence.

4. WRIT OF ERROR—REVIEW—HARMLESS ERROR.

If any error was committed upon the trial, it was of an immaterial and harmless nature.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Albright-Prior Company against the Pacific Selling Company and another. From a judgment for plaintiff against the Pacific Selling Company alone, it brings error. Affirmed.

Moore, Gordon & Branch, for plaintiff in error. Moore & Pomeroy, for defendant in error.

POWELL, J. The Pacific Selling Company is a nonresident corporation. The plaintiff instituted suit against it and another by attachment. The declaration duly filed alleged a breach of contract of sale. By amendment all allegations as to the other defendant were stricken and the case proceeded against the Pacific Selling Company alone. A judgment having been recovered by the plaintiff, the defendant brings error.

1. The defendant filed a demurrer to the declaration in attachment, on the ground that no cause of action was set forth. This demurrer was overruled, and exceptions were duly preserved. It is insisted here that this demurrer should have been sustained because it does not appear that the defendant in attachment did business in this state, and that under Civ. Code 1895, § 4527, foreign corporations are not subject to attachment unless they transact business in this state. As an obiter, we may say that in our judgment the section referred to is merely cumulative to and not restrictive of our other attachment statutes, and that a nonresident corporation having property in this state is subject to attachment, whether it transacts business here or not. Wilson v. Danforth, 47 Ga. 676 (1); Home Ins. Co. v. Augusta, 50 Ga. 541; South Carolina R. Co. v. McDonald, 5 Ga. 531; Selma R. Co. v. Tyson, 48 Ga. 351; Cathcart v. C., H. & D. R. Co., 108 Ga. 253, 33 S. E. 875. So much of the opinion in Schmidlapp v. La Confiance Insurance Company, 71 Ga. 246, 249 (a perfectly sound case as to the point therein actually sub judice), as intimates to the contrary is, as is true of what we have

just been saying, purely obiter. A general demurrer on the ground of no cause of action does not raise the point that the attachment fails to show that the defendant transacted business in this state. A general demurrer, filed without protestation, is a general appearance, and submits the defendant to the jurisdiction of the court.

2. The objection that the petition disclosed that the other defendant originally joined was the principal and the Pacific Selling Company merely an agent, and therefore not liable on the contract, can now avail the plaintiff in error nothing; for by the amendment the plaintiff relieved the petition of this alleged objection. Taylor v. Chambers, 2 Ga. App. —, 58 S. E. 369 (2); Souders v. Carolina Cement Co. (No. 570) 59 S. E. 467.

3. Objection was made to certain documentary evidence on the ground that the execution thereof was not proved. The ground of the motion for a new trial in which exception is taken to this ruling seems to be deficient in the respect indicated in Kelly v. Kauffman, Milling Co., 92 Ga. 105, 18 S. E. 363 (1). But, waiving that, we cannot say, in the light of the facts in the record, that there was not sufficient proof of execution; for the execution of a document, when the statute points out no special method, may be shown by circumstantial as well as by direct evidence. Proctor & Gamble Co. v. Blakely Oil Co., 128 Ga. 617, 57 S. E. 879.

4. Upon the whole, we find no reversible error in the record. The plaintiff avoided the plea of the statute of frauds by showing part performance. The proof that the contract was made between the parties to the action, and not between others was ample. While the charge of the court upon the measure of damages contained a possible slight inaccuracy, in that the jury was instructed that the plaintiff's recovery would be based on the difference between the purchase price of the goods and the market price at the time of delivery in Atlanta, when under the contract delivery was to be made in New York, still this is harmless, for under the proof the difference between the purchase price of the goods if delivered in Atlanta and the market price in Atlanta was exactly equal to the difference between the purchase price if delivered in New York and the market price in that city.

Judgment affirmed.

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(2 Ga. App. 587)

## MUTUAL RESERVE FUND LIFE INS. CO. v. FOWLER. (No. 202.)

(Court of Appeals of Georgia. April 11, 1907.)

1. GARNISHMENT—SET-OFF—JUDGMENT.

As to assets in the hands of a garnishee, such garnishee is entitled to set off any indebtedness owed by the defendant in garnishment, and all such indebtedness. The question as to whether such garnishee is or is not indebted to the defendant, or whether such garnishee has assets of such defendant in its hands, should be ascertained by a comparison of their respective claims or accounts, and the judgment should be in accordance herewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 255–259.]

2. SAME—LIEN OF GARNISHEE.

A garnishee, if the debtor be indebted to him, has a lien on funds coming into his hands, or future indebtedness to the debtor on his part, superior to that of the plaintiff in garnishment. He is entitled to pay himself before he is required to collect for the benefit of others, and this applies to any past indebtedness due him by the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, § 254.]

3. SAME—INSTRUCTIONS.

Consequently, to withdraw from the jury, by failure to charge thereon, the consideration of past indebtedness by the defendant in garnishment to the garnishee, and to confine the investigation, as to the state of the mutual accounts between the garnishee and the defendant in garnishment, to the period of time between the service of the summons and the date of the answer, was error; and the verdict and judgment should be set aside.

4. SAME—FUTURE INDEBTEDNESS.

The purpose of the act of 1901 (Acts 1901, p. 55) was to reach indebtedness accruing between the service of the summons of garnishment and the answer, and to prevent evasions and subterfuges on the part of garnishees; but it does not intend to violate existing contracts, or restrain the right to contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 231–233.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. S. Fowler against J. Cabell Davis and the Mutual Reserve Fund Life Insurance Company, garnishee. Judgment against defendant and garnishee before a justice, and on appeal verdict against the garnishee, and it brings error. Reversed.

Lewis W. Thomas and Anderson & Anderson, for plaintiff in error. J. E. & L. F. McClelland and J. D. Kilpatrick, for defendant in error.

RUSSELL, J. This case originated in a justice's court of Fulton county, where J. S. Fowler appeared as plaintiff, J. Cabell Davis as defendant, and the Mutual Reserve Fund Life Insurance Company as garnishee. A judgment was rendered against the main defendant, and upon a trial upon a traverse of the answer of the garnishee a judgment was rendered against it. The case was appealed to the superior court, and upon a trial before a jury a verdict was rendered against the garnishee for $133.15, being the principal and interest of the debt due to Fowler by Davis. A motion for new trial having been denied, the case was brought to this court for review.

In addition to the allegation of error that the verdict is contrary to law and the evidence, the plaintiff in error avers, in the third ground of the motion, that the court erred in admitting certain evidence; in the fifth, that the verdict is contrary to an instruction of the court; and in the fourth

and sixth grounds it excepts to certain portions of the charge of the court. The seventh and eighth grounds of the motion specify wherein, according to the contention of plaintiff in error, the verdict is contrary to evidence; the plaintiff in error insisting that the evidence shows that the company had not waived any stipulations of its contract with its agent, Davis, with reference to the forwarding of moneys to the home office of the company, and therefore the garnishee in making its answer had the right to offset any amount due to it by Davis. None of the several grounds of the motion for new trial need be considered, except in so far as they present or illustrate the controlling issue in the case at bar, which is the proper construction of the act of 1901 (Acts 1901, p. 55), which amended the existing garnishment laws of said state. This act is as follows: "An act to amend the garnishment laws of this state, so as to make subject to the lien of garnishment all indebtedness of the garnishee to the defendant, accruing after the date of the service of garnishment; and for other purposes: Be it enacted by the General Assembly of the state of Georgia, and it is hereby enacted by the authority of the same, that from and after the passage of this act, whenever a summons of garnishment is served on any person, and such person, after the date of such service, becomes indebted to the defendant, such subsequent indebtedness immediately upon its accruing shall become subject to the lien of such garnishment, and no payments made by the garnishee to the defendant, or to his order, after the date of the service of garnishment, shall defeat the lien of such garnishment. The service of a summons of garnishment shall in all cases operate as a lien on the garnishee's indebtedness, at the date of the service, and also upon all future indebtedness accruing up to the date of the answer; and such lien shall not be defeated by any payments of the garnishee, or over-drafts by the defendant, or other arrangements between the defendant and the garnishee."

As appears from the record, the Mutual Reserve Fund Association, now the Mutual Reserve Life Insurance Company, on July 1, 1901, made a contract with J. Cabell Davis, of Atlanta, Ga., appointing him its general agent. Among other things, the contract contains the following stipulations: "The association may offset against any claim for compensation under this agreement, any amounts payable to other agents on policies secured under this or any other agreement, and any debt due by said party of the second part to said association." According to the undisputed evidence, when the company was served with summons of garnishment on August 27, 1903, Davis owed the company $9,941, after deducting $1,113.57, which Davis was entitled to as a credit between the date of the summons of garnishment and the filing of the answer on September 14, 1903. This amount was due without charging Davis with the additional amount of $1,302.16, which he had become indebted to the company between August 27th and September 14th. And allowing Davis credit for $250 a month office expenses from June, 1901, to September 14, 1903, to which Davis was entitled, it would still leave Davis indebted to the insurance company, both when the garnishment was served, August 27, 1903, and on September 14, 1903, the date the company made its answer, more than $3,000. Between the service of the summons of garnishment and the answer, Davis earned under his contract about $190 more than he drew out. This was an amount more than enough to pay the debt of the garnishing creditor, and the jury, by their verdict, applied it to the payment of this debt, although the evidence showed, without contradiction, that Davis was deeply indebted to the company, and that by its contract the company had the right to apply this overplus of earnings to the diminution of Davis' debt to itself. The verdict of the jury made the garnishee pay Davis' debt to Fowler, despite the fact that Davis was indebted to the company, and despite the provision of the contract that the company might set off any indebtedness due it, because of the fact that during the time intervening between service of the summons and the garnishee's answer Davis had drawn (during that period), under the contract, more than he had earned, an amount more than was necessary to satisfy the garnishing creditor's demand. The real question in the case therefore is whether the contract or the garnishment shall have precedence. We do not think the garnishment can affect the prior contract. The contract antedated the summons of garnishment by more than two years, and if it be genuine, and speak the truth, it was not entered into with a view of evading the provisions of the act of 1901, because the contract was made before the passage of the act. It is not attacked as being invalid or fraudulent. On the contrary, the plaintiff's recovery was based upon an indebtedness claimed to be due by the plaintiff in error as garnishee to plaintiff's debtor, and the evidence by which it is sought to show that the company owed Davis depends entirely upon the contract as its foundation. It is unnecessary to hold that it was not the intention of the Legislature in the passage of the act in question to impair the obligation of existing contracts. In the absence of an explicit expression upon the subject, the contrary would be presumed.

1. This being true, and it being undisputed in the evidence that at the time of the service of the summons of garnishment Davis was indebted (even deducting the allowance for office expenses) to the garnishee, the insurance company, the question arises whether Davis earned more in the employment of the company between the date of the service of the summons of garnishment and the date of the garnishee's answer than was

necessary to discharge his indebtedness to the company. This court has already held, in Holmes v. Pope, 1 Ga. App. 338, 58 S. E. 281, that, "as to assets in the hands of a garnishee, such garnishee is entitled to set off any and all indebtedness owed by the defendant in garnishment. The question as to whether such garnishee is or is not indebted to the defendant, or whether such garnishee has assets of such defendant in his hands, should be ascertained by a comparison of their respective claims or accounts, and the judgment should be in accordance therewith." If the contract was valid, and Davis was indebted to the garnishee at the time of the service of the summons of garnishment, it is clear that the garnishee would have the right to apply any sums which it might thereafter owe Davis, or any assets of his lawfully coming into its hands, to the extinction of his indebtedness to the company before applying it to any other demand.

2. But it is insisted by counsel for defendant in error that the company had, by a long course of dealing (in which it had allowed Davis to keep moneys collected by him and retain his fees and commissions, instead of forwarding them to the company), waived and abrogated the stipulations of the contract upon the subject, and that therefore the correct basis of ascertaining the true state of accounts between Davis and the company, so far as the garnishment law is concerned, is to ascertain whether Davis earned more during the intervening period of time which elapsed from the service of the summons of garnishment and the garnishee's answer, than would be sufficient in amount to pay the plaintiff's demand. This leaves out of sight the admitted fact that the defendant Davis owed the garnishee several thousand dollars at the time that the garnishment was served, and does not take into consideration the question whether the amount that the company may have become indebted to Davis thereafter and before its answer exceeded Davis' prior indebtedness to the company. The true rule is that a garnishee, if the debtor be indebted to him, has a lien on funds coming into his hands or future indebtedness to the debtor on his part, superior to that of the plaintiff in garnishment. He is entitled to pay himself before he is required to collect for the benefit of others; and this applies to any past indebtedness due him by the defendant.

3. We think that the following instruction of the court was erroneous, because it confined the investigation of the jury entirely to the narrow limits alluded to above: "Did the insurance company or garnishee become indebted to the defendant Davis between August 27 and September 14, 1903? If they did, and they paid the sum to Davis between August 27th and September 14th, you will find their answer is not true." The latter portion of the instruction is sound law, but the question in the first sentence, without explanation, was likely to mislead the jury into the belief that they were confined in their investigation to the period mentioned. It should have been explained, in this connection, that what the court meant (as he doubtless did) by the company becoming indebted to Davis, was being indebted after taking into consideration the state of their mutual accounts at the time of the service of the summons of garnishment. It is true that in another portion of the charge the learned trial judge correctly instructed the jury upon this point; but, judging from the verdict rendered upon undisputed testimony, the jury must have been misled by the intimation conveyed in the question which had the effect of withdrawing the consideration of Davis' past indebtedness to the insurance company. And in such a case as this to withdraw from the jury, by failure to charge thereon, the consideration of past indebtedness by the defendant in garnishment to the garnishee, and to confine the investigation as to the state of the mutual account between the garnishee and the defendant in garnishment to the period of time between the service of the summons and the date of the answer, was error. If the jury were not misled by this portion of the judge's charge, the verdict was wholly contrary to other portions in which they were clearly and correctly instructed; and for that reason a new trial should have been granted.

4. To give to the act of 1901 (Acts 1901, p. 55) the construction placed thereon by learned counsel for defendant in error would not only be destructive of the plain contract in this case, but would extend the statute far beyond the manifest purpose of the Legislature in its enactment. A cardinal rule in the construction of a statute is to ascertain the legislative intent by a consideration of the old law, the evil sought to be remedied, the remedy provided, and the reason therefor. It has been further held that the intention of the Legislature is to be deduced from a review of the whole and every part of the statute taken together and compared. Ogden v. Saunders, 12 Wheat. 332, 6 L. Ed. 606. Another fundamental principle laid down by Judge Warner in White v. Ross, 40 Ga. 341, is that "all laws should be made to commence in future," and, in the absence of a provision to the contrary, they will be held only to prescribe for the future. Construing by these rules the act from which we have quoted the caption and first section, we have no difficulty in reaching the conclusion that as to assets in the hands of a garnishee such garnishee is entitled to set off any and all part indebtedness due him by the defendant in garnishment. The question as to whether such garnishee is or is not indebted to the defendant, or whether such garnishee has assets of such defendant in its hands, should be ascertained by a comparison of their respective claims or accounts, the garnishee not being allowed to increase the indebted-

ness to himself for the purpose of this comparison after the service of the summons, and the judgment should be in accordance therewith.

As a matter of common knowledge, it was frequently true that, before the passage of the amending act of 1901, creditors defeated the process of garnishment and rendered it inoperative, or attempted to do so, by making advance payments to their employés, or by accepting orders given by defendants in garnishment after the service of the summons of garnishment and before their answers. This was the evil that the Legislature sought to reach and uproot, and this appears from the reference to these devices in the act. The remedy proposed was the act of 1901, which was designed to thwart the subterfuges theretofore employed to evade the collection of debts due to defendants in garnishment by garnishees. Considering the caption and the first section, all of the parts together, it is plainly to be seen that this was the sole purpose of the act. Both in the caption and in the act itself a lien is declared, to which all indebtedness of the garnishee to the defendant accruing after date of the service of the summons of garnishment shall be subject. The language employed in the act further strengthens and enforces the view that it is to future indebtedness that the law applies: "Whenever * * * such person after the date of such service becomes indebted to the defendant, such subsequent indebtedness immediately upon its accruing shall become subject," etc. Under the evidence in this case, the garnishee never did become indebted, and no debt accrued between the service of the summons and the date of the answer. It is unnecessary for us to discuss the fact that Davis drew more from the company than he paid on his indebtedness. Such a modus operandi might be "an arrangement" between the defendant and the garnishee. If so, it could not be allowed to defeat the garnishment. But in this case the fact that it was such an "arrangement" as is referred to in the act was not shown, because if Davis' whole earnings for the period between the service of the summons of garnishment and the date of the answer be applied to the payment of the indebtedness existing prior to the garnishment, and the amounts drawn out by him had likewise been deducted and used to diminish his indebtedness, instead of to increase it, the evidence still shows him to be in the debt of the insurance company, and therefore no indebtedness on the part of the garnishee to Davis has accrued so as to be subect to the lien. The garnishee has not become indebted to Davis. There was therefore no competent evidence to sustain the verdict of the jury, who found that the company had become indebted to Davis.

We are not called upon at this time to pass upon a judgment in a case where there was no evidence that there was an anterior indebtedness. In such a case it would be for a jury to say whether the moneys retained by Davis were moneys which under the contract he was entitled to retain, and which had never gone and might never go into the custody and possession of the garnishee (although it might be Davis' duty to remit such funds and have the company make the settlement), or whether the money was the property of the company constructively in its hands because Davis is its agent, and certain sums being due, or having become due after service of summons of garnishment. But in this case under no possible view of the evidence can it be claimed that the garnishee has ever become indebted to the defendant in garnishment. Therefore no lien could attach, and the verdict was without evidence to support it. For that reason the judgment should have been set aside, and a new trial should have been granted.

It is wholly immaterial to the present discussion whether the company waived any of its rights under the contract with relation to the collection of the premiums, because the evidence showed that it has never owed Davis anything at any time, even if Davis might have owed it less if it had required the literal fulfillment of the contract. There is nothing ruled in this case which is antagonistic to the ruling in Odum v. Railway Co., 118 Ga. 794, 45 S. E. 619. In the Odum Case, Judge Cobb, delivering the opinion, says: "The purpose of the act was evidently to alter the rule which had been laid down by this court, in several cases, to the effect that, even after a summons of garnishment had been served, no lien would attach upon an advanced payment for services to be performed in the future." And he cites the cases of Standard Wagon Co. v. Lowry, 94 Ga. 614, 19 S. E. 989, McKee v. Ga. Oil Co., 99 Ga. 107, 24 S. E. 961, Wilson v. Georgia R. Co., 103 Ga. 578, 29 S. E. 117, and the cases cited there. And the court unanimously concur in the opinion that it was not the intention of the Legislature to hold an employer who had advanced money to his employé prior to service of summons of garnishment upon him liable to pay to a garnishing creditor that portion of the amount advanced which was unearned at the date of the service of the summons of garnishment. This construction, which would force the garnishee to collect for the garnishing creditor before he is permitted to procure the repayment of a just debt due to himself by the common debtor, is declared to be too unreasonable and arbitrary to be adopted, since the language of the act construed as a whole does not demand such interpretation. So far as appears to us, the difference between the case at bar and the Odum Case is very slight so far as the facts are concerned. In the present case, as in Odum's Case, the garnishee owed the defendant in garnishment nothing when served. In the Odum Case, McLaughlin owed the railroad company for unearned

salary which had been advanced prior to the service of the summons, just as Davis, in the present case, owed the insurance company for unearned fees, commissions, and salary which had been advanced, or which he had collected. The advancement or indebtedness in each case was reduced by earnings of the employé before the answer, but in both cases the employé was still indebted to the garnishee. In the present case the debtor had increased his indebtedness, but, so far as appears from the evidence, this was not with the garnishee's consent, but rather in spite of the company and the contract. We hardly think this slight difference in the two cases should make the reasoning in the Odum Case inapplicable to this.

Judgment reversed.

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(2 Ga. App. 545)

## SINGER SEWING MACH. CO. v. SOUTHERN GROCERY CO. (No. 211.)

(Court of Appeals of Georgia. April 11, 1907.)

1. GARNISHMENT—PERSONS LIABLE.

The situation which the garnishing plaintiff occupies in respect to the garnishee can be no better than that which the defendant himself occupies in respect to the garnishee. If the defendant himself, suing the garnishee, could not get a judgment against him, the garnishing plaintiff cannot get a judgment against the garnishee. The creditor may stand in his debtor's shoes by means of garnishment, but he gains no additional privileges.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 21–24.]

2. SAME—LIEN ON FUTURE INDEBTEDNESS.

The act of 1901 (Acts 1901, p. 55), creating a lien on all future indebtedness of the garnishee to the defendant accruing up to the date of the answer, was only intended to keep garnishees from evading the law. For the reasons stated in the first headnote, it is not intended to restrain the right of parties to contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 231–233.]

3. SAME—EVIDENCE OF INDEBTEDNESS.

Consequently, in a case where it appeared by the undisputed evidence that, under a contract operative more than a year before an attachment was sued out, the defendant sold sewing machines for the garnishee, and that the contract relations were that the defendant used his own horse and wagon, paid his own taxes and expenses, and deducted his commissions before remitting the weekly balances, not being indebted or responsible to the garnishee for any proceeds of the sale except the portion due by the contract, the garnishee was not at any time indebted to such debtor, and was not subject to process of garnishment. Consequently, where a judgment was rendered against such garnishee, and exception was taken thereto by certiorari, to dismiss such certiorari was error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, §§ 21–24.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by the Southern Grocery Company against one Johnson; the Singer Sewing Machine Company, garnishee. From a judgment dismissing a writ of certiorari, the garnishee brings error. Reversed.

Stubbs & Chapman and Hooper Alexander, for plaintiff in error. Wilson & Rogers, for defendant in error.

RUSSELL, J. Exception is taken to the dismissal of a certiorari. The Southern Grocery Company sued out attachment against Johnson, who resided in South Carolina, and served a garnishment on the Singer Sewing Machine Company. The latter answered not indebted, and the former traversed the answer. On the trial of the traverse the justice held that the garnishee was liable, and on certiorari the presiding judge agreed with him and dismissed the certiorari.

The defendant in attachment sold sewing machines in South Carolina for the plaintiff in error under a contract which was executed and had been operative more than a year before the attachment was sued out. The contract relations between Johnson and the Singer Company were as follows: The company shipped machines to him, and he used his own horse and wagon, paid his own taxes and expenses, leased and sold the machines for cash and on credit at prices fixed by the company and made weekly reports to the company on blanks furnished by it to him. For his services he was entitled under the contract to two commissions: (1) A selling commission of 25 per cent. of every machine sold. If a cash sale, he took out his 25 per cent., and with this weekly report sent the balance to the Savannah office. The company never saw or handled the money, but by virtue of the contract Johnson retained it. If a credit sale, he retained all the money he collected until he had his 25 per cent. The balance he sent to the company as its share of the transaction. (2) A remitting commission of 25 per cent. of such part as he might collect of the company's 75 per cent. of the proceeds of his leases and sales, which was due to him one week after he had remitted his collections for the week, e. g., if on Saturday, February 16th, he reported that he had collected $10 for the company, he sent it, less his commission for the preceding week, with his report, and on the 23d he was entitled under his contract to take out 25 per cent., or $2.50, from that week's collections before making his remittance to the company. Copies of all of Johnson's reports for the period claimed to be affected by the garnishment appear in the record. His selling commissions from the date of the service of the summons to the date of answer, over six weeks, amounted to $23. This never passed out of Johnson's hands, but he retained it by right of his contract. Under the evidence his remitting commission amounted to $14.13 made up of six items for the six weeks, varying in amounts from 51 cents to a few dollars. His contract allowed, and the evidence showed, that at the end of the week, when he made up his report, he took out of the amount collected his commission for the previous week, and sent to the company the difference, so that

as a matter of fact the company never did handle any of the defendant's money. It kept no books, had no charges for or against him, and paid him no salary.

1. From the above correct summary of the evidence we are satisfied that the certiorari should not have been overruled, for by no construction of the contract could it be said that the company owed the defendant more than the amount of the remitting commission, viz., $14.13. We are of opinion that no judgment should have been rendered against the company. We have endeavored to declare the intentions of the Legislature in the passage of the act of 1901, in Mut. Res. Ins. Co. v. Fowler (this day decided) 59 S. E. 469. The garnishment law was not intended to restrain the right of parties to contract. The act was only intended to keep men from evading the law. So far as appears, the contract in this case was made in good faith, and had been in operation for more than a year before this garnishment was issued. It is not even suggested that it was made with any purpose to evade the law. Johnson was simply a salesman on commission, with the contract right to deduct his commissions and send the balance to the owner of the goods. We do not think that a wholesale merchant in Atlanta, who ships goods to a retailer to sell on commission, owes the retailer money, or that a farmer who sends produce to a broker or commissioner, to be sold on commission, owes, by reason of that fact, the latter the amount of the commission. In such cases neither the wholesale merchant nor the farmer will ever owe the commissions. If there is no sale, there will be nothing due. If there is a sale, the commissions are deducted from the collections and are paid by the purchaser, and, so far as the vendor and his agents are concerned, it is a cash transaction. From the nature of the case there can be no debt, for the commission man is paymaster and pays himself, whether the sale be for cash or on time. A controlling reason why there should have been no judgment against the garnishee in this case is that the debtor, Johnson, could not have obtained a judgment against the garnishee upon the same demand. Generally a judgment creditor may acquire by garnishment a control over the choses in action of the defendant, and thereby, in effect, bring suit against his debtor's debtor. But the situation which the garnishing plaintiff occupies in respect to the garnishee can be no better than that which the defendant occupies himself in respect to the garnishee. If the defendant himself, suing the garnishee, could not get a judgment against him, the garnishing plaintiff cannot get a judgment against the garnishee. The creditor may stand in his debtor's shoes by means of garnishment, but he gains no additional privileges. Holmes v. Pope, 1 Ga. App. 343, 58 S. E. 281. The garnishee's rights were defined by the contract with Johnson. The garnishing creditor could not, by garnishment, acquire greater rights. The company could not have ordered Johnson to send all he collected, or to send in the commissions they had contracted to pay. They could not have enforced such order by law, for the contract would have prevented it.

As ruled by the Supreme Court in Butler v. Billups, 101 Ga. 103, 28 S. E. 615: "A plaintiff in garnishment cannot place himself in a superior position as regards a recovery than is occupied by the principal defendant. The garnishee's liability is measured by his responsibility and relation to the defendant. He can be charged only in consistency with the subject of his contract with defendant." To the same effect is the opinion in Hoskins v. Johnson, 24 Ga. 628, in which it is said: "If the case be one in which the defendant himself, if suing the garnishee, could not get a judgment against the garnishee, it is one in which the garnishing plaintiff cannot get a judgment against the garnishee. This must be manifest." Under the contract Johnson could not have sued the company for his commissions, for it was his right to retain them, and they were never intended to reach the company. The same ruling as made in the cases above cited was announced in Tim v. Franklin, 87 Ga. 95, 13 S. E. 259, and Bates v. Forsyth, 69 Ga. 365.

2. The contract in this case, strictly speaking, did not create the relation of employer and employé. It is therefore doubtful if the case comes within the scope of the act of 1901, or is at all affected thereby. As we have explained in Mutual Reserve Life Insurance Co. v. Fowler, the purpose of that act is to prevent evasions of the garnishment law, and it was specially intended to correct an evil supposed to exist among a particular class. The relation between the defendant Johnson, and the garnishees, was that of a salesman on commission. He was, in a sense, a traveling commission merchant who handled only one kind of goods, and who, by contract, could sell for the manufacturer, the garnishee, only at a fixed price. Whatever it was, the relation was fixed by the contract. The evidence did not show that the purpose or effect of the contract was to evade process of garnishment. And as the garnishee could not sue for any portion of these commissions, because it would be in violation of the contract, for the same reason the plaintiff cannot reach them by garnishment. The act of 1901 (Acts 1901, p. 55), while creating a lien on all future indebtedness of the garnishee to the defendant accruing up to the date of the answer, was only intended to keep garnishees from evading the law. It was never intended to restrain the right of parties to contract, nor to interfere with or abrogate their contracts when made, unless it appears that such contracts were made to evade or nullify the process of garnishment.

3. We have already alluded to the terms and nature of the contract. From the record it appears, without dispute, that the contract was operative more than a year before the attachment was sworn out, and perhaps even before the debt which Johnson owes the grocery company was created. Therefore the contract could not have been made to evade or avoid this garnishment. The defendant sold sewing machines for the garnishee, but the sales were strictly on commission. He used his own horse and wagon, paid his own taxes and expenses. He deducted his commissions before remitting the weekly balances. These commissions were not a debt due by the company to him. The moment they came into existence they were his own. They never had, and never could, belong to the garnishee. He could have given them to a purchaser of a machine by reducing the price of a machine that much. It was no concern of the company. Under his contract he could not become indebted or responsible to the company for any portion of the proceeds of a sale (or of all his sales), except that portion due them by the contract.

Under the contract and the evidence, the garnishee was not indebted to the defendant at the time of the service of the summons of garnishment, nor did any debt accrue between the service of the summons and the date of the garnishee's answer. Consequently, the certiorari should have been sustained, and to overrule it was error.

Judgment reversed.

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(107 Va. 848)

## HILL v. SMITH, Police Sergeant.

(Supreme Court of Appeals of Virginia. Nov. 29, 1907.)

1. CRIMINAL LAW — PRELIMINARY PROCEEDINGS — ARREST WITHOUT WARRANT — COMPLAINT.

Though an officer may arrest without a warrant on suspicion that the person has committed a felony, and, the person being in custody before a magistrate, no warrant is required, a written complaint or information must be filed, setting out the offense charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 415.]

2. ARREST — CRIMINAL CHARGE—DISPOSITION OF PRISONER.

Where a prisoner is arrested by an officer without a warrant, it is the officer's duty to take him without unnecessary delay before a magistrate who can take such proofs as may be offered, or, if the circumstances justify it, hold him for further examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arrest, § 172.]

3. CRIMINAL LAW — PRELIMINARY EXAMINATION—ADJOURNMENT.

Where a prisoner has been arrested and a complaint duly filed against him before a police justice, the preliminary hearing may be postponed for cause shown by the commonwealth for a reasonable time, not exceeding 10 days at one time without defendant's consent, as authorized by Code 1904, § 3903.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 477.]

4. HABEAS CORPUS—ARREST WITHOUT WARRANT—COMMITMENT AS SUSPICIOUS CHARACTER—DISCHARGE.

Petitioner was arrested by a police officer without a warrant, and on the succeeding day was taken before a police justice and charged with "being a suspicious character." He was suspected of having committed a grave felony, but no complaint was filed charging him with any specific offense, and without a hearing he was committed to jail for 10 days. *Held*, that petitioner was not legally held, and was entitled to his discharge on habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 19.]

Habeas corpus, on petition of Claude Hill, to obtain his release from custody of one Smith. Writ granted. Petitioner discharged.

David Meade White, for petitioner. Minetree Folkes, for respondent.

KEITH, P. At a former day of this term Claude Hill filed a petition before this court, stating that on November 19, 1907, he was arrested, and on the following day, to wit, November 20, 1907, was taken before the police justice of the city of Richmond, and there for the first time learned that he was charged with "being a suspicious character," and without a hearing was committed to the jail of the city of Richmond by the police justice of said city. The petitioner states "that he has not committed any offense against the laws of the commonwealth of Virginia, that he has not violated any of the laws or statutes of the United States, and therefore prays that the commonwealth's writ of habeas corpus may issue, directed to the sergeant of the city of Richmond, commanding him to bring the prisoner before this court."

In accordance with that petition a writ was issued, directed to the sergeant of the city of Richmond, and commanding him to bring before this court, immediately after the receipt of the writ, the body of Claude Hill, which was accordingly done.

From the return of the sergeant of the city of Richmond, it appears that Hill is detained by virtue of a mittimus, which is in the following words:

"City of Richmond, to-wit:

"To the Keeper of the Jail of said City:

"Receive into your jail and custody the body of Claude Hill, charged before me, on oath of F. M. Kraft, suspicious character, and him safely keep until the 30th day of Nov., 1907, when you are required to have him before me, or some other Justice of the Peace of said city, at the police justice's court, at 9:30 o'clock of said day, to be further examined on said charge and dealt with according to law; said examination being thus continued for material witnesses for the commonwealth.

"Given under my hand and seal, this 20th day of Nov., 1907.

"Jno. J. Crutchfield, Police Justice. [Seal.]"

By section 8 of the Bill of Rights, Constitution of Virginia of 1902 [Va. Code 1904, ccix],

it is provided that "no man shall be deprived of his life or liberty except by the law of the land or the judgment of his peers."

It was held by this court in Muscoe's Case, 86 Va. 443, 10 S. E. 534, that a constable may, by virtue of his office, without warrant, arrest for felony, or upon reasonable suspicion of felony, or for misdemeanors committed in his presence, and take the accused before a magistrate, and that a police officer cannot be authorized by municipal ordinances to do more.

And so a party may be arrested without a warrant upon suspicion of having committed a criminal offense. 1 Bishop on Crim. Proc. § 182. And where one is arrested and brought before a magistrate without a warrant, nothing further is required to give him jurisdiction, for, being already in custody, there is no reason to issue a warrant for his apprehension; but a written complaint or information against the defendant setting out his offense is as necessary in such a case as in any other. Section 179.

In the Matter of Arthur Henry, 29 How. Prac. (N. Y.) 185, before the New York Supreme Court, it is held that, "where an officer arrested a prisoner for felony on telegraphic or other satisfactory dispatches without warrant, it is his duty, equally as if the arrest had been made by warrant, to take the arrested party without any unnecessary delay before some officer who can take such proofs as may be offered, or, if the circumstances will justify it, hold him for further examination. If this is not done with reasonable diligence, the party arrested can apply for a habeas corpus, calling on the officer to show cause why he is detained. And, on the return of the writ, the rule is that, where the arrest is upon suspicion and without warrant, proof must be given to show the suspicion to be well founded. If no such proof is offered, it is the duty of the officer to discharge the party." In the course of its opinion, the court said further that "the rule is that a private person even may arrest a party if a felony has in fact been committed, and there was reasonable ground of suspicion; but in the case of an officer he is justified in making an arrest if no felony was in fact committed, if he acted upon information from another on which he had reason to rely. This is the well-settled rule in the English courts, sanctioned and followed in this state in the case of Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702."

It appears from the affidavits in this case that there had recently been committed within the city of Richmond a felony of the gravest nature. Acting upon information in his possession, the police officer arrested Claude Hill upon suspicion of being the perpetrator of this crime. Instead of charging him, however, with being suspected of this specific offense, he was arrested and is held merely as a suspicious character.

We are of opinion that it was proper for the officer to arrest the prisoner if he had reasonable ground to suspect him of having committed a felony, or the felony to which allusion has already been made; and that, having arrested and taken him before the police justice under such circumstances, it became the duty of the police justice, without unnecessary delay, to formulate a specific complaint in writing against the prisoner, informing him of the offense with the commission of which he stands accused, upon which complaint the prisoner may lawfully be held until the case is disposed of according to law; and, if cause be shown by the commonwealth, the hearing may be postponed for a reasonable time, not exceeding 10 days at one time, without his consent. Code Va. 1904, § 3963. But, it appearing that the course indicated has not been pursued in this instance, we are of opinion that the detention of the prisoner is unlawful. The distinction is broad between holding a prisoner because he is suspected of the commission of a specific offense for such reasonable time as enables the commonwealth to investigate his connection with it, and the proceeding in this case of holding him upon a warrant which merely charges that he is a suspicious character.

We are, for these reasons, of opinion that the return of the sergeant of the city of Richmond does not show that the prisoner is held in accordance with the law of the land, and that he is entitled to his discharge.

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(107 Va. 626)

## WARD LUMBER CO. v. HENDERSON-WHITE MFG. CO.

(Supreme Court of Appeals of Virginia. Nov. 29, 1907.)

1. WRIT OF ERROR—JURISDICTION—SHOWING BY RECORD—SUFFICIENCY.

While the jurisdiction of the Supreme Court of Appeals must affirmatively appear from the record, it does so appear when the court can see that the judgment of the lower court necessarily involved the constitutionality of some statute or drew in question some right under the federal or state Constitution, though the amount involved is less than $300, and the record on a writ of error from a denial of motions to vacate a judgment for plaintiff and quash execution thereon shows appellate jurisdiction, where it appears that the judgment against plaintiff in error corporation was by default after service of process by publication only, and that the notices of the motions pursuant to the express terms of Code 1904, §§ 3451, 3599, stated that the judgment was so obtained, since the notice plainly raised the issue whether section 3225, under which the judgment was obtained, and authorizing publication service where defendant corporation has no agent or officer in the county of suit, is repugnant to the state Constitution and the fourteenth amendment to the federal Constitution, guaranteeing due process of law, the denial of the motions necessarily implied a ruling that the section is constitutional.

2. CONSTITUTIONAL LAW — CORPORATIONS — "PERSON" UNDER CONSTITUTION.

A corporation is a "person" within Const. U. S. Amend. 14, and Const. Va. art. 1, § 11 [Code Va. 1904, p. ccx], prohibiting deprivation of property without due process of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 730.

For other definitions, see Words and Phrases, vol. 8, pp. 5322–5335; vol. 8, p. 7752.]

3. SAME—DUE PROCESS—PROVISION FOR PUBLICATION SERVICE.

Code 1904, § 3225, authorizing service of process on corporations, excepting municipalities and banks, by publication, where they have no agent or officer in the county of suit, is a reasonable exercise of legislative authority, and does not violate Const. U. S. Amend. 14, and Const. Va. art. 1, § 11 [Code Va. 1904, p. ccx], prohibiting deprivation of property without due process of law.

Keith, P., dissenting.

Error to Circuit Court, Wise County.

Action by the Henderson-White Manufacturing Company against the Ward Lumber Company. From a judgment overruling motions to vacate a judgment for plaintiff, and quash execution thereon, defendant brings error, and plaintiff moves to dismiss the writ of error. Motion denied. Judgment affirmed.

Aubrey E. Strode, for plaintiff in error. A. P. Crockett, for defendant in error.

CARDWELL, J. The defendant in error, a corporation organized under the laws of this state, with its home office in Danville, Va., having an alleged cause of action arising in Wise county, Va., against the plaintiff in error, also a Virginia corporation, with its home office in the city of Lynchburg, Va., on the 13th day of February, 1906, filed with the clerk of the circuit court of Wise county its memorandum of suit against the plaintiff in error to recover the sum of $210.94 due on account, which memorandum directed the clerk to "have summons published in Wise News [a newspaper published in Wise county, Va.], and to it was appended this affidavit, to wit:

"State of Virginia, County of Wise, to wit:

"This day personally appeared before me, C. J. Edwards, a notary public for the county and state aforesaid, Julian P. Thomas, Jr., attorney for the Henderson-White Manufacturing Co., and made oath before me in my county that the Ward Lumber Co., Inc., of Lynchburg, Virginia, has no agent or officer in the said county of Wise, on whom legal notice can be served.

"Given under my hand this 13th day of Feb'y, 1906.

"C. J. Edwards, Notary Public."

Upon the completion of the publication of the summons, as prescribed by section 3225 of the Code of 1904, the plaintiff in error not appearing, the circuit court of Wise county entered its judgment in favor of defendant in error against plaintiff in error for the amount of the debt sued for, with interest from the date it was alleged to have become payable, and for costs of the suit. On this judgment execution issued and was levied by the sergeant of the city of Lynchburg upon the effects of plaintiff in error, whereupon it on the 17th day of July, 1906, moved the circuit court of Wise county to reverse the judgment, pursuant to the provisions of section 3451 of the Code of 1904, and also to quash the execution issued thereon, pursuant to section 3599 of the Code of 1904, upon the ground that "the judgment was obtained by default and after service of process by publication only, and not by personal service thereof," which motions were overruled.

We are asked to dismiss the writ of error awarded to the said judgment, upon the ground that the amount involved is less than $300; the only error assigned in the petition for the writ of error being that the statute (section 3225 of the Code, supra) under which the suit was brought and maintained is unconstitutional and void, and that the question was not raised nor passed on in the circuit court.

The motion to dismiss is without merit. While the jurisdiction of this court must affirmatively appear from the record, it does so appear when the court can see, as in this case, that the judgment of the lower court necessarily involved the constitutionality of some statute or ordinance, or drew in question some right under the federal or state Constitution. "Any proceeding which necessarily puts their validity in issue, whether it be by demurrer, plea, instruction, or otherwise, is sufficient to give this court jurisdiction of the case." Adkins & Co. v. City of Richmond, 98 Va. 91, 34 S. E. 967, 47 L. R. A. 583, 81 Am. St. Rep. 705, and cases there cited.

It will be observed that the judgment in this case was by default after service of process by publication only, and both the notice of the motion to reverse the judgment pursuant to section 3451 of the Code, and of the motion to quash the execution issued on the judgment, pursuant to section 3599 of the Code of 1904, state as the ground of the motion that "the judgment was obtained by default and after service of process by publication only, and not by personal service thereof." The plain meaning and effect of the notice authorized by statute was to put in issue whether or not the statute (section 3225) under which the judgment was obtained is repugnant to the Constitution of the state and the fourteenth amendment to the Constitution of the United States; and, when the motions were overruled, the trial court necessarily reviewed the statute, ruling that it provides for "due process of law," and therefore not repugnant to the Constitution of the state or of the United States.

The error complained of, however, does not arise out of the construction and interpretation of the statute, but is to the ruling of the trial court that the statute is constitutional

and valid. In the latter case this court has appellate jurisdiction, regardless of the fact that the judgment is for less than $300, while in the former it would not have the constitutionality of the statute as distinguished from its construction and interpretation being the source of appellate jurisdiction. Hulvey v. Roberts, 106 Va. 189, 55 S. E. 585.

Section 3225 of the Code of 1904, supra, after providing that process against, or notice to, a corporation (other than a municipal corporation or a bank) created by the laws of this state or some other state or country, may be served on certain named officers, etc., or in any case, if there be not in the county or corporation wherein the case is commenced any other person on whom service can be had, as aforesaid, on any agent of the corporation against which the case is, or on any person declared by the laws of this state to be an agent of such corporation, reads as follows: "And if there be no such agent in the county or corporation wherein the case is commenced and affidavit of that fact, and that there is no person in said county or corporation on whom there can be service aforesaid, publication of the process once a week for four successive weeks in a newspaper printed in this state shall be a sufficient service of such process or notice."

Section 11 of article 1 of the Constitution of Virginia [Code Va. 1904, p. ccx], and the fourteenth amendment to the Constitution of the United States, provide "that no person shall be deprived of his property without due process of law."

In determining whether or not, in a particular case, this constitutional provision is being violated, or has been violated, it is uniformly held "to include private corporations, such corporations being persons within the meaning of the fourteenth amendment." C. C. & A. Ry. Co. v. Gibbs, 142 U. S. 386, 12 Sup. Ct. 255, 35 L. Ed. 1051.

While this statute has been in force for nearly a quarter of a century, and several times amended (Acts 1885–86, p. 141, c. 146; Acts 1893–94, p. 614, c. 565; Acts 1895–96, p. 445, c. 416), it has never come under review in this court, except in the case of Wytheville Ins. Co. v. Stultz, 87 Va. 629, 13 S. E. 77, and there the constitutionality of the statute was not called in question; the question decided being whether the defendant was a banking corporation, and therefore exempt from the operation of the statute, or to be regarded as an insurance company, and the court held that it was both a banking and an insurance company, and not a banking corporation, and therefore the service by publication of the summons as provided by the statute was good.

In Violett v. City of Alexandria, 92 Va. 567, 23 S. E. 909 (31 L. R. A. 382, 53 Am. St. Rep. 825), it was said: "All the authorities agree that 'due process of law' requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree can be passed affecting his right to liberty or property." Yet it was further said in that case that, while the Legislature cannot dispense with notice altogether, it may prescribe the kind of notice. There the city's charter provided for no notice whatever, and therefore the ordinance of the city, under which it was attempted to fix a charge upon the property of the appellants to meet the cost of paving the streets, was held unconstitutional and void.

Section 3225 of the Code of 1904, under review, applies to all corporations doing business in this state, except certain mentioned corporations, and the purpose of the Legislature seems clearly to have been to provide against hardships arising where corporations go into various sections of the state, making contracts and carrying on their business, and then leave without closing the same satisfactorily, and thereby compelling litigants to follow them perhaps across the entire state to litigate even small matters, or abandon their claims. Any lawful business which may be conducted by an individual may be conducted by a corporation chartered under the laws of the state, and it is a matter of common knowledge that there are many of these corporations which, while having a home office at some point in the state, through their agents and others transact business and contract debts and incur liabilities in many sections of the state. It may be, as suggested by the learned counsel for plaintiff in error, that under this statute a domestic corporation domiciled in Norfolk, Va., wishing to obtain a judgment against another domestic corporation domiciled in the same city upon some cause of action, real or fictitious, and desiring to keep from the defendant corporation knowledge that a suit was being prosecuted against it, might go to Highland county and institute its suit, and making the affidavit required by statute, which it might truthfully do within the limits of the statute, and without making oath that its claim was believed to be just, obtain an order of publication, which, under the statute, if printed once a week for four successive weeks in a newspaper printed in Lee county, however limited its circulation, would yet obtain "a sufficient service of such process." But it is to be borne in mind that, before such proceedings as suggested could be had, there must be jurisdiction in the court in which the proceedings are instituted, under section 3215 of the Code; and it would be a reflection on the judiciary of this state to say that judgment could be obtained in any county where jurisdiction is wanting.

Section 3215, supra, provides: "An action may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein." And section 3214 provides: "Any action at law, if it be to recover a loss under a policy of insurance, either upon

property or life, may be brought in any county or corporation wherein the property insured was situated at the date of the policy, or the person whose life was insured resided at the date of his death or at the date of the policy." It was under this latter section that this court, in Wytheville Ins. Co. v. Stultz, supra, held that the publication of the summons, as provided by section 3225, was a good and valid service of notice to the defendant.

Prof. Lile, in his Notes on Corporations, p. 342, discusses the statute and explains it fully, showing the difference between domestic and foreign corporations. As he shows, when the action is against a domestic corporation, the summons is published and made returnable to rules, and not to appear in 15 days, as in other cases. He makes no suggestion of a question as to the constitutionality of the statute.

The late Judge Burks, in an article appearing in 2 Va. L. Reg. p. 545, reviews the statutes providing for the summoning of corporations by publication, but makes no suggestion of a doubt as to the constitutionality of section 3225, here in question. He calls attention to the differences in the requirements of section 3230 and the three sections following, and the provision of section 3225, and shows that the sections other than the last named do not apply to corporations, and clearly indicates an opinion that, where the provisions of section 3225 are complied with, the defendant corporation is duly summoned.

That hardships may arise out of the execution and enforcement of this statute is very probable; but the courts of the state cannot, for that reason only, declare a statute unconstitutional; "nor can a court declare a statute unconstitutional and void solely on the ground of unjust or oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution." Cooley's Const. Lim. (6th Ed.) 197.

"It is true," says this learned author, "there are some reported cases in which judges have been understood to intimate a doctrine different from what is here asserted; but it will generally be found, on an examination of those cases, that what is said is rather by way of argument and illustration to show the unreasonableness of putting upon Constitutions such a construction as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent, than as laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative power in directions in which the Constitution had imposed no restraint." On page 200 the same author further says: "The rule of law upon this subject appears to be that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them."

In 8 Cyc. 778, it is said that the generally accepted rule is that the courts will not declare a statute void merely because, in their opinion, it is opposed to the spirit supposed to pervade the Constitution.

And in Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648, the court said: "When Congress or a State Legislature pass a law within the general scope of their constitutional power, the courts cannot pronounce it void merely because in their judgment it is contrary to the principles of natural justice, and the great weight of authority favors the rule laid down in this case."

Among the authorities relied on by counsel for plaintiff in error as supporting the contention that section 3225 of the Code does not meet the constitutional requirement of "due process of law" is the case of Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, but in that case the court was dealing with foreign, and not domestic corporations, and neither in that case nor in any other that we have been able to find was it held that the Legislature has not the right to prescribe a mode of service where the statute has no extraterritorial effect. On the contrary, the authorities are in accord with what was said by this court in Violett v. Alexandria, supra, that, while the Legislature cannot dispense with notice altogether, it may prescribe the kind of notice. With the wisdom of the statute the courts have nothing to do, and it may be that the mode of service prescribed might have been different and for the better, in that it would have been more effective and better calculated to arrest the attention of a de-

fendant against whom the summons published is directed, or, as in an action against an insurance company created by the laws of this state, where the statute, although the action may be brought in the county or corporation wherein the property insured was situated at the date of the policy, or the person whose life was insured resided at the date of his death or at the date of the policy, requires that process or notice shall be directed to the sheriff or sergeant of the county or corporation wherein the chief office of such company is located. But these are matters for legislative consideration, and not for the determination of the courts.

Constructive service of a summons or a notice, as authorized by the statutes, has over and over been recognized as a valid service and a reasonable exercise of legislative authority, and we can see no reason why the mode of service provided in section 3225, which was strictly followed in this case, should be regarded as either lacking "due process of law" or the reasonable exercise of legislative authority.

We are therefore of opinion that the judgment of the circuit court must be affirmed.

Affirmed.

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(107 Va. 616)

SMITH et al. v. WHITE et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. APPEAL — DISQUALIFICATION OF JUDGE — SUFFICIENCY OF RECORD.

Code 1904, § 3049, provides that if a judge of any circuit or city court shall consider it improper for him to decide any case or preside at any trial pending therein, unless said case is removed as provided by law, the fact shall be entered of record and certified by the clerk to the Governor, who shall designate another judge to act. *Held*, that a certified statement of the clerk, appended to the transcript of the record filed with the petition for an appeal, that the fact that a judge was disqualified from sitting was not entered of record by the clerk nor certified to the Governor, did not make it affirmatively appear that the disqualification was not entered of record, since the custodian of documents or records cannot certify that a specific document does not exist in his office or that a particular entry was not made on his records, but he must be sworn and examined as any other witness.

2. SAME—PRESUMPTIONS.

Where the record does not affirmatively show the contrary, it will be presumed that a judge, authorized to sit under certain circumstances in place of a disqualified incumbent of a court of general jurisdiction, acted under proper authority in so sitting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3683.]

3. WILLS—CONSTRUCTION—SEPARATE CLAUSES.

The general rule is that when words of a will, in the first instance, distinctly indicate an intention to make an absolute gift, such gift can only be lessened by subsequent provisions equally clear and decisive, and where there are two apparently inconsistent provisions the court will, if possible, reconcile them, and will not disturb the first provision further than necessary to give effect to the second.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 987–989.]

4. SAME.

A will provided: "The residue of my property of every kind I devise to my executor, to be held in trust for the use and benefit of his wife and children, except his two elder sons. The income only of the amount thus devised shall be at the disposal during her life. She may, however, dispose of the whole amount by will to take effect after her death," etc. *Held*, that the executor's wife and children, other than the two elder sons, were jointly entitled to the income of the property devised during the wife's life, and that on her failure to dispose of the corpus by will it would pass to such children and the heirs of the wife jointly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1452–1455.]

5. TRUSTS—SALE OF TRUST ESTATE—AUTHORITY—LEAVE OF COURT—NECESSITY FOR OBTAINING—CONFIRMATION — STATUTORY PROVISIONS.

Under Code 1904, § 2616, providing that a trustee who thinks that the interests of the beneficiaries will be promoted by a sale of the estate may file a bill in equity to obtain such sale, etc., a court having jurisdiction to order a sale may confirm a sale made by the fiduciary before suit is brought, provided it be clearly shown as required by section 2620, independent of any admissions in the answers, that the interests of the beneficiaries will be promoted, and the court is of opinion that the right of no person will be violated thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 268.]

6. SAME—EVIDENCE—AFFIDAVITS.

The rule that, in the absence of a statute authorizing it, affidavits are not admissible to establish the facts necessary to enable a court to enter a judgment or decree on the merits, applies to proceedings under Code 1904, § 2616, relating to sales of trust estates, etc., and the fact that a sale by a trustee promoted the interests of the beneficiaries cannot be shown by affidavits in a suit to confirm the sale.

Appeal from Circuit Court, Albemarle County.

Suit by John M. White, trustee, against Mrs. Lucy W. Smith, W. Lawrence Smith, and others. Decree for complainant, and defendants W. Lawrence Smith and others appeal. Reversed.

G. B. Sinclair and C. W. Allen, for appellants. Perkins & Perkins and White & Long, for appellees.

BUCHANAN, J. The first error assigned is that the court had no jurisdiction of the case, because the record shows that Judge Christian, of the corporation court of the city of Lynchburg, who entered the decree appealed from, had no authority to sit in the case.

The appellee instituted this suit in the circuit court of Albemarle county, of which he was judge, for the sale of certain real estate which he held in trust, and for the construction of the clause of the will under which he held the trust estate sought to be sold. By section 3049 of the Code of 1904 it is provided, among other things, that "if the judge of any circuit or city court * * * is so situated as to render it improper in his judgment for him to decide any case or proceeding, or to preside at any trial, civil or criminal, pending therein, unless

said case or proceeding is removed as provided by law, the fact shall be entered of record by the clerk of said court, and at once certified by him to the Governor, who shall designate a judge of some circuit court or of some city court for a city of the first class to preside at the trial of such cause or hold such term."

Appended to the transcript of the record filed with the petition for an appeal is a certified statement of the clerk of the court, made at the request of appellants' counsel, that the fact that Judge White was disqualified from sitting in the cause was not entered of record by the clerk nor certified by him to the Governor.

This certificate is no part of the record in the case. The question of Judge Christian's right to sit in the cause was not raised in the trial court, and, if it had been, and the certificate in question had been offered in evidence to show that no such entry had been made, it would not have been admissible, if objected to; for by the common-law rule (and that rule has not been altered by statute in this state) the custodian of documents or records has no authority to certify that a specific document does not exist in his office, or that a particular entry was not made on his records. He cannot establish the nonexistence of a particular document or entry by a certificate to that effect, but must be sworn and examined as any other witness. 3 Wigmore on Ev., p. 2109, § 1678; Greer v. Fergerson, 104 Ga. 552, 30 S. E. 943, 945, 946.

But it is claimed that the clerk's certificate to the copy of the record accompanying the petition for appeal—that it "is a true and correct transcript and copy of all papers, evidence, certificates, orders, and decrees as appear of record in my office" in the cause—shows that no entry had been made of the fact that Judge White was so situated that it was improper for him to sit in the case.

The entry which the statute required the clerk to make was not an order or decree in the case, but was a mere statement of fact which he was required to enter of record. It does not, therefore, affirmatively appear from the record that the fact of Judge White's disqualification to sit in the case was not entered of record as required by the statute.

The circuit court of Albemarle county being a court of general jurisdiction, having jurisdiction both of the subject-matter and the parties in this case, and the judge of another circuit or of a city court of the first class being authorized to sit in place of the disqualified incumbent under certain circumstances, it will be presumed that Judge Christian in sitting in the cause acted under proper authority; the contrary not affirmatively appearing from the record. There is some conflict in the authorities upon this point, but the weight of authority and the better reason is in favor of the view here taken. See 23 Cyc. 562, and cases cited in notes 4 and 5; People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933; Riggs v. Owen, 120 Mo. 176, 25 S. W. 356; State v. Newman, 49 W. Va. 724, 39 S. E. 655; Littleton v. Smith, 119 Ind. 230, 21 N. E. 886; Forrer v. Coffman, 23 Grat. 871; Galpin v. Page, 18 Wall. (U. S.) 350, 21 L. Ed. 959.

The case of Gresham v. Ewell, Judge, 85 Va. 1, 6 S. E. 700, is relied on by the appellants as sustaining their contention; but as we understand that case it does not do so. In that case it was conceded that the fact of the disqualified judge's inability to sit in the case was not entered of record as required by the statute, so that it affirmatively appeared in the view of the majority (two judges out of a court of three) that the visiting judge was without authority to enter the judgment complained of; and this was the ground of their decision as we construe it.

One of the objects of this suit was to obtain a construction of the fourteenth clause of the will of Dr. Cabell. That clause is as follows: "The residue of my property of every kind I devise to my executor, to be held in trust for the use and benefit of his wife and children, except his two elder sons. The income only of the amount thus devised shall be at the disposal during her life. She may, however, dispose of the whole amount by will to take effect after her death, in the arrangement of which I desire her to take the advice of her husband."

If the testator had stopped at the end of the first sentence of that clause, and it constituted all that related to the gift, it could not be doubted that under the decision of Fitzpatrick v. Fitzpatrick, 100 Va. 552, 42 S. E. 306, 93 Am. St. Rep. 976, and the authorities there cited, that the wife and children, except the two elder sons, would take a joint fee-simple estate in equity in the property devised. In the case of Fitzpatrick v. Fitzpatrick the gift was to the wife and children, whilst in this the gift is to the executor to be held in trust for the benefit of his wife and children. But the mere fact that the property is to be held in trust does not change the rights of the donees, except to make it an equitable instead of a legal estate. That it was the intention of the testator that the children should take an interest in the gift, as well as the mother, is emphasized by the exclusion of the executor's two elder sons, who had been provided for in other clauses of the will. If the mention of the children was merely to show the motive for the gift to the wife, as must be held if the children are excluded, there was no necessity for providing that the two elder sons should take nothing under that clause, because in that view none of the children would take anything.

The interest or estate which would pass by the first sentence of the clause, if it stood alone, is changed or modified in two particulars by the residue of the clause: First, that

the income only of the devised property can be used during the life of the wife; and, second, that the wife shall have power to dispose of the whole corpus by will.

It is contended on the one side, and the circuit court held, that the wife alone was entitled to the income of the property during her life. The language limiting the right to the use of the property during that time is as follows: "The income only of the amount thus devised shall be at the disposal during her life."

There is nothing in the language quoted which gives the wife the exclusive right to the income; neither is such right to be gathered from the context. The word "the" before the word "disposal" may be construed to mean "their" with as much, if not more, reason as to mean "her." The most that can be said is that the language of that sentence is ambiguous.

The general rule is that when words of a will, in the first instance, distinctly indicate an intention to make an absolute gift, such gift is not to be lessened or cut down by subsequent provisions which are not equally as clear and decisive as the terms by which it was created, and that, where there are two apparently inconsistent and repugnant provisions in a will, the court will, as far as possible, reconcile them, and in so doing will endeavor not to disturb the first provision further than is absolutely necessary to give effect to the second. Gaskins v. Hunton, 92 Va. 528, 23 S. E. 885, and cases cited; Hooe v. Hooe, 13 Grat. 245, 251, 252, and cases cited.

Applying these principles of construction to the clause under consideration, we are of opinion that the wife and the executor's children other than the two elder sons are jointly entitled to the income of the property devised during her life, and, in the event the wife does not dispose of the corpus by will, then it will pass to the said children and the heirs of the wife jointly.

We are of opinion, therefore, that the circuit court erred in the construction it placed upon the will.

Amongst the property passing under that provision was an interest in a tract of land known as "Morven," which contained something over 1,000 acres. Some time after the death of Dr. Cabell, Edward B. Smith, his executor, died, owning the remainder of that tract, which passed according to the law of descents to his wife and children. By a subsequent family arrangement that interest was conveyed to his executors, to be held by them in the same manner and upon the same terms as the property which passed by the fourteenth clause of Dr. Cabell's will, of which they were also the trustees. The complainant, Judge White, as substituted trustee, instituted this suit, under the provisions of section 2616 of the Code of 1904, to have confirmed a sale of that tract of land which he had made upon the condition that it met with the approval of the circuit court of Albemarle county. The widow of E. B. Smith, deceased, her living children, the child of a deceased child, and the heirs of Dr. Cabell, among others, were made parties to the bill.

There was a demurrer in writing to the bill, in which two grounds were stated—one because the bill did not state all the estate real and personal held in trust. The bill was amended in this respect. The other ground of demurrer was that the statute (section 2616 of the Code of 1904) under which the trustee was proceeding did not authorize a conditional sale of the trust property and a subsequent approval and confirmation by the court, but required that the trustee should first apply to the court for authority to sell.

The statute has been generally construed by the circuit courts as authorizing the court which has jurisdiction to order a sale to approve and confirm a sale made by the fiduciary before suit is brought subject to the court's approval and confirmation, provided "it be clearly shown, independently of any admissions in the answers, that the interests of the infant, insane person or beneficiaries in the trust, as the case may be, will be promoted, and the court is of opinion that the right of no person will be violated thereby, * * *" as required by section 2620 of the Code of 1904. This practice has, we think, been beneficial to those in whose interest and for whose protection the statute was enacted, and is justified by the decisions of this court and the decided disposition it has shown to adopt the liberal rather than the strict rule of construction in interpreting the scope of a statute which it has held to be remedial in its nature. Faulkner v. Davis, 18 Grat. 651, 669, 98 Am. Dec. 698.

In 1823, in the case of Garland v. Loving, 1 Rand. 396, where a sale of lands in which infants were interested has been made conditionally, a suit was instituted to have the contract ratified and the proceeds applied under the direction of a court of chancery to the objects of the trust, if it could be done, this court said: "The court is further of opinion that, unless the chancellor [who had dismissed the bill] shall be satisfied [when the case goes back] that it is necessary to appoint another guardian ad litem, or to take other steps to satisfy himself that the interests of the infants manifestly require a sale of the estate, as aforesaid, or should ultimately be so satisfied, it will be competent for him, instead of directing a sale by his decree aforesaid, to confirm that already made to Nathan Loftus, under the terms and conditions aforesaid, provided he is willing to abide thereby, and James Lowry and Nancy his wife are also willing to unite in the conveyance and to invest and secure the proceeds as aforesaid in the same manner as if such sale had originally been made in pursuance of a decree of the court."

In Palmer v. Garland's Committee, 81 Va.

444, where the committee of a lunatic filed his bill under the statute to have the court's approval and confirmation of certain offers to purchase the lunatic's land, it was held that the court had authority under the statute in question to approve and confirm the proposed sales, where it appeared that the interests of the lunatic would be promoted and the rights of no one would be violated by such sales.

Whilst in a proceeding under the statute a conditional sale made before suit brought may be approved and confirmed by the court, as well as a sale directed, in either case, however, it must be clearly shown as a condition precedent to such confirmation or order of sale, independently of any admissions in the answers, that the interests of the infants, insane persons, or beneficiaries in the trust, as the case may be, will be promoted thereby.

The complainant proved that he had made the conditional sale at the request, or with the consent, of several of the beneficiaries under the trust, including the widow of E. B. Smith, deceased, and introduced documentary evidence and took the depositions of a number of witnesses and the affidavits of three persons to show that the conditional sale was for an adequate price, and would promote the interests of the beneficiaries. On the other hand, Mrs. Smith filed an answer in which, while admitting that the conditional sale had been made with her consent and approval, she alleged that it was a mistake, and opposed its confirmation. Other beneficiaries filed answers, also, in which they opposed the confirmation of the sale. They also took depositions of an equal or greater number of witnesses to show that the consideration at which the sale was made was less than its real value, and that the interests of the beneficiaries would not be promoted by its confirmation. The testimony is very conflicting, and the record, excluding the affidavits filed by the complainant which were objected to, does not clearly show that the price was adequate or that the interests of the beneficiaries would be promoted by the sale. The affidavits were ex parte, taken without notice, and filed on the day the case was submitted to the court for decision.

While affidavits are admissible upon the question of the confirmation of an ordinary sale made under a decree of court and reported to it for confirmation (Robertson v. Smith, 94 Va. 250, 26 S. E. 579, 64 Am. St. Rep. 723), they are admitted largely upon the ground that courts in such cases must be able to act in a summary manner, and to avoid the delay which would result if depositions had to be taken (Savery v. Sypher, 6 Wall. [U. S.] 157, 159, 160, 18 L. Ed. 822). But the reason for that practice has no application to a case in which the court has never considered or determined the propriety of a sale under section 2616 of the Code of 1904.

As a general rule, in the absence of a statute authorizing it, affidavits are not admissible to establish the facts necessary to enable a court to enter a judgment or decree upon the merits of any case; and especially is this so in proceedings under section 2616 of the Code of 1904, which involve the rights and interests of persons laboring as a rule under some disability.

We are of opinion, therefore, that the circuit court erred in approving and confirming the conditional sale made by the complainant trustee, since it did not clearly appear that the interests of the beneficiaries under the trust would be promoted thereby.

The decree appealed from will be reversed, and this court will enter such decree in the cause as the circuit court ought to have entered, construing the fourteenth clause of Dr. Cabell's will, and will remand the cause to the circuit court, in order that the parties may take further evidence, if they be so advised, as to the propriety of confirming the sale or of selling the lands in the bill and proceedings mentioned.

Reversed.

KEITH, P., and CARDWELL, J., absent.

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(107 Va. 485)

## MERRYMAN et al. v. HOOVER.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. EJECTMENT — OUTSTANDING TITLE — INVALIDITY—EVIDENCE.

Code Va. 1904, § 2725, provides that no person shall bring ejectment unless he has a subsisting interest in the premises claimed and right to recover the same or the possession thereof, or some share, interest, or portion thereof. *Held*, that where there was an outstanding title in another when plaintiff brought ejectment, which continued for 10 years after the suit was begun, and until a few months before the trial, evidence was inadmissible to show that after such period such outstanding title had been adjudged ineffective as against plaintiff, under the rule that plaintiff in ejectment must recover on the strength of his own title as it existed when the suit was commenced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 28.]

2. SAME—SUBSISTING INTEREST.

Where P. and wife, under whom plaintiff claimed part of the lands in controversy, had executed a deed purporting to convey the fee to a corporation, which deed was duly recorded, it disrupted plaintiff's paper title, and, being outstanding and uncanceled at the time plaintiff sued in ejectment, constituted a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 16–21.]

3. TENANCY IN COMMON — ADVERSE POSSESSION.

In ejectment, a charge, requested by plaintiff, that if the adverse possession claimed by defendant was interrupted at any time from the death of C., and if C.'s heirs had been under disabilities since that date, then there could have been no new adverse possession as against them, and therefore "no adverse possession as against the other parties in interest, their co-tenants," was properly modified by striking the clause quoted; the rule being that each tenant in com-

mon is entitled to sue according to his own capacity, regardless of disabilities of others.

4. WRIT OF ERROR — REFUSAL OF INSTRUCTIONS—PREJUDICE.

Where the court correctly charged on adverse possession, giving the general principles of law and leaving their application to the jury, plaintiffs were not prejudiced by the refusal of an instruction attempting to summarize the facts proved, and charging that on those facts, if believed, adverse possession was not proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4229; vol. 46, Trial, §§ 651–659.]

5. EJECTMENT — LOCATION OF LAND — JURISDICTION.

In ejectment, a request to charge that if part of the land in controversy was in West Virginia, and had been forfeited to that state for taxes, defendant could not acquire adverse possession thereof while it belonged to the state, and his inclosure of such land with land in Virginia could not constitute adverse possession of the Virginia land, was properly refused, the Virginia court being without jurisdiction of the West Virginia lands, and the forfeiture thereof, if any, being ineffective against defendant's adverse possession of lands in Virginia.

6. WRIT OF ERROR—INSTRUCTIONS—REFUSAL—PREJUDICE.

Plaintiffs, in ejectment, requested an instruction that if a certain survey including the land in controversy was assessed in the name of plaintiffs' grantor and sold in 1886 for unpaid taxes and was bought in by the State Auditor, and the land remained unredeemed until 1900, then the period from the date of sale to the institution of the suit should not be included in the period of defendant's adverse possession. *Held*, that the refusal thereof was not prejudicial to plaintiffs, since if the title was outstanding in the commonwealth, and was not restored to plaintiffs until after the commencement of the suit, they could not recover; the redemption in 1900 being after the suit was commenced, and the outstanding title at the commencement of the suit being fatal to plaintiffs' case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4229.]

Error to Circuit Court, Rockingham County.

Ejectment by Mary C. Merryman and others against Isaac Hoover. From a judgment for defendant, plaintiffs bring error. Affirmed.

The following are the instructions referred to in the opinion:

"(4) The court further instructs the jury that if they believe from the evidence that the adverse possession claimed by the defendant was broken and interrupted at any time after the month of October, 1880, the date of the death of Edward Nicholas Clopper, and if they further believe from the evidence that the heirs at law of the said Edward Nicholas Clopper have been under disabilities since the said date, then there can be no new adverse possession as against them, and, there being no adverse possession as against them, there can be no exclusive and adverse possession as against the other parties in interest, their co-tenants, and they must find for the plaintiffs.

"(5) The court further instructs the jury that if they believe from the evidence that the lands in controversy have been used for 15 years prior to the institution of this suit for the grazing of live stock upon it, that it is not inclosed by a permanent and substantial fence, and that those who have lived upon it in a great many cases have not remained upon it during the winter seasons, but that the premises have been frequently left vacant from the fall of the year unto the spring of the year following, and, moreover, that in one or more years the land was not occupied in the summer, except in the grazing of cattle, during the pasture season, then such use of said lands was not continuous, actual adverse possession, even though cabins or houses were built upon the property, and if they further believe from the evidence this is the only adverse possession proven, they must find for the plaintiffs.

"(6) The court further instructs the jury that if they believe from the evidence that the Keister and the three Camphor tracts of land lie on the top of the Shenandoah Mountain, and that part of the said several tracts of land lie on the West Virginia side and part on the Virginia side, as shown by the black lines on the plats made by Jasper Hawse, the surveyor, filed with his report of survey, and that the title under which the defendant claims said tracts of land was forfeited on the West Virginia side by failure to enter said tracts of land upon the land assessment books of Pendleton county, in the state of West Virginia, for the years 1869 and 1874, and some years thereafter, and that said tracts of land were sold by the commissioner of school lands for the county of Pendleton, and the title vested in others on April 13, in the year 1887, they are further instructed that no adverse possession of such parts of said tracts of land lying on the West Virginia side can be claimed as against the state of West Virginia, so that the defendant could only plead adverse possession to such parts of said tracts of land, since the date of said sale.

"And if they further believe from the evidence that the inclosure under which the defendant claims actual possession of said tract of land included within it those parts of said land which lie in the state of West Virginia, and which are forfeited as aforesaid, then the possession of the remainder of said tracts of land was not exclusive, and could not be availed of by the defendant during that period, as adverse possession of the parts of said land lying in the state of Virginia.

"(7) The court further instructs the jury that if they believe from the evidence that the tract of land, known as the 'Chambers & Clopper survey,' which includes the tracts of land in controversy in this cause, was assessed upon the land books of Rockingham county, in the name of James B. Price, and that said tract of land was sold in the year 1886 for the taxes of 1876 to 1883, and was bought by the Auditor of the state of Virginia for the benefit of the state, county,

and district, and that said tract of land remained unredeemed until the 28th day of April, 1900, then they are further instructed that the period from the date of said sale to the auditor as aforesaid to the time of the institution of this suit must not be included in the period of 15 years, during which the defendant must show adverse possession in order to claim title by such possession to any part of the said tract of land."

The court granted instructions Nos. 1, 2, and 3 as prayed for, but modified instruction No. 4 by erasing therefrom the words:

"And, there being no adverse possession as against them, there can be no exclusive and adverse possession as against the other parties in interest, their co-tenants, and they must find for the plaintiffs."

And then granted said instruction No. 4, and rejected in toto instructions Nos. 5, 6, 7 and 8.

John E. Roller and Sipe & Harris, for plaintiffs in error. Conrad & Conrad, for defendant in error.

KEITH, P. Mary C. Merryman and others filed their declaration in ejectment at August rules, 1895, in the circuit court of the county of Rockingham, against Isaac Hoover, to recover certain real estate therein described. Hoover appeared and disclaimed title and interest as to certain parts of the land demanded, and as to the residue pleaded not guilty. The jury sworn in the case on the 4th of October, 1905, found a verdict for the defendant, upon which judgment was entered, and the plaintiffs procured a writ of error from this court, in their petition assigning as errors committed by the trial court:

First. That, after the plaintiffs had introduced their evidence of title to the lands in controversy, the defendant offered a deed from James B. Price, under whom plaintiffs claim in part to the Rawley Iron & Coal Company, bearing date the 14th day of June, 1883, and duly admitted to record in the clerk's office of Rockingham county on the 18th day of June of the same year, which purported to convey the land in dispute in fee simple; it being intended by the defendant, by the introduction of this deed, to show that, in so far as they claimed under James B. Price and his heirs, there was such an outstanding title in another as defeated the right of plaintiffs to recover.

In order to meet this contention, the plaintiffs offered in evidence the record of the chancery cause entitled Price, etc., v. Rawley Iron & Coal Company, including the final decree therein, entered on the 6th day of June, 1905, before the trial of the ejectment suit, holding that the deed of the 14th day of June, 1883, and the deed of trust executed by the Rawley Iron & Coal Company contemporaneously therewith on the lands in controversy, constituted no blot upon the title of those claiming under James B. Price and the heirs at law of Nicholas Clopper, deceased, and no impediment to the assertion of their title. To the introduction of this record the defendant objected, on the ground that all that was necessary to defeat the action of the plaintiffs was for the defendant to show that such outstanding title existed at the date of the commencement of said action, to wit, on the 13th day of August, 1895; and inasmuch as the deed of June 14, 1883, was duly admitted to record on the 18th day of June, 1883, and there had been no reconveyance of the land to the plaintiffs, or those under whom they claim, before the 13th day of August, 1895, such outstanding title at the time the suit was brought was conclusive of the right of the plaintiffs, and it was not competent for them to show that the alleged outstanding title had been divested in any way, or that the plaintiffs; or those under whom they claimed, had been reinvested with title to the land in controversy subsequent to the date of the institution of the suit. This objection was sustained by the circuit court, which refused to permit the record in the chancery cause to be offered in evidence.

The precise contention of plaintiffs in error upon this point is that while it is true that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of that of his adversary, and that an outstanding title in another may be shown in order to defeat the plaintiff's right of action, such outstanding title must be a present outstanding, operative, and available legal title on which the owner can recover against either of the contending parties if asserting it by action.

Section 2725 of the Code of 1904, treating of actions in ejectment, says: "No person shall bring such action unless he has at the time of commencing it a subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or some share, interest or portion thereof."

It would seem that this section is conclusive; but we will supplement it by the addition of adjudicated cases.

In Suttle v. R. F. & P. R. Co., 76 Va. 284, Judge Staples, speaking for the court said: "The doctrine generally understood in Virginia is that in ejectment the plaintiff must show a legal title in himself, and a present right of possession under it at the time of the commencement of the action. To this doctrine some exceptions exist; for instance, one in peaceable possession, and ousted by a stranger without title, may recover in ejectment on the strength of his mere previous possession; and a tenant is estopped to deny the title of his landlord."

None of the exceptions, however, exist in this case, and need not be considered.

In Warvelle on Ejectment, at section 228, it is said: "The same principle, which, un-

der the old practice, when the names of fictitious parties were used, prevented a recovery by the plaintiff unless he showed himself entitled to the possession at the time of the demise laid in the declaration, has remained practically unchanged through all the mutations to which the action has been subjected. The plaintiff must recover, if at all, upon his legal title as it stood at the commencement of the suit, or, as stated by many of the authorities, at the time alleged in the declaration that he had title; and it has been held in some cases that where the title displayed in evidence is shown to have accrued after such time, even though before the commencement of the suit, he cannot recover. The general rule, however, is as first stated, and under this rule, if the plaintiff is without legal title at the time of commencement of his suit, he cannot recover, notwithstanding he may have had an equity which ripened into a legal title after the suit was brought. He must recover, if at all, upon his title as it existed at the institution of his suit, and, even though he has the legal title, yet if at the time suit was commenced his right of possession was intercepted for any valid cause, he cannot recover, even though such intercepting cause is subsequently removed." Numerous authorities are cited in the note to this section which fully sustain the text.

To the same effect is Newell on Ejectment, p. 360, § 7.

In Tyler on Ejectment, p. 75, it is said that "the rule at common law, and in all of the states which have preserved the distinction between legal and equitable titles to land, is that the plaintiff in ejectment must show a legal title in himself to the land he claims, and the right of possession under it, at the time of the demise laid in the declaration, and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery." There are cases which hold that after the purpose of a trust deed has been satisfied the cestui que trust may maintain ejectment upon a demise in his own name, although the legal estate is still in the trustee. Hopkins v. Ward, 6 Munf. 38. But, without expressing any opinion upon that line of decisions, it is sufficient to say that the case before us is not within them, for here there is an absolute deed from James B. Price, under whom plaintiffs in error claim, to the Rawley Iron & Coal Company, and a deed of trust executed by the Rawley Iron & Coal Company to the Guarantee Trust & Safe Deposit Company of Philadelphia, a corporation chartered under the laws of the commonwealth of Pennsylvania.

In Adams on Ejectment (1854 Ed.) p. 33, it is said to be a maxim of our law "that the party in possession of property is considered to be the owner until the contrary is proved. It is necessary, therefore, for a claimant in ejectment to show in himself a good and sufficient title to the disputed lands. He will not be assisted by the weakness of the defendant's claim, for the possession of the latter gives him a right against every man who cannot establish a title; and, if he can answer the case on the part of the claimant by showing the real title to be in another, it will be sufficient for his defense (excepting of course those cases in which the defendant is estopped from disputing the claimant's title), although he does not pretend that he holds the lands with the consent, or under the authority of the real owner."

The doctrine as to the title upon which a plaintiff must recover, if at all, in an action in ejectment, established by the cases and text-writers already quoted, is maintained in all its rigor by the Supreme Court of the United States. See McNitt v. Turner, 16 Wall. 352, 21 L. Ed. 341; Moorehouse v. Phelps, 21 How. 294, 16 L. Ed. 140; Sheirburn v. De Cordova, 24 How. 423, 16 L. Ed. 741.

The outstanding title under consideration is evidenced by a deed from James B. Price and wife, under whom the plaintiffs claim part of the lands in controversy, purporting to convey an absolute title in fee simple to the Rawley Iron & Coal Company, a corporation of this state. The deed was executed on the 14th day of June, 1883, and was admitted to record on the 18th day of the same month. The Rawley Iron & Coal Company, grantee in the deed from Price, conveyed the same land to the Guarantee Trust & Safe Deposit Company of Philadelphia, a corporation chartered under the laws of the commonwealth of Pennsylvania, and this deed was admitted to record on the 18th of June, 1883. The suit in chancery, brought with the object of canceling these deeds and reinvesting the plaintiffs with the legal title, was not instituted until April, 1901, six years after the institution of the action in ejectment; and the final decree was not entered until the 16th day of June, 1905, ten years after the institution of the action in ejectment, and a few months before it was tried. The effect of those deeds was not only to constitute a sufficient ground of defense to the action of ejectment by showing an outstanding title in another, but they went to the very root and heart of the plaintiffs' case, broke in upon and disrupted their paper title, and established beyond controversy that at the date of the demise laid in the declaration and at the institution of the suit they did not have "a subsisting interest in the premises claimed and a right to recover the same, or to recover the possession thereof, or some share, interest or portion thereof." Code 1904, § 2725.

We shall deal, however, more specifically with the contention of plaintiffs in error. Their position is that while they must recover upon the strength of their own title, and not upon the weakness of that of their adversary, yet, if the defense rests upon an

outstanding title in another, that title must be shown to be one which was a present, subsisting, operative legal title at the time of the trial of the case, and that at the time of the trial a court of competent jurisdiction had annulled the deeds from Price to the Rawley Iron & Coal Company and from that company to the Guaranty Company; and that, therefore, it was not a present, outstanding title in another.

We think it has been made to appear that plaintiffs in error did not show a legal title in themselves at the institution of the suit; but, taking their case as they present it, they must equally fail.

With respect to the general principle as to the character of outstanding title which may be relied upon as a defense, there can be no doubt. It is fully established, so far as this court is concerned, by the decision in Reusens v. Lawson, 91 Va. 243, 21 S. E. 347, where Judge Buchanan says: "An outstanding title, sufficient to defeat a recovery in an action of ejectment, must be a present, subsisting, and operative legal title, upon which the owner could recover if asserting it by action." For instance, if the statute of limitations constituted a bar to the outstanding title, it could not be set up as a defense; but to hold that a plaintiff could after the institution of his suit acquire from another an otherwise valid title, and thus make good the defect in his own title, would be at war with the fundamental principle recognized in all common-law courts by innumerable adjudicated cases by all the text-writers, and crystalized into a statute in this state, that the plaintiff in an action of ejectment must have in him the legal title at the institution of his suit.

We shall now consider the authorities relied upon by plaintiffs.

In Jackson v. Todd, 6 Johns. (N. Y.) 257, the facts are somewhat complicated, but a careful reading of the report will show that the deed from Dunbar, under whom Jackson claimed, to Brooks, which the defendant Todd relied upon as defeating the chain of title from Dunbar through Macy and others to Jackson, the plaintiff, was not a subsisting outstanding title at the date of the institution of the suit.

In Jackson v. Hudson, 3 Johns. (N. Y.) 375, 3 Am. Dec. 500, the general principle as to the character of the outstanding title as set out in Reusens v. Lawson, supra, is affirmed, and under the circumstances of that case it was held that the lapse of time during which no claimant under the alleged outstanding title had appeared had been so great that the presumption was irresistible that it was no longer a subsisting title; and the further and decisive objection made to the outstanding title that it did not appear to have been duly executed.

The case of Perryman's Lessee v. Callison, 1 Tenn. 515, is cited to show that, where the defendant is permitted to set up a title in a third person, the plaintiff, having first shown a prima facie good title in himself at the time of bringing the action, may show that since the issue joined he had procured the title of such third person. And the case, upon inspection, seems to be authority for that proposition. Turning, however, to the case of Miller's Lessee v. Holt, 1 Tenn. 308, the question was whether it was competent for the defendant to show a better subsisting title out of the lessor of the plaintiff, and the court said: "Possession is always favored, and of itself, with color of title, is a title against all the world, except the person having the best title. The law of England on the subject is too clear to admit of doubt, nor could any reason be seen why the law should not apply here as well as there."

In Crockett v. Campbell, 2 Humph. 411, the Supreme Court of Tennessee held that deeds made after the commencement of a suit, confirming and ratifying deeds made before the commencement of the suit, are admissible in evidence; the court saying: "If the deeds confirmed were executed and properly proved and registered before the suit was commenced, they would pass the title by force of this confirmation, and vest it in the bargainee from their date. The deed of confirmation makes the acts of the attorney good at the date they were performed."

In Lewis v. Curry, 74 Mo. 49, it was held that a plaintiff in ejectment may recover upon a deed obtained after the date of the demise laid in the petition; but, upon looking to the facts, it will appear that, while the deed was obtained after the date of the demise laid in the declaration, it was prior to the institution of the suits; the court saying in its opinion that there is nothing in the point that the demise laid in the petition is the 1st day of March, 1876, while the deed was made on the 27th day of April, 1876.

In Martin v. Parker, 26 Tex. 253, much relied upon by plaintiffs in error, the court, speaking of the outstanding title in that case, said: It would seem that it "was barred by the statute of limitations when set up by the intervenor; or, if not barred, it was extinguished by having been bought in by the plaintiff before the trial. It was not a present, subsisting, and operative title at that time, and could not, therefore, defeat a recovery by the plaintiff. The latter, having prima facie a good title at the time of instituting the suit, had a right to protect himself by buying in the outstanding title, even after issue joined"—citing the cases which we have already considered. That case seems to be authority for the position of plaintiffs in error, but it stands alone.

In Mexie v. Lewis, 87 Tex. 208, 22 S. W. 397, it is said: "It is laid down in this court as a general rule that the plaintiff in an action of trespass to try title must recover upon his title as it existed at the time of the institution of the suit; and that in order to avail himself of an after-acquired title, he

must amend so as to avail himself of it as a new cause of action." An exception has been recognized in a case in which the plaintiff when he brings his suit has the superior title as against the defendant, and subsequently buys an outstanding title for the protection of that which he formerly held. Martin v. Parker, 26 Tex. 254. This case does not fall within that exception. Nor, in our opinion, does it come within any other exception which has been recognized by this court.

Wilson v. Braden, 48 W. Va. 196, 36 S. E. 367, maintains the general proposition that "an outstanding title in a third person, in order to defeat the plaintiff's recovery in ejectment, must be a present, subsisting, legal title, not one barred by the statute of limitations, abandoned, or otherwise lost. It must be one which the party owning it could now assert. The burden is on the defendant to show the present validity of such title." But it is not authority for the proposition that it may be acquired by the plaintiff in ejectment after the institution of his suit, in order to mend a gap in his own title.

We are of opinion, therefore, that there was no error on the part of the circuit court in refusing to permit the record of the chancery suit of Price v. Rawley Iron & Coal Co. to be introduced in evidence in this case.

We think the modification made by the court in instruction No. 4, offered by plaintiffs in error, was clearly right, and that the law is correctly stated in Malone on Real Property Trials, p. 293, where it is said: "If several tenants in common, having a cause of action, one of whom is under disabilities and the others not, those under no disabilities will be barred by the statute, while the one under disabilities may recover. Each tenant in common has a right to sue and recover his interest. Therefore it is no excuse to say that a co-tenant was under disabilities."

We think that there was no error to the prejudice of plaintiffs in error in refusing instruction No. 5, even though it be conceded that it correctly propounded the law, for the court subsequently, at the instance of defendant in error, gave to the jury correct instructions upon the subject of adversary possession, very properly confining itself to the general principles of law controlling in such cases and leaving it to the jury, subject to the supervision of the court, to apply the principles to the facts in issue, rather than undertake to summarize those facts gathered from a voluminous record and present them to the jury, as was done in the instruction asked for, at the peril of omitting some fact which the evidence tended to prove, or of embracing some fact not sufficiently proved. This court has said in numerous cases that the refusal of an instruction, even though it correctly propounds the law, will not be ground for reversal if other instructions to the jury upon the same subject were sufficient to enable them correctly to apply the facts. The same principle obtains in other courts.

In Armstrong v. Morrill, 14 Wall. (U. S.) 120, 20 L. Ed. 765, it is said: "Where the instructions given were in all respects sufficient to dispose of the controversy, it is not error to refuse to give further instructions."

Instruction No. 6, offered by plaintiffs in error, was properly refused. The circuit court of Rockingham county had no jurisdiction over the land lying in West Virginia, and the forfeiture, under the law of that state, of so much of those parts of the original tracts of land as lay within its borders, could not affect defendant's title by adversary possession to lands lying within this commonwealth and within the jurisdiction of the circuit court of Rockingham county.

Nor were plaintiffs in error prejudiced by the refusal of the court to give instruction No. 7, for, if the facts upon which that instruction is predicated be true, then the plaintiffs were out of court; for the same title in the commonwealth which was sufficient to disrupt the continuity of defendant's adverse possession was equally efficacious to break the plaintiffs' chain of title. In other words, if the title was in the commonwealth at the institution of the suit, and was not restored to plaintiffs in error until the 28th of April, 1900, then upon the authorities considered with reference to the first assignment of error there could be no recovery, for, as was said by this court in Reusens v. Lawson, supra, "there is no reason why a defendant in an action of ejectment should not be permitted to rely upon an outstanding legal title in the commonwealth. The plaintiff must rely upon the strength of his own title; and, if it appear in the cause that the legal title is in another, whether that other be the defendant, the commonwealth, or some other person, it shows that the plaintiff has not the legal title, and it is therefore sufficient to defeat his recovery."

In support of this assignment, plaintiffs in error rely upon Armstrong v. Morrill, supra. In that case (which, by the way, went from West Virginia, and involved to some extent a construction of the laws of that state prior to 1861) the defendant relied upon adversary possession, and it appeared from the facts that, during a part of the period necessary to bar the plaintiff's action under this plea, the title had been forfeited to the state, and the court held that this broke the continuity of the adversary possession, and that the two disjointed parts could not be computed in order to maintain the plea; the court saying: "Continuity of possession is one of the essential requisites to constitute such adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession, the seisin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseisin, and it is equally well settled that if the continuity of possession is broken be

fore the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute a new adverse possession for the time limited must be taken for that purpose." But it also appears in that case that, before the institution of the suit, the plaintiff had redeemed the land which had theretofore been forfeited to the commonwealth, and his full fee-simple title had been restored to and was vested in him.

Upon the whole case, we are of opinion that the jury was correctly instructed, and, without discussing the evidence in detail, that the facts were sufficient—certainly when viewed as we are bound to view them as upon a demurrer to evidence—to sustain the verdict of the jury.

The judgment of the circuit court is therefore affirmed.

Affirmed.

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(107 Va. 602)

## DEATRICK'S ADM'R v. STATE LIFE INS. CO.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. WRIT OF ERROR—OBJECTIONS IN COURT BELOW—PLEADING—ISSUE JOINED.

Where a case was voluntarily tried throughout by both parties as though the pleadings had been perfected, plaintiff was estopped to claim on a writ of error that the judgment was unsustainable because no issue had been formally joined on defendant's pleas to the jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1056, 1057.]

2. PLEADING — PLEA IN ABATEMENT — DUPLICITY.

A plea to the jurisdiction, necessarily negativing every ground of jurisdiction enumerated in the statute, is not bad for duplicity, under the rule that a plea in abatement, pleading two or more distinct and sufficient defenses, either of which, if true, will necessitate a finding for the defendant tendering the plea, is duplicitous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 202.]

3. COURTS—JURISDICTION—PLEA—ABSENCE OF PROPERTY.

In an action against a foreign corporation, so much of a plea to the court's jurisdiction as alleged that defendant had no estate or debts due to it within the jurisdiction was immaterial, where there was no attempt to gain jurisdiction by attachment; the only way in which the existence of an estate or debts due the defendant could affect the question of jurisdiction being under the attachment laws.

4. SAME.

Code 1904, § 2959, providing for an attachment of property within the jurisdiction in an action against a nonresident, does not apply to a suit the object of which is not to attach particular property, but to acquire general jurisdiction of defendant, so as to authorize a personal judgment against it.

5. PLEADING — PLEA IN ABATEMENT — BETTER WRIT.

A plea in abatement to the jurisdiction is not objectionable for failure to give plaintiff a better writ by showing a more proper or sufficient jurisdiction in some other court, where the plea shows facts under which no court in the state has jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 214.]

6. CORPORATIONS — FOREIGN CORPORATIONS — ACTIONS.

A corporation may be sued on a transitory cause of action wherever it is doing business in such a manner or to such an extent as to warrant the inference that it is there present through its agents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2568.]

7. CONSTITUTIONAL LAW—PRIVILEGES OF CITIZENS—RIGHT TO SUE.

Where a citizen of a state is authorized to sue a foreign corporation therein, a nonresident is entitled to a similar privilege under Const. U. S. art. 4, § 2, providing that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 646.]

8. CORPORATIONS — FOREIGN CORPORATIONS — ACTIONS — PROCESS — SERVICE OUTSIDE COUNTY.

Since some of the grounds of jurisdiction enumerated by Code 1904, §§ 3214, 3215, must appear in order to authorize the issue of process for service in another county, where none of such grounds existed, process could not issue out of the circuit court of Frederick county to be served on a foreign insurance company's resident agent in Richmond, in a suit in which the insurance company was the sole defendant, on a policy on the life of a person who did not reside in Frederick county either at the time the policy was issued or at the date of his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2622.]

Error to Circuit Court, Frederick County.

Action by Parvin E. Deatrick's administrator against the State Life Insurance Company. From a judgment for defendant, plaintiff brings error. Affirmed.

Barton & Boyd, for plaintiff in error. R. M. Ward, for defendant in error.

KEITH, P. Parvin E. Deatrick, of Martinsburg, W. Va., took out a policy of insurance upon his life in the State Life Insurance Company, of Indianapolis, Ind. Some time after taking out this policy, he died in the city of Martinsburg, W. Va., on January 27, 1905. His estate was committed to J. William Taylor, sergeant of the city of Winchester, Va., who brought suit upon the policy of insurance and filed his declaration to the second February rules, 1906. To the same rules the defendant appeared and filed three pleas in abatement, to the first of which the plaintiff replied, the replication was sustained, and this plea passed out of the case.

In plea No. 2 the defendant craved oyer of the writ and the return of the officer thereon from which it appears that it was directed to the sheriff of the city of Richmond, and was served by his deputy upon Emmett Seaton, the statutory agent of the defendant company in the city of Richmond. Thereupon the defendant prayed judgment of said writ and the return thereon, because "it appears from the said writ and the return thereon that

the defendant is sued alone, and not with any person residing in the county of Frederick; that the writ is directed to the sergeant of the city of Richmond, Va., and was by said officer or his deputy served upon the agent of the defendant corporation within the said city; that at the time the writ was issued and since the defendant was and is a life insurance company, incorporated under the laws of the state of Indiana, and not a resident of the state of Virginia, and that its principal office was and is at Indianapolis, Ind., in which city its chief officer resides; and that plaintiff's decedent, Parvin E. Deatrick, did not reside in said county of Frederick at the date of the said policy of insurance, but that at the date of said policy, as well as at the date of his death, the said Parvin E. Deatrick resided in Martinsburg, in the county of Berkeley, and the state of West Virginia; that the defendant has no estate or debts due it within the jurisdiction of the court; and that no such affidavit and publication of process as is prescribed by section 3225 of the Code of Virginia has been made, and this the defendant is ready to verify. Whereof the defendant prays judgment whether this court can or will take any further cognizance of the action aforesaid, and prays judgment of the said writ and return thereon, and that the same may be quashed."

Plea No. 3, leaving out the formal parts, avers that the defendant "is a life insurance company duly incorporated under the laws of the state of Indiana, and that the said supposed cause of action did not, nor did any part thereof, arise in said county of Frederick, nor elsewhere within the state of Virginia, nor did the said plaintiff's decedent, Parvin E. Deatrick, reside in the said county of Frederick at the date of the said policy of insurance, nor at any time prior to or since said date; but that the said supposed cause of action, or some part thereof (if any such cause there be), did arise either within said city of Indianapolis, wherein said alleged contract of insurance was made and effected, or within the county of Berkeley, in the state of West Virginia, in which said county plaintiff's decedent, Parvin E. Deatrick, did reside at the time the alleged contract of insurance was made and effected, and wherein the said insured, Parvin E. Deatrick, resided at the time of his death, and in the court of which said county and state letters of administration upon the estate of said decedent were duly granted prior to the institution of this action, and wherein his personal representative, so appointed, qualified and has since resided, and that no court of the state of Virginia has jurisdiction over the said alleged cause of action; and this the defendant is ready to verify. Wherefore he prays judgment whether this court can or will take any further cognizance of the action aforesaid."

At the April term, 1906, the plaintiff, by its attorney, moved the court to reject pleas in abatement Nos. 2 and 3, and at the same term the following order was entered: "And the court, having heard the argument of counsel upon the motions of the plaintiff to reject pleas in abatement 2 and 3, doth deny said motions. Thereupon the plaintiff replied generally to pleas in abatement 2 and 3, and this case is continued until the next term of this court for trial of the issues upon the said two pleas. And the defendant moved the court to quash the writ and the return thereon, and the court, being of opinion that the same matters of law and fact are presented in the pleas in abatement, doth overrule said motion until the court passes upon said pleas."

And at the June term the following order was entered: "This day came again the parties by their attorneys, and neither party requiring a jury, but agreeing to submit all matters of law and fact to the court, and the court, having fully heard the evidence upon the issues made up at the April term, 1906, of this court, and on the motion to quash the writ, is of the opinion to sustain the pleas in abatement, and the motion to quash the writ in this case; and thereupon, for reasons stated in a written opinion made a part of this record, it is ordered that the said writ be quashed and the action of the plaintiff abated, and that he pay to the defendant its costs in this behalf sustained. To which ruling of the court the plaintiff excepted and tendered his bill of exceptions, and asks that the same be signed, sealed, and enrolled, which is accordingly done."

To this judgment a writ of error was obtained from this court.

The first error assigned is that no issue was joined upon the pleas; and, strictly speaking, this seems to be true. There was no formal joinder of issue, but it appears that the court, the plaintiff, and the defendant dealt with the case as though the pleadings had been perfected. The evidence was introduced, and the case argued by counsel, and considered by the court just as would have been done had the utmost formality in pleading been observed. It is certain, therefore, that the omission caused no injury to the plaintiff.

In Keator Lumber Co. v. Thompson, 144 U. S. 434, 12 Sup. Ct. 669, 36 L. Ed. 495, Mr. Justice Harlan, delivering the opinion of the court, said: "The objection that replications were not filed when the trial commenced, nor before judgment, with leave of the court, came too late after judgment was entered. The defendant was bound to know, when the court ordered the parties to proceed with the trial, that replications had not been filed to its first and third pleas. It should then have asked for a rule upon the plaintiff to file replications. Its failure to do so was equivalent to consenting that the trial, so far as the pleadings were concerned, might be commenced." The opinion cites with approval Kelsey v. Lamb, 21 Ill. 559, where the Su-

preme Court of Illinois said: "If the defendant had filed his plea, and the other party fails to reply within the time required by the rules of the court, he has a right to judgment by default against the plaintiff, but, until he obtains such default, the pleas cannot be considered as confessed by the plaintiff. It is the default which gives the right to consider and act upon the pleas as true. In this case no default was taken. When the parties submitted the case to trial by the court, without a jury by consent, it had the effect of submitting the case to trial on the pleadings, as if there were proper issues formed, and the court will hear evidence under all the pleas presenting a legal defense precisely as if the allegations of such pleas had been formally traversed. This is the fair and reasonable construction to be given to such agreements. But it is otherwise where the party is compelled to proceed to trial without the issues being formed in the case. Then the act is not voluntary, and no such intendment can be made." "The defendant here," continues Judge Harlan, "was compelled to proceed with the trial, but no objection was made by it to a trial because the issues were not fully made up."

In Bartley v. McKinney, 28 Grat. 750, Judge Moncure, delivered the unanimous opinion of the court, and we quote from the syllabus of that case as follows: "In an action of unlawful detainer, the defendant appears; but, though the case is continued for years, he does not file any plea. The cause is proceeded in precisely as if there was a plea filed—the jury are sworn to try the issue joined, and the defendant makes full defense. There having been a verdict and judgment in favor of the plaintiff, the defendant cannot set up the want of the plea and issue thereon in the appellate court." Judge Moncure, in the course of his opinion, quotes with approval a passage from the opinion by Judge Staples in Southside R. Co. v. Daniel, 20 Grat. 344, in which he says: "'The spirit of the modern cases, and the disposition manifested by the courts to disregard mere technical objections, unless there be something omitted so essential to the action or defense that judgment according to law and the very right of the case cannot be given.'" "This," says Judge Moncure, "strongly applies to this case. But, without considering that question, we are of opinion that there is no error in the judgment on the ground taken in the first assignment of error." "To permit a party to make such an objection for the first time in an appellate court," Judge Moncure further declares, "would be to allow him to take advantage of his own wrong, for had he made it in the court below, while the cause was pending there, it might, and no doubt would, at once have been removed. In fact, the defendant has sustained no injury by what has been done in the court below in that respect; and the case was tried precisely in the same manner and with the same effect as if the plea of not guilty had been put in, and issue thereon had been joined in the case."

In Briggs v. Cook, 99 Va. 273, 38 S. E. 148, which was a proceeding upon a motion, issue was joined upon the plea of nonassumpsit, but no replication was filed to a special plea of set-off under section 3299, Code 1887 [Va. Code 1904, p. 1740], this court said that "the statute of jeofails does not apply to the omission to file such replication, and the failure to reply entitles the defendant to nominal damages, but the defendant waives the irregularity by going to trial without it." And in the opinion it is said that "the defendant should have asked for a rule upon the plaintiff to file replications. Its failure to do so was equivalent to consenting that the trial, so far as the pleadings were concerned, might be commenced."

Preston v. Salem Improvement Co., 91 Va. 583, 22 S. E. 486, was a proceeding by motion under section 3211 of the Code of 1887 [Va. Code 1904, p. 1686]. When the case was called in court, the defendant declined to plead or tender any issue of fact, claiming the right, as it was summary proceeding, to go to trial without any formal pleadings, and to produce orally in the progress of the trial any defenses he might have. The court declined to allow a jury to be sworn until and unless some issue of fact was joined. The parties thereupon submitted the matters of law and fact arising in the case to the determination and judgment of the court, but without waiving the defendant's exception to the refusal of the court to allow a jury. The judgment was for the plaintiff, and the defendant obtained a writ of error from this court, and undertook to maintain the proposition that, having refused to plead when called upon to do so, he was entitled to a trial by jury without pleas; and thus made his own delinquency a ground for asking a reversal of the case. In the course of its opinion the court cites quite a number of authorities to show that a judgment given upon a verdict cannot be sustained when no issue has been joined, and the judgment of the circuit court was affirmed.

In Norfolk & Western Ry. Co. v. Coffey, 104 Va. 665, 51 S. E. 729, 52 S. E. 367, the court held that in an action at law the statute of jeofails does not cure the nonjoinder, or want of issue altogether, and no verdict or judgment can properly be rendered therein; but from the opinion in that case it appears that "both court and counsel were taken by surprise at the reliance of the defendant on the statute of limitations." After not guilty was pleaded and the issue upon it was regularly made, the defendant in vacation filed in the clerk's office the plea of the statute of limitations, upon which no issue was joined; the plaintiff and the court being, as we have seen, in ignorance of its existence. It cannot be doubted that in this case no element of estoppel existed, for there can be no estoppel without knowledge. And so, too,

of other cases in which this question has been raised in this court, and which will not be mentioned because it would needlessly protract this opinion; but we believe that, in every case in which the want of issue has been adjudged a ground for reversal, the facts upon an examination will be found to be wholly different from the case before us, and that in every case in which the parties were advised of the state of the pleadings and were permitted to present evidence in support of their respective contentions as though issues had been formally joined they have been held to be estopped from making the objection after verdict rendered, because in such case, to repeat the language of Bartley v. McKinney, supra, "the defendant has sustained no injury by what has been done by the court below in that respect."

Objection is taken to the pleas on the score of duplicity. It is true that a plea in abatement, which sets up two or more distinct and sufficient defenses, either of which, if true, would necessitate a finding in favor of the defendant tendering the plea, is bad for duplicity; but a plea to jurisdiction which fails to negative the several grounds of jurisdiction enumerated in the statute would be bad for insufficiency. To constitute a sufficient plea, every ground of jurisdiction enumerated in the statute must be negatived in the plea.

Coming, then, to consider the pleas upon their merits, we concur with the learned judge of the circuit court in the view taken by him, that process can only issue to another county when some jurisdictional fact exists under section 3214, Code 1904. Now, in the case before us, adopting the analysis of the circuit court, it appears (1) that the insurance company was the sole defendant; and (2) that the insured did not reside in the county of Frederick at the time of his death, nor at the date of the policy of insurance, nor, indeed, at any period of his existence, to which may be added that the defendant corporation is a nonresident; that its principal office is in the state of Indiana; and that its chief officer resides in the city of Indianapolis.

The pleas aver that the defendant company has no estate or debts due it within the jurisdiction of the court; and it is assigned as error in the judgment that there was no proof of this averment. The only way in which the existence of estate or debts due to the defendant corporation could affect the question of jurisdiction would be under the attachment laws, by virtue of which jurisdiction over the particular subject, but not over the person of the defendant, could be acquired.

Section 2959, Code 1904, provides, in part, that if the defendant or one of the defendants is a foreign corporation or is not a resident of this state, and has estate or debts owing to it within the county or corporation in which the action is, or is sued with a defendant residing therein, or that the defendant, being a nonresident of this state, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or corporation in which the action is, upon the institution of any action at law accompanied by a proper affidavit, as prescribed in the preceding part of the section, an attachment shall issue. But in the case before us the proceeding is manifestly not under the attachment law. The object of the suit was not to attach particular property, but to acquire general jurisdiction over the defendant, so as to authorize a personal judgment against it.

In Guarantee Company v. National Bank, 95 Va. 487, 28 S. E. 912, it is said: "The Guarantee Company being a foreign corporation, the circuit court of the city of Lynchburg could acquire jurisdiction of the suit against it only in some one of three ways: By the cause of action, or some part thereof, having arisen in the said city; by being sued with another who was a resident thereof; or by having estate or debts owing to it within the said city"—none of which conditions exist in this case.

A further objection to the pleas is that they do not give the plaintiff a better writ; and it is true, as a general rule, that a plea in abatement must show a more proper or sufficient jurisdiction in some other court of the state wherein the action is brought. But this requirement cannot avail where the plea shows a condition of facts under which no court in the state has jurisdiction.

We come, now, to the principal contention of plaintiff in error, as set forth in his petition: "The chief defense set up by the pleas in abatement is that no court in Virginia can entertain jurisdiction of a suit by a nonresident plaintiff on a contract not made in Virginia against a nonresident corporation, except by attachment of the nonresident's property, even though, as in this case, the defendant be a nonresident insurance company having an agent in this state on whom under the statute, process could be served. The claim of the plaintiff for jurisdiction, upon which he based his motion to reject the pleas in abatement, rests upon the ground that because no statute of Virginia gives to any particular court in Virginia jurisdiction over a suit against a nonresident corporation in favor of a nonresident plaintiff on a contract made out of the state that, therefore, under the provisions of the Constitution of the United States (article 4, § 2), coupled with the statute requiring such nonresident insurance company as the defendant to have agents within the state upon whom process can be served, that any court of general jurisdiction in Virginia, from which process could be issued and be sent to be served on the statutory agent of such a corporation, has jurisdiction of such a suit."

In support of this proposition Reeves v. Southern Ry. Co., 121 Ga. 561, 49 S. E. 674

copiously annotated in 70 L. R. A. 513, is relied upon. That was an action brought in the city court of Atlanta by a plaintiff (whose residence does not appear in the case as reported) against a foreign railroad corporation doing business in the city of Atlanta. The defendant was duly served with process, according to the laws of the state of Georgia. The cause of action was a tort to property in the state of Alabama, consisting of injury to a horse; and the trial court had decided in favor of the railroad company, upon the authority of Bawknight v. Liverpool, L. & G. Ins. Co., 55 Ga. 194. That case was reviewed and overruled; the court holding that "a foreign corporation doing business in the state of Georgia and having agents located therein for this purpose may be sued and served in the same manner as domestic corporations upon any transitory cause of action, whether originating in this state or otherwise, and it is immaterial whether the plaintiff be a nonresident or a resident of this state, provided the enforcement of the cause of action would not be contrary to the laws and policy of this state." In the course of its opinion, the court said: "The fact that a corporation has no existence except in legal contemplation gave rise to the conception that its existence could not be legally recognized outside of the territorial jurisdiction of the lawmaking power which created it, and that, therefore, it was impossible for a corporation to migrate beyond the bounds of its creator. This conception resulted in the court's holding that the corporation could not be sued in a jurisdiction foreign to that which gave it existence. While, under this view, as a matter of theory the corporation did not migrate, yet as a matter of fact its officers and agents did; and contracts were made in its name, and wrongs committed by its officers and agents, in territory far remote from that in which it was supposed to have its only legal existence. Great hardship and inconvenience resulted oftentimes from the application of this rule, which had the effect of compelling those who sought redress for breaches of contract and other legal wrongs against the corporation to bring their actions in the courts of the jurisdiction creating the corporation; the expenses of the remedy in many cases amounting to more than what would have been the fruits of recovery. The recognition of the hardship resulting from this rule brought about a modification of the rule to the extent that, where a foreign corporation located an agent and actually transacted business in a foreign jurisdiction, it so far acquired a residence in that jurisdiction as to make it amenable to the processes of the courts thereof on all causes of action originating within that jurisdiction. The rule was then further modified to the extent that, where the corporation had an agent and was doing business in a foreign jurisdiction, it might be sued upon any transitory cause of action by a citizen of the state in which the corporation was thus doing business. And in this country it followed from this rule that, if a resident was allowed to bring this suit, any citizen of the United States would, under the Constitution of the United States, have a similar right to bring suit.

In Green v. C., B. & Q. Ry. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, it was held that: "While in case of diverse citizenship the suit may be brought in the circuit court for the district of the residence of either party, there must be service within the district; and, if the defendant is a nonresident corporation, service can only be made upon it if it is doing business in that district in such manner, and to such an extent, as to warrant the inference that it is present there through its agent. A railroad company which has no tracks within the district is not doing business therein, in the sense that liability for service is incurred because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic."

With the doctrine of these cases we concur—that a corporation may be sued upon a transitory cause of action wherever it is doing business in such a manner and to such an extent as to warrant the inference that, through its agents, it is there present. We further agree (though it is not necessary, perhaps, to decide it in this case) that by virtue of the Constitution of the United States (article 4, § 2) any citizen of the United States would have a similar right to bring suit.

It is to be observed that in Reeves v. Southern Ry. Co., supra, process was served upon the defendant in accordance with the laws of the state of Georgia, and the service was upon the agent in the district in which the corporation of which he was the agent was doing business, and doing business of such a character as to warrant the inference that through its agent it was there present.

It seems that service upon the statutory agent of a foreign insurance company is valid only so long as such company continues to do business in this state, and that, when such a company ceases to do business in this state, it is no longer amenable to the jurisdiction of its courts. See Millan v. Mut. Reserve Fund L. Ass'n (C. C.) 103 Fed. 764, and numerous cases there cited. But it is unnecessary to decide that point in this case, for, if all that is claimed by plaintiff in error with respect to the validity of the service upon the statutory agent be true, yet, where none of the grounds of jurisdiction enumerated in sections 3214, 3215, Code 1904, are present, the suit must be brought in the city of Richmond, where the statutory agent resides, and process cannot be sent, as was done in this case, from the city of Winchester to be served in the city of Richmond, where the insurance company is the sole

defendant, and is not sued along with a resident defendant, or upon a policy of insurance issued upon the life of a person residing, either at the date of his death or at the date of the policy, in the county of Frederick. See Warren v. Saunders, 27 Grat. 259.

We are of opinion that the judgment should be affirmed.

Affirmed.

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(62 W. Va. 466)

## STATE v. KIDWELL.

(Supreme Court of Appeals of West Virginia. Nov. 8, 1907.)

1. HOMICIDE—DEFENSES—DRUNKENNESS.

A person who, being sane and responsible for his acts, voluntarily becomes intoxicated, with or without a preconceived design to commit murder or other crime, and while intoxicated, though it be to such a degree as to render him wholly oblivious to his acts or conduct, commits a homicide, or does any other act which, if done by a person capable of distinguishing between right and wrong, is criminal, if not excused or justified in some way, is held responsible by the law for his act, notwithstanding his mental condition at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 45.]

2. SAME — INSANITY INDUCED BY INTOXICATION.

Insanity, though superinduced by long continued indulgence in intemperance or intoxication and known as delirium tremens or mania a potu, renders the person so afflicted irresponsible for his acts, if it be of such character as to deprive him of the power to distinguish between right and wrong, whether he be under the influence of liquor at the time of the commission of the act or not; but, to do so, his affliction must be settled or fixed insanity, not a mere fit of drunkenness. A person, not previously laboring under such disease or affliction, who voluntarily becomes intoxicated to such an extent and for such a period of time as to cause unconsciousness of his acts and affliction with delusions and hallucinations, is not irresponsible under the law for the acts done by him while in such mental condition.

3. CRIMINAL LAW — TRIAL — REQUESTS TO CHARGE—APPLICABILITY TO EVIDENCE.

The accused on the trial of an indictment for murder is not entitled to an instruction propounding the inquiry as to whether he was insane at the time of the killing, if the evidence adduced by him to sustain such defense lacks tendency to show mental unsoundness antedating the drunken spree, in the course of which the killing was done, and also to show that intoxication had ceased, and settled insanity ensued, as a result of habitual indulgence in intoxication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1982–1984.]

4. SAME — CIRCUMSTANTIAL EVIDENCE — WRIT OF ERROR—VERDICT—REVIEW.

The rule, defining the character and prescribing the quantum of circumstantial evidence necessary to a conviction, saying that the facts and circumstances shown must be consistent with the hypothesis of guilt, inconsistent with every other hypothesis and conclusive in their nature and tendency, operates upon the facts found by the jury, not on mere items of evidence adduced, and a verdict will not be set aside as based on insufficient evidence, or as being contrary to the evidence, when the evidence relating to the facts found by the jury was conflicting and involved the credibility of witnesses, and the court can see that the jury may have found from the evidence facts sufficient to bring the case within the rule just stated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1259.]

(Syllabus by the Court.)

Error from Circuit Court, Raleigh County.

James Kidwell was convicted of murder, and he brings error. Affirmed.

Matheny & Brown, for plaintiff in error.

C. W. May, Atty. Gen., for the State.

POFFENBARGER, J. James Kidwell, under sentence of imprisonment for a period of 10 years for the murder of his wife, pronounced by the criminal court of Raleigh county, complains, among other things, of the action of the court in refusing to give certain instructions and to set aside the verdict of the jury because of its alleged error in refusing them.

Testimony having been introduced tending to show that for a period of several days, namely, from about the 15th or 18th day of January, 1907, until the 1st day of February, in said year, when the homicide occurred, he and his wife, Annie Kidwell, the deceased, had been drinking heavily and remained in a state of gross intoxication, so that the prisoner had had delusions and hallucinations, that both had for a long time indulged in periodical drunken sprees of this sort, which occurred about three times a year, and that the prisoner on this particular occasion did not know, after the 6th or 8th day of the spree, what he was doing, except on one or two occasions—the following instructions were asked for by the prisoner and refused:

"The court instructs the jury that if they believe from the evidence in this case that the prisoner at the time of the death of Annie Kidwell was suffering from a diseased and disordered condition of the mind to the extent that his will power and reasoning faculties were, at the time, dethroned, and that as a result of said malady he was, at the time, unable and incapable of understanding the necessary consequences of his acts, and at the time was unable to distinguish between right and wrong, then under such circumstances he would be incapable of committing crime, even though such disorder of the mind was caused from drunkenness, unless it is further shown that said prisoner rendered himself into a state of voluntary drunkenness for the purpose of carrying into effect a preconceived design to commit a felony."

"No. 2A. The court instructs the jury that, in the case now on trial, the prisoner would not be responsible for the murder of Annie Kidwell, even though they should find that he inflicted the wound from which she died, if they should further find and believe from the evidence that, at the time of the commission of the act, the said prisoner was suffering from a disordered condition of the mind, which for the time being dethroned his will power and rendered him incapable of

knowing right from wrong, even though such disordered condition of the mind was brought about by drunkenness, unless it has been made to appear that such disorder of the mind was voluntarily brought about by said prisoner for the purpose of stimulating him to the commission of a felony.

"No. 3A. The court instructs the jury that no crime can be committed, under any circumstances, where there is a complete loss of reason and will power."

That drunkenness, however gross or long continued, does not excuse crime, was substantially declared by this court in State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799. It did not, however, preclude the defense of insanity, superinduced by habitual and long continued intoxication. An instruction, approved by the court, and based upon Drew's Case, 5 Mason, 28, Fed. Cas. No. 14,993, in which Judge Story delivered the instructions, fully set out in the report of the case, enunciated that doctrine. Judge Story said: "The question made at the bar is whether insanity whose remote cause is habitual drunkenness is or is not an excuse in a court of law for a homicide committed by the party while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of the opinion that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime because the party has not the possession of that reason which includes responsibility. An exception is when the crime is committed by a party while in a fit of intoxication; the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct to shelter himself from the legal consequences of such crime. But the crime must take place and be the immediate result of the fit of intoxication and while it lasts; and not, as in this case, a remote consequence superinduced by the antecedent exhaustion of the party arising from gross and habitual drunkenness." It seems to be well established that insanity will excuse crime, though superinduced by habitual drunkenness and only temporary in the sense that it is curable or will naturally pass off; but the distinction between a fit of drunkenness, sometimes called "delirium tremens," and temporary insanity, a disease resulting from violent dissipation and indulgence in liquor, technically called "delirium tremens," or "mania a potu," is strongly marked by the authorities everywhere. It is noticed in Drew's Case, as may be observed in the quotation just given. In United States v. McGlue, 1 Curt. C. C. (U. S.) 1, Fed. Cas. No. 15,679, Judge Curtis, afterwards a distinguished member of the Supreme Court of the United States, said: "It is an inquiry of great importance in this case, and, in the actual state of the evidence, I think, one of no small difficulty, whether the homicide was committed while the prisoner was suffering under that marked and settled disease of delirium tremens, or in a fit of drunken madness. My instruction to you is that if the prisoner, while sane and responsible, made himself intoxicated, and while intoxicated committed a murder by reason of insanity, which was one of the consequences of that intoxication and one of the attendants of that state, then he is responsible in point of law, and must be punished. This is as clearly the law of the land as the other rule, which exempts from punishment acts done under delirium tremens." Concluding, he said: "For the charge, then, assumes this form: That the prisoner committed a murder, for which, though insane, he is responsible, because his insanity was produced by, and accompanied, a state of intoxication." In harmony with this is the decision in Beck v. State, 76 Ga. 452, holding as follows: "If the drunkenness produced a temporary frenzy, madness, or unsoundness of mind in the accused, he would not be excused or held irresponsible for the act done by him while laboring under such temporary insanity, madness, or unsoundness of mind thus produced; it being his own voluntary act. But if the mania, insanity, or unsoundness of mind, though produced by drunkenness, be permanent and fixed, so as to destroy all knowledge of right and wrong, then the person thus laboring under these infirmities would not be responsible." In People v. Travers, 88 Cal. 233, 26 Pac. 88, the court said: "As to the instruction asked by the appellant on the subject of delirium tremens, etc., it is sufficient to say that settled insanity produced by a long-continued intoxication affects responsibility in the same way as insanity produced by any other cause. But it must be 'settled insanity,' and not merely a temporary mental condition produced by recent use of intoxicating liquor." In State v. Riley, 100 Mo. 493, 13 S. W. 1063, the same principle is stated in the following terms: "Whilst drunkenness is no defense, and does not mitigate the offense, and whilst temporary insanity immediately resulting from voluntary intoxication does not discharge any one of his responsibility, on the other hand, long-continued habits of intemperance, producing permanent mental disease amounting to insanity, or as the instruction says, so weakened or impaired the mind that one committing an offense has not mind enough at the time to know right from wrong, relieves the party, we apprehend, of responsibility under the law. Insanity of this sort, and thus produced, is the same in law as insanity arising from other causes." Additional authorities to the same general effect are O'Brien v. People, 48 Barb. 274; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; Cluck v. State, 40 Ind. 263; Fisher v. State, 64 Ind. 435. A hasty examination of Bailey v. State, 26 Ind. 422, might create the impression that it states a different rule. The syllabus says: "Where the defendant's mind is so far destroyed by a long-continued habit of drunkenness as to render him mentally incompetent intentionally and knowingly to commit the

larceny, he should be acquitted, although he was intoxicated at the time he took the property." This, however, is predicated upon the theory that the evidence tended to show insanity, on the part of the prisoner, before the commission, while intoxicated, of the act for which he was prosecuted. This would constitute an exception to the general rule that the accused cannot be held guiltless if intoxicated at the time the act was done. The whole doctrine proceeds upon the presumption of sanity in all men until the contrary is proven. No sane man can be excused for an act done while intoxicated, however gross the intoxication may be. No matter that he has fits and is wholly unconscious of what he is doing, he is responsible for his acts, even though he be entirely oblivious of his conduct and utterly unable to distinguish between right and wrong; and the common law made no exception when intemperance resulted in permanent insanity. "The third sort of madness is that which is dementia affectata, namely, drunkenness. This vice doth deprive a man of his reason, and puts many men into a perfect, but temporary frenzy; but by the laws of England such a person shall have no privilege by his voluntary contracted madness, but shall have the same judgment, as if he were in his right senses." 1 Hale, P. C. 32. This has been modified by the modern decisions to the extent above indicated, namely, that, when drunkenness produces disease by which reason is dethroned or the will so impaired that the victim is no longer able to distinguish between right and wrong, the law holds him guiltless as in the case of insanity arising from any other cause.

There is a further qualification of the doctrine, namely, that if a sane man, not having voluntarily made himself drunk for the purpose of committing crime, does, while in a state of such gross intoxication as to render him incapable of deliberation, commit a homicide, he is guilty of no higher offense than murder in the second degree. State v. Robinson. In view of these principles, the Indiana decision above mentioned is no departure from the settled law. The presumption of sanity may be overcome and established prior to the time of the commission of the alleged offense, and the drunkenness of an insane man would become immaterial. We do not perceive any departure from, or qualification of, these principles in State v. Kraemer, 49 La. Ann. 766, 22 South. 254, 62 Am. St. Rep. 664, which holds that: "One who was laboring under delirium tremens at the time of his commission of a criminal act, so that he did not know or realize what he was doing, is not excused, unless such delirium tremens antedated the fit of drunkenness during which such act was committed." It must be apparent from these settled principles of law relating to the subject that the evidence adduced in support of the defense of insanity wholly fails to bring the case within them. None of it tends to show any mental weakness or insanity on the part of the prisoner between his periods of drunkenness. It only shows that, while drunk, he was subject to delusions and hallucinations. That state of mind was nothing more than what the courts term a fit of intoxication, not amounting to settled insanity or mania a potu, as it is defined by the law. He was under the influence of liquor at the time of the homicide. He had not ceased drinking and subjected himself to the terrible craving for liquor which is said to afflict those who have been on protracted debauches and produce delirium. There was no evidence, as in Drew's Case, that the prisoner fancied himself pursued and his life imperiled, and, if there were, the presumption would be that his condition was due to drunkenness, not disease, for he was still drunk.

Instructions given for the state, conforming strictly to the principles announced in State v. Robinson, are complained of, under the impression and upon the theory that the state of the evidence adduced here, respecting intoxication, differs so widely from that of the evidence in State v. Robinson that the instructions should have been varied to suit the altered condition. We have no evidence tending to show voluntary drunkenness produced for the purpose of carrying out a preconceived intent and design to commit murder, and no instruction presenting that theory was given. In other respects the evidence is substantially of the same character as that given in the case from the opinion in which the instructions were taken.

A further assignment of error is the failure of the court to set aside the verdict as being contrary to the law and the evidence. The only theory inconsistent with the guilt of the defendant is that of suicide. The death of Annie Kidwell by violence, at the hands of some human being, is fully proven, and not denied. Whether the wounds of which she died were self-inflicted or were given by the prisoner are the only issues of fact. There is no basis in the evidence for the view that any third person inflicted them. Aside from the possibility or probability of self-destruction, the question with which the jury had to deal was the connection of the prisoner with the killing. The evidence was wholly circumstantial, there having been no eyewitness to it, unless the prisoner, who denies the killing, did it. The homicide occurred between 12 and 1 o'clock of the 1st day of February, 1907. There was direct and positive evidence to the effect that on the night of the preceding day the deceased ran to the house of a near neighbor, apparently in great terror, and knocked for admission, and was almost immediately followed by the prisoner, who inquired if his wife was in the house, and was told that she was and had said he had threatened to kill her, to which he replied, "She called me bad names, and I am not going to take it;" and then left. The deceased remained at

that house over night, and the prisoner appeared in the morning, and, after some conversation between them, which the witnesses did not hear, they both went home; but later in the morning the deceased sought refuge again at the neighboring house, pursued by the accused, and shut herself up in an outhouse, into which he attempted to force his way. She was induced, however, to come out by his convincing her that he was not armed, and then went home with him. Later in the day the accused went to the store of the company for which he had been working, where he obtained 50 cents, and then crossed the river to a village called Prince, where he obtained some liquor. In his absence the deceased frequently came to the door, and sometimes out on the porch, looking anxiously toward the river, apparently for the absent husband. On his return he entered the house through the kitchen, and, in a few minutes afterwards, emerged from the front thereof and communicated to a child of a neighbor the fact that his wife had been killed. Later he gave the information to others, and accused a young neighbor of the crime, of whose guilt there is not a particle of evidence. About 5 o'clock in the evening he was met by J. H. Guinn, a justice of the peace, just below Prince, on the opposite of the river from Royal, the village in which he lived and in which the homicide occurred, seeking an officer to arrest the man who he said had killed his wife. Guinn searched him, and found in his pocket a bloody razor, and asked him what he was doing with it, to which he replied that it was the razor with which his wife's throat had been cut. The blood had dried on it, sticking the blade to the handle, so that it was difficult to open it. In explanation of his possession of this weapon, he says that, on entering his home, he found his wife lying on the floor with her throat cut, and, after placing a pillow under her head and taking possession of the razor, he came out of the house by the front door, the knob of which was bloody, and went in search of help. Some blood was found on his hands and clothing. The evidence relied upon as tending to prove suicide is that the wound seemed to have been made from left to right, it being deeper on the left than on the right side and high up under the chin, indicating self-infliction, when viewed in connection with the proof that the deceased was right-handed and the accused left-handed, and that on three previous occasions the deceased, while under the influence of liquor, had threatened self-destruction, once by piercing her heart with a hat pin, again by drowning herself, and last by shooting herself with a pistol, all of which threats she had attempted to execute. Some of the criminating evidence was contradicted, but the conflict thus produced was a matter for jury, not court, disposition.

While the law prescribes certain rules for the guidance of juries in dealing with the evidence, it accords to them full and unrestricted power to determine what facts are proven and what not proven, when there is substantial evidence tending to establish them, or the evidence pro and con is conflicting, and is not controlled by some fact or circumstance so clearly and fully established as to leave no possible doubt of its existence, and of such character as makes it necessarily rule the whole case. The credibility of witnesses is for jury determination, and no other, when any link or fact depends upon that question. Fulton v. Crosby & Beckley Co., 57 W. Va. 91, 49 S. E. 1012; State v. Flanagan, 26 W. Va. 116; State v. Baker, 33 W. Va. 319, 10 S. E. 639. Here the evidence is circumstantial, and the guilt of the accused arises by inference, it is true, but that inference comes from the facts found by the jury, and what they were the court cannot know with any degree of certainty. Much of the prisoner's testimony, conflicting with that of the state, may have been cast aside by the jury as false and worthless, and no doubt was. Thus it becomes manifest that the essential facts and circumstances found, as proven by the evidence, may have been perfectly consistent with the hypothesis of guilt, inconsistent with every other, conclusive in their nature and tendency, and therefore such as to warrant and call for a verdict of guilty in strict conformity with the rule, defining the character and prescribing the quantum of circumstantial evidence necessary to conviction. There may have been no strong motive for the commission of the crime, but there was the element of drunkenness, accounting for the absence of deliberation and motive, and yet not relieving from responsibility. Though the couple may have been perfectly devoted to each other, as stated by the accused, he may have killed her in his drunken fit. The jury may have found that he nevertheless pursued her to the neighboring house in anger and resentment of some fancied injury or insult. The deadly weapon was found in his possession, and he had falsely accused another person of the murder. Whether these were incriminating circumstances depends upon the findings of the jury concerning the mental condition of the accused at the time, and many witnesses say he appeared to be perfectly sane and rational. The rule invoked against the verdict operates on the facts found, not on the mere evidence adduced, and as the court cannot know what facts were, in the opinion of the jury, proven and what not, it is obviously impossible to disturb the verdict on the theory that the circumstances were not inconsistent with the hypothesis of suicide.

Seeing no error in the judgment, we affirm it.

(62 W. Va. 512)

## JOSEPH SPEIDEL GROCERY CO. et al. v. M. E. STARK & CO. et al.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

1. LANDLORD AND TENANT — LEASE — SALE — RECORD.

A bill of sale or assignment of a lease of real estate, giving an estate therein for a term of three years, is not required to be recorded, in order to give title as against creditors of the vendor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 76–79.]

2. SAME — REAL OR PERSONAL PROPERTY — LEASE.

Such term is personal property, and, as regards such creditors, is governed by the rules of law relating to other kinds of personal property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 215.]

3. FRAUDULENT CONVEYANCES — SALE OF LEASE.

Possession of such a lease by the vendor, after a sale thereof, raises a legal presumption that the sale is fraudulent as to his creditors, and casts upon the vendee the burden of proving the fairness and good faith of the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 817–819.]

4. SAME—EVIDENCE.

To establish his title in such case against the creditors, the vendee must prove by sufficient evidence that the sale was for a fair and valuable consideration, and that the vendor did not continue to have an interest in the property by some secret understanding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 796–805.]

5. SAME—CONSIDERATION.

The consideration of such a sale may be an antecedent debt; but the vendee, to repel the presumption of fraud so raised against him, must clearly and fully prove the debt and the amount thereof, or the payment of the consideration in money or other thing, if it be other than an antecedent debt. Mere proof of admission by the vendor of the antecedent indebtedness alleged as the consideration is not sufficient as against his creditors.

6. SAME—BURDEN OF PROOF.

A deed of trust, duly executed by the vendee of a lease, possession whereof is retained by the vendor, conveying the same to a trustee to secure a debt, and duly recorded, is, as against the creditors of the vendor in possession, prima facie valid, and the burden is upon them, in a suit to set it aside as fraudulent, to prove that the trust deed creditor had notice of the fraudulent intent of the vendee out of possession, the grantor in the deed of trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 796–815.]

(Syllabus by the Court.)

Appeal from Circuit Court, Tyler County.

Bill by the Joseph Speidel Grocery Company and others against M. E. Stark & Co. and others. From the decree, defendants Atwood and Appel appeal. Affirmed in part, and reversed in part.

F. L. Blackmarr, for appellants. M. D. Hanes, for appellees.

POFFENBARGER, J. Assigning as grounds of error the setting aside of a sale of a lease and a deed of trust on the ground of fraud, M. J. Atwood and Ed Appel have appealed from a decree of the circuit court of Tyler county in favor of the Joseph Speidel Grocery Company. On August 8, 1899, Mrs. M. E. Stark took from Martha J. Wells a three-year lease on a certain town lot, situate in a village called "Garry Owen," adjoining the city of Sistersville, agreeing to pay, as annual rent therefor, the sum of $20, and erected thereon a two-story frame building, a baker's oven, a stable, and other outbuildings. In said building she resided and carried on a grocery and bakery business, in which her sister, Mrs. Atwood, the appellant, was a partner. At this time Fred Appel, a young man, clerked for them, and later he married the daughter of Mrs. Stark. Mrs. Atwood retired from the copartnership, and Fred Appel succeeded her. By a writing under seal, and dated December 24, 1900, Mrs. Stark, in consideration of $1,600, the receipt whereof was acknowledged, sold, assigned, and transferred the lease to Mrs. Atwood. On the 28th day of December, 1900, Mrs. Atwood executed a deed of trust whereby she conveyed the lease to Fred Appel, trustee, to secure to Edward Appel, his brother, the payment of a negotiable promissory note for the sum of $300, bearing the same date as the trust deed. Mrs. Stark and Fred Appel continued the grocery and bakery business on the premises, in the firm name of M. E. Stark & Co., agreeing to pay Mrs. Atwood rent at the rate of $45 per month. In the month of September, 1902, more than a year and a half after the retirement of Mrs. Atwood from the firm and her purchase of the lease and execution of the deed of trust, the mercantile firm was overwhelmed with financial trouble, owing many debts it could not pay, and was threatened with many actions, if not, in some cases, already sued, when Mrs. Atwood, claiming unpaid rent amounting to $540, sued out and caused to be levied on the stock of goods a distress warrant. Thereupon this suit in equity was instituted by the Joseph Speidel Grocery Company, a creditor of M. E. Stark & Co., in aid of an action of assumpsit, with an attachment which had been levied upon the stock of goods. The bill alleged fraud and collusion among the parties to the mercantile firm, Mrs. Atwood and Edward Appel, the trust creditor, to hinder and delay the creditors of the firm and prevent the collection of their debts, denied that there was any rent due Mrs. Atwood, and prayed an injunction restraining further proceedings under the distress warrant and administration of the funds by the court. The injunction was granted, and subsequently, on the petition of the plaintiff, a special receiver was appointed to take charge of the property and collect the debts due the firm. Afterwards an amended bill was filed attacking the sale of the lease to Mrs. Atwood and the deed of trust in favor of Edward Appel as fraudulent. Full defense to all the allegations of the bills was made in the several answers fil-

ed by the defendants. They denied all fraud and collusion, and averred good faith in all the transactions and proceedings against which relief was sought by the plaintiff. The stock of goods and other property claimed by M. E. Stark & Co. were sold for $595 by the constable, by virtue of his levy under the distress warrant, Ed Appel becoming the purchaser; but in obedience to the injunction the officer held the fund subject to the order of the court. He was appointed special receiver, and sold the buildings on the lease under an order of the court for $500. On final hearing the court adjudged the assignment of the lease and the deed of trust fraudulent and decreed the funds to the creditors of M. E. Stark & Co., giving preference to the plaintiff, whose claim then amounted, with interest, to $1,040.47; many others having come into the suit by petition, so that the entire fund was taken by them.

The record discloses no evidence of any indebtedness at the time of the sale of the lease and execution of the deed of trust, nor can it be said that the assignment or transfer was voluntary, since that is negatived by positive testimony to the effect that it was made in consideration of indebtedness due from Mrs. Stark to Mrs. Atwood. All the claims presented against the firm in the bill and petitions seem to have accrued long after the assignment was made. The plaintiff does not show when its claim was acquired; but Fred Appel's testimony, not contradicted, shows that it was for goods sold in June, July, and August, 1902, or possibly in July and August only, and certainly not for goods sold as early as within a year after the sale of the lease. There is no evidence showing when any of the other debts were contracted. It further appears, from the uncontradicted evidence of Fred Appel, that M. E. Stark & Co. paid Mrs. Atwood rent at the rate of $45 per month after she had bought the lease, and that the note given to Ed Appel and secured by the deed of trust represented money actually loaned to her. The decree seems to rest upon the close relationship of the defendants and the withholding from record of the bill of sale, or written assignment of the lease, as badges of fraud, and this is the line of the argument found in the brief. The decree sets the sale aside, as to the creditors, "because of never having been admitted to record nor recorded in the proper office of Tyler county," and the deed of trust is annulled because it is "predicated on said unrecorded deed." As the lease was for a term of only three years, no recordation thereof was required. Sections 4 and 5, c. 74, Code 1899 [Code 1906, §§ 3102, 3103], do not require it. Their provisions do not apply to written contracts made in respect to real estate or goods and chattels, unless they are made in consideration of marriage, or for conveyance thereof for a term therein of more than five years, or are deeds of trust or mortgages. An absolute deed of sale of chattels is not required to be recorded, and its recordation has no legal effect. Curtin v. Isaacsen, 36 W. Va. 391, 15 S. E. 171, Poling v. Flanagan, 41 W. Va. 191, 23 S. E. 685. Section 3 of that chapter relates [Code 1906, § 3101], except in the case of reservations of title, to goods and chattels the possession whereof shall have remained with the party for a period of five years, a case not made out by this record. As the bill charges fraud, and not a preference, and it does not appear that there were any debts existing at the time the sale was made and the deed of trust executed, the suit cannot be regarded as having been brought under section 2 of chapter 74 of the Code of 1899 [Code 1906, § 3100]. It charges fraud in the sale and deed of trust for the purpose of hindering, delaying, and defeating the rights of creditors. Hence the suit must be regarded as having been brought under section 1 of said chapter [Code 1906, § 3099].

As the subject-matter of the bill of sale or assignment was a mere chattel real, a term less than five years in duration, created by an instrument not required to be recorded, a writing effecting a sale thereof does not have to be recorded. Its status is, in that respect, the same as that of a bill of sale or any other personal property, which we have seen need not, and cannot, be so recorded as to have any legal effect. The withholding of such an instrument from record cannot be regarded as evidence of fraud, for the reason that it involves no breach of duty to any one. The vendor of this lease, Mrs. Stark, however, remained in possession thereof. If the rule applicable to movable tangible personal property, making retention of possession thereof evidence of fraud as against creditors, applies to a lease, then the burden would be on Mrs. Atwood to show that she was a purchaser in good faith. If the vendor in an absolute sale of personal property continue in possession thereof, his possession raises a legal presumption that the sale was fraudulent; but it makes the sale only prima facie fraudulent. The presumption is rebuttable, and may be overthrown. It puts upon the vendee the burden of proving the fairness and good faith of the transaction. Bindley v. Martin, 28 W. Va. 773; Curtin v. Isaacsen, 36 W. Va. 391, 15 S. E. 171; Poling v. Flanagan, 41 W. Va. 191, 23 S. E. 685. Between this and the conclusive sentence of the law, making a sale absolutely void as to purchasers and creditors for failure to record the deed, the distinction is very clear as well as important. In some states the statutes require every sale of personal property, possession of which is not delivered, to be in writing and the instrument recorded. Failure to comply with such a statute renders the sale wholly void; but, even in those states, the courts have made exceptions when the nature of the property is such that deliv-

ery thereof cannot be made. An instance of this is a growing crop. Whether such a sale of a lease would have to be recorded is a question not answered by any decision so far found in my investigation of the subject. While personal property, it is not movable, nor is it capable of delivery, as most tangible property is. But the vendor can vacate it and put the vendee in possession, and this is most usually done, when sales of such property are made in good faith. In this state, our statute not requiring the recordation of the instrument of transfer, retention of possession by a vendor cannot render the sale absolutely void. Its utmost effect would be to make it prima facie fraudulent in so far as it affects the rights of purchasers and creditors. As to whether it has this effect, our decisions do not respond specifically; but it falls within the reason of the rule. Creditors and purchasers of property, the title to which is evidenced by the records, generally rely upon the records in their dealings with reference to its title, and may do so with perfect safety at all times. As to property, the title whereof is not evidenced by the public records, persons dealing with respect to it, and having no notice to the contrary, rely upon the possession as evidence of title. Wherefore, if the retention of possession did not make a sale prima facie fraudulent as to such persons, they would have no protection against fraud and deceit. Public policy, therefore, has required the establishment of this rule for their protection. In doing so, the courts have merely recognized and enforced a legal principle that is very broad in its application.

Possession of land has always been evidence of title sufficient to put a purchaser upon inquiry. In making it evidence of title in favor of creditors against a purchase of personal property out of the possession of the vendee, and requiring him to prove that he is a purchaser in good faith, the courts have simply set it up as a shield and defense against fraud and imposition. Even in the case of conveyances of real estate to the prejudice of creditors, retention of possession by the vendor is a circumstance tending to show fraud and bad faith. It is characterized by the decisions everywhere as a badge of fraud. Colston v. Miller, 55 W. Va. 490, 47 S. E. 268; Hutchinson's Ex'x v. Boltz, 35 W. Va. 754, 14 S. E. 267; Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133; Livesay v. Beard, 22 W. Va. 585. Though delivery of possession of a lease cannot, from its very nature, be made in the same manner in which delivery of movable property can be made, it can be made no less effectually and notoriously, and in the ordinary course of business it is generally done. The vendor vacates and the assignee enters. The rule, therefore, ought as clearly to extend to a lease of this kind as to any other personal property. The rule is founded upon a presumption that a purchaser will naturally protect his purchase by taking possession. The enjoyment of the thing purchased is generally, if not always, the object the purchaser has in view; and his neglect to take possession is so unusual and contrary to general experience as to be very strong evidence that the purchase was only colorable, and not real. And it makes a much stronger case in favor of the creditor than a mere circumstance, an item of evidence, tending to prove fraud. It puts the title prima facie in the party in possession, so that the claimant must prove a purchase in good faith for an adequate consideration. To overcome the prima facie case so made, the evidence must be clear, positive, and full. It is scrutinized more closely than the evidence in many other cases. While ordinarily fraud must be proved, like any other fact, the law makes cases of this kind exceptional. It gives the creditor the benefit of a presumption, which the alleged purchaser must overthrow. He upon whom such a burden is cast by the law must show, not only that he paid an adequate consideration for the property, but also that he did it in good faith. Though the consideration may be an antecedent debt, he must prove the existence of the debt. Whether an adequate consideration passed from him must not be left uncertain by the evidence. The fact is within his knowledge, and the means of proof within his control, and he must clearly and fully prove his claim. Colston v. Miller, 55 W. Va. 490, 47 S. E. 268; Bindley v. Martin, 28 W. Va. 773. The evidence produced must be sufficient to rebut the strong legal presumption arising from the retention of possession.

Has Mrs. Atwood complied with this rigid rule of law? She claims a sale in consideration of antecedent indebtedness without showing when or how it accrued. She does not testify. Her brother, J. M. Childers, merely says he was present when the bill of sale was executed, and that Mrs. Stark then owed her sister about $1,700. The two sisters were present and agreed upon this fact in his presence. This seems to be the extent of his information on the subject. Whether he knew of his own knowledge the time, amount, or purpose of any particular loan or advancement is not revealed. His evidence would be sufficient as between Mrs. Atwood and Mrs. Stark, no doubt; but the case of the former against the creditors of Mrs. Stark must leave nothing to mere inference. She must show what was parted with in consideration of the property she claims to have purchased. The facts that she retired from the partnership at about the time she claims to have bought the lease, and the lease may have been conveyed in satisfaction of her interest in the store, and that she was a woman of means and able to have loaned her sister money, are too remote. They fail to show payment. They merely argue ability to pay and possibility of payment, and leave the fact of payment to mere uncertain inference. If

Mrs. Atwood advanced all this money to her sister, or was her creditor to the extent of her interest in the store, how easily she could have taken the witness stand and told when, how, and in what amounts she had loaned or advanced it, or whether it represented her interest in the store. Her silence, as well as the uncertain character of the evidence upon which she relies, are both against her. Vandervort v. Fouse, 52 W. Va. 214, 43 S. E. 112. All that J. M. Childers states upon his own knowledge may be true, and yet Mrs. Stark not have been indebted to her sister a dollar at the time of the alleged sale. While he asserts that she had frequently loaned her money, he does not say he handled it for them, or saw it, or personally knew anything about it. Evidently he states only what he has heard them say. Evidence to relieve from the presumption of fraud must have more of the elements of directness and certainty. Colston v. Miller, 55 W. Va. 490, 47 S. E. 268; Cochrane v. Hyre, 49 W. Va. 315, 319, 38 S. E. 554.

The claim of Ed Appel is better sustained. There is direct and positive evidence that he loaned the money to Mrs. Atwood, and he is not burdened with any presumption of fraud. The evidence discloses no indebtedness at the time the loan was made, and no circumstance casting suspicion upon the transaction with him has been shown. His deed of trust may be sustained as against the creditors of Mrs. Stark, notwithstanding the failure of Mrs. Atwood, the grantor in the deed of trust, to prove title as against them. She, having title as against Mrs. Stark, executed the deed of trust in favor of Appel. He caused it to be recorded long before any of the other debts in question were incurred, and all creditors, relying in any way upon the lease as security, had constructive notice of the lien. These subsequent creditors, entitled to the presumption of fraud, arising from the mere retention of possession, on the theory that they extended credit under the belief that Mrs. Stark still owned the lease, can have no higher equity than one who loaned money directly as security with the knowledge and consent of Mrs. Stark, and without any knowledge of actual fraud on the part of the then admitted owner. There is no proof that Ed Appel knew or had any reason to believe the sale, evidenced by the bill of sale shown him, was not actual and bona fide. He was not dealing with Mrs. Stark, but with Mrs. Atwood, and was not bound to ascertain whether she had actually paid the purchase money and made Mrs. Stark her tenant. Though Mrs. Atwood may have been a fraudulent vendee, he is not affected by that fact, since he appears from the evidence to have been a bona fide purchaser for value without notice of the fraud. Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133; Goshorn's Ex'r v. Snodgrass, 17 W. Va. 717; Root-Tea-Na-Herb Co. v. Rightmire, 48 W. Va. 222, 36 S. E. 659; Code 1899 W. Va. c. 74, § 1 [Code 1906, § 3099]. Here the burden of proof shifted to the plaintiff. His answer denies notice of any such fraud, and there is no proof to sustain the charge.

From these conclusions it results that the decree complained of must be reversed, in so far as it set aside said deed of trust and denied the claim of Edward Appel, and the cause remanded, with directions to enter a decree sustaining said deed of trust and giving said Appel priority over all other creditors in respect to the fund in the hands of the court arising from the sale of the buildings on the lease, and modify the decree complained of accordingly, and in all other respects said decree will be affirmed.

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(62 W. Va. 521)

## BICE v. BOOTHSVILLE TELEPHONE CO. et al.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

1. COSTS — APPEAL — DISMISSAL — JUDGMENT.

An appellate court, on dismissing an appeal for want of jurisdiction, has no jurisdiction or power to render a judgment for costs of the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 880.]

2. SAME.

Section 4, c. 138, Code 1899 (Code 1906, § 4127), empowering the court to give or withhold, in its discretion, costs on any motion, other than a motion for a judgment for money, authorizes judgment for costs incident to the motion, but not costs of the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 229.]

3. PROHIBITION — ENFORCEMENT OF VOID JUDGMENT.

The enforcement of a judgment for costs, not authorized by any statute, may be prohibited as a judgment rendered without jurisdiction, when the court rendering it has not jurisdiction of the cause on any other ground.

4. SAME—ISSUANCE OF WRIT.

The rule respecting application to the inferior court to vacate its unauthorized judgment before awarding a writ of prohibition to prevent the enforcement thereof is discretionary, and the judgment of a circuit court, on review in the Supreme Court of Appeals, will not be reversed for failure of the circuit court to require such application before awarding the writ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Prohibition, §§ 4, 11.]

(Syllabus by the Court.)

Error from Circuit Court, Marion County.

Application by J. Lee Bice against the Boothsville Telephone Company and others for a writ of prohibition. From an order granting the same, the telephone company brings error. Affirmed.

Harry Shaw, for plaintiff in error. W. S. Meredith, for defendant in error.

POFFENBARGER, J. The Boothsville Telephone Company recovered a judgment in a justice's court for the sum of $8, against J. Lee Bice, who took an appeal therefrom to the intermediate court of Marion county, whence the appeal was, on motion, dismissed

for want of jurisdiction; the amount in controversy being insufficient. The order of dismissal was accompanied by a judgment for costs, amounting to $17.35, and, denying a lack of jurisdiction in the court to adjudge costs in dismissing an appeal for want of jurisdiction, Bice obtained from the circuit court of said county a writ of prohibition inhibiting the enforcement of the judgment. To the judgment of the circuit court awarding said writ, the telephone company obtained from this court a writ of error.

The federal courts uniformly deny power in the court to award costs on dismissing for want of jurisdiction. Inglee v. Coolidge, 2 Wheat. (U. S.) 360, 4 L. Ed. 261; McIver v. Wattle, 9 Wheat. (U. S.) 650, 6 L. Ed. 182; Strader v. Graham, 18 How. (U. S.) 602, 15 L. Ed. 464; Hornthall v. Keary, 9 Wall. (U. S.) 560, 19 L. Ed. 560; Mayer v. Cooper, 6 Wall. (U. S.) 247, 18 L. Ed. 851; Bank v. Cannon, 164 U. S. 319, 17 Sup. Ct. 89, 41 L. Ed. 451. Some of these cases were referred to in the opinion in Nutter v. Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. (N. S.) 1083, by way of illustration in the discussion of principles governing costs generally, as showing a condition under which there might be no discretion in the court respecting the matter, but no intimation was there given as to whether it would be proper to award costs in such case under our practice. That question was neither involved nor discussed; but several decisions rendered by this court declare the principle of the federal cases. Ferguson v. Millender, 32 W. Va. 30, 9 S. E. 38; State v. Lambert, 52 W. Va. 248, 43 S. E. 176; Elbon v. Hamrick, 55 W. Va. 236, 46 S. E. 1029; Baker v. Tappan, 56 W. Va. 349, 49 S. E. 447. Some apparent exceptions, as well as some actual ones, are recognized by all courts, and in some jurisdictions the rule is not observed at all. The federal Supreme Court holds that the costs of a motion to dismiss for want of jurisdiction may be allowed, when any expenses incident thereto, such as the printing of the record, have been necessarily incurred for the purposes of the motion, but not costs of the suit, as upon a hearing (Bradstreet Co. v. Higgins, 114 U. S. 262, 5 Sup. Ct. 880, 29 L. Ed. 176); and, when the appellate court reverses for want of jurisdiction in the lower court, appellate court costs are allowed (Ferguson v. Millender, 32 W. Va. 30, 9 S. E. 38; Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895; Gaylord v. Kelshaw, 1 Wall. [U. S.] 81, 17 L. Ed. 612; Railroad Co. v. Swan, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Assessors v. Osborn, 9 Wall. [U. S.] 567, 19 L. Ed. 748; Montalet v. Murray, 4 Cranch [U. S.] 46, 2 L. Ed. 545). For cases wholly denying the rule inhibiting judgment for costs when the court is without jurisdiction of the case, or awarding costs in such cases under special statutes, see 11 Cyc. 211, note 2. On the main question there is sharp conflict of authority; but this court has undoubtedly adopted the rule adhered to by the federal courts, and it seems to be sustained by the great weight of authority throughout the country. In doing so, we have necessarily construed the statutes we have as not authorizing costs in such cases, even though they may not have been specially considered. One exception among our own decisions has been observed (Taylor v. Maynor, 46 W. Va. 588, 33 S. E. 260), but the matter of costs was not discussed. It was referred to in Elbon v. Hamrick, 55 W. Va. 236, 46 S. E. 1029, but not followed in respect to costs. These observations apply, also, to Richmond v. Henderson, 48 W. Va. 389, 37 S. E. 653, in which this court, dismissing a writ of certiorari on a writ of error, awarded costs in the court below, as well as costs in this court. Frye v. Miley, 54 W. Va. 325, 46 S. E. 135, was a different kind of case. There a bill in equity was dismissed as upon a demurrer, and the statute (section 4, c. 138, Code 1899 [Code 1906, § 4127]) probably warranted the decree for costs.

All costs are of statutory authorization, for the common law gave none in any case. 11 Cyc. 24; 5 Ency. Pl. & Pr. 110. Statutes relating to costs must be strictly construed. 11 Cyc. 27; 5 Ency. Pl. & Pr. 111. In England and many of the states of this country they are regarded as penal statutes (11 Cyc. 27); but our statute declares them not penal (Code 1899, c. 138, § 10 [Code 1906, § 4133]). The statutory provisions, relied upon as giving jurisdiction, are sections 4, 8, and 11 of chapter 138 of the Code of 1899 (Code 1906, §§ 4127, 4131, 4134). Section 4 says: "Upon any motion (other than for a judgment for money), or upon any interlocutory order or proceeding, the court may give or refuse costs, at its discretion, unless it be otherwise provided. * * * And when any part of the proceedings is adjudged insufficient, order all costs occasioned by such insufficient pleading, to be paid by him who committed the fault." Section 8 provides as follows: "Except where it is otherwise provided, the party for whom final judgment is given in any action, or in a motion for judgment for money, whether he be plaintiff or defendant, shall recover his costs against the opposite party." Section 11 says: "In every case in an appellate court, costs shall be recovered in such court by the party substantially prevailing." That section 11, expressly made applicable to appellate courts, does not cover the case, is manifest from the several decisions in which it has not been so considered. Section 8, as well as section 11, plainly contemplates only final judgments and decrees. Section 4, by the use of the terms "any motion," may seem to cover the case; but the costs to be allowed under that clause would be only those incident to the motion, if any, and not costs in the suit. This is the construction placed by the federal Supreme Court on one of its rules,

couched in terms similar to those of our statute. It does not authorize a judgment for costs generally, including fees and mileage of witnesses, clerk's fees, and attorney's fees. Nothing is suggested or perceived that could afford ground for the taxation of $17.35 as costs incident to the motion to dismiss. That said sum is the cost of the suit is put beyond doubt by the terms of the order under which the taxation was made. It gives to the plaintiff, appellee, a recovery of "its costs by it expended in and about its prosecution of this suit in this court."

Want of jurisdiction in a court entertaining a cause of action, or rendering a judgment, subjects it to the writ of prohibition, although there may be other remedies. Johnson v. Hunter, 50 W. Va. 52, 40 S. E. 448; Judy v. Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413; Morley v. Godfrey, 54 W. Va. 54, 46 S. E. 185. That the amount is insufficient to give appellate jurisdiction, if the case were within the jurisdiction of the court, is immaterial. Knight v. Zahnhizer, 53 W. Va. 370, 44 S. E. 778, does not assert the contrary of this proposition. The justice in that case had jurisdiction. Neither prohibition nor mandamus lies to give a right of review, when the Legislature has failed to provide for it (Fleshman v. McWhorter, 54 W. Va. 161, 46 S. E. 116); but that is not the matter involved here. Our question is whether prohibition lies against a court acting without jurisdiction, and in such case the amount involved is immaterial. The rule respecting the giving of opportunity to the inferior court to correct its own error is one of discretion only. It is not obligatory upon the superior court to refuse the writ until application shall have been made to the court below for correction. Board of Education v. Holt, 51 W. Va. 435, 41 S. E. 337. The circuit court of Marion county having deemed it proper, under the circumstances, to award the writ, without requiring such application to be first made, this court cannot disturb its judgment on that ground. No abuse of its discretion is disclosed by the record, and it is elementary law that the exercise of judicial discretion will not be disturbed, so as to reverse a judgment, unless the discretion appears to have been abused.

For the reasons stated, the judgment will be affirmed.

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(62 W. Va. 486)

## BOYLAN v. HINES.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

GARNISHMENT — PERSONS SUBJECT — SPECIAL COMMISSIONERS.

Special commissioners, who have in their hands an amount arising out of a chancery cause belonging to a judgment debtor, and which amount by decree in such cause has been directed to be paid over to the said owner, are liable to garnishment thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, § 115.]

(Syllabus by the Court.)

Error to Circuit Court, Mineral County.

Action by Thomas Boylan against John Hines. Judgment for defendant, and plaintiff brings error. Reversed.

Wm. MacDonald, for plaintiff in error. Taylor Morrison, for defendant in error.

ROBINSON, J. A single question is involved here, and presented by the record squarely. It is this: Are special commissioners in a chancery cause, who have in their hands money arising out of said cause belonging to a judgment debtor, and the amount of which by decree therein has been directed to be paid to the said owner, liable as garnishees of such judgment debtor upon proper suggestion proceedings in the premises? Thomas Boylan had judgment before a justice of the peace of Mineral county against John Hines on the 11th day of February, 1907, for the sum of $231, with interest thereon until paid, and the costs, a transcript of which judgment was filed in the clerk's office of the circuit court of said county, pursuant to section 118 of chapter 50 of the Code of 1899 [Code 1906, § 2069], and execution was there issued. Suggestion proceedings thereupon were regularly instituted in the circuit court of said county, and Taylor Morrison, F. C. Reynolds, and William MacDonald, special commissioners in the chancery cause of Floyd Knight, administrator of James W. Tasker, deceased, against Sarah J. Tasker and others, were made garnishees. By decree in such chancery cause, in said circuit court, the said Hines was entitled to the sum of $175, in the hands of said special commissioners, and the same had been thereby directed to be paid him by them. This amount was admitted by said special commissioners, garnishees, to belong to him, and it was further admitted by them that they "were authorized and directed by said decree to pay out said money." Hines moved the court to quash the suggestion process upon the ground, as stated in the record, that special commissioners were not liable to such process. This motion was sustained, the suggestion quashed, and judgment given Hines against the plaintiff therein for costs. From this action of the circuit court, the plaintiff, Boylan, obtained this writ of error.

It is insisted that money so in the hands of special commissioners is in the custody of the law, and therefore not liable to be suggested. The rule that property in the custody of the law cannot be made the subject of attachment or garnishment is practically universal. Brewer v. Hutton, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804. "Any person deriving his authority to receive and

hold money or property from the law, and who is obliged to apply such money or property according to the rules of law, cannot be held liable as a garnishee for such money or property while it is held by him under such authority. Consequently a public officer of any name or nature is beyond the reach of process of garnishment while he holds the funds or property in his official and public capacity, and is accountable to the public or an individual merely as an officer." Shinn on Attachment and Garnishment, § 505. The reason for such rule is well founded and clearly known. The due and orderly administration of the law is not to be interfered with by such process. But "the reason of the law is the life of the law," and, when the reason for a rule ceases, so does the rule. Does an officer hold money in his official capacity after he has been directed by the court, whose instrument he is, to pay the same to the party to whom it belongs? Is not his legal custody, and through him the custody of the law, then at an end? After such direction of the court, and before his payment pursuant thereto, to whom is his liability? The custody then rightfully belongs to the owner. The officer thereafter holds the money for him, not for the law, because the law has done with it and fulfilled its administration.

Under our statute (section 10, c. 141, of the Code of 1899 [Code 1906, § 4180]), the suggestion is based on the lien of plaintiff's writ of fieri facias, and to support garnishment there must be liability upon the party suggested in favor of the judgment debtor. It will be readily conceded that such liability must be such as will support an action at law. Swann, Adm'r, v. Summers, 19 W. Va. 115. A special commissioner, under our law and practice, is of practically the same legal status as a receiver. Blair v. Core, 20 W. Va. 265. In Crawford v. Fickey, 41 W. Va. 544, 23 S. E. 662, this court held that "an order that a receiver pay a fixed sum to a certain person is a personal judgment or decree against the receiver"; and in Rickard v. Schley, 27 W. Va. 617, the same principle is enunciated. In this light, and upon sound reason, was not the order in said chancery cause directing payment to Hines by said special commissioners an end of the custody of the law of the money in their hands belonging to him, and did it not have the effect of casting a personal liability upon them in his favor for the amount so belonging to him? We so hold. Such being the case, the money is liable to garnishment. And in support of this is the great weight of modern authority. In Wade on Attachment, § 424, it is stated: "The authorities seem to concur in holding receivers and similar officers liable to garnishment, when they have in their hands a definite sum to which the defendant or the judgment debtor is clearly entitled, and the officer has nothing more to do with the fund than to pay it over. Some of them may go beyond, but none, so far as they have been examined, fall short of this conclusion." And a most extensive examination of the books leads us to an approval of the author's statement. The author in the same section tells us that it is held with considerable unanimity that when defendant has a right to a certain distributive share of the funds in the hands of a receiver, master in chancery, or trustee of court, such officer may be garnisheed by a creditor of the party so entitled after the court has ordered it to be paid. Mr. Shinn, at section 506, announces the same in the following language: "When the purpose of the legal custody has been accomplished, and the only duty of the officer is to pay the money to the principal defendant in garnishment, the officer may then be held as garnishee." He also says: "Money in the hands of a clerk of the court, which has been ordered to be paid, may be secured by process of garnishment served upon the clerk." And again he says: "Official duty ceases when the court directs the officer to pay over the fund. After the confirmation of a sale by a commissioner, and an order of distribution of the purchase money of the land sold, such commissioner may be held as garnishee."

It follows that the circuit court is in error in sustaining the motion to quash the suggestion, and such judgment of the circuit court is therefore reversed, with costs against the defendant in error, John Hines, upon whose motion the suggestion was quashed; and this court, now proceeding to do what the circuit court should have done in the premises, it will be ordered that the said special commissioners, garnishees, pay the said sum in their hands belonging to the said judgment debtor to the plaintiff, in furtherance of his right of garnishment thereof.

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(62 W. Va. 497)

## THOMPSON et al. v. HERN et al.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

1. EXECUTORS AND ADMINISTRATORS—PARTIES TO ACTIONS.

To a bill in equity, seeking the release of a vendor's lien, reserved in his lifetime by a person who has since died, the personal representative of such person is a necessary party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1777.]

2. APPEAL—DEFECT OF PARTIES—WAIVER.

The defect of want of necessary parties is not waived by failure to assign it specially as a ground of demurrer; and when a demurrer has been interposed and overruled, and a decree entered, without such special assignment either on the demurrer or at the hearing, it may nevertheless be relied upon in the appellate court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1186–1189.]

(Syllabus by the Court.)

Appeal from Circuit Court, Monroe County.

Bill by H. Preston Thompson and others against Cornelia Hern and others. Decree for plaintiffs, and defendants appeal. Reversed and remanded.

John W. Arbuckle, for appellants. Rowan & Meadows, for appellees.

POFFENBARGER, J. H. Preston Thompson and others obtained, in the circuit court of Monroe county, a decree requiring from some of the heirs at law of Levi Jones, deceased, the release of a vendor's lien on a tract of 103 acres of land, conveyed to Thompson by Jones by a deed dated July 21, 1879, in fulfillment of a prior contract of sale, for and in consideration of the sum of $250, of which $25 was paid in cash and for the residue of which Thompson had executed his three promissory notes for $25, $100, and $100, to become due, respectively, on the 1st days of October, 1878, 1879, and 1880; from which decree the defendants below have appealed.

Plaintiffs rely upon long lapse of time as raising a presumption of payment, and the defendants resist this by production of the notes, claiming them to have been found among the papers of the decedent, and denying payment, and by averment of their tender years at the time of their father's death, and their ignorance of the nonpayment of the notes. Owing to the failure of the plaintiffs to make the administrator of the decedent a party, the decree will have to be reversed, without reference to the merits of the cause. As the administrator is the legal representative of the personal estate, the legal title thereof is in him; and the allegation of payment is the assertion of a right against him. Under certain circumstances, distributees may sue a creditor of the estate in equity, as in the case of collusion between the personal representative and creditor and refusal of the former to sue. Matheny v. Ferguson, 55 W. Va. 656, 47 S. E. 886; Wilson v. Straight, 46 W. Va. 651, 33 S. E. 758; Poling v. Huffman, 39 W. Va. 320, 19 S. E. 421; Tabb v. Cabell, 17 Grat. 160. But this case is not within the exception. The distributees here are defendants, making no complaint of any dereliction on the part of the administrator, and the exception presupposes the appointment of a personal representative and dereliction on his part, while this bill does not.

It is argued that a decree will not always be reversed for want of proper parties; but that rule applies only when the court can see that no right of the absent party is affected by it. Sometimes interests are severable, but such is not the nature of the interests involved here. The administrator's title extends to the entire subject-matter of the controversy, the debt and the lien to secure payment thereof, wherefore the case is not within the principle invoked. In this connection delay in raising the objection is relied upon, it not having been specifically set up in the court below; but there was a demurrer to the bill, clearly covering it, which the court overruled, and as the objection goes to the very root of the decree, and ground for it was so laid in the trial court, we perceive no theory and know of no authority upon which we can refuse to entertain it. When want of necessary parties is disclosed by the record, as it is here, the defect may be relied upon in the appellate court, although it was not set up in any way in the court below. Reger v. Gall, 54 W. Va. 373, 46 S. E. 147; Gall v. Gall, 50 W. Va. 523, 40 S. E. 380; Miller v. Morrison, 47 W. Va. 664, 35 S. E. 905; Moore v. Jennings, 47 W. Va. 181, 34 S. E. 793; Graves v. Hedrick, 44 W. Va. 550, 29 S. E. 1013.

Whether an administrator was ever appointed is not disclosed by the record. The briefs say administration was, many years ago, cast upon a sheriff of the county whose term of office has expired, and, upon this statement, which in no sense brings the fact into the record, is predicated the untenable claim that, on the expiration of his term, the assets of the estate necessarily went into the hands of his successor, so that he can have no interest in the suit. That the status of such an administration is the same as that of any other has been repeatedly declared. Hutcheson v. Priddy, 12 Grat. 85; Lucas v. Locke, 11 W. Va. 81; Brewer v. Hutton, 45 W. Va. 106, 30 S. E. 81, 72 Am. St. Rep. 804; Tunstall's Adm'r v. Withers, 86 Va. 892, 11 S. E. 565; Dabney's Adm'r v. Smith's Legatees, 5 Leigh, 13; Douglass' Ex'r v. Stumps, 5 Leigh, 392; Tyler, v. Nelson's Adm'x, 14 Grat. 214; Mosby's Adm'r v. Mosby's Adm'r, 9 Grat. 601. That the administrator is a necessary party, when the bill alleges payment of money due the decedent as the very ground on which relief is sought, admits of no doubt. Hill v. Proctor, 10 W. Va. 59; Nichols v. Nichols, 8 W. Va. 174; Caldwell v. Prindle's Adm'r, 11 W. Va. 307. The defect of want of necessary parties may sometimes be waived, but there is no waiver here.

For the error aforesaid the decree will be reversed, and the cause remanded, with leave to the plaintiffs to amend by making the administrator of Levi Jones, deceased, a party defendant.

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(62 W. Va. 489)

## ROBINSON et al. v. KISTLER.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

1. APPEAL—REVIEW—GRANT OF NEW TRIAL. This court being called upon to review the action of a trial court in setting aside a verdict and awarding a new trial, it will inquire from the record what errors, if any, sufficient to justify such action, were committed at the trial to the prejudice of the party against whom such

verdict was rendered, and whether such verdict is plainly contrary to law and the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3477.]

2. WITNESSES—IMPEACHMENT.

When a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answers, be subsequently contradicted by the party so cross-examining.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1273.]

3. MINES AND MINERALS — MINING LEASE — CONSTRUCTION—ROYALTY.

A lease for coal mining purposes stipulates for a fixed minimum royalty, to be payable from a stated time, and provides that if the lessee is disabled or prohibited from mining or shipping coal, by reason of strikes, accidents, or any cause of stoppage of transportation over which the lessee has no control, the minimum royalty shall be suspended for the period of such disability. *Held*:

(a) That the words "over which the lessee has no control" are practically synonymous with "for which the lessee is not to blame," or "without the fault of the lessee," and relate only to the personal or immediate control of the lessee.

(b) That the obligation to pay the minimum royalty ceases during any period of such disability, and for such period the lessee is liable only for royalty on the coal actually mined and shipped.

(Syllabus by the Court.)

Error from Circuit Court, Harrison County.

Action by Camisee D. Robinson and others against Flavius J. Kistler. Judgment for plaintiffs, and defendant brings error. Affirmed and remanded.

Davis & Davis, for plaintiffs in error. John Bassel and L. C. Crile, for defendant in error.

ROBINSON, J. The writ of error herein is prosecuted to the action of the circuit court of Harrison county in setting aside a verdict rendered in favor of the defendant below and granting to the plaintiffs there a new trial. Camisee D. Robinson and others instituted their action against Flavius J. Kistler, in assumpsit, at March rules, 1904, for the recovery of royalties alleged to be due and unpaid upon a certain lease for coal mining purposes, executed by the plaintiffs to the defendant on the 11th day of January, 1901. The general issue was joined, and upon trial had the jury found a verdict in favor of the defendant. Thereupon the plaintiffs moved to set aside the verdict of the jury, and, the motion being considered by the court, the verdict was set aside and a new trial awarded, and the defendant excepted.

The lease declared upon, and under the terms of which payment for royalty was demanded in said action, contained the following clause: "The said party of the second part agrees to pay to the said parties of the first part at least $900 for the first year, $1,500 for the second year, and $2,100 for each year thereafter until the said coal is all mined; that is, the minimum royalty to be 15,000 tons for the first year, 25,000 tons for the second year, and 35,000 tons for each subsequent year until the coal is mined. The first year under this clause is to commence when the Short Line Railroad Company is ready to receive coal at this point, not to be later than January 1, 1902; but it is understood that in case of strikes, accidents, or any cause of stoppage of transportation over which the second party has no control, and he is disabled or prohibited thereby from mining or shipping coal from the said mine, then the minimum royalty as above specified is to be suspended for the period of such disability." There is no conflict of testimony on any material point, and the record shows that defendant began shipments of coal under the lease on May 8, 1902; that for all the coal actually mined and shipped during the period covered by the declaration the defendant made payment to the plaintiffs; that the defendant was never, after he began shipments of coal, furnished, by the only railroad company or public carrier by which transportation could be had from the mine, with sufficient railroad cars to mine and transport the minimum amount of coal stipulated in the lease; that the defendant was urgent and insistent in his efforts to secure such supply of railroad cars; that such lack of supply of cars was beyond his personal control; and that by reason of the failure to receive a sufficient supply of railroad cars he was disabled and prohibited from mining and shipping the minimum amount agreed. The mining lease in question was introduced upon behalf of plaintiffs, and is the basis of their action. The case coming here upon error assigned to the action of the court below in setting aside the verdict in favor of defendant and awarding plaintiffs a new trial, we are therefore called upon to inquire from the record what errors, if any, the trial court had committed to the prejudice of the plaintiffs, and that justified a disturbance of the verdict, or whether or not said verdict was contrary to law and the evidence.

An exception was reserved by the plaintiffs to the action of the court in overruling their motion made during the trial to strike out so much of the testimony of the defendant, as a witness in his own behalf, as relates to inadequate car supply, on the ground, as alleged, "that the contract provides that the payment of the royalty shall only be suspended because of stoppage of mining and shipping of coal." But, in view of the stipulation in the lease that the minimum royalty shall be suspended for the period that the lessee is disabled or prohibited from mining or shipping coal by reason of strikes, accidents, or any cause of stoppage of transportation over which the lessee had no control, it is observed that the objection to the testimony was not well taken and was properly overruled. It will certainly not be argued that a failure in car supply is not a cause of stoppage of transportation. The ground alleged as a basis for said motion contains a faulty recital of the terms of the lease.

It appears that at the close of defendant's testimony the plaintiffs recalled a witness,

who was asked if he ever applied to the coal office of the mine for permission to examine the books and see as to the shipments of coal, and was refused. There was objection by defendant to the question, which objection was sustained, and the plaintiffs excepted. The only purpose of this question could have been for rebuttal of matter brought out on the cross-examination of the defendant, and which we find to be wholly collateral and immaterial to the real controversy, and not related to or connected with anything that the witness had been asked or testified in chief. It was properly rejected. "When a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question." 1 Wharton on Evidence, § 559; State v. Goodwin, 32 W. Va. 177, 9 S. E. 85.

Are the three instructions that were given on behalf of plaintiffs at such variance with the law and facts applicable to the case as made as to justify the court below, upon more mature consideration of them, to set aside the verdict? In view of the final conclusion we are compelled to reach in this opinion, it avails nothing to set out these instructions and to discuss them in detail. It suffices to say that, taking them together, and as related to a true construction of the said lease and the facts proven, no instructions more favorable to plaintiffs could have been given, and that the verdict cannot be said to be at variance with them, except in a particular to be hereinafter discussed. In fact, we do not hesitate to say that the instruction asked for by the defendant, to the effect that the defendant was not required to pay to the plaintiffs the minimum royalty specified in the lease for such period as he might be disabled or prohibited from mining or shipping coal from his mines by reason of strikes, accidents, or any causes of stoppage of transportation over which defendant had no control, and that if the jury should find from the evidence that by reason of the failure or refusal of the railroad company to furnish cars for transportation of his coal the defendant was prevented during the period in question from mining or shipping from his mine the minimum quantity of coal agreed in said lease, and that such failure was beyond the control of the defendant, and that defendant paid the plaintiffs the agreed royalty upon all the coal actually mined and shipped by him during said period, then the jury should find for the defendant, presented the true construction of the clause of said lease in relation to the minimum royalty; but this instruction was properly refused, since it was inconsistent with the total want of evidence that for the period from January 1, 1902, to May 8, 1902, defendant was so disabled or prohibited from mining or shipping coal.

The construction of this minimum royalty clause contended for by counsel for plaintiffs below, who argue that it simply defers or postpones the payment of the minimum until the happenings mentioned have passed, is untenable. The clause is definite, direct, and wholly unambiguous in its stipulations. It is a most usual one in such contracts, and the provision against the penalty of the minimum royalty, or "dead rent," as it is called in England, in the event of accidents or other insuperable contingencies, wholly beyond the fault of the lessee and for which, in justice, he should not be penalized by the payment of such dead rent when something other than his own idleness has caused him to fail to produce the minimum, is also most ordinary, and is sanctioned by good reason and fair stipulation between the lessor and lessee. MacSwinney on Mines, 217. The stipulation in the lease in this case not only fixes a time, in no uncertain language, for the minimum royalty to become a spur to diligence by the lessee in working the mine and producing royalty for the lessor, but it also provides a time when that spur shall not be used, and shall not prick the flesh of the lessee; that is, during the existence of strikes, accidents, or any cause of stoppage of transportation over which the lessee has no control. This provides against the three great causes that prevent the operation of coal mines in this modern age, and the contract must be construed with reference to the common knowledge which all persons have of the things which would prevent the lessee, without fault on his part, from diligently prosecuting the mining and producing royalty to the lessor. Most naturally would parties, after fixing a dead rent upon the lessee as a spur to his diligence, provide for a taking off of this spur when the lessee without fault could not make the minimum. This was done in the lease under consideration by providing that "the minimum royalty as above specified is to be suspended for the period of such disability," thereby using to express such meaning not only the usual every day words of common speech to express it, but the language of the law when it refers to the cessation of or absolute relief from rent because of a disturbance of a tenancy. The dictionaries say that "to suspend" is "to cause to cease for a while." Taking the language of this lease, and reading it in the light of the purposes for which it was made and the things to which it relates, to say nothing of the common as well as the legal acceptation of the terms employed, we must say that the minimum royalty ceased when any of the things happened that are provided against therein, and was again effective when those things, in their turn, were suspended, or ceased. Huffcut's Anson on Contracts, § 344; Carnegie Nat. Gas Co. v. South Penn Oil Co., 56 W. Va. 402, 49 S. E. 548.

The fourth instruction asked by the plaintiffs was refused, and properly so. It would have instructed that the defendant was required to use all reasonable effort to obtain

cars to carry coal from his mine, and if the railroad company that supplied cars for said mine refused to furnish cars sufficient for the requirements of the defendant, or capacity to transport enough coal to amount to the minimum royalty to be paid to the lessors at the agreed rate per ton, and if said railroad company did not furnish a sufficient number of cars upon request, it was the duty of defendant to resort to legal process, if necessary, to compel said railroad company to furnish sufficient cars, if it could do so, and the burden devolved upon the defendant to show that said railroad company did not have sufficient cars to furnish him an adequate number for said purpose, in order to relieve him from the duty of resorting to legal process to obtain such supply of cars. The construction of the words of the lease, "any cause of stoppage in transportation over which the second party has no control," as insisted for by the proposed instruction, is not a reasonable one, since the control mentioned in the stipulation plainly means the immediate or personal control of the lessee, and not the control of the law. Can we say that in making this contract the parties had in contemplation such an extraordinary proceeding as an appeal to the courts by the lessee to compel transportation of the coal? They had reason to presume, and we must say they did so presume, and that it entered into the making of the contract, that the common carrier would fulfill its duty as such and furnish all the transportation in its power. They provided fair relief from the dead rent in the event of car shortage, but there is not a word to indicate that they were acting on anything but the reasonable and legal presumption of obedience to duty by the carrier. The words of a contract will be given a reasonable construction, if possible, rather than an unreasonable one. Bishop on Contracts, 400; Clark on Contracts, 563; 9 Cyc. 587. These words, "over which the second party has no control," are simply another way we have of saying, almost every day in making contracts, "for which the second party is not to blame," or "without the fault of the party of the second part." The word "control" has no legal or technical meaning distinct from that given in its popular acceptation, and we must here construe the word "control" to mean the immediate control of the party, and not to refer to some remote control or uncertain remedy of control. It was so construed in Pullman Palace Car Co. v. Missouri Pac. Ry. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499, by the late Chief Justice Waite. To say that it was within the control of the lessee to resort to uncertain proceedings to secure cars from the carrier, which carrier was presumed to obey its duty to the public when this stipulation was entered into, we may as well say that it was within the control of the lessee to purchase his own railroad cars and thereby prevent a stoppage of transportation. But will it be conceived for one moment that such idea of the word "control" entered into the contemplation of the parties when this lease was made?

The two instructions given on behalf of defendant, and without objection by the plaintiffs, are proper, and, their soundness not being questioned by counsel, we may pass them without discussion. In consideration of what we have said, it appears that the trial court had committed no errors to the prejudice of plaintiffs, and we must therefore see whether the verdict in defendant's favor is so contrary to law and the evidence as to demand its being set aside and new trial awarded.

As has been said, there is no substantial conflict in the evidence. The parties practically stand agreed on the material facts. The lease has been introduced, and speaks for itself. It provides that the first year under the minimum royalty clause "is to commence when the Short Line Railroad Company is ready to receive coal at this point, not to be later than January 1, 1902." It is shown clearly by the evidence, the defendant's own testimony, that the first shipment of coal from the mine was on May 8, 1902. All the coal for which cars could be secured was mined and shipped after that time, and payment of the royalty thereon made; but it was less than the minimum. It is shown that the railroad company, notwithstanding pleadings and insistence by the defendant almost daily, would not furnish sufficient cars to carry away the minimum, and that the same could have been easily mined if such transportation of the product could have been secured. But there is not a word in the case to excuse the defendant's liability for the minimum royalty from January 1, 1902, the definite date when it became effective, to May 8, 1902, when shipments began. He shows no excuse under the provisions of the lease for such delay of shipment, and his want of diligence, if such it was, or failure without excuse to mine and ship, for that period, is to be compensated, under the stipulations of the lease, by the minimum royalty, and the plaintiffs were clearly entitled to a verdict for proper amount thereof. This being true, the verdict was contrary to the evidence and the law applicable to the case, and for such reason was rightly set aside. Coalmer v. Barrett (W. Va.) 56 S. E. 385.

The order of the circuit court in setting aside said verdict and awarding a new trial is therefore affirmed, and this case is remanded.

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(62 W. Va. 546)

## STATE v. BROWN.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

1. CRIMINAL LAW—CONTINUANCE—DILIGENCE.

Upon a motion for a continuance because of the absence of a witness, it must be shown that the accused used proper diligence to secure the presence of the witness, and a fair probabil-

ity that his presence can be secured at a later term must also appear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1335–1341.]

2. SAME—ABSENT WITNESS.

On a second motion for continuance of a murder case by the accused for the absence of the same witness on account of whose absence was the former continuance, if there is any ground to suspect that the continuance is for delay, it must appear what evidence the absent witness is expected to give.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1314.]

(Syllabus by the Court.)

Error from Circuit Court, Mercer County.

Charles Brown was convicted of murder, and brings error. Affirmed.

Hale & Pendleton, for plaintiff in error. C. W. May, Atty. Gen., for the State.

BRANNON, J. Charlie Brown was sentenced to the penitentiary for life by the criminal court of Mercer county. He was refused a writ of error by the judge of the circuit court, but was allowed it by this court.

The only assignment of error is based on a refusal of a continuance. No evidence is before this court touching the case, except only as to the continuance. The indictment was found July 3, 1906; the trial, in October. At the first term a continuance was granted on the ground of the absence of Bryant, whom Brown wanted as a witness. Bryant was not summoned for that term, and just before it he left Mercer county and went to Virginia. Leave was given to take his deposition. How long there was omission to do this does not appear. Very shortly after the first term Bryant returned to Mercer, which is given as a reason why his deposition was not taken. No summons was issued for him while he remained in Mercer or McDowell, as he was in both counties, until a very few days before the second term, when a summons and attachment were sent to McDowell, but he had left. Brown and his wife and his attorneys knew of his return from Virginia, but took no steps to summons him until a very few days before the trial, though they had ample time to do so. The summons is gone, and we cannot tell the date; but it is proven to have been issued just before court. The process must be sued out early. 9 Cyc. 191, 194. This manifests a gross want of diligence. This denies a continuance. State v. Betsall, 11 W. Va. 726; Dimmey v. Elm Grove, 27 W. Va. 32, 55 Am. Rep. 292. Again, where was Bryant? The accused in his evidence said that he did not know. No one located him. He went to the Chesapeake & Ohio Railroad, running off with a woman. There is a little hearsay tending to show that he may have been in Fayette county, but it is by no means proven; in fact, the probability is that he was out of the state. "It is well settled that the refusal to grant a continuance will not be considered an abuse of discretion, where the witness is beyond the jurisdiction or compulsory process of the court, or his whereabouts is unknown, and there is no reasonable certainty of the party being able to produce such witness at the next term." 9 Cyc. 181; Hurd Case, 5 Leigh (Va.) 715; 4 Ency. Pl. & Prac. 882. The mere statement that the suitor expects to produce him will not do. "Where a continuance is asked to produce the evidence of a witness not resident in the state, the affidavit should state, not only the bona fide belief that such evidence can be produced, but the grounds of such belief, in order that the court may see that the belief is not merely a hope, but a well-founded, reasonable expectation, that it will be procured." State v. Harrison, 36 W. Va. 730, 15 S. E. 982, 18 L. R. A. 224.

Again, the evidence does not intimate what Bryant was expected to prove. Will a court, especially on a second motion for continuance in a criminal case, where the motion to delay a trial is always to be suspected, defer criminal justice, unless it can see that the evidence of the absent witness will be material and answer some material end? In 9 Cyc. 201, we find the law, on many authorities, cited thus: "In an application for a continuance on the ground of absent witnesses, it is not sufficient to state in general terms or by indefinite allegations what the absent testimony will be. It must specifically set forth the facts expected to be proved by such witnesses, so that the court may judge of the materiality of the same. While it has been argued that to disclose, at the time the continuance is desired, facts to which it is expected an absent witness will swear, may in many instances work a hardship or injustice upon a party in the presentation of his case, it is nevertheless generally held by the courts to be necessary to the proper administration of justice that the expected testimony be set out with such definiteness and detail as will enable the court to judge, from the issues presented by the pleadings, whether or not such absent testimony is material and indispensable to a fair and just trial." In a note it will be seen that in Tennessee, where at the first term no inquiry can be made as to what the absent witness will prove, yet this is not the rule where a second continuance is asked. In Williams v. Freeland, 2 W. Va. 306, Judge Brown said that on an affidavit for a continuance it could not be presumed that the witness would prove the case, if present; but it must be shown, and, if not, it cannot be taken to exist. The court held that the affidavit must show "the materiality and importance of the witness," to guard against evasion of justice. In Buster v. Holland, 27 W. Va. 535, Judge Green said the affidavit must name the witness and give the substance of his expected evidence. It seems that Bryant was present at the homicide. He went there with Brown. The murder occurred at a railroad station, where there were numerous eyewitnesses, and a number of them were present

as witnesses at the trial, who could as well prove the transaction as could Bryant. The case has the appearance of a design to delay trial. Certainly, when this is the case, and the presiding judge is better able to detect such motive than we, he can, at the first calling of the case, require the party to state what he expects to prove by the absent witness. Riddle v. McGinnis, 22 W. Va. 254; Harris v. Harris, 2 Leigh (Va.) 584; Hewitt's Case, 17 Grat. (Va.) 627. So, on the case made by the evidence on such motion, the court may consider this defect in its showing. He can say whether a case is made for a continuance.

When the court had overruled the motion for a continuance the accused asked a postponement for some days to send a summons for the witness in Fayette county; but the court refused to do so. This is complained of as error. The remarks above apply to this motion. Where was Bryant? Nobody could say. Nobody knew. Most likely he was out of the state. Was his evidence material? We do not know, except the mere general statement of the prisoner that he was material, without any specification; and this the second motion for the same cause. And then he had used no diligence. So no cause for continuance or delay was shown. But, in addition to that, let us not forget the principle governing, in this court, refusals for continuance. It is so much a matter of discretion, and the presiding judge having so much better means for determining whether a request for continuance is bona fide or simply for delay, that the United States courts and many others refuse to review the question of continuance. In the Virginias, however, it is different, and the courts do review upon error assigned for the refusal of a continuance; but they do so under rules that have been announced for the hundredth time, and which it seems useless here to repeat. A motion for a continuance is addressed to the sole discretion of the court, and it will not reverse the judgment on that ground unless such action was plainly erroneous. Many of our cases say that it must be so plainly erroneous as to be an abuse of such discretion. State v. Lane, 44 W. Va. 730, 29 S. E. 1020; State v. Harrison, 36 W. Va. 757, 15 S. E. 982, 18 L. R. A. 224. The circuit court has to determine "from a variety of circumstances occurring in its presence whether applications for continuance are made in good faith." Flott's Case, 12 Grat. (Va.) 576.

Judgment affirmed.

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(62 W. Va. 557)

## SWICK v. REASE et al.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

1. QUIETING TITLE—WHEN SUIT MAINTAINABLE.

Where removal of cloud from title is merely incidental to the primary relief sought, or the plaintiff has no remedy at law, neither legal title nor possession is necessary to maintain his suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 36–43.]

2. TRUSTS—FRAUDS, STATUTE OF.

The statute of frauds has no application to trusts in this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 15–24.]

3. SAME—EVIDENCE TO ESTABLISH.

In a chancery suit instituted for that purpose land of H. is decreed to be sold to satisfy a judgment held by S. Shortly after entry of the decree S. by written agreement with H. becomes owner and assumes possession of the land. Subsequently, upon advertisement for sale by the commissioner appointed, R. enters into a verbal agreement with S. and the commissioner to buy in the land for S. at a sum sufficient merely to cover costs and expenses of sale, and, upon repayment to him by S. of such purchase money, to convey the land to S. R. bids in the land, pays the agreed price, and obtains from the commissioner conveyance of the legal title. *Held*, the relation of trustee and cestui que trust is thus created between R. and S., and any purchaser from R. with notice thereof must account to the holder of the equitable title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 95, 273–276.]

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by F. L. Swick against F. P. Rease and others. Decree for plaintiff, and Rease appeals. Affirmed and remanded.

Ware & Viquesney, for appellant. Wm. T. George, for appellee.

MILLER, P. The bill of complaint, the demurrer of the appellant to which was overruled, is substantially that the plaintiff, after the recovery of a judgment by his firm of Baker & Swick against one Himes, acquired title thereto by assignment from his partner; that in a subsequent suit in chancery instituted for that purpose certain deeds made by Himes were set aside as fraudulent as against said judgment, by a decree of 1889 which appointed C. F. Teter commissioner to make sale of 10 acres of land owned by Himes to satisfy said judgment; that in 1890, before sale under said decree, by a written contract with Himes the plaintiff, in consideration of said judgment, became the owner of said land and assumed and has since held possession thereof, farming it and enjoying the rents and profits; that in 1893 he conveyed to the defendant railroad company a right of way for its railroad through said land, which was immediately built and put in operation; that when Commissioner Teter advertised said land to be sold in satisfaction of the plaintiff's debt in May, 1897, he explained to said commissioner that he had sold said right of way and that he was not financially able to purchase said land, when the commissioner suggested that, inasmuch as the residue after payment of costs and expenses of sale would be due to the plaintiff, he could induce the defendant Rease, who was superintendent of the railroad company, to pur-

chase the land for the plaintiff at a nominal sum; that pursuant to such suggestion the commissioner wrote and sent by plaintiff a note to Rease concerning the matter, which being delivered to and read by Rease, the latter entered into a verbal agreement with plaintiff to attend the sale and bid in the land for him, and, as soon as the plaintiff should repay him the purchase money, to convey it to him; that pursuant to said verbal agreement Rease attended the sale and purchased the land at $95, the amount of costs and expenses of sale and a small fee due Teter as attorney; that a few months thereafter plaintiff paid Rease on account of the purchase $17.55; that in different conversations concerning said purchase Rease always told plaintiff that whenever he should pay him the balance of the purchase money he would make him a deed for the land; that, thinking Rease was in no hurry about the money, he did not go to make final settlement and obtain his deed until the summer of 1902, when he was surprised to learn from Rease that he had grown tired of waiting and had conveyed the land to the defendant company on March 21, 1902; that Rease refused, when then requested, to receive the money tendered and to execute a deed to the plaintiff; that Rease was the agent and general manager of the railroad company, who purchased the right of way through said land, and held that position at the time of his agreement with plaintiff; that he fully trusted said Rease and relied on him to carry out his agreement; that, had he been informed or advised Rease would not have carried out his contract, he would have made other arrangements to protect himself and his debt against said land, then amounting to nearly $200; that he is ready and willing to fully reimburse the said Rease. He prays that the deed from Rease to the railroad company be annulled as a cloud upon his title, that the title be decreed to be in him, that upon payment of the balance of the purchase money conveyance be made to him, and for general relief.

The sufficiency of the bill is challenged upon two grounds: First, that the plaintiff does not allege legal title or possession; second, that the bill cannot be sustained to impress upon the legal title a trust in favor of the plaintiff, because it is not alleged that the plaintiff invested any money in the purchase, nor that he took possession pursuant to the alleged agreement with Rease, and because the part payment alleged is not sufficient to avoid the statute of frauds. A suit for removal of cloud is one purely of equitable cognizance. There is great conflict of authority as to whether one with purely equitable title may maintain a bill for this relief alone. 6 Pom. Eq. § 730. This writer says: "The better opinion appears to be that the proposition that only the owner of the legal title can remove a cloud is not only not sustainable upon authority, but is not supported by the reason which lies at the basis of such actions. That reason is that the party has no adequate remedy at law, and that to require him to await the action of the party claiming under the instrument or other matter constituting the cloud, until perhaps his evidence and ability to defend against it is lost by lapse of time, would, in many cases, be to deny him any remedy. The reason is as forcible in the case of one holding an equitable estate, or merely a lien, as in that of the legal owner." See, also, 4 Pom. 1399. The rule of the federal court is that only one with legal title can maintain a bill simply to remove cloud. Smith v. Orton, 21 How. (U. S.) 241, 16 L. Ed. 104; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010; Whitehead v. Shattuck, 138 U. S. 156, 11 Sup. Ct. 276, 34 L. Ed. 873; Sharon v. Tucker, 144 U. S. 543. Our own decisions, also, adhere to this view. Hitchcox v. Morrison, 47 W. Va. 206, 34 S. E. 993; Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682; Davis v. Settle, 43 W. Va. 17, 26 S. E. 557; Smith v. O'Keefe, 43 W. Va. 172, 27 S. E. 353. But it is nevertheless a rule of these and other cases that where the plaintiff, either in or out of possession, has some equitable right not redressible in a court of law, and removal of cloud is only incidental to the primary relief sought, the bill may be maintained; and where the plaintiff's title is an equitable one possession by him is not necessary. Hogg, Eq. Prin. 84; Moore v. McNutt, supra; De Camp v. Carnahan, 26 W. Va. 839; Mason v. Black, 87 Mo. 329; Insurance Co. v. Smith, 117 Mo. 261, 22 S. W. 623; Sneathen v. Sneathen, 104 Mo. 201, 16 S. W. 497, 24 Am. St. Rep. 326; Mathews v. Marks, 44 Ark. 436; Sloan v. Sloan, 25 Fla. 53, 5 South. 603; Freeman v. Brown, 96 Ala. 301, 11 South. 249.

The second ground of demurrer assumes that the verbal contract alleged is executory, and, being made after deed by the commissioner to the appellant, is not enforceable; and he relies upon the cases of Currence v. Ward, 43 W. Va. 368, 27 S. E. 329; Woods v. Ward, 48 W. Va. 653, 37 S. E. 520, and like cases. But the contract alleged is not of that character. The contract set forth in the bill was made before sale and deed, and puts the appellant in the relation of trustee to buy in the property at the judicial sale for Swick, under such circumstances of trust and confidence as to preclude him from asserting adverse title in this suit. 1 Perry on Trusts, § 171; 6 Pom. Eq. § 830; Camden v. Dewing, 47 W. Va. 310, 34 S. E. 911; Potts v. Fitch, 47 W. Va. 63, 34 S. E. 959; Glass v. Hulbert, 102 Mass. 35, 3 Am. Rep. 418. The statute of frauds has no application. Camden v. Dewing, supra; 2 Washb. on Real Prop. § 1430; Currence v. Ward, supra; Hamilton v. McKinney, 52 W. Va. 317, 43 S. E. 82; Hogg, Eq. Prin. § 553; 2 Minor, Inst. 188, 568; Bank v. Carrington,

when the train emerged from a cut, so that the track was in view for the distance of 1,670 feet, all of which distance was clearly in the view of Mr. Bartell. The horse that was killed came onto the track running towards the engine, and must have been in sight within the 1,670 feet when the train came through the cut. The horse had blankets upon him, which dropped from him onto the track some 200 or 300 feet before he reached the point where he was struck. The horse ran about 600 feet on the track, meeting the train, after he came to the point where he could have been seen from the engine after it emerged from the cut. Mr. Bartell testified that he did not see the horse until it was within about 300 feet of the engine, yet he says positively that he saw the blankets fall off the horse, which ran 200 or 300 feet after the blankets dropped off before it was struck; but he failed to call attention of Engineer Bull to the fact that the horse was on the track and running towards the engine until it was within 300 feet of the engine. Engineer Bull testified that he did not see the horse until it was struck and falling over the embankment from the engine, owing to the fact that the nature of the curve, the dome of the engine, sand box, bell, and headlight obstructed his view. A diagram is filed with the evidence in the case, made by Surveyor Morgan, who was a witness for plaintiff, by which it is shown, together with the evidence of Morgan, that from the point where the train came out of the cut to the point where the horse was struck was 1,670 feet, and the distance from the point of the collision to where the track was first in view of the engine from the first point named, where the horse could have first been seen, was 600 feet, and the horse was seen at least from 200 to 300 feet by Bartell east of where he was struck by the engine, as the blankets were found there; so that Bartell must have seen the horse immediately after the engine came through the cut, and, as the horse was running on the track meeting the train, prompt action on the part of the engineer when Bartell saw the blankets fall from the horse would have enabled them to have stopped the train before striking the horse, as it is shown in evidence that the train could have been stopped in 700 feet. But, as shown by the evidence, the first effort that was made to slacken the speed of the train was when the engine was within 300 feet of the horse, and it was only slightly slackened when the horse was struck. The demurrer to the evidence, under the rulings laid down by this court in Heard v. Railway Co., supra, and many other cases, was properly overruled by the court.

It is claimed by the plaintiff in error that the damages found by the jury are grossly excessive, and "evidences prejudice, hostility, and temper on the part of the jury. The only evidence is found on pages 21 and 22 on cross-examination." Counsel overlooks the fact, in making this statement, that not only the plaintiff stated that the horse was worth $300, but that J. G. Rixey, another witness, testified that the horse was "worth $300 in hand money right down"; also another witness, I. K. James, testified: "Q. What was that horse worth, Mr. James? A. About $300, anyhow. Q. How much? A. $275, or $300, or $325." The proof is ample as to the value of the horse to sustain the verdict of the jury.

For the reasons stated, the judgment of the court is affirmed.

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(62 W. Va. 550)

## WEESE v. YOKUM et al.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

1. WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEDENT.

A father who has emancipated his infant daughter is not thereafter, by section 23, c. 130, Code 1899 (Code 1906, § 3945), disqualified, in a suit by her against the estate of a decedent for the value of services rendered the latter in his lifetime, to give evidence on her behalf of a personal transaction or communication between witness and decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 601.]

2. PARENT AND CHILD—EMANCIPATION—EVIDENCE.

Such emancipation may be established by oral or written evidence, or it may be proved by circumstantial evidence, or it may be implied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, §§ 165–175.]

3. SAME—EMANCIPATION—REVOCABILITY.

An agreement for emancipation between a father and his infant child is irrevocable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, §§ 165–175.]

4. WITNESSES—COMPETENCY — TRANSACTIONS WITH DECEDENT.

A claim for wages subsequently accruing to a child thus emancipated can in no legal sense be said to be derived from, through, or under the parent, by assignment or otherwise, so as to disqualify the latter, under section 23, c. 130, Code 1899 (Code 1906, § 3945), from giving evidence on behalf of the child, in an action to recover such wages, as to a personal transaction or communication between the witness and the decedent, for whom the services were rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 664–676.]

(Syllabus by the Court.)

Error from Circuit Court, Randolph County.

Action by Myrtle M. Weese, by her next friend, against H. Yokum, administrator, and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Jared L. Wamsley, for plaintiffs in error. C. H. Scott, for defendant in error.

MILLER, P. Myrtle M. Weese, a minor daughter of Henry Weese, suing by next friend, brought an action in assumpsit in the circuit court against the administrator and administratrix of the personal estate of

Geo. W. Leonard, deceased, and recovered judgment for $725. The declaration is in two counts—the first a quantum meruit count for work and services; the second, upon a contract alleged to have been made with decedent in May, 1895, for services and compensation at $2.50 per week, under which the plaintiff alleges she had rendered services thereafter for seven years, until the death of said decedent, and had received no part of the stipulated compensation. Beginning with May, 1896, and annually thereafter up to and including March, 1903, the bill of particulars filed charged the decedent's estate with the sums then due at the rate of $2.50 per week, with interest, aggregating $1,283.30. There was a demurrer to the declaration and each count thereof; but the action of the court in overruling the same is not assigned as error, and under our rules we must treat it as waived. The errors assigned and argued by plaintiff in error are the judgment overruling the motion to set aside the verdict and grant a new trial, that the verdict was excessive, and that the court improperly permitted Henry Weese, a witness for the plaintiff, to answer two certain questions covered by bills of exception. All other errors will be treated as waived.

It is proper we should first dispose of the questions relating to the testimony of Henry Weese. As they mainly relate to his qualification as a witness, they may be considered together. The first question was, "State whether you as the father of this girl agreed that she should go there [the residence of Geo. W. Leonard] to live and whatever she would earn would be her own," to which, over the objection of the defendants, he answered, "Yes, sir." The second was, "State whether you agreed with Mr. Geo. W. Leonard, the deceased, that you would not demand or expect him to pay you anything that might be earned by your daughter," and over like objection he answered, "No, sir; he was not to pay me." The objection to these questions is based upon section 23, c. 130, Code 1899 (Code 1906, § 3945), providing that "no party to any action, suit or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of such examination deceased." The only ground of objection argued here is that the witness is interested in the result of this action. The only other ground based on the statute which could be assigned is that the plaintiff derived some interest by assignment or otherwise from him. With respect to the first question, we do not think it necessarily, or by any fair implication, relates to any personal transaction or communication with the deceased. While the second does have such relation, yet the testimony given was so far immaterial to any real issue in the case as not to render its admission reversible error. The testimony covered by both these questions and answers was offered, not to prove a contract between the witness and the deceased for the services of the plaintiff, but to show an emancipation by him of his daughter, her freedom to contract with the deceased for the services rendered, and her right to maintain this action. The fact of emancipation was established by the witness' answer to the first question. Such emancipation may be established by oral or written evidence, or it may be proved by circumstantial evidence, or it may be implied. Trapnell v. Conklyn, 37 W. Va. 242, 254, 16 S. E. 570, 38 Am. St. Rep. 30. The character of other evidence in the case covering this subject was such that, without this testimony of Henry Weese, the jury would necessarily imply an emancipation; and it was not necessary, in order to entitle the plaintiff to recover, to show a contract with the deceased for, or knowledge by him of, emancipation. Corey v. Corey, 19 Pick. (Mass.) 29, 31 Am. Dec. 117; Whiting v. Earle, 3 Pick. (Mass.) 201, 15 Am. Dec. 207. And it is held that an agreement between a father and his infant child that the latter may have his earnings is irrevocable. Morse v. Welton, 6 Conn. 547, 16 Am. Dec. 73, and note.

But was the witness disqualified to give this evidence, even if material, on behalf of the plaintiff, by reason of any derivative interest acquired by the plaintiff from him by assignment or otherwise? This presents the question whether a claim for wages by an infant thus emancipated is derived, through assignment or otherwise, from the parent. In this case the emancipation occurred prior to any claim for services against the decedent, and when the witness had no claim which he could assert in a court of law or elsewhere against the decedent. Having been emancipated and given power to contract for wages, which was thereafter irrevocable, the claim of the child for wages subsequently accruing to her could in no legal sense be said to be derived from, through, or under her father, by assignment or otherwise. The principle underlying this proposition was distinctly affirmed in Godine v. Kidd, 64 Hun (N. Y.) 585, 593, 19 N. Y. Supp. 335. This case involved specific execution of an agreement, made by a mother on behalf of her infant daughter, whereby, in consideration that the father and mother should emancipate the daughter and permit the decedents to bring her up as their own and give her their name, the latter agreed to make her their heir, and that any property they might have at their decease should go to her in case she survived them. The court said that, had this been a contract made by the mother for her own benefit and assigned to the daughter, there might be some force in the suggestion that the mother was an incompetent witness, because the daughter's interest had been derived from her mother

"But," says the court, "it is clear that this is a case where the contract was made by the mother on behalf and for the benefit of the child; and her interest was in no way derived from or received through her mother. We think the test of this objection is to be found in a consideration of whether or not the mother could have maintained any action for this property, or whether she at any time or under any circumstances would have any interest therein." The same principle was announced in Lashaw v. Croissant, 88 Hun (N. Y.) 206, 34 N. Y. Supp. 667, a case involving the right of a husband to give testimony in a suit by the wife on a claim for services rendered by her to third persons under her agreement with him that she should receive the recompense therefor. It was held that in such case the wife did not derive her interest by assignment from the husband, and that he was, therefore, not prohibited by the statute in such cases from testifying in her behalf as against the estate of the deceased persons for whom the services were rendered. It was so ruled, also, in Slack v. Norton, 111 Mich. 213, 69 N. W. 497, a case involving facts quite similar to those in the New York cases. From these authorities we conclude that the witness was not disqualified or prohibited from giving testimony by the provisions of our statute.

Was, then, the verdict plainly contrary to the evidence? Or was it excessive? The latter question is, of course, involved in the first. The evidence shows that the plaintiff, being emancipated by her father, went to live with the deceased, Geo. W. Leonard. She was between 11 and 15 years of age. The evidence leaves her exact age uncertain. Her mother had died. It appears that she was a strong, hearty girl, with much aptitude for domestic services. She was sent to school and provided with clothing at intervals during the first 2 or 3 years of her service. There is no evidence of any specific contract for compensation between the plaintiff and deceased, except such as may be implied from the facts and circumstances in relation to her employment and services. But there is positive proof that the deceased declared to at least one of the witnesses, after the plaintiff had gone away and returned to his home, some 4 years before his death, that if she stayed with him he would more than pay her. There is also evidence of numerous declarations made by the deceased to other witnesses that he proposed to take good care of and provide for her, and give her a house and lot, and specific houses and lots were mentioned as the ones he proposed to give her as she might prefer. There is evidence, somewhat conflicting, that during the last years of her service, when she had reached the age of maturity, she did laborious domestic work, and was of great service in Mr. Leonard's family. He declared, to one witness at least, that he could not keep house without her—that "she was worth her weight in gold." Witnesses give testimony as to the value of such services as the plaintiff rendered, based on prevailing prices at the time and place covered by the claim, ranging all the way from $1.50 to $2.50 per week. The plaintiff was not permitted to testify in her own behalf as to any transaction or contract she may have made with the deceased. Her lips were sealed against him by the inhibition of the law. But we think the evidence on the whole was sufficient to establish a contract, at least by implication, for payment for services rendered. It is argued that such contract could not be implied from declarations or promises of gifts by the deceased. It is true such promises would not support an action for specific execution. This evidence seems to have been admitted without objection or exception. The jury may have given some weight to it in considering their verdict, and as tending to show the value of the services in the estimation of the deceased. The deceased died without having made any provision for the plaintiff. The verdict does seem large, but we cannot say it is unsupported by the evidence. The record does not disclose that it was the result of any of the elements which, under the rules of practice so often declared by this court, would justify us in disturbing it.

For these reasons, we affirm the judgment.

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(62 W. Va. 555)

## SCOTT LUMBER CO. v. WOLFORD et al.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

EMINENT DOMAIN — NATURE AND EXTENT OF POWER.

A condemnation proceeding, in which the principles announced in Hench v. Pritt (decided June, 1907) 57 S. E. 808, are reaffirmed and applied.

(Syllabus by the Court.)

Error from Circuit Court, Tucker County.

Action by the Scott Lumber Company against Charles Wolford and others. Judgment for plaintiff, and defendants bring error. Reversed.

Cunningham & Stallings, for plaintiffs in error. J. Wm. Harman, for defendant in error.

MILLER, J. The Scott Lumber Company, a copartnership, owning timber lands in Canaan Valley, of Tucker county, filed its petition in the circuit court, under section 69a, c. 54, Code 1899 (Code 1906, § 2370), to condemn for three years a right of way 10 feet wide through the lands of the defendants for a railroad to be constructed of steel and wood from and intersecting the Dry Fork Railroad near the mouth of Spring Run to its timber lands, a distance of not more than 12 miles, which it is alleged will be of public utility and needful and useful for the transportation to market of timber and other products from the territory traversed by the

proposed route, which is claimed to be the only practicable one. The petitioner alleges its inability to agree with the defendants on the price of the land proposed to be taken, but that it is ready and willing to pay to Hettie Wolford $100 and to Charles Wolford $125 for the right of way to be taken from them, respectively. It prays that commissioners be appointed to ascertain a just compensation for said right of way, and for further proceedings in conformity to law. The defendants, by demurrer and answer, contested the right of condemnation upon constitutional grounds, claiming that the petition showed an attempt to take their lands for private, and not public, use. The circuit court ruled adversely to the defendants; and, the defendants not accepting the offer of a trial by jury on the question of damages and public utility, the court overruled their exceptions to the report of commissioners appointed, awarding $50 damages to each, and finding, upon the evidence of witnesses examined by them, the proposed road to be of public utility and the proposed route the only practicable one; and judgment of condemnation was rendered accordingly.

This case is controlled in all respects by the case of Hench v. Pritt (recently decided by this court) 57 S. E. 808; and, although urged to reconsider and overrule that case as being inimical to the great business interests of the state, we are not disposed, in doing so, to ignore the constitutional inhibition and the rights of private property protected thereby, as defined by prior decisions.

We therefore reverse the judgment of the circuit court.

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(62 W. Va. 540)

## TRUEX v. SOUTH PENN OIL CO.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

1. NEGLIGENCE — BLOWING WHISTLE NEAR HIGHWAY.

The owner of a boiler near a highway, on which boiler is a large steam whistle used for giving employés times for beginning and closing work, which, when blown, makes a loud, coarse noise calculated to frighten horses, must not blow the whistle negligently, but must keep a lookout for horses on the highway, and is liable for injury resulting from the fright and running away of horses on the highway, caused by blowing the whistle when such horses are near it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 54.]

2. TRIAL—PROCEDURE—INSTRUCTIONS.

Before chapter 38, p. 223, Acts 1907, it was not reversible error for a court to read to a jury first in order instructions asked by the defendant, and next those asked by the plaintiff.

3. APPEAL — REVIEW — PRESUMPTIONS — AFFIRMATIVE ERROR.

A party who wishes the court, under Code 1899, c. 116, § 31 (Code 1906, § 3731), to state to the jury that a juror knowing anything relative to a fact in issue must disclose the same in open court, but not to the jury out of court, must ask the court to make the statement; otherwise, the omission to do so will not be ground of reversal. Where the record is silent as to this, such omission will not be presumed; but rather it will be presumed that the court made such statement.

(Syllabus by the Court.)

Error from Circuit Court, Wetzel County.

Action by W. H. Truex against the South Penn Oil Company. Judgment for plaintiff. Defendant brings error. Affirmed.

A. B. Fleming, Thos. P. Jacobs, and C. Powell, for plaintiff in error. J. H. Strickling and E. L. Robinson, for defendant in error.

BRANNON, J. The South Penn Oil Company was using a boiler on its premises in the production of oil, and on the boiler was a steam whistle used in the operations of the company for giving the hours for commencing and quitting work to its employés by blowing. One end of the boiler was 2 feet from the edge of a public highway and 18 feet from its center. On the boiler was the steam whistle, 11 feet from the highway. W. H. Truex was riding on horseback on the highway, and when distant from the boiler 175 feet, having come down the road several hundred feet before reaching the boiler, and having passed it by said distance of 175 feet, the whistle was sounded by the servant of the company, frightening Truex's horse, and causing it to run away and fall on Truex's leg, throwing him against a bank on the highway, and causing injury to him. In an action against the company he recovered a verdict and judgment for $1,500 damages, and the company brings the case to this court.

The most material point in the case arises upon the refusal to the defendant of an instruction "that under the law and the evidence in this case the plaintiff is not entitled to recover, and you are therefore directed to find a verdict for the defendant." I consider that the case is ruled in this respect by the case of Snyder v. Philadelphia Co., 54 W. Va. 149, 46 S. E. 366, 63 L. R. A. 896, 102 Am. St. Rep. 941. There a gas well situated near a public highway was opened, making a loud noise and frightening a team in the highway, and it was held that, though such use of the gas well was not a nuisance per se, as the noise made was such as to frighten horses on the highway, if the act was performed negligently the company was liable. That case holds that, whilst a person or company may lawfully so use a gas well, though near a highway, and it is not per se a nuisance, still it must not be negligently used, but its use must be characterized by such care as will prevent injury to persons using the highway. It says that the use of a steam whistle in a manufacturing establishment is not a nuisance per se, but it may be used so as to be such, and that care and caution are necessary in its use. In this case the evidence is that the highway could be seen for several hundred feet from the boiler

in the direction from which Truex rode, and for more than 175 feet in the direction in which he rode after passing the boiler. The engineer could have seen Truex approaching the boiler long before Truex reached it, and as he passed the boiler, and for 200 feet at least after he passed it. The engineer was standing at the boiler near the road when Truex passed, and Truex spoke to him. The whistle was a very large whistle, six inches in diameter, doubly larger than whistles usually used for such purpose, and it made a loud, heavy, grum sound, well calculated to frighten horses, and emitted a large volume of steam. The law regards public highways as of the utmost importance to the public, and is assiduous to render them safe for public use. This ought to be done. It regards, also, the use of private property highly. It says that a manufacturing establishment may lawfully maintain a whistle in the transaction of its business. Here are two rights, both valid in the eye of the law. The law says to both that the right must be so used with prudence and care that one shall not negligently invade the other. Under the Snyder Case the company was not allowed to blow that whistle while a traveler was passing along the highway so near to the boiler that the whistle might frighten the rider's horse, and that a lookout for travelers must be kept. By the evidence, uncontradicted, the engineman could have seen Truex riding along the highway for hundreds of feet. By the evidence of Truex, whom the jury credited, as its verdict shows, the engineman did see him, and blew the whistle before he had gotten a reasonable distance from it. The road ran 200 feet from the whistle, and then turned and ran back in the direction of the whistle about 200 feet, within 100 feet of the boiler. The engineman knew the road well. He knew that Truex would go about 200 feet from the boiler, then turn and come back toward the boiler fully that distance, before it would be safe to blow that whistle, because Truex would still be close to it, and it was his duty to wait until Truex should pass beyond those limits. For legal principles I refer to the opinion by Judge Poffenbarger in the Snyder Case. I will add some. In Powell v. Nevada, C. & O. Ry., 28 Nev. 40, 78 Pac. 978, the railroad company had a steam whistle on its shop six feet from a street, and a traveler's horse took fright at the sounding of the whistle and ran away, injuring the rider, and it was held that a statute authorizing the company to erect all buildings, fixtures, and machinery for its operation did "not protect the company in such a use of a steam whistle in its shop as to frighten horses and thereby injure others." In Albee v. Chappaqua Shoe Co., 62 Hun, 223, 16 N. Y. Supp. 687, it was held that a manufacturing company which maintained a steam whistle, constructed so as to be heard for miles, very near to a platform of the freight station of a railroad, was liable for sounding the whistle three times and frightening Albee's horse at the station, causing it to run away and injure him. The court held that "a person has no right to do upon his own premises an act which detracts from the safety of travelers or renders the highway disagreeable." In that case, as in the Nevada Case, there was an element that is found in this case, namely, that the whistle made loud noises, as this whistle did, owing to its great and unusual size.

Counsel for Truex lay stress upon this fact as an element bearing on the question of negligence, and I think properly so. A whistle of small size, amply sufficient to be heard a short distance by employés, so as to tell the hour of beginning and quitting work, would be very different from a great whistle of six inches diameter, making an alarming sound, heard for miles around. What the use of such a whistle, when a smaller one would answer all purposes? This whistle, suddenly giving behind a horse a loud blast, and kept up until the horse had run 400 or 500 feet or more, would be very much calculated to frighten any horse not used to it. The evidence is that the horse, while of good mettle, was safe. The livery stable man proves this. Elliott on Streets, § 649, lays down the proposition that "an object at the side of a highway, or in close proximity thereto, of such character that it is naturally calculated to frighten horses of ordinary gentleness, may constitute a nuisance. * * * We have already, when treating of causal connections, noticed that it is one of natural incidents of the employment of horses on a highway that they should be frightened by extraordinary sights or sounds. Those who negligently and unnecessarily, therefore, place such objects on a highway, are liable for the consequences, if damage of this kind result. Nor can the owner of land erect on it, so as to impinge upon a highway, implements, flags, or banners, thus calculated to frighten horses. * * * Yet it must be remembered that there are some instruments of alarm—e. g. steam whistles on locomotives—which are essential to important industries, which are tacitly, if not expressly, licensed by the state. The use of these is not per se negligence, though animals be thereby frightened and injury ensue. It is otherwise when the use is not necessary to the industry. Thus it has been correctly held that the proprietors of factories are not entitled to use steam whistles on their factories, so located, of such a character, and placed in such a manner, as to frighten horses of ordinary gentleness when passing upon the highway adjoining their land; and they are responsible for an injury caused by an unnecessary, alarming, or frightening use of them. It is conceded, however, that the law is otherwise as to whistles upon railroad engines. At the same time, where the whistle is negligently and wantonly sounded, so that horses lawfully in

the vicinity are caused to run off and injury is inflicted, it is correctly held that the company is liable. So liability attaches for frightening horses by the negligent discharge of a gun, or the beating of a drum near a highway." Wharton on Neg. §§ 835, 836. I repeat that the fact that Truex was on a public highway is a large consideration in the case. The law seems to hold that another, though exercising a lawful right on his own premises, must so exercise it with care and caution, and without negligence, as not to hurt one lawfully using a public highway. So we think the instruction was properly refused.

Complaint is made of another instruction, but not argued. Complaint is made that the court erred in reading to the jury, first the instructions asked by the defendants, and next those of the plaintiff. We do not see why there is any error in this. It may be unusual, but it is not a ground of error. By an act passed after the trial of this case it is provided that instructions given by the court on its own motion shall be read first; those of the plaintiff shall be read second, and in any event before those of the defendant; those of the defendant shall be read last; and none shall be read twice, except at the request of the jury. Chapter 38, p. 223, Acts 1907. We do not intimate any opinion as to whether departure from it would be reversible error.

Complaint is made that the court did not inform the jury that a juror knowing anything relative to a fact in issue in the case must disclose it in open court, but not to the jury out of court, as required by Code 1899, c. 116, § 31 (Ann. Code 1906, § 3731). It does not appear that any request was made of the court to make such statement to the jury, nor was there any exception for its failure to do so, if it did fail to do so. If any exception had been made, the court could and would have corrected its omission. Fairness to the court would demand that a request be made to make the statement, or that the attention of the court should be called to it before retirement of the jury, or certainly before the verdict. It is claimed that the record must affirmatively show compliance with that statute, and, if it does not so show, the presumption would be that the court did not do so. We cannot sustain this position. We think that error must affirmatively appear. Indeed, we think the presumption would be that the court performed its duty, unless the contrary appear. As somewhat akin to this matter, see State v. Beatty, 51 W. Va. 232, 41 S. E. 434, holding that even in a murder case the court is not bound to instruct that the jury may find that the defendant be confined in the penitentiary, and not hanged, unless there be a request, and where the record is silent as to this it will be presumed that the court did so, or that such instruction was waived.

We are compelled to affirm the judgment.

(62 W. Va. 526)

## EMMONS v. HAWK et al.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

1. MORTGAGES—TRUST DEED—ASSIGNMENT.
The indorsement or assignment of a note or other evidence of a debt secured by trust deed carries with it as incident thereto the benefit of the lien of such trust deed, unless excluded expressly or by fair and reasonable implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 620.]

2. APPEAL—RULINGS ON PLEADINGS—PREJUDICE.
In a chancery cause, where a defendant tenders a plea in writing, which is rejected, and he is permitted to file an answer setting up the same defense, to which plaintiff enters a general replication, the defendant is not prejudiced by the rejection of the said plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4078, 4079.]

3. MORTGAGES—TRUST DEED—FORECLOSURE—LIMITATIONS—PERSONAL DECREE.
In a suit to enforce the lien of a trust deed securing a note upon which the statute of limitations has run, where the trust debtor has filed an answer claiming the benefit of the statute of limitations, it is error to enter a personal decree against the maker of the note for the amount thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1604, 1605, 1613.]

4. APPEAL—DISPOSITION OF CAUSE—REVERSAL IN PART.
In such suit, where a personal decree has been so entered, and also further providing for the sale of the trust property to pay the debt, when it appears that the plaintiff was entitled to a decree of sale, the appellate court will reverse the decree in so far as it is personal against the defendant and affirm it as to the provision for the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4555–4560.]

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.

Suit by Arthur S. Emmons against Sarah E. Hawk and others. From a decree in favor of plaintiff, defendants appeal. Reversed in part.

Simms & Enslow, for appellants. Campbell, Heffley & Davis, for appellee.

McWHORTER, J. Arthur S. Emmons filed his bill in equity in the circuit court of Cabell county against Sarah E. Hawk, S. A. Hawk, the National Mutual Building & Loan Association, a corporation, George F. Peet, trustee, and C. R. Wyatt, trustee, for the purpose of enforcing the lien of a deed of trust made by said Sarah E. Hawk and Samuel A. Hawk, her husband, to C. R. Wyatt, trustee, on the 17th day of May, 1894, conveying a certain property on Sixth avenue, in the city of Huntington, 45x200 feet, being a part of block No. 145, to secure to C. D. Emmons two promissory negotiable notes—one for the sum of $291.95, bearing date on the said 17th day of May, 1894; the other for $1,000, dated the 17th day of April, 1893, payable in 15 months from date, with interest at the First National Bank of Huntington—the last note mentioned only remaining unpaid. The bill alleges that the

said $1,000 note at 15 months was indorsed by the said C. D. Emmons to the order of D. W. Emmons, who is since deceased; that since the death of D. W. Emmons the same has been indorsed to the order of Arthur S. Emmons by Mary J. Emmons, administratrix of D. W. Emmons, deceased, and that Arthur S. Emmons now owns the said note of $1,000; that said note was long since due, just, and unpaid; that the said Sarah E. Hawk and S. A. Hawk had, on the 14th day of May, 1894, executed another deed of trust upon the same property to secure a loan, being an advance of 20 shares of stock in the said National Mutual Building & Loan Association, which trust deed was the first lien on said property, but plaintiff was unable to state the exact amount due the said association on said loan—and prayed that the terms of the trust deed held by C. D. Emmons be enforced, and that the property be sold to pay the said note of $1,000, with interest and costs of the suit, and for general relief.

Sarah E. Hawk and S. A. Hawk filed their demurrer to said bill, and for special grounds thereof say that said bill shows upon its face that the suit was not brought within 10 years next ensuing after the maturity of said note, and that the same was barred by the statute of limitations, and that said bill shows upon its face that the trust deed securing said note was never assigned to plaintiff, Arthur S. Emmons, but was held by C. D. Emmons, who was not a party to this suit, and that plaintiff had no right to have the same enforced. Defendants also filed a plea in bar to plaintiff's bill by leave of the court, the plaintiff objecting to the legal sufficiency of the same, which objection being argued, the court held that the plea was not sufficient in law, and rejected the plea. The plea tendered was to the effect that the demand of plaintiff was stale and the collection of the debt barred by the statute of limitations, more than 10 years having elapsed since the right to enforce the lien sought to be enforced by the plaintiff accrued to the party holding said note, and that the plaintiff and those under whom he claimed were by their laches estopped from enforcing the said lien against defendant's property, because the defendant Sarah E. Hawk, as surety for her husband, executed the note and secured the same by a lien upon her said property, which note was thereafter by the payee thereof indorsed to D. W. Emmons, now deceased; that the note became payable and the rights thereunder accruing to D. W. Emmons more than 10 years before the issuing of summons in this suit to enforce said trust lien; that said S. A. Hawk agreed with and through the said D. W. Emmons for the payment of said note, said D. W. Emmons agreeing to discharge the said note in consideration of the fact that the said S. A. Hawk would not at that time require the Fitzgerald Patent Prepared Plaster Company, of which the said D. W. Emmons, then in life, was a stockholder and director, to pay to the said S. A. Hawk a certain amount of money then due the said S A. Hawk from said plaster company, said Hawk to permit the same to remain unpaid, and the said D. W. Emmons, who was a large stockholder and creditor thereof, to apply the assets and proceeds of the business of said company to the payment of his debts; that in consideration of said agreement said Emmons agreed that he would surrender said note held by him and cancel and release the said lien on defendant's property; that said agreement and understanding between Hawk and D. W. Emmons was after the note became due and payable and more than 10 years before the bringing of this suit; that the facts connected with and growing out of the said agreement, by which the said note was agreed to be paid and the lien released, were known only to the said S. A. Hawk and D. W. Emmons; that defendant could not prove the facts by any one except by her joint debtor on the said note, S. A. Hawk, her husband, who could not testify as to the understanding and agreement between himself and the said D. W. Emmons, since deceased; that through the delay of the said D. W. Emmons in bringing this suit the conditions of the parties had been changed, and defendant could not show by parol testimony of S. A. Hawk—the only evidence in the matter—the true facts and circumstances connected with the settlement and agreement of release made by said Samuel A. Hawk and D. W. Emmons, now deceased; that said delay of over 10 years in bringing said suit until after the death of D. W. Emmons was such laches as prevented the defendant establishing her rights in said suit and barred the plaintiff of all relief, all of which things defendant averred and pleaded in bar of plaintiff's bill of complaint, and prayed judgment, etc.

The defendants Sarah E. Hawk and Samuel A. Hawk then tendered their answers, setting up the same defense set out in the special plea aforesaid, to which answers general replications were made. The depositions of defendants Sarah E. Hawk and S. A. Hawk were taken and filed in the case, which depositions were excepted to by the plaintiff, and the exceptions indorsed thereon in writing. Also the deposition of C. D. Emmons was taken and filed in the cause in behalf of the plaintiff, which deposition was also excepted to by the defendants. The cause was brought on to be heard on the 12th day of May, 1906, when the court sustained the exceptions taken to the whole of the evidence of Sarah E. Hawk, as well as the exceptions to the depositions of S. A. Hawk in the particulars excepted to and pointed out, and the exception to the deposition of C. D. Emmons was overruled. The court then rendered a personal decree against S. A. Hawk and Sarah E. Hawk for the sum of $1,786, with interest thereon from date of decree, and the costs of suit, and decreed that the debt or

$1,786 was secured by deed of trust upon the said lot on Sixth avenue, 45x200 feet, in the city of Huntington, and constituted a valid lien upon said real estate second in priority to a decree rendered the day before in the case of Sarah E. Hawk against the said building and loan association, in favor of said association, for the sum of $1,646.46, with interest from the 11th day of May, 1906, and further decreed that, unless said defendants should pay to the plaintiff the said sum of $1,786, with interest and costs, within 30 days from the rising of the court, that the said property should be sold by a special commissioner appointed for that purpose, to pay the same on the terms provided by said decree, being one-third of the purchase money in cash on day of sale and the residue in two equal payments at 9 and 18 months, with interest.

Defendants assign as error the overruling of their demurrer to plaintiff's bill. It is true the statute of limitations may be taken advantage of by demurrer in an action to enforce a contract. If this were an action against the makers of the note for judgment for the amount thereof, a demurrer would lie because of the statute of limitations, and the authorities cited by appellants would be applicable; but the object of the suit here is, not to collect the amount of the note against the makers, but simply to enforce the lien created by the deed of trust. In Criss v. Criss, 28 W. Va. 388, Syl. point 1, it is held: "The statute of limitations to a suit to enforce a debt bars the remedy, but does not extinguish the debt; and therefore, if the debt be secured by a deed of trust, though the action for its recovery be barred, the enforcement of the lien by deed of trust is not affected by any lapse of time short of a period sufficient to raise a presumption of payment." See, also, Camden v. Alkire, 24 W. Va. 674, where it is held: "The fact that the debt secured by the deed is barred by the statute of limitations does not as a general rule extinguish the security or prevent the enforcement of the lien by suit." And in Pitzer v. Burns, 7 W. Va. 63: "In a suit in equity to enforce a deed of trust given upon land to secure the payment of money, the fact that the grantor remained in possession of the land for 17 years after the right to sell the property to pay the debt accrued does not operate a bar to the suit." See, also, Hanna v. Wilson, 3 Grat. (Va.) 243, 46 Am. Dec. 190; Ross v. Norvell, 1 Wash. 14, 1 Am. Dec. 422; Coles v. Withers, 33 Grat. (Va.) 187; Smith v. Railroad Co., 33 Grat. (Va.) 617; Elkins v. Edwards, 8 Ga. 325; Thayer v. Mann, 19 Pick. (Mass.) 585; Pratt v. Huggins, 29 Barb. (N. Y.) 277; Borst v. Corey, 15 N. Y. 505; Belknap v. Gleason, 11 Conn. 160, 27 Am. Dec. 721; Miller v. Trustees of Jefferson College, 5 Smedes & M. (Miss.) 651; Trotter v. Erwin, 27 Miss. 772; Nevitt v. Bacon, 32 Miss. 212, 66 Am. Dec. 609; Joy v. Adams, 26 Me. 330; Wiswell v. Baxter, 20 Wis. 713; Cookes v. Culbertson, 9 Nev. 199.

It is further contended by appellants as ground of demurrer that the bill fails to allege that the deed of trust was assigned to the plaintiff. In Thomas v. Linn, 40 W. Va. 122, 20 S. E. 878, it is held: "The assignment of a bond or note secured by deed of trust carries with it, as an incident of such assignment, the benefit of the lien of the deed of trust, unless excluded expressly or by fair and reasonable implication." It was not necessary that it should show the assignment of the deed of trust, nor was an assignment thereof necessary. The assignment or indorsement of the note carried with it to the indorsee or assignee the benefit of the trust lien. The demurrer was properly overruled. The matters set up in defense by the demurrer, the plea, and the answers of the defendants are all of the same character. The defendants, making the same defense in their answers as in the plea, were not prejudiced by the rejection of the plea.

The defendants rely principally upon the question of laches, and the only transaction upon which they base their defense was that alleged to have been between S. A. Hawk and C. D. Emmons, and acquiesced in by D. W. Emmons, who is since deceased, and aver in their plea, and answers as well, that said transaction could only be proved by S. A. Hawk since the death of D. W. Emmons. Defendants contend that D. W. Emmons was guilty of laches in not demanding the payment of the note in his lifetime, and that the plaintiff, taking said note barred by the statute of limitations, had no greater right under the same than D. W. Emmons had, and that the changed conditions and delay is a bar and discharge of all liability upon the defendants and of the property involved to the payment of the same. S. A. Hawk in his testimony says he had charge of the business of the Fitzgerald Patent Prepared Plaster Company from April, 1893, to March, 1897; that at the time he left the company it was indebted to him in the sum of $1,400, which under the agreement with C. D. Emmons, "acquiesced in by D. W. Emmons, was to be applied on the note in question" (the $1,000 note secured by said deed of trust). That portion of his evidence, "acquiesced in by D. W. Emmons," was properly ruled out; the same relating to a transaction between himself and the deceased Emmons. In a letter addressed by S. A. Hawk to C. D. Emmons, dated March 10, 1904, he says: "Referring to your letter of March 8, 1904, I fear I did not make myself sufficiently clear. You know you or your father holds a mortgage on our Sixth avenue property, and in view of settlement I wish to ascertain what credit your father and yourself would allow me on settlement. I am not asking that your father and yourself settle the claim I hold against the stockholders of the plaster company. I do think.

however, you should allow me your pro rata on the settlement. Would it be fair and just that, under the conditions, you would collect from me for the full mortgage, with interest, and give me no credit for a claim against the company that you both are interested in, and hold stock? As I stated above, I do not ask you to settle the claim I hold against the company; but I do ask that you give me your pro rata share of the claim on settlement. Let me hear from you." It does not appear from this letter that Hawk was at that time claiming that the note had been paid or was to be paid out of the amount due him from the plaster company; but he was simply claiming that Emmons and his father should allow him on account of the note their pro rata, supposably the amount coming to them as stockholders in said company on a settlement of the affairs of the company. It would seem that, if Hawk at that time claimed the note was paid or was to be paid out of what the company owed him on his salary, he would have contended that the same should be so applied. While he states in his deposition that it was to be so applied under the agreement, he makes no such claim in the letter, which was written before the institution of his suit. No such time had elapsed after the note became due as would, under the authorities, raise the presumption of the payment of said note. Only a little over 11 years elapsed before the bringing of the suit, when ordinarily the presumption will not be raised short of 20 years. In Cranmer v. McSwords, 24 W. Va. 594, one of the cases relied upon by the appellants, Judge Snyder in writing the opinion of the court, refers to the case of Harrison v. Gibson, 23 Grat. (Va.) 212, where the court refused relief after the lapse of 14 years from the time the cause of action arose. Judge Snyder says: "Even in this case the court did not rely wholly on these circumstances and the lapse of time, for it proceeds to show that the facts which did appear weighed in favor of the presumption that no breach of trust had been committed. This is the only case I have found where relief was denied within less than 15 years after the cause of action arose."

The third assignment is that the court erred in entering judgment for the entire debt against Sarah E. Hawk and Samuel A. Hawk; the statute of limitations being relied upon by both of said defendants both by demurrer and answer. There is no prayer for any such decree; but the suit is merely for the purpose of subjecting the property to sale for the payment of the debt or the enforcement of the trust lien. It is admitted by appellee that the defendants were freed from personal liability by the statute of limitations, although the property remains bound under the deed of trust, and he says: "If this decree, taken by its four corners, is to be construed as a personal one, it was made so by inadvertence on the part of the draftsman, and to cure the decree of this error, Arthur S. Emmons, the plaintiff below, tenders a release of the defendants from personal liability for the principal and interest, but not of the costs"—which release, duly signed, under seal, and acknowledged, was filed with appellee's brief. The suit was not based upon the promise to pay the note, but was only to enforce the lien created by the deed of trust. The decree, so far as it is a personal decree against the defendants, is erroneous, and will be reversed to that extent.

The fourth assignment of error is in permitting C. D. Emmons, a distributee of D. W. Emmons and a party in interest, to testify in regard to the facts of the case within his knowledge, and especially as to the original agreement, and because by order of the court the evidence of Sarah E. Hawk and Samuel A. Hawk had been stricken out. The witness, C. D. Emmons, only testified in relation to the claim of the defendants that he had agreed that the note should be paid out of the salary due to S. A. Hawk from the plaster company, but gave no evidence touching the acquiescence or nonacquiescence of D. W. Emmons to that agreement claimed to have been made between said C. D. Emmons and S. A. Hawk. S. A. Hawk had testified that C. D. Emmons had made this agreement with him, in which agreement D. W. Emmons had acquiesced. The testimony of S. A. Hawk was not stricken out so far as it referred to the agreement made between himself and C. D. Emmons, but only so far as it involved the communications with or the knowledge and acquiescence of D. W. Emmons. The only testimony of C. D. Emmons which was material to the defendants was his denial of any such agreement being made between himself and S. A. Hawk, when he was asked: "Q. Mr. S. A. Hawk in his deposition says that you agreed that this $1,000 note should be paid out of his salary as general manager of a certain plaster manufacturing company. State what you know on that subject. A. There was no agreement of that kind." The fourth assignment is not well taken.

The fifth assignment is that the court erred in rendering the decree complained of, because there was no evidence to prove the same; "the testimony of C. D. Emmons not in any manner refuting the affirmative facts set up in the answers of the defendants." There was a general replication to the answers of the defendants, and no valid evidence to sustain such answers. The testimony of Sarah E. Hawk refers to what took place between her and H. E. Hereford, president of the plaster company, in relation to making the note and deed of trust, and detailing what Hereford had said in relation to what D. W. Emmons and C. D. Emmons had agreed that the salary of Mr. Hawk should pay the last note—purely hearsay evidence—and the fact that D. W. Emmons

or C. D. Emmons had never asked her to pay the notes. Her testimony was very properly ruled out—part of it as being hearsay; and the part which referred to the action of D. W. Emmons, and so much of the testimony of the defendant S. A. Hawk as referred to the transaction with D. W. Emmons or what he said in relation to it, was also properly ruled out. So that the affirmative matter, spoken of as contained in the answers of the defendants, was wholly without evidence to sustain it. The decree for the enforcement of the deed of trust is based upon the note and deed of trust held by the plaintiff, which is the highest type of evidence. The lien of the trust deed is a matter of record, and is shown to be a valid, subsisting lien against the property named in the deed of trust, in the absence of proof of payment; and the facts and circumstances set up as defense not being sufficient to raise the presumption of payment, and payment not having been proven, the plaintiff was entitled to his decree of sale to satisfy said lien, and, being so entitled, that part of the decree must be affirmed.

The decree entered in the cause will be modified, by reversing so much of the decree as is personal against the defendants, and in other respects affirmed. The appellants, being the parties substantially prevailing here, are entitled to costs of their appeal.

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(62 W. Va. 566)

## CHADISTER v. BALTIMORE & O. R. CO.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907.)

1. APPEAL—RECORD — BILL OF EXCEPTIONS — SUFFICIENCY.

A bill of exceptions, otherwise sufficient, which of itself and of its own matter and character identifies itself as the bill mentioned in the order of the court certifying its execution, although the letters of identification referred to in the order are omitted from the transcript, is sufficient to make it a part of the record.

2. SAME — REVIEW — SUFFICIENCY OF EXCEPTIONS.

In an action at law, if it appears in the orders or judgment of the court, or in any other proper manner by the record, that a motion to set aside the verdict and award a new trial has been made, overruled, and exception taken, it is not essential that there be other objection to such ruling of the court in order to entitle the defendant to review thereof by the appellate court.

3. TRIAL—INSTRUCTIONS.

An instruction to the jury, where there is no appreciable evidence to support it, is improper, and should not be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

4. APPEAL—REVIEW—PREJUDICIAL ERROR.

Where the party objecting may have been prejudiced by such instruction, the giving of it constitutes reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

(Syllabus by the Court.)

Error from Circuit Court, Harrison County.

Action by Joseph Chadister against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

John Bassel, for plaintiff in error. Millard F. Snider and F. G. Viger, for defendant in error.

MILLER, P. Three horses of a team of six, in charge of three teamsters, were killed by a passenger locomotive of defendant westward bound from Grafton, at a public crossing called "Despard Mine Crossing," in Harrison county, August 30, 1904. Just a few moments before, at another crossing west of the Despard Crossing, these teamsters were warned by a watchman of their danger from the passenger train then about due. After making the first crossing, a west-bound freight train was noticed, but mistaken by the teamsters for the train against which they had just been warned. The declaration, with bill of particulars filed, would render the defendant liable for alleged breach of duty in three particulars, namely: For failure to blow the whistle or ring the bell, so as to give timely warning of the approaching train; failure to stop the train before reaching the crossing, when in sight of the horses upon the crossing; and failure to maintain a signboard at the crossing with the usual warning. The evidence was conflicting on the first ground, and the instructions and rulings of the court below relating thereto it is conceded were fairly and properly presented. There was little or no effort made to establish the last ground, and the point was not relied on below and is not here. The controversy here relates to the second. Upon the trial there was a verdict and judgment for the plaintiff for $750.

The only error relied on by the plaintiff in error is the giving of the following instruction at the instance of the plaintiff below: "If the jury believe from the evidence that the plaintiff's horses were injured by the defendant's engine while the horses were on a public road crossing, and that the persons in charge of the engine could have seen the horses on the track, or in dangerous proximity thereto, in time to have stopped the engine and prevented the injury, and did not see them, or, seeing them in time to have avoided the injury did not do so, this would be negligence for which the company would be liable, unless the plaintiff through his teamsters, was himself guilty of negligence which contributed to the injury of which he complains." The defendant in error would preclude us from considering this instruction upon two grounds: First, that the transcript of the evidence, as contained in the bill of exceptions, is not identified by the letters "C. W. L.," called for in the order of the judge; second, that by not objecting and

excepting to the entry of judgment upon the verdict, and preserving the same on the record by proper bill of exceptions, all prior errors were waived. We must dispose of this preliminary question; for, unless we are permitted to look into the record of the evidence, if any, upon which the instruction was founded or if the plaintiff has waived the error, as claimed, we are precluded from further consideration thereof.

The order of the court making up the bill of exceptions, properly styled in the case, was entered May 19, 1906, and recites that the defendant that day presented a transcript of "the evidence adduced upon the trial of said action by both the plaintiff and the defendant which transcript for the purpose of identification is marked with the letters 'C. W. L.,' being all the evidence offered therein by both parties, together with true copies of the instructions given at the instance of both plaintiff and defendant, together with the exceptions of the defendant to the rulings of the court upon said trial and upon the motion for a new trial, making up the complete bill of exceptions tendered by the defendant," and the same was on the same day signed, sealed and made a part of the record. While the letters of identification "C. W. L.," are not copied into the transcript, the bill of exceptions as printed is styled in the case; it contains various rulings of the court upon the trial with the instructions referred to in the order, and in every other way answers the description in the order; and it is certified by the judge of the court under seal on the date of the order, which certificate also shows that the defendant moved the court to set aside the verdict and grant it a new trial and excepted to the ruling of the court thereon. The clerk also certifies that the transcript is a true copy of all the proceedings had, "as fully appears from the records in this office." The bill of exceptions, therefore, "of itself and of its own matter and character identifies itself as the bill mentioned in the order of the court or the judge certifying its execution," and is properly a part of the record. Bank v. Wetzel, 58 W. Va. 1, 50 S. E. 886, 70 L. R. A. 305; Schwarzchild & Sulzberger Co. v. Railroad Co., 59 W. Va. 649, 652, 53 S. E. 785; Parr v. Currence, 58 W. Va. 523, 52 S. E. 496; Dudley v. Barrett, 58 W. Va. 235, 52 S. E. 100; Tracy's Adm'x v. Coal Co., 57 W. Va. 587, 50 S. E. 825; McKendree v. Shelton, 51 W. Va. 516, 41 S. E. 909; Hughes v. Frum, 41 W. Va. 445, 23 S. E. 604. The bill of exceptions is complete in and of itself; not a skeleton bill with reference to other papers. No writ of certiorari has brought the original paper here to impeach the genuineness of the transcript, as in Woods v. King, 59 W. Va. 418, 53 S. E. 605, and it would seem, also, in Schwarzchild & Sulzberger Co. v. Railroad Co. So we conclude the bill of exceptions in the record is the one it purports to be and is properly a part of the record.

As pertinent to the question of waiver of error by the defendant arguendo, we are cited to Danks v. Rodeheaver, 26 W. Va. 274, Core v. Marple, 24 W. Va. 354, and State v. Phares, 24 W. Va. 657. These cases hold that unless a motion is made to set aside the verdict and grant a new trial, and that motion overruled and an exception taken and noted on the record, the appellate court cannot review the rulings of the lower court; but we are cited to no authority that objection and exception to the entry of judgment on the verdict must also be saved on the record, and we have found no such authority. In Congrove v. Burdett, 28 W. Va. 220, the point was made that, because on motion for a new trial no objection was made or noted on the record to the overruling of that motion, this court could not review the action of the court in overruling such motion. Judge Snyder in that case, reviewing Danks v. Rodeheaver and State v. Phares, holds that where a party moves for a new trial, and upon such motion being overruled he excepts, it is not essential that he also object to the action of the court in overruling this motion before he can have the ruling reviewed in the appellate court; that if the record shows that a motion was made, overruled, and exception taken, this is sufficient, and all that the rule declared by this court in any of its decisions requires; and in this connection Judge Snyder says: "If the fact that such motion was made, overruled, and excepted to appears in the orders or judgment of the court, or in any other proper manner by the record, the appellate court will review any rulings of the inferior court made during the trial which are properly saved and presented by the record." We hold that this case is clearly within the rule of Congrove v. Burdett, and that the rulings of the circuit court are properly before us for review. Until judgment the whole matter remained in the breast of the court, and the previous error could have been corrected. By the final judgment the error, if any, was carried into it, and then became the subject of review here.

Was the instruction referred to well founded on the evidence? As an abstract proposition of law it is not challenged. It does not involve any question of negligence of the defendant's agents to blow the whistle or ring the bell, covered by other instructions, but whether or not the defendant's servants in charge of the locomotive could have seen the horses on the track or in such dangerous proximity to it, and did not see them, or, seeing them in time to have avoided the injury, did not do so, and thereby negligently caused the injury. The evidence on both sides, including that of the civil engineer who made survey and plat of the crossing, track, and ground adjoining, shows that the railroad at the Despard Crossing and east and west of it consists of the main track on the north side and a side track on the south side.

and approaches the crossing on a downward grade from the east by a sharp curve to the south through a deep cut on the north hillside; that when standing on the main or north track the farthest distance eastward on this track one can see is about 610 feet, and, because of the cut through the intervening hillside, the farther south on the public road one should be from the crossing the shorter the vision eastward on the track. The engineer's place on the right side of the engine going west put him on the outside of the curve, the cab and the head of the engine necessarily obstructing his view of the crossing in rounding the curve through the cut; and, although at his post of duty, he testifies he did not see the horses on the track until within 250 to 300 feet from the crossing. The evidence is that he was running at the rate of 35 miles per hour; that, as soon as he saw the obstruction, he blew the whistle and applied the emergency brake, which was all he could do to stop the train quickly; that by reversing the engine the wheels are liable to be "skidded" (that is, caused to slide on the track), and the train not brought to a stop as quickly as by the application of the brake; that at the rate of speed of the train that day the engineer estimated the train could be stopped by the application of the brake in from 900 to 1,000 feet, depending on the locality. He estimated that he stopped that day from 900 to 1,000 feet beyond the crossing; the fireman thought about 800 feet, about 1,200 feet from where the brake was first applied, which he thought was about 400 feet from the crossing; the baggage master was of opinion the train was stopped about 100 feet beyond the crossing; the conductor, about 300 feet; the brakeman, 300 feet; the head teamster, about 100 feet. The fireman, it appears, was not looking ahead at the particular moment his engine entered the cut in question, but was down shoveling in coal, and it does not distinctly appear at what distance from the crossing, if on the lookout, he could have seen the obstruction on the track; but he testifies that when the engineer blew the second alarm this was notice to him to protect himself and the passengers, and he then looked ahead, and it must have been about 200 to 250 feet from the engine to the obstruction.

The testimony of these trainmen was the only direct evidence on the subject covered by the instruction. No other witness was called to testify that a train like the one in question, traveling at the rate of 35 miles per hour, at that particular point could have been stopped by the application of any agency provided, or which could have been provided, within less than 900 to 1,000 feet; and, although it may have been the duty of the fireman to be in the cab and on the watch at the time, and, if he had been, he might have seen the obstruction on the track and given the engineer earlier warning, yet the evidence of both parties is positive that the greatest distance an object on the track could be seen from the crossing, with no obstruction, was about 600 feet, within which the train could not have been stopped and the danger avoided. Besides, we may safely assume that, from the place of the fireman in the cab on the side next to the deepest part of the cut, with part of the engine ahead of him, his view must have been to some extent obstructed. A significant fact bearing on the question of contributory negligence is that, although the head teamster testifies that he left the team some 600 feet from the crossing and went ahead, and, standing on the track, motioned to the other teamsters to come ahead when they were from 200 to 250 feet from the track, and that just as the lead horses placed their forefeet about the center of the track on which the train was running, and within 10 feet of where he was standing, he saw the train coming out of the cut, yet he says, with this train plainly within his sight for 610 feet, he could not get these horses off the track in time to save them. This gives additional color to the positive evidence of the trainmen that it was physically impossible to have seen the obstruction or stopped the train in time to avoid the injury.

Counsel concede there is no direct evidence contravening the testimony of the trainmen on the subject of the instruction, but argue that the discrepancy between the evidence of the engineer and fireman as to the distance of the engine from the crossing when the emergency brake was first applied, coupled with the fact that the jury were taken upon the ground to view the premises, may have furnished some evidence upon which the court was justified in giving the instruction. We do not think this disparity in the evidence of these witnesses is material. How could the witnesses, under such circumstances, speak with absolute certainty regarding distance? Preservation of his own life and the lives of his passengers precludes the inference of any delay in the application of the brake by the engineer as soon as he saw the obstruction. His positive evidence is that he did, and that he did everything possible to bring the train to a stop before reaching the crossing; and we know what was done, which we must say, from the evidence, was all that could have been done, was unavailing. How could a view of the premises by the jury have justified a different conclusion, or furnished evidential facts on which to found the instruction? In Virginia the Supreme Court of Appeals, in a similar case, has recently said that the view by the jury of the grounds where the accident occurred did not authorize them to base their verdict on such examination, or to become silent witnesses to facts not testified to in court. It did but the better enable them to apply the testimony disclosed on the trial. Kimball v. Friend's Adm'r, 95 Va. 125, 27 S. E. 901, 905. We are aware, however, that this court in Fox v. Railroad

Co., 34 W. Va. 466, 12 S. E. 757, an action for damages to real estate by construction of a railroad track along a public street, held it was not error to refuse an instruction to the jury that they were not to take into consideration anything they saw or any impressions received at the view of the premises; and in State v. Henry, 51 W. Va. 283, 300, 41 S. E. 439, a murder case, that it was not error for the court of its own motion, after ordering a view of the premises, to instruct the jury that they should not consider as evidence any of the objects or locations pointed out to them upon the grounds. We think our decisions properly propound the law applicable to those cases. The Virginia case is not in conflict. That case, as we understand it, simply told the jury that as jurors, after viewing the premises, they were not to become witnesses to facts not testified to in court. This would preclude jurors from becoming witnesses, for example, as to the question of mechanics involved here. Section 31, c. 116, Code 1899 (Code 1906, § 3731), following the one providing for a view by the jury, in plain terms inhibits a juror who may know anything relative to a fact in issue from disclosing it except in open court. He cannot become a silent witness to facts not testified to in open court.

The proposition of plaintiff's counsel is that the jury may have disbelieved the evidence of the trainmen, and that the view of the premises may have furnished some slight evidence to support the instruction; that if there is any evidence tending to prove the facts supposed in an instruction the giving of it will not be regarded as reversible error. for this we are cited to Carrico v. Railway Co., 39 W. Va. 87, 19 S. E. 571, 24 L. R. A. 50, and Hopkins v. Richardson, 9 Grat. (Va.) 486. The Carrico Case does so hold; but, in the light of other and subsequent decisions, it must be interpreted to mean any appreciable evidence. It was so ruled in the recent case in this court of Kuykendall v. Fisher (W. Va.) 56 S. E. 48, 8 L. R. A. (N. S.) 94, and substantially in Parker v. Building & Loan Association, 55 W. Va. 134, 46 S. E. 811, Parkersburg Industrial Co. v. Schultz, 43 W. Va. 470, 27 S. E. 255, McDonald v. Cole, 46 W. Va. 186, 32 S. E. 1033, and Bloyd v. Pollock, 27 W. Va. 75, 139. In McDonald v. Cole, following Industrial Co. v. Schultz, the language used is "which no evidence fairly presents"; and these two cases, following Bloyd v. Pollock, decided that it is error to give an instruction when the evidence on which it is based is not appreciable, or such as to fairly present the question, or when the evidence is so strongly against the hypothesis that the court would set aside the verdict based on the truth of such hypothesis. A later case, State v. Clifford, 59 W. Va. 1, 52 S. E. 981, Syl. 14, modifying the expressions of the prior cases, says: "Whether there is any evidence of it is a question for the court in giving or refusing instructions. Whether there is sufficient evidence of it to sustain a verdict is for the court on a motion for a new trial." Section 9, c. 131, Code 1899 (Code 1906, § 3979), enlarges the powers of this court. It requires us, both upon the application for and the hearing of a writ of error or supersedeas, to consider the whole evidence, conflicting or otherwise, and, if the verdict is against the clear and decided preponderance of the evidence, it may be and should be set aside. Johnson v. Burns, 39 W. Va. 658, 20 S. E. 686; State v. Zeigler, 40 W. Va. 593, 21 S. E. 763; Yeager v. Bluefield, 40 W. Va. 484, 21 S. E. 752; Deering v. Coberly, 44 W. Va. 606, 29 S. E. 512; Laidley v. Kanawha, 44 W. Va. 566, 30 S. E. 109. As we view this case, there was no evidence appreciably tending to prove the hypothesis of the instruction, and it was error to give it.

Was the error in giving the instruction cause for reversal? If the plaintiff in error may have been prejudiced thereby, the authorities say, "Yes." State v. Douglass, 28 W. Va. 303; McKelvey v. Railway Co., 35 W. Va. 517, 14 S. E. 261; Beard v. United States, 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086. How can we say that an erroneous instruction on one of the two material points relied on, the evidence being highly conflicting on the other, may not have prejudiced the defendant? As is said by Judge Poffenbarger in Kuykendall v. Fisher, supra: "Thus the evidence for the plaintiff does not tend to sustain his side of the issue in an appreciable degree, and therefore amounts in law to no evidence. In that state of the case, no instruction should have been given by the court tending in any degree to impair the weight of the evidence for the defendant. The vice of the instruction not based on evidence in the case consists of its tendency to do that. In effect it tells the jury there is evidence, when there is none."

We therefore think the defendant company entitled to a new trial.

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(78 S. C. 502)

## GLOVER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Nov. 28, 1907.)

1. APPEAL—REFUSAL OF NEW TRIAL—REVIEW—RECORD.

Where the record does not disclose the grounds of a motion for a new trial, an exception to the refusal to grant a new trial cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2944–2947.]

2. TRIAL — INSTRUCTIONS — CHARGES ON THE FACTS.

Where, in an action against a telegraph company for delay in the delivery of a message to plaintiff announcing the illness of a son, plaintiff, in reply to the question, "When you opened the telegram, did that or not cause you mental pain and anguish?" stated that it did, and counsel for the company objected, and said that the plaintiff was not suing for transmitting a message giving the information which caused anxiety, a statement by the court that

the company was liable for failure to give plaintiff sufficient notice to put himself in a position to minister to his sick son was not a charge on the facts in violation of the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 439–466.]

3. TELEGRAPHS — MESSAGES — DELAY IN DELIVERY—ACTIONS—CONDUCT OF TRIAL.

Where, in an action against a telegraph company for delay in the delivery of a message to plaintiff announcing the illness of a son, the complaint alleged that, when the telegram was received, it was impossible for plaintiff to reach his son until late at night on that day, a statement of the court that the company was liable for failure to give plaintiff sufficient notice to put himself in position to minister to his sick son was within the issues.

4. EVIDENCE—RES GESTÆ.

Where, in an action against a telegraph company for delay in the delivery of a message to plaintiff, the proof showed that the message was delivered to a third person, the statement of the messenger boy at the time of the delivery as to the contents of the message was admissible as a part of the res gestæ, though he had no authority to state the contents of telegrams.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 308, 898.]

5. TELEGRAPHS — MESSAGES — DELAY IN DELIVERY.

The duty which a telegraph company owes to the addressee of a telegram is personal, and is not fulfilled until reasonable diligence has been exercised to place it in his hands, and such duty is not as a matter of law fulfilled by delivery to a third person at the place of the business of the addressee unless the third person is authorized to receive the message, and one partner is not authorized to receive telegrams relating to private and social matters of the copartner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 29–32, 76.]

6. SAME—QUESTION FOR JURY.

Whether a telegraph company exercised reasonable diligence in attempting to place a message in the hands of the addressee is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 76.]

7. SAME—EXCUSE FOR DELAY.

Where the wires of a telegraph company from Atlanta to Augusta were not in good working order, due to causes over which it had no control, a delay of three or four hours in transmitting a message from Atlanta to Aiken through the Augusta relay office was explained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 33.]

8. SAME — UNEXPLAINED DELAY — PUNITIVE DAMAGES.

Long unexplained delay in the delivery of a telegram is sufficient to go to the jury on the question of punitive damages, in the absence of undisputed evidence of effort to deliver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 71.]

9. SAME—DELIVERY TO THIRD PERSON — EFFECT.

A telegraph company delivering a message to a person not authorized by the sender to receive it is responsible for the consequences of any delay by such person in delivering to the addressee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 32, 33.]

10. SAME—EXEMPLARY DAMAGES.

In an action against a telegraph company for delay in the delivery of a message delivered to a third person and by him to the addressee, evidence *held* to support a finding of willful breach of duty to the addressee, authorizing punitive damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 63, 71.]

Appeal from Common Pleas Circuit Court of Aiken County; G. W. Gage, Judge.

Action by P. B. Glover against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Barrett and Davis, Gunter & Gyles, for appellant. Hendersons, for respondent.

JONES, J. Plaintiff brought this action for damages, actual and punitive, for mental anguish caused by the failure of defendant to promptly deliver a telegram filed at its Atlanta office on the morning of March 27, 1904, announcing to plaintiff the critical illness of his son in Atlanta, Ga. Defendant in its answer alleged that the telegram was transmitted to Aiken, S. C., as speedily as possible under the existing conditions that day; that the message was delivered promptly at plaintiff's place of business, the Aiken Bottling Works, and was receipted for there by the partner of plaintiff, one Royal; that, the delivery sheet being signed "P. B. Glover," defendant's Aiken manager did not know until some time afterwards that the telegram had not been actually received by Mr. Glover himself, as the signature on the delivery sheet indicated; that such delivery was proper and legal; and that, if there was any negligence, it was on the part of Royal in failing to promptly deliver to Glover the said message. The trial resulted in a verdict and judgment thereon in favor of plaintiff in the sum of $500, from which defendant appeals.

The message was filed at defendant's Atlanta office on March 27th between 9:30 and 10 o'clock a. m. central time, according to testimony for plaintiff, and at 11 o'clock a. m. central time, according to testimony for defendant, and was transmitted to Aiken, S. C., through the Augusta relay office, reaching Aiken at 2:25 p. m. When the message was delivered to the messenger boy, he at 3:10 the same afternoon carried it to the store of Mr. Wesley Royal, who receipted for it in the name of "P. B. Glover." Royal delivered the message to plaintiff a few minutes before 8 o'clock next morning, March 28th. Plaintiff reached the bedside of his son in the hospital at Atlanta that night about 9 o'clock. Plaintiff's son in a few weeks recovered from his illness.

The first exception is to the refusal to grant a new trial. The record does not disclose on what ground the motion for a new trial was made, and therefore this exception cannot be considered. Pearlstine v. Insurance Company, 70 S. C. 75, 49 S. E. 4.

The second exception assigns error in some remarks made by the court in the presence of the jury while ruling as to the admissibility

of testimony. During the examination in chief he was asked this question by his counsel: "When you opened the telegram, did that or not cause you mental pain and anguish? A. It certainly did. There are no words to express my feelings. Mr. Barrett: We object to that. The knowledge that his son was sick caused him anxiety, but the telegram company did not make him sick, and he is not suing us for transmitting the telegram giving the information which caused him anxiety. It was Providence made him sick, not the telegraph company. The Court: The telegraph company is liable, not for Mr. Glover's mental anxiety over the illness of his son, but for the failure of the telegraph company to give him sufficient notice to put himself in a position to minister to the sick son, and that is the thing that caused him the anxiety, and that is the thing that would make the telegraph company liable. You can direct your questions to that point." It is objected that the court in stating that "the telegraph company is liable" expressed an opinion on the facts. This is not a charge on the facts in violation of the Constitution, but merely a remark made by the court during the progress of the trial. State v. Marchbanks, 61 S. C. 17, 39 S. E. 187, and cases cited; State v. Thrailkill, 71 S. C. 143, 50 S. E. 551; Tinsley v. Telegraph Co., 72 S. C. 352, 51 S. E. 913; Willis v. Telegraph Co., 73 S. C. 379, 53 S. E. 639. It is further objected that the court erred in stating that the defendant was liable "for the failure of the telegraph company to give him sufficient notice to put himself in a position to minister to the sick son"; the error being that the complaint did not allege that the father could have ministered to his sick son, or that he was worried by not being able to minister to him. We think the statement of the issue by the court was fairly within the meaning of the allegations in the complaint "that, when said telegram was received on March 28th, it was impossible for this plaintiff to reach his said dangerously ill son until late on the night of March 28th." The whole context shows that the court merely meant to limit plaintiff's proof to such mental anguish as resulted from defendant's negligence.

The third exception assigns error in not excluding testimony of Wesley Royal on cross-examination as to what the messenger boy said to him as to the contents of the telegram. Royal testified that, when he asked the messenger boy if the telegram was about machinery, the boy said he thought it was. It is contended that the ruling was erroneous, because it was not proven that the telegraph messenger had any authority to state the contents of a telegram, but that, on the contrary, it was shown he had no such authority, and that he is not supposed to know the contents of a telegram. The testimony was admissible not to show the contents of a telegram by the declarations of the messenger boy, but because the declaration accompanied the act of delivery to Royal, and tended to explain it. The messenger boy being authorized to deliver the message, whether the act of delivery to Royal was proper, or negligent, or in willful disregard of duty, was a litigated matter, and accompanying declarations were admissible as a part of the res gestæ. Crawford v. Railroad Co., 56 S. C. 145, 34 S. E. 80. The defendant requested the court to instruct the jury as follows: "Unless some direction to the contrary be given to the telegraph company, such company is authorized to deliver at the place of business of the sendee any telegram directed to him." The instruction was given with this qualification: "But it must be delivered to the sendee's hand or to a hand authorized expressly or impliedly to receive it for the sendee." The defendant also instructed the court to instruct the jury: "If you find that the plaintiff, Mr. Glover, and Mr. Wesley Royal, were in partnership and had a place of business, and that the telegram directed to the plaintiff was delivered to Mr. Royal at such place of business, and he receipted therefor in the name of Mr. Glover, this would be sufficient to acquit the telegraph company of any negligence as to the delivery." This instruction was also given with the added words: "If you find Mr. Royal was authorized expressly or impliedly to receive the same for Mr. Glover."

The fourth and fifth exceptions charge error in so modifying defendant's requests. The appellant fails to indicate wherein the action of the circuit court was erroneous and prejudicial, and it is not apparent wherein the error consists. The duty which a telegraph company owes to the addressee of a telegram is personal, and is not fulfilled until reasonable diligence has been exercised to place it in his hands, and the jury must say whether such due diligence has been exercised. Western Union Tel. Co. v. Mitchell, 91 Tex. 454, 44 S. W. 274, 40 L. R. A. 209, 66 Am. St. Rep. 911. This duty to deliver personally is not a matter of law fulfilled by a delivery to a third person at the place of business of the addressee, unless such person is authorized to receive such message. Possibly, if the message related to a matter of business within the scope of a partnership, a delivery of such a message to a partner of the addressee might under certain circumstances be regarded as the exercise of a reasonable diligence; but there is no implication that one partner is authorized to open, receive, or transmit telegrams relating to private and social matters of the other partner. It would have been error to have given the instructions requested, and the modification was proper.

We next consider whether there was any evidence of a willful failure of duty. This question is raised by the exception to the refusal to charge that there was no evidence that would warrant a verdict of punitive

damages. The testimony was undisputed that defendant's wires from Atlanta to Augusta were not in good working order on March 27th, due to causes over which the telegraph company had no control, hence the delay in transmission to Aiken may be regarded as fully explained. After the message reached Aiken, there was a delay of more than 16 hours before the message was put in the hands of the plaintiff. It is now well settled that long, unexplained delay in the delivery of a telegram, in the absence of undisputed evidence of effort to deliver, is sufficient to go to the jury on the question of punitive damages. Young v. Telegraph Co., 65 S. C. 93, 43 S. E. 448; Machen v. Telegraph Co., 72 S. C. 264, 51 S. E. 697; Willis v. Telegraph Co., 73 S. C. 385, 53 S. W. 639; Roberts v. Telegraph Co., 73 S. C. 520, 53 S. E. 985, 114 Am. St. Rep. 100; Key v. Telegraph Co., 76 S. C. 301, 56 S. E. 962; Dempsey v. Telegraph Co., 77 S. C. 399, 58 S. E. 9; Todd v. Telegraph Co., 77 S. C. 522, 58 S. E. 433.

The question whether Royal was authorized to receive the message was squarely submitted to the jury under proper instructions, and the verdict of the jury involves a finding that Royal had no authority from plaintiff to receive the message. Was the delivery to such unauthorized person merely negligent, or was it in wanton disregard of duty? There was no evidence that defendant's agent at Aiken who gave the telegram to the messenger had reason to believe Royal was a partner of Glover or authorized to receive his telegrams, nor was there any undisputed evidence that the messenger boy had reason to believe that Royal was authorized to receive a message of such serious import. Mr. Glover denied that there was any partnership at that time. There was evidence, therefore, tending to show that the error in delivering the message to Royal and his receipt of it was the result of incorrect and misleading information as to the import and urgency of the message given by defendant's agent. Mr. O. H. Holly, manager of the defendant company at Aiken, testified that one of the duties of a messenger boy was to help copy the messages through a copying press, and that he would not ordinarily know the contents of a message unless he especially noticed. This tended to show that the messenger boy may have known the contents of the message. It was for the jury to say whether the delivery to Royal, under misleading information as to the contents of the message, was a mere inadvertence, or was the result of a willful disregard of duty. A telegraph company having delivered a message to a person not authorized by the sender or addresser to receive, it is responsible for the consequence of any delay by such person in delivering to the addressee, just as if such third person had been authorized by the company to deliver as its agent. Royal did not deliver the message until next morning, after a delay of 15 or 16 hours. He testified that, after closing his store that night he passed plaintiff's house on his way home at about 10 o'clock, and called at the house to deliver the message, but no one answered. The plaintiff and his wife were then in the house, and it seems were not aware of Mr. Royal's call; but, assuming that Royal made an effort to deliver the message that night, it was only after a delay of about seven hours after it was placed in his hands. It may be a reasonable inference that Royal's long delay was the result of ignorance as to the urgency of the telegram, but this ignorance may also have been the result of the information defendant's agent gave him concerning the message. On the whole, we think there was some evidence of misconduct in the delivery of this urgent message so gross as to pass beyond mere negligence into a reckless and wanton disregard of defendant's duty to plaintiff. The facts in this case more nearly resemble those in Machen v. Telegraph Co., 72 S. C. 263, 51 S. E. 697, than those in Roberts v. Telegraph Co., 73 S. C. 526, 53 S. E. 985.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

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(78 S. C. 513)

## LOVE v. TURNER.

(Supreme Court of South Carolina. Nov. 28, 1907.)

1. APPEAL — EXCEPTIONS TO INSTRUCTIONS — SUFFICIENCY.

An exception that the court, in giving instructions set out, violated Const. art. 5, § 26, prohibiting judges from charging in respect to matters of fact, which fails to specify in what particulars they trenched on the constitutional provision, is too general to be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1631; vol. 46, Trial, §§ 687–694.]

2. ADVERSE POSSESSION—CONTINUITY OF POSSESSION—INTERRUPTION BY TRESPASSER.

The intrusion of a trespasser does not interrupt the continuity of adverse possession unless continued for such a length of time that knowledge of the intrusion is presumed, or so as to become the assertion of an adverse right; and, where the intrusion is known, and it becomes the assertion of a right, it operates to break the continuity, unless legal remedies are resorted to within a reasonable time to regain possession, and are prosecuted to a successful determination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 236.]

3. SAME—HOSTILE CHARACTER OF POSSESSION —POSSESSION BY GRANTOR.

Where a grantor continues in possession after the execution and delivery of a deed conveying the entire legal interest in the premises, his possession will be either that of tenant or trustee of the grantee, and he will be regarded as holding the premises in subserviency to the grantee, and nothing short of an explicit disclaimer of such relation and a notorious assertion of right in himself is sufficient to change the character of his possession, and render it adverse to the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 333–357.]

4. SAME—CONTINUITY OF POSSESSION.

Where the heirs of an alleged owner in possession under paper title quit paying taxes on the premises, disclaimed title thereto, allowed it to be sold for taxes, and permitted others to purchase the same, make improvements thereon, and occupy it for any considerable period, such period cannot be included in any period in which a grantee of the heirs can claim title by virtue of the possession of the heirs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 213–231.]

5. APPEAL—REVIEW—HARMLESS ERROR — INSTRUCTIONS.

Where, in an action for the possession of land, the issue was defendant's title by adverse possession, the error, if any, in an instruction that plaintiff by accepting a deed from a third person recognized the title of the latter, which could not be disputed, was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

6. SAME.

Where, in an action for the possession of land, the issue was defendant's title by adverse possession, the error, if any, in an instruction that the deeds introduced in evidence by plaintiff conveyed only such title as they purported to convey, and that, if after the conveyances were executed the grantors acquired any additional interest, such interest did not pass as after-acquired title, was not ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

7. ADVERSE POSSESSION — TRIAL — INSTRUCTIONS—REQUESTS.

The proposition that as matter of law the possession attends the legal title is distinct from that embodied in an exception to an instruction that if neither plaintiff nor any one under whom he claimed was possessed of the land within 10 years before the commencement of his action for the possession thereof, or was out of possession for a period of 10 years before that time, and if during that time defendant or those under whom he claimed held the same adversely to plaintiff, plaintiff could not recover, and should have been requested if relied on.

8. SAME—EVIDENCE—COLOR OF TITLE — VOID WILL.

The fact that a void will may be introduced in evidence as color of title, in an action for the possession of real estate, does not show that the will conveyed title.

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Cherokee County; R. Withers Memminger, Judge.

Action by W. P. Love against M. J. Turner. From a judgment for defendant, plaintiff appeals. Affirmed.

See 51 S. E. 101; 56 S. E. 232.

Exceptions 3, 4, 5, 6, and 7 are as follows:

"(3) That his honor further committed error in charging as matter of law that the supposed facts referred to in the nineteenth request would as matter of law operate as an excision from the period of plaintiff's term of possession of the Palmer heirs, although no mention was made in such request of any knowledge or absence of knowledge of such supposed facts by such heirs.

"(4) That his honor further committed error of law in charging said twenty-eighth request; the error being that, even if the facts therein supposed were true, they were not sufficient to necessarily produce the legal conclusion therein announced, to wit, that thereby plaintiff's adverse possession could not have begun before 1895, especially in view of the fact, as shown by the deeds of 1885 and 1886, that such deeds themselves declared that it was the intention of the grantors in said prior deeds of 1871 to 1875 to convey all the premises described in the deeds of 1885 and 1886.

"(5) That his honor further erred in charging defendant's twenty-third request, to wit: 'Under the deeds of conveyance introduced in evidence by the plaintiff, they convey only such title as they purport to convey, and, if after the conveyances were executed and delivered the grantors acquired any additional interest than is conveyed, such interest will not pass to the grantees as after acquired title by virtue of such conveyances'—the error being as matter of law that, as the deeds referred to therein were warranty deeds, the title subsequently acquired by the grantors inured to the benefit of the grantee thereof.

"(6) That his honor erred in charging the defendant's twenty-fifth request, to wit: 'If neither the plaintiff nor any one under whom he claims was seised or possessed of the land within 10 years before the commencement of this action, or was out of possession for a period of 10 years before the commencement of this action, and if during that time the defendant or those under whom she claims held the same adversely to the plaintiff, then the plaintiff cannot recover'—the error being that as matter of law possession attends the legal title.

"(7) That his honor erred in charging the defendant's twenty-sixth request, to wit: 'The will of Susan Love conveys no title to any land in this state'—the error being that such will did convey color of title."

The instruction referred to in exception 3 is as follows:

"If the heirs of G. B. Palmer, or any one lawfully acting for them, quit paying taxes on the land in dispute, disclaimed title to the same, allowed it to be sold for taxes under judgments, and permitted others to purchase the land, make improvements on it, and to occupy the land, for any considerable period, then such period cannot be included in any period in which the plaintiff could make any claim of title by virtue of the possession of G. B. Palmer's heirs."

The instruction in exception 4 is as follows:

"Where a party accepts a deed of conveyance to land from another, such acceptance is recognition of title in the grantor which the grantee cannot dispute. So, if in 1885 and 1886 W. P. Love accepted deeds from the heirs of G. B. Palmer, conveying the land in dispute, and if the Holloway land was not covered by the deeds of the heirs from 1871 to 1875, then the plaintiff recognized an outstanding title in the heirs to

the land in dispute, and cannot show any title as against them by adverse possession before the acceptance of the deeds of 1885 and 1886."

J. C. Jefferies and Stanyarne Wilson, for appellant. W. S. Hall, Jr., and H. B. Carlisle, for respondent.

GARY, A. J. This is an action to recover possession of a tract of land containing 100 acres, and has heretofore been before this court on appeal. 71 S. C. 322, 51 S. E. 101. After the former trial the plaintiff amended his complaint by alleging title in himself, by adverse possession as well as by grant. The jury rendered a verdict in favor of the defendant, and the plaintiff has appealed.

Before considering the exceptions, it may be well, in a general way, to state the facts and sources of title upon which the respective parties rely. They are thus set forth by the plaintiff's attorneys: "G. B. Palmer, plaintiff's source of paper title, had granted to him in 1858 a tract of 576 acres, which included the 100 acres in dispute. He died in possession in 1865. His children (except plaintiff's wife) conveyed their interests to plaintiff. They made deeds at different dates. In the first set of deeds, from 1871 to 1875, the land was described as 449 acres. But in 1885 all of them except D. D. McCraw (and he in 1886) corrected the error of acreage by making new deeds to plaintiff, to wit, for 576 acres, stating therein: 'It was the intention of each one of us (in the deeds heretofore made) to convey all our right, title, and interest in the premises covered by said grant.' His wife afterwards devised to him her interest therein by will made in North Carolina, which had only two witnesses. She left no children. G. B. Palmer's estate was administered upon by plaintiff and T. W. Palmer, one of the sons. Plaintiff lived in North Carolina. T. W. Palmer fell out with plaintiff somewhere in the 60's and did not pay the taxes along about 1866 or 1867. The land was put up, and, as claimed by defendant, sold for taxes, and bid in by one A. P. Turner, who did not comply with his bid. Defendant does not contend that A. P. Turner acquired legal title at such alleged tax sale, but claims color of title therefrom in this way: Judgment was obtained in a suit on debt against A. P. Turner, and his interest, whatever it might be, was sold under execution, and bid in by Merrick (assignee of Casey & Cummings), and Merrick on June 17, 1886, made a quitclaim deed to G. S. Turner for $20. Defendant claims that G. S. Turner went into possession under that deed, and then began his adverse possession, which, they say, ripened into title June 17, 1896. The man whom Turner first put in possession was Z. B. Nance. Plaintiff claims that Nance was plaintiff's tenant and agent as to this land in 1885 and 1886, and proved it by documents. Nance was succeeded by Mrs. Wilkins and Mrs. Dormant; Turner claiming they were his tenants, and plaintiff claiming they were his since 1900, while those ladies claim that they were holding for themselves all along till 1900. The testimony was very conflicting as to the character of the possession of Mrs. Wilkins and Mrs. Dormant. Plaintiff proved, upon the subject of his title by possession, that G. B. Palmer was in possession from 1853 to his death in 1865. (Defendant's witness Harris says since 1840.) His heirs were in possession (of at least part, and thereby of the whole under grant covering whole) till they conveyed to plaintiff; and his own possession by tenants ever since, except when these ladies were in."

They are stated as follows by the defendant's attorneys: "The defendant showed a prior grant to Moses Waters, dated August, 1817, for the purpose of showing title out of the state at the time of the Palmer grant. (2) A sale of the land in dispute by the sheriff of Spartanburg county for taxes of 1866, at which sale A. P. Turner became the purchaser. (3) A sale of the same tract under execution in the name of the state and Elizabeth Littlejohn against A. P. Turner in 1871, at which sale the land was bid off by Casey and Cummings, who transferred their bid to A. C. Merrick, to whom a deed was executed by G. Wash Thompson, sheriff of Spartanburg county. (4) A conveyance by A. C. Merrick to Geo. S. Turner, who went into possession in 1886. (5) Deed from Geo. S. Turner to Duncan & Sanders, conveying a one-half undivided interest. (6) Deed from Duncan & Sanders to R. B. Powell, conveying the same one-half undivided interest. (7) Deed from R. B. Powell by Duncan & Sanders as attorneys in fact, to Duncan & Sanders, under power contained in the mortgage to secure the purchase money. (8) Deed from Duncan & Sanders to W. N. Turner, conveying the same one-half undivided interest. (9) Partition between W. N. Turner and heirs of Geo. S. Turner in 1899, at which sale the defendant became the purchaser, and a proper deed for the entire tract made to her by the clerk of the court. Geo. S. Turner died about 1894, and his minor heirs continued to hold possession through tenants that were put in possession by their father and Duncan & Sanders."

The first exception assigns as error that his honor, the presiding judge, in charging certain of defendant's requests violated section 26, art. 5, of the Constitution, which provides that "judges shall not charge juries in respect to matters of fact." The requests are set out, but the exception fails to specify in what particulars they trenched upon the provisions of the Constitution. They are therefore too general for consideration. Furthermore, the statement of facts was merely hypothetical.

The second exception is as follows: "(2) That his honor further erred in charging in

those requests that the adverse possession set up by the defendant could not be defeated by acts of Powell, referred to in the eighteenth request; the error being that as matter of law it was not necessary for the said Powell to claim under the plaintiff, in order to be in possession, to break a continuity of possession of the defendant, and those under whom she claims." The eighteenth request, referred to in the exception, is as follows: "If you should find that Bob Powell remained on the premises after his interest, if he had any, was conveyed to Duncan & Sanders, and claimed the land, or attempted to exercise any ownership to the same, unless he claimed through the true owner of the land, his claim and acts of ownership and possession, if he made any, were simply that of a trespasser, and would not prevent the possession of the other tenants in common from ripening into title, and especially if Powell abandoned the premises; for occasional act of ownership, or trespasses committed by others than the true owner, do not interrupt the continuity of the possession of others claiming under color of title, and holding the land adversely." The rule is thus stated in 1 Cyc. 1011 et seq: "The mere temporary entry or intrusion or occasional trespass by a stranger does not interrupt the running of the statute in behalf of the adverse claimant. The intrusion of a trespasser will in no case interrupt the continuity of adverse possession, unless continued for such a length of time that knowledge of the intrusion is presumed, or so as to become the assertion of the adverse right. If they are known, they become assertions of right, and operate to break the continuity, unless legal remedies are resorted to within a reasonable time, to regain possession, and are prosecuted to a successful determination." The court uses this language in the case of Duren v. Sinclair, 22 S. C. 361: "While it may be true that certain acts of ownership exerted by others during the statutory period submitted to by the plaintiff, or that an action of trespass, under some circumstances, might afford evidence that he was not holding as owner himself, but by permission of the true owner, yet it would not be true that any act of ownership by another, or that any and every action of trespass, as the judge was requested to charge, would have that effect. Each case must be governed by its own facts and circumstances, and what would be the law in reference to one state of facts might not be in reference to another. Adverse possession is one of the modes of acquiring title to land. At the beginning of such possession, the actual title is in some one other than the adverse holder; i. e., the true owner. If he submits for the statutory period, the adverse holding ripens into a title against him, and, of course, against all others, and the fact that others not being the true owner may have attempted during his possession to exercise some acts of ownership, or commit some trespass, or may have brought action of trespass against him and failed, would not prevent the title of the true owner from passing to him at the expiration of the statutory period." This principle, however, is to be considered in connection with another rule, to wit: "By the execution and delivery of a deed of land, the entire legal interest in the premises vests in the grantee, and, if the grantor continues in possession afterward, his possession will be that either of tenant or trustee of the grantee. He will be regarded as holding the premises in subserviency to the grantee, and nothing short of an explicit disclaimer of such relation, and a notorious assertion of right in himself, will be sufficient to change the character of his possession, and render it adverse to the grantee." 1 Cyc. 1039. McCutchen v. McCutchen, 77 S. C. 129, 57 S. E. 678. There was no testimony showing that the case under consideration comes within the principle last stated, and the exception is therefore overruled.

The remaining exceptions will be set out, in the report of the case, and considered in their regular order.

Third exception: The appellant's attorneys have not argued this exception, and we deem it only necessary to state that it is without merit.

Fourth exception: Conceding that the ruling set forth in this exception was erroneous, it did not relate to the vital question in the case; for, as stated by appellant's attorneys: "In this trial, as well as the other, the real battle ground was defendant's claim of adverse possession."

Fifth exception: This exception was practically abandoned, but, even if still urged, it could not be sustained, for the reasons stated in considering the fourth exception.

Sixth exception: The proposition that as matter of law the possession attends the legal title is entirely distinct from that embodied in the exception, and should have been presented, in a separate request, if relied upon, by the appellant.

Seventh exception: The fact that the void will might be introduced in evidence, as color of title, does not show that it conveyed title.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. (dissenting). I think the fourth exception should be sustained, and therefore I am unable to concur in the judgment of the court.

The issues between the parties are set out at length in the opinion written by Mr. Justice Gary, and need not be restated here. The decision of the case depended mainly on the jury's view of the evidence on the claims of title by adverse possession set up by both parties. The plaintiff alleged the heirs of G. B. Palmer had acquired title by adverse possession, and then conveyed to him; and he also alleged that he had acquired title

by his own adverse possession. The first conveyances of the Palmer heirs to plaintiff were made at different dates from 1871 to 1875, describing the land conveyed as 449 acres. In 1885 and 1886 new deeds were made describing the land as 576 acres, and reciting that the grantors intended by the former deeds to convey the entire 576 acres. Mrs. Love, the plaintiff's wife, was one of the heirs, and her interest plaintiff claimed by adverse possession under a paper in the form of a will purporting to devise all of her property to him, but which was available only as color of title because not legally executed. On the issue of adverse possession thus made by the plaintiff, the circuit judge, in accordance with the request made by the defendant, charged the jury this proposition, limiting plaintiff's claim of adverse possession: "Where a party accepts a deed of conveyance to land from another, such acceptance is recognition of title in the grantor which the grantee cannot dispute. So, if in 1885 and 1886 W. P. Love accepted deeds from the heirs of G. B. Palmer, conveying the land in dispute, and if the Holloway land was not covered by the deeds of the heirs from 1871 to 1875, then the plaintiff recognized an outstanding title in the heirs to the land in dispute, and cannot show any title as against them by adverse possession before the acceptance of the deeds of 1885 and 1886." There was evidence of the plaintiff's holding adverse possession by a tenant of the land in dispute after the deeds of the Palmer heirs of 1871 to 1875, and before the deeds of 1885 and 1886. If the plaintiff held possession of the land so that he had acquired a title by adverse possession prior to the deeds of 1885 and 1886, there is no ground whatever for saying he could not avail himself of a title so acquired merely because he chose to strengthen his title by obtaining conveyances from other claimants. This instruction clearly deprived the plaintiff of the benefit of the consideration by the jury of his evidence of title acquired by adverse possession before the execution of the deeds of 1885 and 1886, and was therefore prejudicial on a vital issue in the cause.

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(78 S. C. 510)

## JARROT et al. v. KUKER.

(Supreme Court of South Carolina. Nov. 28, 1907.)

TRUSTS — CREATION BY PAROL — STATUTE OF FRAUDS.

One orally agreed to attend a judicial sale of real estate held by a trustee, and purchase the same for the trustee and hold it as security for payment of the price to him by the trustee. He purchased the premises, and the trustee, relying on the agreement, did not attend the sale. *Held*, that a trust would be declared in favor of plaintiff on the land notwithstanding the statute of frauds; the relief not being based on the agreement, but on the chilling of the bidding at the sale.

Appeal from Common Pleas Circuit Court of Florence County; R. O. Purdy, Judge.

Action by C. E. Jarrot, as trustee, and others, against John Kuker. From a judgment for plaintiffs, defendant appeals. Affirmed.

S. W. G. Shipp and J. Kuker, for appellant. George Galletly, for respondents.

JONES, J. This is an action by plaintiffs to have a trust declared in their favor in 12 lots of land described in the complaint, which were sold at a judicial sale at Florence, S. C., on the first Monday in November, 1897, to defendant for the sum of $391. It appears that at the time of the sale the title to the lots was in the plaintiff C. E. Jarrot as trustee for his wife, Emma E. Jarrot, for life and after her death for their children. By written request of the life tenant the trustee had power of sale for reinvestment. Several years prior to the sale these lots were recovered by the trust estate in the case of J. Howard Jarrot et al. v. James G. Gibbes. In that case the circuit court fixed the fees of plaintiffs' attorneys at $250, made the payment of the same a lien on the lots, and provided that in case of default in payment of the fees and a portion of the costs, the said lots might be sold for that purpose. The costs and fees not having been paid, the lots were duly advertised for sale.

Plaintiff C. E. Jarrot alleges that before the sale on his own behalf and on behalf of his cestui que trustent he entered into an agreement with defendant that the latter should attend the sale, purchase the lots, pay the purchase money therefor, and hold the land as security for the repayment to the defendant by the plaintiffs of the amount so advanced for that purpose; that, relying on this agreement, he did not attend the sale, nor did the other plaintiffs make any other effort to protect the interest of the trust estate; that the defendant attended the sale, purchased the lots for $391, only $9.20 more than the interest, costs, and attorney's fees; that but for said agreement plaintiffs would have attended the sale and protected their interests; that said lots were worth more than $1,200, and also that he had tendered to defendant the purchase price and interest, which was refused. Defendant answered, denying having entered into any such agreement verbally or in writing, and alleged that he attended the sale on his own behalf, purchased the lots at the highest bid for $391, paid the purchase money, and took title in his own name, went into possession, and has since remained in possession; that it was an open and fair public sale, no effort being made by any one to chill the bidding or prevent any of plaintiffs from attending the sale; that defendant refused to accept plaintiff's alleged tender of the purchase price because he had made no agreement with plain-

tiffs in regard to the purchase of the land, and that he is not wrongfully withholding the property. Before the case came on for trial, the parties entered into a written agreement providing for the conveyance of the premises to Rev. Charles Wood for $900, under a stipulation that the controversy should be over the fund without prejudice.

The case was tried on testimony taken by a referee and resulted in a decree that as to the property in controversy defendant was a trustee for the plaintiffs. Defendant appeals upon numerous exceptions, most of which are to the findings of fact by the circuit court.

Without considering the exceptions in detail, we will notice the questions that are controlling. The circuit court found as a fact that plaintiff C. E. Jarrot and defendant had entered into the agreement alleged in the complaint on the day of sale, and that, relying on said agreement, plaintiff did not attend the sale of the property which was bought by the defendant at much less than its value at the time of sale. This finding is not based on the testimony of plaintiff alone as to the agreement, but upon all the circumstances of the case. After careful consideration, we are unable to say that this finding of fact is against the preponderance of the evidence.

It is vigorously contended, however, that such agreement was not shown by any writing, and that it cannot be enforced under the statute of frauds. Even conceding that the statute of frauds was pleaded, which was doubtful, the statute cannot prevent recovery in this case. The action, which is in effect an action to set aside the sale and restore the parties to their rights in the property or fund, is not based upon a mere repudiation of any oral agreement concerning land, but is based upon the chilling of the bidding at the judicial sale, resulting from the conduct of the defendant. Such result is contrary to the policy of the law, and operates as a fraud upon those interested in the sale of the property. Fairy v. Kennedy, 68 S. C. 250, 47 S. E. 138.

This conclusion renders it unnecessary to further consider the exceptions. The decree of the circuit court fully protects the defendant for the money paid out by him.

The judgment of the circuit court is affirmed.

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(78 S. C. 499)

## MANIGAULT v. LOFTON et al.

(Supreme Court of South Carolina. Nov. 28, 1907.)

1. VENDOR AND PURCHASER—BONA FIDE PURCHASER—ABSOLUTE DEED AS MORTGAGE—POSSESSION—NOTICE.

Civ. Code 1902, § 2457, provides that no possession of real property described in any writing by law to be recorded shall operate as notice of such instrument, and actual notice shall be deemed sufficient to supply the place of registration only when such notice is of the instrument or of its nature and purport. *Held*, that such section did not affect the rule that possession by a grantor in a deed which was in fact a mortgage was notice to a subsequent purchaser of the rights of such grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 540–562.]

2. MORTGAGES—RIGHT TO REDEEM.

Where the instrument under which plaintiff claimed title to certain land in controversy was recorded, and defendant, a subsequent purchaser, claiming under a deed executed by plaintiff as security only, had knowledge that plaintiff was in possession and claiming the property, as well as actual knowledge that defendant's grantor only claimed a mortgagee's interest in the premises, plaintiff was entitled to redeem.

Appeal from Common Pleas Circuit Court of Charleston County; R. O. Purdy, Judge.

Action by James Manigault against S. J. Lofton and another. From a decree in favor of plaintiff, defendants appeal. Affirmed.

Nathans & Sinkler, for appellants. W. St. J. Jervey, for respondent.

JONES, J. This action is brought to recover possession of the land described in the complaint, to have the deed under which defendant S. J. Lofton holds declared to be a mortgage, to compel a reconveyance to plaintiff of the land upon satisfaction of the mortgage debt, and for damages. The decree of the circuit court was in favor of the plaintiff on all the issues, and defendants appeal mainly upon questions of fact.

It appears that plaintiff went into possession of the premises under a deed of conveyance from C. Gillican, which was duly recorded August 24, 1884, and continued in possession until his ejectment by Lofton on May 5, 1904. In the year 1896 Manigault mortgaged the land to L. H. Rivers, and, not being able to satisfy the same when due, executed a deed of conveyance to Rivers dated January 4, 1897, as security for the debt until November following. This deed was duly recorded. In November, 1897, Mr. H. T. Morrison agreed to take up Manigault's account with Rivers, and received from Rivers the original mortgage by Manigault to Rivers and a deed of conveyance to the land bearing date December 6, 1897, which was also placed on record. Morrison carried the account, upon which small payments were made at intervals, for a time, when, wishing to have the claim settled, he placed the papers in the hands of Magistrate McClellan for collection. McClellan reported to him that Mr. Lofton had agreed to take up the papers, if it was satisfactory to Morrison. Not long after that, on January 11, 1902, R. M. Lofton, brother and agent of S. J. Lofton, took a deed from Morrison to S. J. Lofton, together with the other papers held by Morrison, and paid up the account between Morrison and Manigault. The record further discloses that defendant S. J. Lofton admitted on cross-examination that he knew, when he received title, that Manigault was in possession of the property and claiming

it. Mr. Morrison testified concerning the conveyance to Lofton that he realized he was making a deed to Lofton, but did not consider he was selling the land; that, if the land had been his own, he certainly would not have sold it for that price; that his purpose was to wind up his account with Manigault; and that the matter was settled entirely by Manigault's account without any reference to the value of the land.

The circuit court found that the deed from Rivers to Morrison, though in the form of a deed of conveyance, was intended by the parties as a mortgage, and that this was strongly supported by the positive testimony of Morrison, who disclaimed ownership of the property and charged up against the plaintiff Manigault the debt, interest, and taxes on the land, which was inconsistent with the claim of ownership. He further found that the consideration of the deed from Morrison to defendant S. J. Lofton, $79, was ascertained by reference to the debt alone due Morrison by plaintiff, that the property was of far greater value than this sum, and that the papers held by defendant were intended merely as security for the debt paid Morrison.

These conclusions are fully borne out by the testimony. Furthermore, it is clear from all the circumstances in the case that defendant S. J. Lofton had actual notice of Morrison's interest in the property as mortgagee. Having such notice, he could not take any greater interest than Morrison had.

In reaching his conclusion, the circuit court placed reliance on the case of Sheorn v. Robinson, 22 S. C. 32, which held that open and unconcealed possession of land by one claiming the same is notice to a would-be purchaser. From that case we quote the following language: "It is the business of one who buys land, or attempts to secure a lien on land, to know the surroundings. In justice to his own interest, and certainly in justice to the interest of the party who has contracted to buy in advance of his purchase, and who is notoriously in possession, claiming and using it as his own, he should examine into and ascertain the facts. One in possession under an equitable title has nothing that he can record; and possession open and unconcealed is the only mode by which he can give notice to the world of his rights, and, when this notice is given in the only way in which it could be given, he should be protected."

It is contended, however, that the effect of Sheorn v. Robinson was counteracted by the act of 1888, now appearing as section 2457, Civ. Code 1902, which provides: "No possession of real property described in any instrument of writing required by law to be recorded shall operate as notice of such instrument; and actual notice shall be deemed and held sufficient to supply the place of registration only when such notice is of the instrument or of its nature and purport." We do not think that this statute affects the principle of Sheorn v. Robinson as applied to the particular facts of this case. The instrument under which Manigault claims was duly recorded, and it has been shown that Lofton had actual knowledge that Manigault was in possession claiming the property, as well as actual knowledge of the nature of the interest which his alleged grantor, Morrison, had in the premises. Under these circumstances, it is manifestly just to decree that Lofton holds the premises subject to the equitable right of Manigault to redeem.

The exceptions are overruled and the judgment of the circuit court is affirmed.

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(78 S. C. 490)

## BELL v. EDWARDS et al.

(Supreme Court of South Carolina. Nov. 28, 1907.)

1. TRUSTS—ENFORCEMENT—COMPLAINT—CONSTRUCTION.

A complaint alleged that at the time of an execution sale of land plaintiff's ancestor furnished to defendant's intestate $905.77 to pay for the land by allowing him to use the amount going to her on the execution to pay for the land in part, and that thereby a resulting trust was established in favor of plaintiff's ancestor to the extent of about two-thirds of the value of the land; that the purchase money was so paid by plaintiff's ancestor pursuant to an agreement between her and intestate that he should take a deed and hold the same in his own name till certain moneys he claimed he had advanced to her husband should be paid, and then the land should be conveyed to her. *Held*, that the complaint alleged the creation of an express trust; the agreement charged being different from that which the law would imply from a mere payment of part of the purchase money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 589, 590.]

2. SAME—RESULTING TRUST—INTENT.

A resulting trust in favor of one who pays the purchase price of land, and takes title in the name of another, cannot arise when a contrary intent appears.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 102.]

3. SAME—EXPRESS TRUST—PROOF—PAROL EVIDENCE.

An express trust cannot be established by parol evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 62–65.]

4. SAME—EXPRESS TRUST—WRITTEN EVIDENCE—JUDICIAL SALE—AUDITOR'S ENTRY.

Plaintiff's ancestor B. having a judgment lien on certain land in which defendant's intestate was also interested, the land was sold by the sheriff to B., who assigned her bid to intestate, and an entry was made on the auditor's books at intestate's request that the land was sold to B. *Held*, that such direction by intestate was for the mere guidance of the auditor, and was not an admission of a previous existing trust, and, not being "signed by the party" as required by statute, was incompetent to establish an express trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 61.]

5. SAME—ADMISSIONS.

Land having been sold under a judgment to plaintiff's ancestor B., she assigned her bid to

defendant's intestate, to whom the land was conveyed. In 1903 he contemplated a sale of the land and division of the proceeds among B.'s children, a meeting of whom was held, and it was agreed that the land should be sold for $5,000. The land was knocked down at auction at $3,375, whereupon the purchaser offered to sell his interest to intestate for $1,000, to which intestate wrote: "We cannot accept his proposition, but would entertain a proposition on the basis of $5,000, all the heirs agreeing." Intestate also wrote that he owned the land in fee, that his offer of an interest in the proceeds to B.'s children was purely voluntary, and, as they sought litigation, he stood on his legal rights, as he had bought and paid for the land with his own money. *Held*, that the clause quoted from intestate's letter was insufficient to establish an express trust of the land for B.'s heirs, under the rule that the writing must acknowledge a previous trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 66–68.]

6. APPEAL—SCOPE OF REVIEW—THEORY OF CAUSE.

Where a complaint was considered by the trial court, though erroneously, as alleging a resulting trust, the case would be reviewed on that theory on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1056, 1057; vol. 3, Appeal and Error, § 3405.]

7. TRUSTS — RESULTING TRUSTS — PURCHASE PRICE OF LAND.

Where plaintiff's ancestor assigned her bid for land purchased at sheriff's sale to intestate, and evidence that she permitted intestate to use the proceeds of her judgment in settlement of the price of the land was consistent with the idea that she intended to make intestate her debtor to that extent, and where he also claimed to have paid for the land with his own money, the evidence was insufficient to establish a resulting trust under the rule that where money is lent to be used by the borrower in the purchase of land, who takes title in his own name, no resulting trust arises in favor of the lender.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 108.]

8. SAME—PART PAYMENT—EXTENT OF TRUST.

Where intestate used the proceeds of a judgment in favor of plaintiff's ancestor to pay a part of the price of certain land, a trust would result by operation of law, not on the whole land, but only to the extent of the payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 111.]

Appeal from Common Pleas Circuit Court of Abbeville County; C. A. Dantzler, Judge.

Action by R. O. Bell against Janie Edwards and others. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Wm. N. Graydon, for appellant. M. P. De Bruhl and W. P. Greene, for respondents.

JONES, J. The plaintiff seeks in this action to have a trust declared for the heirs of Elizabeth Bell, deceased, in the tract of land described in the complaint. On December 3, 1877, J. E. G. Bell, father of plaintiff and of defendants J. H. Bell, Rosa Gregory, W. E. Bell, Georgia Baskin, and Janie Edwards, being indebted to sundry parties, among whom were his wife, Elizabeth Bell, and the firm of Wardlaw & Edwards, who were judgment creditors, the tract of land in question was sold on that day by the sheriff of Abbeville county to Mrs. Elizabeth Bell for the sum of $1,600. Subsequently Mrs. Bell assigned her bid to John G. Edwards, member of the firm of Wardlaw & Edwards, and husband of defendant Janie Edwards. The sheriff made deed of said tract of land to John G. Edwards on February 21, 1878, who went into possession and continued in possession until his death in August, 1904. Defendants J. H. Bell, Rosa Gregory, W. E. Bell, and Georgia Baskin filed no answer. The other defendants answered, setting up various alleged defenses. The circuit court (Judge Dantzler presiding) tried the case on testimony taken by the master, and held that neither an express trust nor a resulting trust had been established, and dismissed the complaint. Plaintiff appeals upon numerous exceptions.

Without considering the exceptions seriatim, we will notice the controlling questions raised by the appeal.

1. Properly construed, what is the nature of the trust alleged in the complaint? The allegations of the complaint pertinent to this inquiry are: "That at the time said land was sold by said sheriff the said Elizabeth Bell furnished to the said John G. Edwards the sum of $905.77 to pay for the said land by allowing him to use the amount going to her on her execution under said sale in paying for said land; the said tract of land being paid for by the execution held by her, being credited with that amount, and execution of Wardlaw & Edwards being applied to said purchase money. The said execution was used by said John G. Edwards in part payment of said tract of land, and thereby a resulting trust was established in said land in favor of the said Elizabeth Bell to the extent of about two-thirds of its value. * * * That said purchase money was paid by the said Elizabeth Bell in pursuance of agreement between her and the said John G. Edwards that the said John G. Edwards should take a deed to the said tract of land and hold the same in his own name till certain moneys which he claimed he had advanced to the said J. E. Bell, the husband of Mrs. Bell, should be paid, and then that the said land should be conveyed to the said Elizabeth Bell." We think the complaint alleges an express trust, as was held by the circuit court. It is alleged in paragraph 2, above quoted, that there was a resulting trust in said land in favor of the said Elizabeth Bell to the extent of about two-thirds of its value, but this is a mere conclusion of law, and is followed by allegations in the third paragraph of an agreement that all the land should be reconveyed to Mrs. Bell upon condition. This negatives the idea of a resulting trust because it shows an agreement different from that which the law would imply from the mere payment of a part of the purchase money. "A resulting trust arises in favor of one who pays the purchase money of an estate, and

takes title in the name of another, because of the presumption that he who pays for a thing intends a beneficial interest therein for himself, but this presumption cannot arise when a contrary intent appears, since it is based on the absence of evidence of such contrary intent." Manning v. Screven, 56 S. C. 83, 34 S. E. 22.

It is well settled that an express trust cannot be established by parol evidence (Rogers v. Rogers, 52 S. C. 393, 29 S. E. 812; Pruitt v. Pruitt, 57 S. C. 163, 35 S. E. 485); and we concur with the circuit court in the finding that there is no sufficient evidence of an express trust. The only writings in evidence urged as testimony supporting such trust are: (1) The following entry made by the auditor of Abbeville county upon his duplicate books in February, 1903, in respect to the land in question at the request of John G. Edwards: "Sold Mrs. E. Bell." This was a mere direction for the guidance of the auditor, is not an admission of a previously existing trust, and was not "signed by the party" as expressly required by the statute. The next writing relied on is that contained in the correspondence between John G. Edwards and J. J. Johnson during the month of October, 1903. It seems that Edwards contemplated a sale of the land and division of the proceeds among the children of Mrs. Elizabeth Bell, and that a number of these children had met at his house, and agreed that the land should bring $5,000. Accordingly the land was offered for sale at auction at Abbeville on October 4, 1903, and, having been knocked down to defendant James H. Bell at $3,375, there was dissatisfaction with the sale at such price, a controversy arose, and this correspondence ensued. In his letter of October 6, 1903, Johnson, on behalf of J. H. Bell, offered to sell Edwards his (J. H. Bell's) part for $1,000, to which Edwards next day replied: "Please say to Mr. Bell that we cannot accept his proposition, but would entertain a proposition on a basis of $5,000, all the heirs agreeing." This proposition was accepted by J. H. Bell through Johnson, but later the acceptance was withdrawn. Then Edwards wrote Johnson to the effect that he (Edwards) owned the land in fee free from any claim whatever, that his offer of an interest in the proceeds of sale to the children of Mrs. Elizabeth Bell was purely voluntary, and that, since they were disposed to seek litigation, he stood strictly on his legal rights, as he had bought and paid for the land with his own money.

It is contended by appellant that the words "all the heirs agreeing," quoted above, constituted an admission in writing of an existing trust in favor of the Bell heirs. It is well settled that the writing as evidence of a trust or acknowledgment thereof must manifest a previous trust (Barrett v. Cochran, 11 S. C. 29; Kennedy v. Gramling, 33 S. C. 367, 11 S. E. 1081, 26 Am. St. Rep. 676), and such is the language of the statute. Hence mere vague and ambiguous words capable of an inference which negatives a trust cannot be regarded as a compliance with the statute. In Barrett v. Cochran, supra, the instruments of writing relied on to create a trust were a deed made to "A., trustee for B.," and a bond and mortgage executed at the same time by and in the name of "A., trustee for B.," with no further declaration of trust except that the condition of the bond was that the payment of the money should be "out of the estate which may be held by me as such trustee.' This court held that these instruments were not sufficient to prove a previously existing trust. The evidence in the case at bar in support of the acknowledgment of a trust is not so strong as in Barrett v. Cochran, for here there is no reference to any trust, and in the writing "all the heirs agreeing" is thoroughly consistent with the later written declaration by Edwards in the same correspondence that he intended to divide the proceeds of the sale of the land among the children of Mrs. Bell merely as a gratuity, so that these words may fairly be construed to mean in the distribution of such gratuity he desired to consult the wishes of the heirs. We agree, therefore, with the construction of these writings by the circuit court, and with his finding of fact that the offer made by Edwards was a mere gratuity.

The foregoing is sufficient to dispose of the appeal in this case, but, as it is earnestly insisted that the complaint should be considered as alleging a resulting trust, and as the circuit court considered the complaint from that standpoint also, we will not decline to so view it. Thus considering it, was there sufficient evidence of such trust? We think not. While a resulting trust may be established by parol testimony in this state, such testimony, to warrant an inference of a resulting trust, must be "clear, strong, unequivocal, unmistakable, and must establish the fact of payment by the alleged beneficiary beyond a doubt." Catoe v. Catoe, 32 S. C. 595, 10 S. E. 1078. See, also, Rogers v. Rogers, 52 S. C. 391, 29 S. E. 812. The record in the case of Elizabeth Bell v. J. E. G. Bell, introduced in evidence, shows the following receipt entered on the execution book of Sheriff J. Y. Jones, p. 32: "$905.77. Rec'd of Sheriff Jones this day the sum of Nine Hundred and Five and $^{77}/_{100}$ dollars in this case. 21st Feb., 1878. [Signed] J. G. Edwards, for Eliz. Bell." The same record also shows this receipt entered on the execution book of J. Y. Jones, p. 19: "$675.75. Received this day of Sheriff Jones the sum of Six Seventy-five and $^{75}/_{100}$ dollars, balance on our claim in this case. [Signed] J. G. Edwards, for Wardlaw & Edwards." The deed of conveyance to Edwards by the sheriff recites a receipt of a consideration of $1,600 from Edwards, and the following receipt given Edwards by the sheriff for that sum was introduced in evidence:

"$1,600. Received of John G. Edwards the sum of sixteen hundred dollars, being the purchase money of the James E. G. Bell place, containing five hundred acres, more or less, and sold 3rd Dec., 1877. Titles made to John G. Edwards. Applied as follows:

| | |
|---|---|
| Wardlaw & Edwards claim..... | $ 675 75 |
| Mrs. E. Bell..... | 905 77 |
| Amos Clark ..... | 18 50 |
| | $1,600 00 |

"21 Feb., 1878. J. Y. Jones, S. A. C."

Even if it be conceded that the above receipts show Mrs. Bell permitted Edwards to use the proceeds of her judgment in settlement of the purchase price of the land, it is perfectly consistent with the idea that she intended to make Edwards her debtor to that extent and liable to account to her for his collection of the judgment. In none of the declarations which it is alleged Edwards made concerning this transaction did he ever state that Mrs. Bell paid any portion of the purchase money of this land, but, on the contrary, in his letter of October 20, 1903, addressed to J. J. Johnson already referred to, Edwards expressly declared that he paid for the land with his own money. "The rule is well settled that, where one person lends money to another to be used by the borrower in the purchase of land, no resulting trust arises in favor of the lender in the land purchased by the borrower, title to which is taken in the latter's name." 15 Ency. Law (2d Ed.) 1149. Furthermore, it appears that on the day before the transaction above referred to between the sheriff and Edwards it appears that Mrs. Bell assigned the bid of the land made by her December 3d preceding to John G. Edwards for value received, and directed the sheriff to make the same title to him he could have and should have made to her. We concur with the circuit court in the view that this instrument clearly shows Mrs. Bell intended that the sheriff should convey to Edwards all the beneficial, as well as the legal interest in the land. This negatives the idea that Mrs. Bell intended to reserve to herself any beneficial interest. Therefore, under the rules already stated, there was no resulting trust. Manning v. Screven, supra.

It is also worthy of mention that all the testimony offered by plaintiff to establish a trust was intended to show not such a resulting trust as the law would imply from the payment of a portion of the purchase money—i. e., to the extent of the payment—but the whole land is claimed under the alleged trust, notwithstanding the fact that Edwards admittedly paid a large part of the purchase money and paid a large prior incumbrance. While parol testimony is permissible to prove a resulting trust, when the proposed testimony shows an agreement beyond what the law would imply, it involves an express agreement inconsistent with a resulting trust.

In reaching these conclusions, we have not considered the statement in writing of a settlement between Mrs. Bell and Edwards prepared about the time of the sale by T. C. Perrin, attorney for Mrs. Bell, to the introduction of which in evidence objection was made by appellant, since the conclusion of the circuit court is fully supported by other evidence in the case, the competency of which is not questioned.

The judgment of the circuit court is affirmed.

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(146 N. C. 187)

## PATAPSCO GUANO CO. v. BOWERS-WHITE LUMBER CO.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. BOUNDARIES—DEED—ARTIFICIAL POND.
Where the description in a deed of land contained a call, "and thence down the bottom to the pond and Kehukee Swamp," and the grantor owned the land under the pond which had banks and had been maintained for generations, and also owned the low boggy land on either side, each being known by a specific name, the line stopped at the edge of the pond, and did not extend to the run or channel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 113, 114.]

2. SAME — PERMANENT POND — TEMPORARY POND—RULE OF STATING.
The rule that the boundary upon an artificial pond does not extend to the thread of the stream, where the pond has been so long kept up as to have become permanent and to have acquired anothed well-defined boundary, does not apply in the case of a purely artificial pond temporarily maintained, the margin and banks of which had not been long established and clearly marked.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 118.]

3. SAME—LOCATING—NAME OF BODY OF WATER.
In the conveyance of land, a boundary line may be located and terminated by calling for a body of water by name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 95.]

4. SAME — PERMANENT ARTIFICIAL POND — BOUNDARY—NATURAL LAKES.
Where an artificial pond has existed until it is a well-known landmark, and is considered a permanent body of water and to have acquired in the community boundaries as well defined as natural lakes, the rule regarding boundaries is the same as that applied to natural lakes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 118.]

Appeal from Superior Court, Halifax County; Lyon, Judge.

Action by the Patapsco Guano Company against the Bowers-White Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed, and action dismissed.

Civil action to recover damages for unlawfully trespassing upon and cutting timber on plaintiff's land and to enjoin further cutting.

Kitchin & Smith, for appellant. Albion Dunn, for appellee.

BROWN, J. It is unnecessary to set out the lengthy statement of facts agreed contained in the record. It is admitted that the

case turns upon the construction of a deed from R. H. Smith to Geo. W. Graffiln, and upon the following call in the deed: "And thence down the bottom to the pond and Kehukee Swamp." His honor was of opinion that this line extended to the run of the swamp, and did not stop at the edge of the pond. It is admitted that the pond called for is a well-known and long-established pond known as "Smith's millpond." Taking the deed by "its four corners," and reading it in the light of the facts agreed, we find ourselves unable to agree with his honor. We are of opinion that "the reason of the thing," as well as the authorities, sustain the defendant's contention that the aforesaid line stops at the edge of the pond.

It is unnecessary to discuss the case of Wall v. Wall, 142 N. C. 387, 55 S. E. 283, Brooks v. Britt, 15 N. C. 481, and other cases cited in the brief of the learned counsel for plaintiff. They do not militate at all against our conclusion. If the words "down the bottom to the pond" did not occur in this deed, the authorities cited would be in point. The insertion of those words in this deed under the circumstances under which it was made denote the intention of the grantor to stop at the pond, and the use of the words "Kehukee swamp" serve only to indicate what waters flow into and make up the pond, and thus locate it. If this were not so, there would have been no use in calling for the pond. Smith's pond appears to be an old established pond of large dimensions, which has existed "since the time whereof the memory of man runneth not to the contrary." It appears to us that the circumstances and facts of the case strongly support defendant's contention. Smith owned the land covered by the pond and swamp and the lands adjoining, including the lands described in the deeds to plaintiff and in the deed to Brinkley, through whom defendants claim. He was the owner and operator of the mill, which from time immemorial had been run by the waters of the pond. The pond covered 100 acres or more, and had been maintained through generations. The margin, bank, or edge of said pond is clearly marked by nature and well defined. The channel or run (to which plaintiff claims the call in said deed extends) of said pond and swamp had a well known and specific name, separate and distinct from the pond and swamp, rising miles above the said swamp and pond. This was known as "Kehukee Run," while the swamp, the low, boggy land on either side, was known as "Kehukee Swamp," and the pond as "Smith's Millpond." With these patent facts before the parties when the deed was made, it is evident Smith intended to convey only to the pond, and did not intend to convey the pond itself, which he would have done had he extended the call to the run of the swamp from which the pond had been created. It is hardly to be presumed that Smith intended to destroy the value of his mill by selling its pond, for it appears that immediately after the execution of the Graffiln deed Smith conveyed to Brinkley "the tract of land known as Smith's millpond, including the millpond, mill," etc. Ever since then Brinkley and those claiming under him have operated the mill by the power furnished by the waters of that pond.

Our conclusion is supported by abundant authority. The two encyclopedias sum up the authorities by saying: "It is perhaps the prevailing doctrine, regarded as particularly applicable to the large lakes of this country and qualified in the case of artificial ponds, that while a general grant of land on a river or stream, which is nonnavigable, extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge." 12 Am. & Eng. Enc. (1st Ed.) p. 642. "Land bounded on a pond extends only to the margin, and the margin of the pond, as it existed at the time of the conveyance, is the limit, whether the pond was then in its natural state or raised above it by a dam." 5 Cyc. p. 901. The American & English Enc., at page 653, states the true principle of construction which differentiates this case from those cited by plaintiff: "The boundary upon an artificial pond raised by a dam swelling a stream over its banks presumptively extends to the thread of the stream, unless the pond has been so long kept up as to have become permanent and to have acquired another well defined boundary." To the same effect and in practically the same language the rule is announced in Waterman v. Johnson, 13 Pick. (Mass.) 261, and afterwards approved in Paine v. Woods, 108 Mass. 160. This rule of construction would not hold good in the case of a purely artificial pond temporarily maintained, the margin or banks of which had not been long established and clearly marked. Smith's pond is a permanent body of water which has existed in its present status for generations past, and its margin must necessarily be a landmark well known in the community. We think the principles herein laid down are fully supported by the following authorities among text-writers: Angell on Water Courses (6th Ed.) § 41; 3 Wash. Real Prop. (5th Ed.) p. 443; Gould on Waters, § 203; Devlin on Deeds, § 1026—and also by many decided cases. West Roxbury v. Stoddard, 7 Allen (Mass.) 167; Nelson v. Butterfield, 21 Me. 238; Hathorne v. Stinson, 12 Me. 183, 28 Am. Dec. 167; Diedrich v. Railroad, 42 Wis. 248, 24 Am. Rep. 399. It being admitted that the pond called for is known as Smith's millpond, we have a definite and certain identification of the thing called for, amply sufficient to uphold a conveyance of the land covered by its waters had the land under the pond been conveyed by that name. My Lord Coke says, in substance, that, where a collection of water has by long existence and usage acquired a specific name, the land by which it is covered may be conveyed under that name and illustrates it thus: "Stagnum a

poole doth consist of water and land, and therefore by the name of stagnum or poole the water and land shall pass also." Co. Litt. 5b. If land may be conveyed by describing it by a well-known name given to a collection of water covering it, we think that it is equally proper to hold that a boundary line might be located and terminated by calling for such body of water by name. The most interesting and well-considered case on the subject that we have examined is Boardman v. Scott, 102 Ga. 404, 30 S. E. 982, also reported with copious notes in 51 L. R. A. 178. In this case all the authorities are collected and carefully and elaborately reviewed by Mr. Justice Fish, who in a headnote by himself states the great weight of authority to hold: "Under a deed bounding the land therein conveyed by an artificial pond, which had been in existence for more than 40 years and which had thus become a permanent body of water, and was still being kept up and maintained as such, its waters, however, ebbing and flowing from time to time so as to leave a margin of land between its high and low water marks, the line of the land so conveyed did not extend to the thread of the stream from whose waters the pond was formed, but only to the low-water mark of the pond at the date of the deed." In that case the collection of water called for was known as "McCall's millpond," and it was formed exactly in the manner as Smith's pond was formed by constructing a dam across a swamp. Smith's pond has existed for so long a period that it must have become a well-known landmark in the neighborhood, and may justly be considered a permanent body of water and to have acquired in the community as well-known and as well-defined boundaries as most natural lakes or ponds, and under these circumstances we think the rule is the same as that universally applied to natural lakes and ponds.

The judgment of the superior court is reversed, and the action is dismissed.

Reversed.

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(146 N. C. 147)

## MUDGE v. VARNER.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. GUARANTY—LIABILITY OF GUARANTOR.

The liability of one who guarantees that a corporate debt will be paid on a designated date is that of a guarantor of payment, and not of collection, and, on the corporation failing to pay, his obligation to pay is absolute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, §§ 36–41.]

2. SAME.

A guarantor of payment is liable on an absolute promise to pay on failure of the principal debtor to pay, while a guarantor of collection is liable on a promise to pay on condition that the creditor will diligently prosecute the principal debtor without success.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, §§ 36–41.]

3. EVIDENCE — PAROL EVIDENCE — WRITTEN GUARANTY.

Where a contract of guaranty is in writing and free from ambiguity, the guarantor cannot alter it by proof that he did not intend to be bound according to its terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1813–1817.]

4. GUARANTY—CONSIDERATION.

A guaranty by one that the debt of another will be paid on a designated date, if the creditor will delay enforcement of the claim until that time, is, on the creditor agreeing to delay, supported by a sufficient consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, §§ 13–17.]

Appeal from Superior Court, Rowan County; Moore, Judge.

Action by Edmund T. Mudge against H. B. Varner. From a judgment for plaintiff, defendant appeals. Affirmed.

John L. Rendleman and Adams, Jerome & Armfield, for plaintiff. R. Lee Wright and P. S. Carlton, for defendant.

HOKE, J. Plaintiff, holding a valid account past due for goods sold, and delivered to the Globe Publishing Company to the amount of $286.88, and having some reason to complain of inattention on part of the company to his letters concerning it, placed the same in the hands of an attorney for collection. Defendant, who was the president of the Globe Company, wrote protesting against such course, whereupon plaintiff wrote that, if defendant would give notes for the account and indorse same, the plaintiff would withdraw the claim from the hands of the attorney. Defendant replied, giving plaintiff general assurance of payment, but not offering to indorse any notes for the account. Thereupon plaintiff wrote defendant a letter containing this statement: "Now, please do not misunderstand us. We are making a claim against the Globe Publishing Company, and not against you, and, if you have any confidence yourself in the Globe Publishing Company, you will indorse the notes. Should we have a satisfactory settlement from you by Friday of this week properly secured, we will withdraw the claim entirely from the hands of the attorney, otherwise we will authorize him to proceed to collect the account, by suit of necessary. If you should decide to indorse the note, and will wire us at once, we will withdraw the claim immediately." In reply defendant wrote on June 25th inst., saying: "Will you be so kind as to hold up this account until July 10th. If so, I will guarantee that it will be paid on that date." Plaintiff immediately replied, agreeing to the delay. The account was not paid, and some time thereafter the company became insolvent, and the present action was instituted against defendant personally, on the agreement contained in this written correspondence.

Recovery was resisted by defendant chiefly on the ground that the plaintiff was required to show that he had proceeded with diligence

against the principal debtor. The evidence does not indicate very clearly that the plaintiff has been at all remiss in this respect, but conceding that this should be established, we are of opinion that it would not avail to relieve defendant from liability, for the reason that the agreement, shown by the correspondence, is a guaranty of payment and not simply of collection, and, on default of the principal, the defendant's obligation to pay became absolute. Cowan v. Roberts, 134 N. C. 415, 46 S. E. 979, 65 L. R. A. 729, 101 Am. St. Rep. 845; Jenkins v. Wilkinson, 107 N. C. 707, 12 S. E. 630, 22 Am. St. Rep. 911; Jones v. Ashford, 79 N. C. 173. In Jenkins v. Wilkinson, supra, the distinction between the two kinds of guaranty is well stated, and in that case the court held: "(1) A. was indebted to B., and gave his promissory note, which, at maturity, he failed to pay. In consideration of a further extension of the time for payment, C. executed a writing, promising to guarantee the payment of the debt, provided B. would hold a certain mortgage as collateral. Held, C. was liable as a guarantor of payment, and not as a mere guarantor of collection. (2) A guarantor of payment is liable upon an absolute promise to pay upon failure of the principal debtor. (3) A guarantor of collection is liable upon a promise to pay the debt, upon condition that the guarantor shall diligently prosecute the principal debtor without success." The authority is decisive against this position of defendant.

It is objected, further, that the court declined to permit defendant to testify as to what he intended by the letter in which he guaranteed the payment, to wit, that he only intended to give the promise as president of the company, and not as an individual, citing in support of his position the case of Typewriter Co. v. Hardware Co., 143 N. C. 97, 55 S. E. 417, and other cases of like kind. But the principle announced in those cases has no application here, where the entire contract is shown to be in writing and the terms are explicit and free from ambiguity. The guaranty of defendant as president would have given no additional value to plaintiff's claim against the company. That was already acknowledged and complete. The entire correspondence conclusively shows that the guaranty expressed was that of defendant personally. In such case the correct doctrine is that a party to such a contract is not permitted to contradict, or alter, the agreement by showing that he did not intend the clear import of the terms in which the contract is expressed. Bank v. Moore, 138 N. C. 529, 51 S. E. 79, and authorities cited; Clark on Contracts, pp. 386–401.

In the case before us the letters express the entire contract between the parties. The obligation on the part of the defendant is explicit and absolute. The consideration, the assent to the delay asked for, is sufficient (Clark on Contracts, p. 121), and there is no reason shown why the plaintiff's recovery should not be sustained. The objection to the second deposition is without merit, and we find no error which gives defendant any just ground for complaint.

No error.

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(145 N. C. 490)

## STATE v. WRIGHT.

(Supreme Court of North Carolina. Nov. 27. 1907.)

1. WITNESSES — CONTRADICTION — COMPETENCY OF STATEMENTS OF DECEDENT.

Where the state did not offer the dying declarations of decedent, but showed by witnesses that accused was the person who killed decedent, the statement of decedent as a witness before the committing magistrate that he did not know who struck him was irrelevant, and did not contradict the state's witnesses.

2. CRIMINAL LAW — TRIAL — CONDUCT OF JUDGE.

The language of the court in referring to the testimony of a witness for accused as "the Smith woman" was not prejudicial to accused; the language being used in a respectful manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1520.]

Appeal from Superior Court, Catawba County; Ward, Judge.

Reese Wright was convicted of murder in the second degree, and he appeals. Affirmed.

Self & Whitener, for appellant. Assistant Attorney General Clement, for the State.

BROWN, J. The defendant was convicted of murder in the second degree for the killing of one Lowry.

There are only two assignments of error.

(1) Four witnesses for the state testified that the prisoner is the person who struck the deceased; that he picked up something from the ground, threw it at Lowry, and hit him while Lowry and the prisoner were in a quarrel. The prisoner, his wife, and two other witnesses, Tom Smith and his wife, testified that there was no quarrel between deceased and prisoner, and that prisoner did not throw anything at Lowry or any one else. The prisoner offered to show that on his trial before the mayor of Hickory a day or two thereafter, on a charge of having assaulted Lowry, Lowry, introduced as a witness for the state, testified that he "did not know who hit him." The court, upon objection by the solicitor, refused to admit this testimony, and prisoner excepted. It is unnecessary to consider the effect of the failure of the committing magistrate to reduce the evidence to writing and signed by the witnesses, as required by the statute, and as to whether such failure will necessarily deprive either the state or defendant of the benefit of Lowry's evidence testified to before the mayor during life. The evidence is irrelevant and immaterial, and proves nothing. The state had not offered the dying declarations of Lowry to prove that defendant was the person who hit him. Lowry's ignorance as to who hit the blow does not in

the least tend to contradict the positive testimony of the state's witnesses who testify that the defendant is the person who did it.

(2) His honor, in referring to the testimony of the prisoner's witness, Ila Smith, spoke of her as "the Smith woman." The record states that this language was used in a respectful manner. The point made on the prisoner's behalf is that the jury may not have understood the reference to be "respectful." We do not think the manner of referring to the witness tended to prejudice the defendant in the least, and we have no idea that the conscientious judge who presided ever had the slightest purpose of being discourteous to any witness, however humble in the walks of life. It is frequently the case in nisi prius trials that witnesses are referred to without "putting a handle to their names."

We find nothing in the record of which the defendant can justly complain.

No error.

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(145 N. C. 487)

## STATE v. TUTTLE.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. TRESPASS—FORCIBLE TRESPASS—ELEMENTS.
The gist of the offense of forcible trespass is the violence and intimidation, and no assault need appear, and such violence, threats, and cursing towards a female as to cause her against her will to sign an order for cancellation of a mortgage held by her against defendant is terror and violence, making a forcible trespass.

2. SAME.
Whenever a man, either by behavior or speech, gives those who are in possession just cause to fear that he will do them some bodily hurt if they will not give way to him, he is guilty of forcible trespass.

Appeal from Superior Court, Forsyth County; Ferguson, Judge.

E. S. Tuttle was convicted of forcible trespass, and he appeals. Affirmed.

The defendant was indicted on the following bill: "The jurors for the state, upon their oaths, present that E. S. Tuttle, late of Forsyth county, on the ——— day of ———, 1906, did execute unto V. R. Anderson a certain chattel mortgage, therein conveying certain personal property to secure unto the said V. R. Anderson the payment of the sum of $100 at the maturity of a note in like amount, which said chattel mortgage was duly recorded in the office of the register of deeds of Forsyth county; that the said E. S. Tuttle afterwards, to wit, on the 1st day of January, 1907, with force and arms, at and in the county aforesaid, unlawfully, violently, forcibly, injuriously, and with a strong hand, and by threats and cursing, did compel the said V. R. Anderson to sign an order directing the cancellation of the said chattel mortgage so recorded in the office of the register of deeds of Forsyth county against the will of the said V. R. Anderson and against the protest of her, the said V. R. Anderson, to the great damage of her, the said V. R. Anderson, to the evil example of others in like case offending, against the form of the statute in such cases made and provided, and against the peace and dignity of the state." The defendant made a motion to quash and excepted to its refusal. After verdict, he moved in arrest of judgment, which motion being denied also he again excepted and appealed.

Lindsay Patterson and F. T. Baldwin, for appellant. Hayden Clement, Asst. Atty. Gen., for the State.

CLARK, C. J. The indictment sufficiently charges a forcible trespass. It alleges that the defendant "unlawfully, violently, forcibly, injuriously, and with a strong hand, and by threats and cursing, did compel the said V. R. Anderson to sign an order directing the cancellation of the said chattel mortgage so recorded in the office of the register of deeds of Forsyth county against the will of the said V. R. Anderson, and against her protest, to her great damage," etc. Suppose the allegation had been that the defendant had slapped a pistol to the prosecutrix's head, and thus compelled her to sign a check or do any other act. It is the show of force and compelling the doing of an act against the will of the prosecutrix which makes a forcible trespass. No assault need appear in the indictment. Wharton, Cr. Law (10th Ed.) § 1092; also State v. Mills, 13 N. C. 423, where Judge Ruffin says that an actual breach of the peace is not necessary, and that, while there must be something more than a mere civil injury, it is a forcible trespass if the act tends to a breach of the peace by being done in the presence of the prosecutor, "to his terror or against his will." Certainly the violence, threats, and cursing towards a female which caused her, against her will, to sign an order for cancellation of a mortgage held by her against the defendant was terror and violence making a forcible trespass. In State v. Tolever, 27 N. C. 454, the court sustained an indictment for forcible trespass which charged that the defendants did "curse, abuse, and threaten" a woman, and throw a dead cat into her house through the open door. It was not charged there, as here, that the terror compelled her to do any act against her will.

The gist of the offense is the violence and intimidation. That is sufficiently charged when it is alleged that the violence, cursing, and threatening made the woman, against her will and protest, sign the order to cancel on the record, the mortgage which she held against the defendant. In State v. Mills, 104 N. C. 907, 10 S. E. 676, 17 Am. St. Rep. 706, the indictment was not quashed, but the court held that the facts found by the special verdict did not constitute forcible trespass, because "there was nothing done or said which should have intimidated or overawed a man of ordinary firmness." But the allegation of

the bill in this case is that the woman was intimidated by the violence, threats, and cursing, and that to the extent that the defendant compelled her to sign the paper he wanted against her will and protest. In State v. Gray, 109 N. C. 790, 14 S. E. 55, the defendant was held guilty on a special verdict, where without violence he procured of a female a duebill, and, by using rough language, intimidated her so that she made no effort to take it back. Here the defendant took and carried away the paper which he made the prosecutrix sign, against her will and protest, by his violence, threats, and cursing. In State v. Armfield, 27 N. C. 207, which is very like this case, the court held that the indictment was sufficient and sustained the charge of the trial judge, which was, in part, as follows: "That it was not a necessary constituent of such an offense that the individual whose rights were violated should oppose the seizing or taking away of his property by force, provided he were overawed and prevented from doing so by a superior force and a disinclination to engage in a breach of the peace." "Whenever a man, either by his behavior or speech, gives those who are in possession just cause to fear that he will do them some bodily hurt if they will not give way to him," he is guilty of forcible trespass. Archbold, Cr. Pr. & Pl. p. 1133. "No particular words are necessary in the indictment at common law. All that is required is that it should appear by the indictment that such force and violence have been used as constitute a public breach of the peace" (Id. 1135), or tends thereto (State v. Mills, 13 N. C. 423).

The charge is sufficiently made, and it appears that the jury had no difficulty in finding the proof sufficient. There is no exception to the evidence or to the charge of the court.

Affirmed.

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(146 N. C. 158)

## NORFOLK LUMBER CO. et al. v. SMITH et al.

(Supreme Court of North Carolina. Nov. 27, 1907.)

LOGS AND LOGGING—SALES OF TIMBER—CONSTRUCTION OF CONTRACT.

Under a contract of sale of timber, providing that vendee should have four years to cut and remove the same, and, if longer time was desired, that the same was granted not exceeding two years, vendee was bound to begin the cutting and removal within the first four years, and, not having done so, could not begin during the two supplementary years, they being allowed for the purpose only of completing the cutting and removal begun during the first four years, and not as additional time within which to begin.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, §§ 9, 11.]

Appeal from Superior Court, Harnett County; E. B. Jones, Judge.

Action by the Norfolk Lumber Company and others against M. A. and E. S. Smith. Judgment for defendants, and plaintiffs appeal. Affirmed.

This is an action brought for an injunction against the cutting of timber on the land described in the pleadings, containing 375 acres, and known as the "Smith tract." The question in the case for our consideration arises upon the construction of a contract between J. D. Barnes and James E. Ethridge, the plaintiff having acquired the interest of Ethridge under the said contract by mesne conveyances or assignments, and the defendants having acquired the title and interests of J. D. Barnes by a deed to M. A. Smith, whose husband and codefendant, E. S. Smith, cut the timber by her permission and authority. The material part of the contract between Barnes and Ethridge is as follows: "In consideration of the sum of fourteen hundred dollars in cash, the receipt of which is hereby acknowledged, I have this day agreed to bargain and sell, and by these presents do bargain and sell to James E. Ethridge, of Norfolk, Va., his heirs and assigns, with the privilege of moving, as hereinafter stated, at any time within four years from date, subject to the conditions hereinafter contained, all of the pine saw mill timber of the following dimensions: That is twelve inches in diameter at the stump at the time of removing, on that tract or parcel of land situated in the county of Harnett, and the state of North Carolina, and bounded as follows: [Description here given.] The said James E. Ethridge, his heirs and assigns, shall have four years to cut, haul and remove said timber from the land, and, if longer time is desired to remove the timber, right is hereby granted upon the payment of eight per cent per annum on the purchase price for the time it takes after the expiration of the four years herein granted, together with the rights and privileges, for and during the said period from this date, of his agents, heirs or assigns to enter upon said land, or any other land owned by him, and to pass and repass on the same at will on foot or with teams and conveyances, to build lumber camps, stables and other fixtures, to cut and remove the said timber, and to construct and operate any roads, tramroads or railroads over and upon said lands, as the said James E. Ethridge, his heirs or assigns may deem necessary for cutting and removing said timber, and to use such trees, underwood and brush on said land as may be needed in the construction and operation of said roads, tramways and railroads, and to use and operate any railroad, tramways or roads that the grantee herein or his heirs may construct or cause to be constructed, so long as they may desire, not exceeding two years; [with] the right to remove any and all fixtures, roads, railroads and tramways, or anything put up by said James E. Ethridge, his heirs or assigns, on said lands." His honor, Judge Jones, issued a restraining order to stop the cutting and removal of timber and an order to show cause

why the injunction should not be continued to the final hearing, at which time he refused to continue the injunction and the plaintiffs appeal.

Rose & Rose, for plaintiffs. E. A. Young and J. C. Clifford, for defendants.

WALKER, J. (after stating the facts as above). It seems to us that the presiding judge correctly interpreted the agreement between Barnes and Ethridge. The parties evidently intended that Ethridge should begin the cutting and removal of the timber within the first four years, and the additional period of two years was granted, not as an original period for the cutting and removal, but for the purpose of enabling Ethridge to complete the cutting and removal commenced during the four years, provided it should be found that it was not sufficient time for cutting and removing all the timber from the land, which is described in the complaint. Surely it was not the intention of the parties that Ethridge should lie by, and not cut a tree during the four years, and then claim the right to cut and remove the timber during the two supplementary years. They were allowed, as we have said, for the purpose of completing the cutting and removal, and not as additional time to provide against the delay and laches of Ethridge in performing the work. The plaintiff's construction of the contract is utterly inadmissible. Our opinion, therefore, is that Ethridge should have begun cutting and removing the timber within the four years, and if, in the exercise of reasonable diligence, he was not able to finish during said period, then it is provided that he shall have the additional time, not exceeding two years, to complete the work. It was admitted that Ethridge did not attempt to cut or remove a single tree during the four years first allotted to him. Would it not be a perversion of the terms of the contract to permit him to take advantage of his neglect, and to use any part of the two years to cut and remove the timber which was merely intended to supplement the four years to the extent that further time was needed to do what could not be done within that period. The stipulation is, not that if another full term is required to begin and finish the work, but if longer time is required for that purpose. This necessarily implies that at least some of the cutting and removing should be done during the first-mentioned period. The plaintiff cited in support of its position the cases of Hawkins v. Lumber Co., 139 N. C. 160, 51 S. E. 852; Lumber Co. v. Corey, 140 N. C. 462, 53 S. E. 300; Mining Co. v. Cotton Mills, 143 N. C. 307, 55 S. E. 700; Woody v. Timber Co., 141 N. C. 471, 53 S. E. 953. Those cases are not in point. They relate altogether to a different question from the one presented in this case. Bunch v. Lumber Co., 134 N. C. 116, 46 S. E. 24, is also referred to in the plaintiffs' brief. But that case, as well as Hawkins v. Lumber Co., decides that the party who has, by a contract, been given permission to cut and remove timber, must proceed to do so with reasonable diligence, where no time is fixed. And so in this case it was not contemplated that Ethridge should waste the whole period of four years by idleness or inaction, and claim the right to cut and remove the timber during the time limited for finishing the work. If we give such a meaning to the contract, it will contravene the plainly expressed will of the parties, and it cannot be warranted by any recognized rule of construction. If we should so decide, both the spirit and the letter of the agreement would be violated. The law does not permit a party to sleep upon his rights. He must be diligent.

The case of Lumber Co. v. Cedar Co., 142 N. C. 411, 55 S. E. 304, also cited, has no application to the facts stated in the record. That decision was based upon the statute, which requires a bond to be given by the defendant in certain cases, if an injunction is refused. But why do the vain thing of requiring a bond in this case, when it is apparent that the plaintiff must eventually fail in its suit?

The ruling of his honor in refusing to continue the injunction to the final hearing, being right, is affirmed.

No error.

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(146 N. C. 150)

## CRITCHER v. WATSON.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. LANDLORD AND TENANT — BETTERMENTS — LIABILITY OF LANDLORD.

A tenant could not put a window and frame in the house without the landlord's request, and by such act make the landlord his debtor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 585.]

2. SAME—CONSIDERATION — PAST CONSIDERATION.

Where a tenant occupying a room 18 feet square that had no light except from the door put a window and frame therein without the landlord's request, and the landlord during the term accepted the betterment and promised to pay for it, such promise was not unenforceable as based on a past consideration; the tenant being authorized to remove such betterment within the term without injury to the freehold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 587; vol. 11, Contracts, §§ 357–381.]

Appeal from Superior Court, Granville County; Justice, Judge.

Action by C. M. Critcher against James Watson. From a justice's judgment in favor of defendant, plaintiff appealed to the superior court, where a judgment was again rendered in favor of defendant, and plaintiff appeals. Affirmed.

Graham & Devin, for appellant. B. S. Royster, for appellee.

CLARK, C. J. Action for recovery of rents, begun before a justice of the peace. The only exception is to the following charge of the court: "If defendant bought and paid for the window and frame, and put it in the house, and after that time told plaintiff he had done so and plaintiff could pay for it or not as he saw fit, and plaintiff ratified and accepted it and plaintiff said he would pay for it, the plaintiff would be liable for the value of the window and frame, and defendant would be entitled to credit for the same." The defendant could not put a betterment on the house without request, and by such officious act make the landlord his debtor; nor, if the consideration was passed, would the promise of the plaintiff to pay therefor be binding, being gratuitous and without a consideration moving thereto. But the window and frame being a betterment to the house, of future benefit, if the plaintiff "accepted the same and promised to pay for it" (as the court charged), there were all the elements of a valid contract, for the tenant had a right to remove all betterments affixed by him, if done before the lease expired, if this were done without injury to the freehold. State v. Whitener, 93 N. C. 594, bottom of page, citing Tyler on Fixtures, pp. 384, 385, on the very point of the right of a tenant to remove windows placed by him in a windowless house. If under such circumstances the plaintiff promised to pay for the window, this was ratification and acceptance. This distinction reconciles the authorities. As the plaintiff contends, an executed or past consideration is no consideration to support an express promise in cases where the law does not raise an implied promise. 6 A. & E. 690, 693; Allen v. Bryson, 67 Iowa, 591, 25 N. W. 820, 56 Am. Rep. 358. In Bailey v. Rutjes, 86 N. C. 522, Rutjes was lessee of the premises for five years under a contract to make certain betterments. The plaintiff furnished the lumber to Rutjes for the purpose. He sued Rutjes and the lessors jointly, and the court held that, unless the lessors "were originally liable by reason of a contract of some sort, they cannot be made so because of their having resumed possession of the premises with its improvements, upon the surrender of their tenant; * * * nor under such circumstances would a promise to pay, after the lumber had been furnished and used, be binding on them, since it would be purely gratuitous and as such would make no contract."

But here the jury find that the plaintiff expressly agreed to pay for the window and frame their cost, $1.72, and the only query is whether the promise is void for lack of consideration. If the only claim were that at the expiration of the lease, as in Bailey v. Rutjes, the property passed to the plaintiff with the window and frame added, there would be, as in that case, no liability of plaintiff, neither to the maker of the window and frame, nor to the defendant. And even if after the expiration of the lease, when the house with its betterments had already passed back to the landlord, he had then made an express promise to pay for the betterment, this would have been unenforceable because nudum pactum, being a promise to pay for what had already become his property. But here the express promise, which the jury finds was made, was made during the tenancy. The tenant had a right to remove the window if before he went out, and this could be done without injury to the freehold. 24 Cyc. 1101. It does not appear that it would have been irremovable, for the jury find that the plaintiff promised to pay for it. If so, he must have desired to keep it there, and that it was desirable to keep it appears from the plaintiff's own testimony that "the room was 18 by 18 feet, with no light except from the door." Such a house was unsanitary, and would be condemned by any board of health. Both parties testify that the conversation occurred during the tenancy, and at the time when the defendant was doing work putting in the window, the plaintiff denying and the defendant affirming a promise to pay for the same. A landlord cannot be "improved" into a liability for improvements put upon his property by the tenant without authority. Nor can any one be held liable legally for a promise made without consideration, but here the betterment to the house was accepted at the time by the plaintiff, who promised to pay the $1.72 for it, as the jury find. He has lost nothing, but still has the consideration of better light for a large room, which before had no light except from the door.

No error.

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(146 N. C. 47)

## STEWART v. CARY LUMBER CO.

(Supreme Court of North Carolina. Nov. 20, 1907.)

1. RAILROADS — PRIVATE TRAMWAYS — RULES GOVERNING.

A lumber company operating a tramway for its private use is subject, in matters relating thereto, to the rules governing ordinary railway companies.

2. MASTER AND SERVANT—LIABILITY FOR ACTS OF EMPLOYÉS—WANTON AND UNNECESSARY ACTS—DAMAGES.

A railway company is liable for actual damages resulting from the wanton and unnecessary blowing of a locomotive whistle by its engineer for the purpose of frightening plaintiff's mule, but not for exemplary damages, where there is no evidence tending to show authorization, ratification, or negligence on the part of its managers in selecting a reckless or improper engineer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1273.]

3. SAME—LIABILITY FOR INJURY TO THIRD PERSON—WILLFUL ACT OF SERVANT.

Where an agent of a corporation commits a wanton and malicious tort when acting in the furtherance of his master's business, and within the scope of the agency, he acts as and for it, so that the criminal intent necessary to warrant exemplary damages is brought home to the corporation; but no master is liable for exemplary

damages for the tort of an employé committed on his own account, beyond the scope of his agency, and not in furtherance of the master's business.

From the refusal of exemplary damages, Clark, C. J., and Hoke, J., dissent, and from holding the master liable for any damages, Connor and Walker, JJ., dissent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1273.]

Appeal from Superior Court, Harnett County; Peebles, Judge.

Action by J. W. Stewart against the Cary Lumber Company. From a judgment for plaintiff, including punitive damages, defendant appeals. Reversed, and new trial ordered on the issue of damages.

H. E. Norris, Godwin & Davis, and D. H. McLean, for appellant. Stewart & Muse and Godwin & Townsend, for appellee.

BROWN, J. The plaintiff's evidence tends to prove that the defendant is operating a railroad for conveying lumber; that on May 20, 1903, the engineer of one of its log trains, as he was passing near plaintiff, wantonly and unnecessarily blew the whistle of the engine on purpose to frighten plaintiff's mule; that the whistle was blown violently and for some time, and for the sole purpose of frightening the mule; that this blowing did not take place at a crossing, and was not done in furtherance of the defendant's business. The evidence tends to prove that the engineer blew the whistle for amusement and to "make the mule dance." His honor submitted these issues: "(1) Did defendant's engineer, fireman, or servants unlawfully and wantonly hollow, make noises, and sound the whistle of the engine for the purpose of frightening the horses of the plaintiff, and was the plaintiff injured thereby? Answer: Yes. (2) What damages, if any, is plaintiff entitled to recover? Answer: $1,000."

The defendant's counsel contend through prayers for instruction: First, that it is not liable at all for the wanton tort of its engineer, not done in furtherance of its business, and not in the discharge of his duty; second, that it is liable in any event, under the facts of this case, for actual damage only.

1. In considering the first proposition, I regard the defendant, although not a carrier of passengers, as a railroad, within the ordinary acceptation of that term. Sawyer v. Lumber Co. (at this term) 58 S. E. 598. I admit that the entire evidence shows that plaintiff's cause of action grows exclusively out of the wrongful and unnecessary act of the engineer, done wantonly for his own amusement. I fully agree that the rule obtains generally that a master is not answerable in damages for the wanton and malicious act of his servant, when not done in the legitimate prosecution of the master's business, and that the evidence in this case presents a "positive affirmative tort, pure and simple," committed by the engineer without the master's knowledge, approval, or ratification. If we had not held that lumber railroads of the kind operated by defendant are to be governed by the same rule in relation to the public and to employés as steam roads which are common carriers, I should sustain the contention of defendant in this case. Hemphill v. Lumber Co., 141 N. C. 487, 54 S. E. 420; Bird v. Leather Co., 143 N. C. 283, 55 S. E. 727. But this immunity from liability for tort referred to is not generally extended to railroads whose servants are intrusted with such dangerous instrumentalities, and have thereby such unusual and extensive means of doing mischief. This exception to the general rule seems to be established by most abundant authority, and for the reason I have given. In the well-considered case of Bittle v. R. R., 55 N. J. Law, 615, 28 Atl. 305, 23 L. R. A. 283, the New Jersey appellate court says: "The rule obtains generally that a master is not answerable in damages for the wanton and malicious acts of his servant. Yet this immunity is not generally extended to railroad corporations whose servants have such extensive means of doing mischief. Accordingly, it has been established that if their servants, while in charge of the company's engines and machinery, and engaged about its business, negligently, wantonly, or willfully pervert such agencies, the company must respond in damages; and this is the principle deducible from the authorities upon this subject." Mr. Jaggard expresses the principle as follows: "The master's duty to third persons may arise from ownership or custody of dangerous things, and it may extend to the conduct of the servant, though forbidden, and for the servant's private purpose, and not for the master's benefit." Jaggard on Torts, § 88. It is held by the Circuit Court of Appeals of the United States that the wanton and malicious use of the steam whistle of a locomotive, by servants of a railroad company in charge of the locomotive while in motion, on a regular run, renders the company liable for damages on account of injuries caused thereby. R. R. Co. v. Scoville, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179. The Supreme Court of Illinois held the railroad liable in a case where the engineer, while his locomotive was standing near a crossing, at the instant a person was passing the track in front of his engine, negligently or maliciously caused the steam to escape, whereby the team was made to run off and injure plaintiff. R. R. Co. v. Harmon, 47 Ill. 299, 95 Am. Dec. 489. This view of the law by which railroads are excepted from the general rule is supported by an array of authority. Railway v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Railway v. Dickson, 63 Ill. 151, 14 Am. Rep. 114; Akridge v. Railway, 90 Ga. 233, 16 S. E. 81; Railway v. Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266; Cobb v. Railway, 37 S. C. 194, 15 S. E. 878; Railway v. Starnes, 56 Tenn. 52, 24 Am. Rep. 296; Everett v. Receivers, 121 N. C. 521, 27 S. E. 991; Brendle v. Spencer, 125 N. C. 474, 34

S. E. 634. I think the form and wording of the first issue submitted in this case should make no difference whatever in considering the liability of the defendant for some damage. The case should be considered as if the usual issue as to whether plaintiff was injured by the negligence of defendant had been submitted. I agree with Judge McCormick in R. R. v. Scoville, supra, that "we are in danger of refining too much when we attempt to distinguish between a negligent and a wanton or malicious use of the steam whistle of the locomotive engine in charge of the proper servants of the company." This seems to be the view of this court in Foot v. R. R., 142 N. C. 52, 54 S. E. 843, where it is said: "The breach of duty can be, and frequently is, intentional and willful, and yet the act may be negligent." To same effect is Hayes v. R. R., 141 N. C. 197, 53 S. E. 847. The wrongful act in this case, in its relation to the engineer, was a wanton tort; in relation to the master, it was a mere breach of duty, growing out of the doctrine of negligence, for which motives of public policy require that the master should compensate the plaintiff for the injury sustained.

2. The defendant offered the following prayer, and excepted to the refusal of the court to give it: "The plaintiff has offered no evidence tending to show that the defendant authorized or ratified the wrongful act of defendant's agents and servants, and the plaintiff is not entitled to recover any amount as exemplary, punitive, or vindictive damages." I think the court erred in refusing the prayer, and in instructing the jury that they might award punitive damages. It seems to me that under all the authorities governing the relation of master and servant, and the liability of the former for the tort of the latter, the defendant is not liable at all for the act of the engineer, except upon the one ground that I have stated. To hold it liable on any other ground is directly against our own recent utterance. Sawyer v. R. R., 142 N. C. 5, 54 S. E. 793, and cases cited. This ground of liability, it appears to me, does not warrant the imposition of punitive damages, in the absence of evidence tending to show either authorization, ratification, or negligence upon the part of its managers in selecting a reckless and improper engineer. How far a principal may be mulcted in punitive damages for the act of his agent is a question about which there is much contrariety and not a little confusion of authority, yet the defendant's contention upon the facts of this case appears to me to be supported by most abundant authority, is not in conflict with any of our own decisions, and is founded upon reason and justice. I admit that where the servants of a corporation engaged in carrying passengers are guilty of acts towards the injured party as a passenger which would subject the servants to exemplary damages the great weight of authority holds the corporation liable to similar damages without proof that it ratified or directed the wrongful acts. 3 Sutherland, § 950, where all the cases are collected. This is because the corporation can act only through its agents, and when it commits to them the safety and comfort of persons in transitu over its road the authority of the corporation pro hac vice is vested in such agents, and "as to such passengers they are the corporation."

Upon this theory a railroad company may be held liable for punitive damages for the insults and rudeness of a conductor to a passenger. Holmes v. R. R., 94 N. C. 318. I admit that, where the agent of the company is acting within the scope of his duty and in furtherance of its business, the company may be held, under certain circumstances, liable for exemplary damages, even though the injured party is not a passenger. Thus, if the agent of the carrier maliciously uses unnecessary force in ejecting a trespasser it may be a case for punitive damages. Thompson on Negligence (2d Ed.) § 3253. Upon this principle this court allowed such damages against the company for the conduct of its brakeman in ejecting a trespasser from a train with reckless and unwarranted violence. Hayes v. R. R., 141 N. C. 199, 53 S. E. 847. In that case this court said: "It would seem from the authorities that, where the brakeman is acting for the company and within the scope of his agency, the general principles of the law relating to exemplary or punitive damages apply to him as well as the conductor." It was the duty of the brakeman to eject trespassers, and in doing so he represented his master, who was held responsible to the same extent that his servant would be held if he acted maliciously and with unnecessary force. As I read the authorities, the master cannot be punished if the servant, in the language of Lord Kenyon, "quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests. He then no longer acts in pursuance of the authority given him." McManus v. Crickett, 1 East, 106. Mr. Sedgwick declares that it is the better opinion that no recovery for exemplary damages can be had against the principal for the tort of the agent, unless done under the authority of the principal, or he afterwards approved it, or was grossly negligent in hiring such a servant, or in not preventing him from committing the act. 1 Sedgwick on Damages, § 378, and cases cited. The Encyclopædia, in discussing the liability of corporations for punitive damages, says: "A corporation is liable in exemplary damages for the tortious acts of its agents, if done within the scope of their authority, in all cases where natural persons, acting for themselves, guilty of like tortious acts, would be liable to such damages." 12 Am. & Eng. p. 40. Cyclopædia states, after discussing both sides of the question, that the better opinion is that a principal should not be held liable in exemplary damages unless it

be shown that the agent acted within his authority, or that the principal approved the act, participated in it, or was guilty of negligence in selecting his servant. 13 Cyc. 114. In support of his text, the author cites a great array of cases from many states of the Union. Mr. Sutherland, in discussing exemplary damages, sums it up that, where the servant commits a tort in the exercise and scope of his agency, it is deemed, for purposes of compensation, his master's tort, and exemplary damages are allowable. But, says the author, "it is otherwise as to torts which the servant steps aside from or goes beyond his master's employment to commit." "The master is only to be held liable (in exemplary damages) for the act of his servant when the latter is within the scope of his employment."

It has been held by the Supreme Court of the United States, and by some 20 or more state courts of last resort, that neither a corporation or an individual is liable for exemplary damages for the pure torts of employés, although committed while generally on duty, where the act was without authority, not ratified, and diligence was exercised in selecting suitable agents. R. R. v. Prentice, 147 U. S. 106, 19 Sup. Ct. 565, 43 L. Ed. 858. See list of courts and cases so holding cited in 13 Cyc. 117. There is no judicial deliverance that I can find from the original charge of Chief Justice Pratt (afterwards Lord Camden), quoted by Justice Gray in the Prentice Case, supra, down to the present time, wherein exemplary damages were allowed or justified other than as a punishment upon the offender. As they are never awarded by way of compensation, but only for punishment of the offender and as a warning to others, they can only be awarded against one who has actually or by legal construction participated in the offense. R. R. v. Prentice, supra. In discussing the facts in the opinion of the court in the cases of the Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456, Justice Story pronounces the transaction a gross and wanton outrage. Nevertheless, in weighing the extent of the liability of the owners, he says: "They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it, in the slightest degree. Under such circumstances we are of the opinion that they are bound to repair all the real injuries and personal wrongs sustained by the libelants, but they are not bound to the extent of vindictive damages." The rule in admiralty as to exemplary damage is the same as in the common-law courts. Boston Co. v. Fiske, 2 Mason, 119–121, Fed. Cas. No. 1,681.

Chief Justice Marton expresses the view of the Louisiana court with much clearness: "It is true, juries sometimes very properly give what is called smart money. They are often warranted in giving vindictive damages as a punishmnet inflicted for outrageous conduct. But this is only justifiable in an action against the wrongdoer, and not against persons who, on account of their relation to the offender, are only consequentially liable for his acts, as the principal is responsible for the acts of his agent." Keene v. Lizarde, 8 La. 26. "This rule has same application to corporations as individuals." Prentice Case, supra. The true ground for holding the master liable in exemplary damages is stated very clearly by Justice Field for the Supreme Court of Massachusetts: "The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation, still the foundation of the imputation is not that it is inferred that the principal actually participated in the malice or fraud, but that, the act having been done for his benefit by his agent acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages." Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528.

I take it now to be generally accepted law that where the agent of a corporation commits a wanton and malicious tort, when acting for the master in the scope of the agency and in furtherance of his master's business, he acts "as and for" the corporation, and for the time being is the corporation, so that the criminal intent necessary to warrant the imposition of exemplary damages is thus brought home to the corporation. But where the agent, going out of the line of his duty, beyond the scope of his agency and not in furtherance of his master's business, commits a pure tort on his own account, the master, whether an individual or a corporation, is never to be held in exemplary damages. There may be cases where, as in this case and that of the Amiable Nancy, the master should award just compensation for all real injury sustained; but there are none that I can find where, under such circumstances, the master has been made to pay smart money in addition. If the evidence had disclosed that the engineer, in order to frighten plaintiff's mule, recklessly, wantonly, and unnecessarily blew his whistle when approaching a crossing, where it was his duty to blow, then his act would be constructively the corporation's act, and his malice and wantonness could be imputed to it. But it is admitted there is no such evidence or finding. The entire evidence shows that it was the pure tort of the servant, committed without the scope of his duty, and not in furtherance of his master's business. While reasons of public policy may hold the master liable for compensatory damages solely upon the grounds stated heretofore in this opinion, there are no reasons of policy or justice for punishing the master for the malicious tort of his servant, which the master could not help, which was not done in the scope of the servant's duty, for which the master derived no benefit, which he did not ratify, and under circumstances when the servant could not be said in any sense to represent or act for him.

For the reasons given, I think there should be a new trial on the issue of damages.

PER CURIAM. Three Justices concurring in the above opinion upon each issue, it becomes the opinion of the court, and a new trial is ordered upon the second issue relating to damages.

CLARK, C. J. (concurring in part). I concur in the opinion of Mr. Justice BROWN that when the whistle is blown, either negligently or willfully, to frighten horses, the corporation is responsible for any damages resulting therefrom. In Dunn v. R. R., 124 N. C. 257, 32 S. E. 712, it is said, citing authorities: "'Although a railroad company is not liable under ordinary circumstances for the fright of horses caused by the operation of its road in the usual manner, it is liable for frightening horses and causing injury by unnecessary and excessive whistling or letting off steam under such circumstances as to constitute negligence or willfulness. 3 Elliott, R. R. § 1264.' 'When a railway company is entitled by law to run its trains along a street, it is not liable for damages caused by the horses of a traveler taking fright at the necessary blowing off of steam from one of its locomotives, but if the steam is blown off negligently it would be liable. 2 Thomp. Neg. § 1910.' 'Such noises as blowing whistles, sounding large bells, or letting off steam, made without necessity, when animals are near and likely to be frightened, and when ordinary care would have permitted or dictated a postponement of the noise until the animals were out of hearing, will sustain a verdict of negligence. 2 Shearman & Redfield, Neg. § 426.'" This same case (Dunn v. R. R., 124 N. C. 258, 32 S. E. 712) cites other authorities (for all the authorities are uniform to same effect), among them "the English case of R. R. v. Fullarton, 108 C. L. R. 54," in which the company was held liable where the engineer "blew off steam from the mudcocks in front of his engine to frighten horses"; citing also R. R. v. Barnett, 59 Pa. 263, 98 Am. Dec. 346, where the engineer blew his whistle under a bridge while a traveler was passing over it, whereby his horse took fright, ran off and injured him, the company was held liable. In R. R. v. Dickson, 63 Ill. 151, 14 Am. Rep. 114, it is held: "If defendant's engineman wantonly and maliciously sounded the locomotive whistle so as to frighten the horses of the plaintiff, whereby he was injured, the company is liable." In Billman v. R. R., 76 Ind. 166, 40 Am. Rep. 230, it is held: "If the engineer of a locomotive engine unnecessarily and wantonly sounds the whistle near a highway, and thus frightens a team of horses on the highway, causing it to run away and kill another horse, the company is liable." The court calls attention to the fact that there was "not merely passive negligence, but willful and wanton wrong." In Voak v. R. R., 75 N. Y. 320, cited by Wharton, Neg. § 836, and approved in Billman v. R. R., supra, the following is stated to be the rule of law: "Where the whistle is negligently and wantonly sounded, so that the horses in the vicinity are caused to run off and injury is inflicted, the company is liable." In R. R. v. Scoville, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179, it was held: "The wanton and malicious use of the steam whistle of a locomotive by servants of a railroad company in charge of the locomotive, while it is in motion, on a regular or authorized run, is an act within the scope of their employment, so far as to charge the company with liability for injury caused thereby." In Culp v. R. R., 17 Kan. 475, it is held that, when the whistle or steam is let off carelessly, heedlessly, and without necessity, the company is liable for damages caused by a horse being frightened thereby and running off. The opinion is by Brewer, C. J., now on United States Supreme Court. In Bittle v. R. R., 55 N. J. Law, 615, 28 Atl. 305, 23 L. R. A. 283, it is held that even when approaching a crossing or a station where the whistle is required to be blown, if this is done "negligently, wantonly, or maliciously, the company is liable for any damage resulting." This case cites many others (page 623 of 55 N. J. Law, page 308 of 28 Atl. [23 L. R. A. 283]), among them: "If the whistle is blown in a spirit of wanton playfulness, the company is liable" (R. R. v. Starnes, 9 Heisk. [Tenn.] 52, 24 Am. Rep. 289); or "if blown louder than necessary, or with intent to frighten horses" (R. R. v. Dunn, 52 Ill. 451; Hill v. R. R., 55 Me. 438, 92 Am. Dec. 601). A railroad is liable for injury caused when a horse is frightened by the negligent or careless blowing of the whistle or escape of steam. R. R. v. Boettcher, 131 Ind. 82, 28 N. E. 551. The whole subject of liability of a railroad for damages caused by willfully and wantonly blowing the whistle is reviewed and reaffirmed in Alsever v. R. R., 115 Iowa, 338, 88 N. W. 841, 56 L. R. A. 748, and previously in R. R. v. Scoville, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179. The cases to above effect are numerous, and it is believed without any to the contrary. Among others in point, but not above cited, are R. R. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; R. R. v. Dickson, 63 Ill. 151, 14 Am. Dec. 114; Hahn v. R. R., 51 Cal. 605; Andrews v. R. R., 77 Iowa, 669, 42 N. W. 513; Cobb v. R. R., 37 S. C. 194, 15 S. E. 878; R. R. v. Starnes, 56 Tenn. 52, 24 Am. Rep. 296. In 3 Elliott, R. R. p. 1987, in note 3, many cases to above purport are collected, and also in 2 Thompson, Neg. §§ 1909-1914, and notes, and notes to Wharton, Neg. § 836. The text-books are all to same effect. Besides those already cited, Wood, Master & Servant, 539; Cooley, Torts, 536; 12 A. & E. (2d Ed.) 31, 40; Wharton, Neg. 107, which is cited and approved on this very point in Myers v. R. R., 87 N. C. 350.

I believe no case has been found holding that a railroad is not responsible for damages caused by negligently or willfully and wantonly blowing the whistle, though there are some ancient cases, especially in England, and possibly a few later ones, that the master is not liable for willful or wanton acts of employés. But Cooley, Torts, § 536, shows that this reasoning does not now apply to railroads, if it ever did. It would be too unreasonable, for they exercise a public employment, and the public are entitled to protection from the willful, wanton, arrogant, or arbitrary conduct of railroad employés, especially when frightening horses along the public road. The employé cannot be identified, and, if he were, he usually could not respond in damages. It is the defendant's engine which makes the noise, and the defendant, having put the engineer in charge of it, is responsible whether he runs the engine willfully over a man, or willfully frightens horses with the whistle. The principle is the same.

It cannot be logically maintained that, while a railroad is responsible for injuries caused by the negligent acts of the servants, there is no such responsibility if the servant acts willfully and wantonly. Besides the above authorities to the contrary, our own cases are all to the same effect. In Cook v. R. R., 128 N. C. 333, 38 S. E. 925, the flagman and brakeman threw rocks at a tramp stealing a ride under a car, making him get off and causing him to be injured. The court held the company responsible, citing Pierce v. R. R., 124 N. C. 84, 32 S. E. 399, 44 L. R. A. 316. Yet there the brakeman and flagman were not employed to throw rocks and the tramp was a trespasser. Here the plaintiff was not a tramp, but a peaceful traveler on the public road, where he had a right to be, and blowing the whistle was one of the duties in the scope of the engineer's employment. In Everett v. Receivers, 121 N. C. 521, 27 S. E. 991, where the facts were almost identical with those in this case, the court charged: "If the engineer wantonly and maliciously made unnecessary noise for the purpose of scaring the horses, and thereby the injury was brought about in the loss of the horses, the defendant would be liable." On the defendant's appeal the court affirmed the judgment. On rehearing, 122 N. C. 1010, 30 S. E. 334, this ruling was adhered to. In Brendle v. Spencer, 125 N. C. 474, 34 S. E. 634, which was an action on the same facts for injury to the driver, the court held that the defendant was "responsible for the willful and wanton injury occasioned by its employés while on duty in its service." In Hussey v. Railroad, 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312, the defendant was held liable for the wanton and willful misconduct of its servant, though the act was ultra vires, the court saying: "It is no defense to legal proceedings in torts that the torts are ultra vires. Gruber v. Railroad, 92 N. C. 1; Railroad v. Quingley, 21 How. 202, 16 L. Ed. 73." In White v. Railroad, 115 N. C. 636, 20 S. E. 192, 44 Am. St. Rep. 489, the court said: "It is contended also that there is a distinction between the liability of the master for negligence and that for a willful wrong committed by the servant," and proceeded to show that this contention was unfounded. In Waters v. Lumber Co., 115 N. C. 652, 20 S. E. 719, the court, Avery, J., says that the principal (defendant company) was "liable for any trespass committed in the course of his employment or the scope of his agency by the person acting for him, to the same extent that he would have been answerable had the wrong been done by him in his own proper person." This, in the case of a corporation, which has no "proper person," means, of course, as fully as if specifically directed to do the wrong by resolution of the governing board. Here the blowing of the whistle was an act both in the course of the engineer's employment and in the scope of his agency. No one else was employed or authorized to blow it. In the recent and unanimous opinion of Foot v. R. R., 142 N. C. 52, 54 S. E. 843, the defendant was held liable for the willful and wanton misconduct of its employé, citing Brendle v. Spencer, 125 N. C. 474, 34 S. E. 634.

It is contended that a railroad is only liable for the acts which the servant is employed to do. When an engineer runs over a man or an animal on the track which, with due care, he ought to have seen, is he employed by the company to do the act? It is true the engineer is in the course of his employment in running the engine, and so was the engineer in this case when he willfully and wantonly blew the whistle to frighten the plaintiff's horses. Would the company be absolved from the responsibility because the engineer willfully and wantonly ran over a man or an animal on the track instead of negligently? Certainly not. 3 Elliott, R. R. p. 1969, and cases cited in note 8. Is the company less responsible because the engineer, in running his engine, uses its steam to injure a peaceable traveler at a distance, by sounding his whistle to frighten his horses, instead of using it to willfully crunch and grind the body of a man or an animal on the track? The engineer was not "employed to do" either act, but he did both alike "in the course of his employment."

A locomotive engine is a dangerous, indeed a deadly, instrumentality. The whistle is a part of the engine. It is dangerous if negligently or improperly used. These engines crossing public roads, and running along them, would be per se nuisances, and the use of their whistles, too, but for the overwhelming public necessity. The right to use locomotives, whether on lumber roads or on railroads, is permissible only on condition that competent and careful men are put in charge of them, and that they are not used to the public detriment. If so used, whether

negligently or willfully, the company is responsible. What is more calculated than a locomotive whistle to frighten brute or beast? Not the roar of lion, not the horn of Roland at Roncesvalles, "on Fontarabian echoes borne," can shake the nerves and "set the echoes flying" like the shrill shriek of this demon imprisoned in the energies of steam. The whistle should be blown to give notice and save from danger, not to cause danger. If the whistle is not blown at a public crossing, and one is run over, the company is responsible. Willis v. Railroad, 122 N. C. 910, 29 S. E. 941; Norton v. Railroad, 122 N. C. 935, 29 S. E. 886, and cases cited. If the engineer, seeing that a rider's horse is frightened, blows the whistle unnecessarily, in too shrill a manner, this would be negligence if it causes any injury which by due care could be avoided. For a stronger reason the company is responsible when the whistle is purposely blown to frighten a horse and causes him to run and injure his driver. Bittle v. R. R., 55 N. J. Law, 615, 28 Atl. 305, 23 L. R. A. 283. If by a sudden draft the engineer negligently throws out sparks which set out fire, the company is responsible. If the engineer purposely turns on the sudden draft in order to set out fire, is it possible that the company is less responsible?

The defendant was allowed to use this dangerous and deadly instrument, running it across and along public roads, but subordinate to the rights of the public. It put this engineer in charge. It is responsible for his conduct in discharging that duty when it causes injury to others, whether that misconduct was omission or commission, whether it was willful and wanton, or merely negligent. We cannot divide the engine up and say that the company is responsible for misconduct of the engineer in running over people or in setting out fires, but not for his use of the whistle. The company was held responsible for not blowing the whistle whereby (in Randall v. Railroad, 104 N. C. 410, 10 S. E. 691) the plaintiff's oxen along the county road (not at a crossing) were not turned out and were frightened and killed. The more is the defendant liable here when its agent blew the whistle purposely to frighten the plaintiff's horse. In Fulp v. Railroad, 120 N. C. 525, 27 S. E. 74, the company was held liable for killing one on the track, though not at the crossing, because by not blowing the whistle at a crossing he had no notice to get off the track. The cases where the company has been held responsible for the engineer's failure to blow the whistle are numerous, not only at crossings, but along the track when its use would give people or animals notice. Can we divide up his duty as to the whistle, and say that the company is responsible if he negligently or willfully fails to blow the whistle (Wilson v. Railroad, 90 N. C. 569), but not if he negligently or willfully does blow it? He is not employed negligently "not to blow it," if that is the test, any more than he is employed to wrongfully blow it. There is no analogy between the use of the deadly instrumentality of a locomotive engine and the misuse of its dangerous whistle and a farmer sending his wagon to town with a driver and his whip. Not only is the wagon and whip not dangerous or alarming per se, but the wagoner knows he can be promptly identified and arrested, and no public policy requires the liability of his master to enforce the wagoner's regard of the rights of others. In Pierce v. Railroad, 124 N. C. 94, 32 S. E. 402, 44 L. R. A. 316, the point was fully discussed and decided by a unanimous court, after citation of numerous authorities. It is there said: "The assumption in these prayers that the defendant is not liable if the plaintiff's intestate was killed by the wanton and malicious act of one of the employés of the defendant, and especially if such act was not done in furtherance of the business of the defendant, cannot be sustained. The true test is, was it done by such employé in the scope of the discharge of duties assigned him by the defendant and while in the discharge of such duties? 'In furtherance of the business of the employer' means simply in the discharge of the duties of the employment, and the court below properly told the jury that the defendant is responsible for the injury if caused by the wrongful act of the employé while acting in the scope of his employment. In Ramsden v. Railroad, 104 Mass. 120, 6 Am. Rep. 200, Gray, J. (now on United States Supreme Court), says: 'If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent (Howe v. Newmarch, 22 Allen, 49); or even if contrary to an express order of the master (Railroad v. Derby, 14 How. 468, 14 L. Ed. 502).'" After stating above, this court further proceeded to say (page 95 of 124 N. C., and page 402 of 32 S. E. [44 L. R. A. 316]): "'The rule is thus laid down (2 Wood, Railways, § 316 [p. 1404, 2d Ed.]): 'Where the act is within the scope of the servant's authority, express or implied, it is immaterial whether the injury resulted from his negligence, or from his willfulness and wantonness; nor is it necessary that the master should have known that the act was to be done. It is enough if it is within the scope of the servant's authority.'" The court, after approving the above quotations, followed with many more authorities to the like purport, and this case (Pierce v. Railroad) has been since often quoted with approval on this point, among the instances: Cook v. Railroad, 128 N. C. 333, 38 S. E. 925; Lewis v. Railroad, 132 N. C. 387, 43 S. E. 919. In the last case three of the present court sat with approval. Rounds v. Railroad, 64 N. Y. 129, 21 Am. Rep. 597, held: "To make the master liable it is not necessary to show that it expressly authorized the particular act; it is sufficient to show that the servant was acting at the time in the general

scope of his authority, and this, although he departed from his instructions, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury." To same purport, Carter v. Railroad, 98 Ind. 552, 49 Am. Rep. 580; Lovett v. Railroad, 91 Mass. 557. In Clark on Corporations, § 208, the authorities are thus clearly summed up: "A corporation is liable for acts done by its officer or agent apparently in the course of his employment and within the scope of his general authority, though the particular act is unauthorized." This must necessarily be so if corporations are liable for torts of their servants at all, for it is very rarely that servants are "employed to do those acts." Even if it were true, the company is responsible for such torts only when it fails in selecting careful and prudent men, the evidence shows that it did not select careful and prudent agents in selecting this engineer and his crew.

There are circumstances under which it has been held that the corporation would not be liable for mere negligence, but only if the act of its servant was willful or wanton or reckless. Moore v. Electric Co., 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470. But this is the first time it has been contended in this court that, though the defendant would have been liable if the engineer had negligently frightened plaintiff's horse in the road by blowing the whistle (Wilson v. Railroad, 90 N. C. 69), it is not liable if he purposely blows the whistle. As to this suggested distinction, 2 Sutherland, Damages, § 410, quotes with approval Chief Justice Ryan in Craker v. R. R., 36 Wis. 673, 17 Am. Rep. 504: "It is contended that though the principal would be liable for the negligent failure of the agent to fulfill the principal's contract, the principal is not liable for the malicious breach by the agent. As we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleeps while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable."

We have not cited any of the numerous cases in this court where the corporation has been held liable for the wanton and willful misconduct of their employés to passengers, if done in the scope of their employment. The above-cited cases are all where the willful and wanton injury was done to others. But it is not perceived why there should be any distinction. If the test is, as contended by defendant, "Was the servant employed to do the act?" it is certain that the railroad agent was not employed to kill the ex-passenger in Daniel v. Railroad, 117 N. C. 592, 23 S. E. 327; nor was the conductor employed to kiss the female passenger in Strother v. R. R., 123 N. C. 197, 31 S. E. 386. If the corporation is liable at all for the willful and wanton misconduct of its employés done in the course of their employment, and in the scope of their agency, it cannot affect the liability therefor whether such misconduct is perpetrated on passengers or the public, as a corporation acts only through agents; it is responsible for the willful and wanton act of an employé in the scope of his agency and in the course of his employment as fully as if the act were done by its president or other officer or by their order.

The next proposition is also well settled by the decisions of this court that where the tort is committed, as here, willfully and wantonly, the corporation is liable for exemplary damages. I fully concur in the able and well-considered dissent of Brother HOKE on this point. In Redditt v. Mfg. Co., 124 N. C. 100, 32 S. E. 392, it is held that: "When liability is established and the circumstances are aggravating or malicious, the company is subject to punitive damages on the same principles that natural persons are." The liability of a corporation in exemplary damages for the wanton or malicious conduct of its employé has been again and too recently held by a unanimous court, with citation of authorities, to be so soon questioned. Hutchinson v. R. R., 140 N. C. 127, 52 S. E. 263. In 1 Cook, Stockholders, § 150, p. 69, it is said that, while there are some cases to the contrary the better rule is that, if injury "has resulted through the willful misconduct of employés, or through such reckless indifference to the rights of others as amounts to an intentional violation of them, punitive or exemplary damages may be awarded"—citing numerous cases, among them Railroad v. Harris, 122 U. S. 610, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Railroad v. Arms, 91 U. S. 493, 23 L. Ed. 374. In 2 Sutherland, Damages, § 410, it is said, quoting with approval from Hanson v. R. R., 62 Me. 84, 16 Am. Rep. 404. "Since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will, for a moment, reflect upon the absurdity of their own thoughts, this anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggagemen can be secured who will not handle and smash trunks and bandboxes, as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences called corporations, and that

is the pocket of the moneyed power that is concealed behind them, and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before." In the next section (411) Judge Sutherland gives a long list of states and decisions establishing "the views of the liability of corporations to punitory damages" for the misconduct of employés. In Clark on Corporations, § 69, p. 197, it is said, citing authorities: "A corporation may not only be held liable for actual damages resulting from a malicious wrong, but it may also, by the weight of authority, be held liable for exemplary damages, where under similar circumstances a natural person would be held so liable. A corporation is liable for the acts of its servants and agents, including their wrongful acts, on the same principles." In Jackson v. Tel. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738, it was held that the master must answer for the servant's wrongful act "if committed in the course and scope of the servant's employment," and that he is in the course of his employment "when he is engaged in that which he is employed to do, and is at the time about his master's business,"—citing numerous authorities. And that case also holds that where the act was wantonly done the plaintiff can recover exemplary damages; citing Railroad v. Prentice, 147 U. S. 106, 13 Sup. Ct. 261, 37 L. Ed. 97; Railroad v. Arms, 91 U. S. 489, 23 L. Ed. 374; Hansley v. Railroad, 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600. To same effect, Foot v. Railroad, 142 N. C. 52, 54 S. E. 843; Hutchinson v. R. R., 140 N. C. 127, 52 S. E. 263.

In Daniel v. Railroad, 136 N. C. 527, 48 S. E. 820, Walker, J., says: "If the servant, instead of doing that which he is employed to do, does something else which he is not employed to do at all the master cannot be said to do it by his servant, and therefore is not responsible for what he does. It must be something done in attempting to do what the master has employed the servant to do. Nor does the question of liability depend on the quality of the act, but rather upon the other question, whether it has been performed in the line of duty and within the scope of the authority conferred by the master." Here the servant was doing what he was employed to do—running this engine —and was not doing "something else which he was not employed to do at all." In discharging that work, and "incident to the furtherance of the duties intrusted to him by the master" (Roberts v. Railroad, 143 N. C. 176, 55 S. E. 509), it was for him to blow the whistle. If he negligently blew it or failed to blow it, and caused injury, the master is liable, and equally so if the misconduct in blowing or failing to blow the whistle was wantonly done, as here, and was not merely negligent. That it was an act of commission, not of omission, does not relieve the master who put the engine in the servant's charge, for the wanton act was done in operating the engine and in the course of the employment.

Whenever the facts are such that the rule of respondeat superior will make the master responsible in damages for the servant's negligence, it will make the master responsible for exemplary damages if there was wantonness, insult, or oppression, as where the train ran by a station without stopping to take on a passenger (Walker, J., Williams v. Railroad [at last term] 144 N. C. 503, 57 S. E. 216, and cases there cited; Thomas v. Railroad, 122 N. C. 1005, 30 S. E. 343; Hansley v. Railroad, 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600; Purcell v. Railroad, 108 N. C. 414, 12 S. E. 954, 956, 12 L. R. A. 113; Milwaukee v. Arms, 91 U. S. 489, 23 L. Ed. 374; 2 Sutherland Dam. § 937); or where a passenger is wrongfully put off the train under circumstances showing indifference to consequences, or rudeness (Rose v. Railroad, 106 N. C. 168, 11 S. E. 526); or false imprisonment (Lovick v. Railroad, 129 N. C. 437, 40 S. E. 191), and similar cases. If the corporation here was liable for damages for injury caused by the negligence of the engineer, the judge was right in charging that if the engineer's conduct was wanton and willful the master was liable for exemplary damages. This is already so held. Purcell v. R. R., 108 N. C. 418, 12 S. E. 954, 956, 12 L. R. A. 113.

The rule is thus stated in both the Encyclopedias, with copious citation of authorities: The master is "liable in exemplary damages for any act of his agent or servant committed in the course of, or connection with, his duties or employment; and this, irrespective of whether the particular act has or has not been expressly authorized or subsequently ratified by the principal or master. If the tortious act of the agent or servant, when committed in the business of his principal or master, is such as would have subjected the agent to exemplary damages had he been sued as principal, the principal will be responsible for like damages when sued for the misconduct of the agent, or, as it has been otherwise expressed, the principal or master is in such cases liable precisely as if he were the original wrongdoer." 12 A. & E. (2d Ed.) 32, 33. The employment of the agent "afforded him the means and opportunity which he used while so employed in committing the willful wrong. The agent's conduct, therefore, is attributable to the principal, though he may not have specially authorized the particular act or afterwards ratified it." Id. 33. "The general rule is that these artificial bodies are liable in the same manner and to the same extent that * * * natural persons acting for themselves, guilty of like tortious acts, would be liable to such

damages. In some cases the rule of punitive damages has been held especially applicable and salutary in its operation as affecting corporations." Id. 40, 41. "The better rule seems to be that, where a wrong is committed in the ordinary course of the servant's duty, and is committed willfully, the corporation can be held liable as in ordinary cases of tort. Since a corporation can only act through its agents or servants, a stricter rule has sometimes been applied than in cases of individual liability, and they have been held liable in exemplary damages, although there was no previous authorization of the wrong nor subsequent ratification of it." 13 Cyc. 117.

The great majority of the vast army of men engaged in running locomotives and trains for common carriers, or for lumber companies and street railways, are good men, but necessarily there are always some who are not. It is to the interest of the good men thus employed, and an absolute necessity to the public, that there shall be some rigid restraint to prevent injury, insolence, and arrogance towards the public, being perpetrated by those who "have no fear but of human law." With the almost insuperable difficulty of identifying men engaged on moving trains, the only possible regulation is by their officers, who can readily hunt the guilty out. This protection cannot be secured unless the corporations themselves are liable, as heretofore, in punitive damages for willful and wanton wrongs, inflicted upon the public, as well as on passengers by any employé of such corporations "when on duty," or, as our decisions say, "in the course of their employment."

In so vast a number of decisions as has been poured out by the numerous courts of this country and in England, some can be found, by a little diligence, on either side of almost any question. There are, it is true, some few decisions in a few courts contrary to those above cited. These are almost solely those whose views on this question were expressed at any early day before this matter was thoroughly discussed (see 1 Cooley, Torts, p. 199), and before the absolute necessity was fully comprehended of protecting the public against insult and wrong from irresponsible employés who could not be identified, and before it was fully seen that the only possible way to insure this protection to the public is by punitive damages against the corporation, to be assessed by juries who, in fixing the amount, will consider the greater or less care shown by the corporation in selecting their servants and in supervising their conduct. There may indeed be a few courts whose expressions on this subject should be entitled to small weight for other reasons. We cannot particularize and weigh each case. These decisions of our own court should rather be followed and not be lightly set aside for those of any other court, when our own decisions have been uniform, and are based on sound reasons and the absolute necessity of giving adequate protection to the public, and, besides, are supported by the great weight of authority elsewhere, as above shown.

The facts as found by the jury, on the conflict of evidence, present an aggravated case of wanton wrong. An old man, accompanied by two lady relatives, peacefully traveling along the public road at a place where he could not turn out, has his horses wantonly frightened by those in operation of the defendant's engine and cars, that they may have the pleasure of seeing his horses "jump about," and enjoy his terror and fright. It is peculiarly a case permitting exemplary damages—if the jury should think proper—that the people living in the country may know that they can travel along their public highways without fear of exposing their lives and limbs to such wantonness. If a corporation is liable for injuries caused to travelers along the public road, by the negligence of its servants, but exempt if their acts are willful and wanton, it can always escape liability by thus aggravating the nature of the wrong inflicted. The misconduct of the engineer and other employés was wanton and willful, and committed "while on duty in the course of their employment and in the scope of their agency" in operating the defendant's engine and train of cars. There was no evidence of contributory negligence, and that phase of the case is immaterial to be considered.

It is true that this is not a public service corporation, but the same principle against wanton frightening of the plaintiff's horses would apply if the wrongdoer had been operating a railroad locomotive or was the chauffeur of an automobile. The public are entitled to use their public roads with their horses without fear of such wanton wrongs being inflicted upon them in the use of the superior power of steam, and that willful wrongdoers shall be restrained by the fear of exemplary damages against themselves or their master for such misconduct.

HOKE, J. (concurring in part). I differ from the court in its decision on the question of damages, and am of the opinion that no error appears affecting the determination of either of the issues submitted, and that the judgment on the verdict should be affirmed as rendered.

The evidence of plaintiff tends to show that he was driving in a buggy along a public highway which ran parallel to defendant's tramroad at a point where there was 30 feet space between the railroad and a fence, which also ran parallel to both roads, and where he was not able to get out of the way with the vehicle after seeing defendant's engine and cars approaching; that plaintiff's sister and niece were just behind him in another buggy, and when the train came in sight they all got out, and plaintiff led the

horse drawing the rear buggy up by his own and was holding both animals at their heads; that when the engine and cars came within 75 yards of plaintiff, and where he was in full view, the engineer, or an employé in the engine, commenced blowing short, sharp, piercing blows with the engine whistle, and the hands commenced to halloo and cry out at plaintiff, and continued this conduct until the train was 75 yards beyond plaintiff, causing his horses to take fright, and by their action do him severe bodily injuries. The plaintiff charges that this conduct was done unnecessarily and wantonly, and with intent to frighten the horses, and that in consequence of the shrieks and piercing sounds from the engine, and the shouts, yells, etc., of the crew, the horses did become badly frightened, demoralized and unmanageable, causing the serious injuries as stated. The sister and niece of plaintiff gave substantially the same testimony. There was also evidence to the effect that Troy Monds, the engineer, was heard to say that he blew the whistle "to see the horse jump about." There was evidence on the part of defendant denying these allegations, and affirming that the whistle was only sounded as required by the rules of the company as the train approached a crossing at or near this place, and that no whistle was blown to frighten any one's stock.

The issues submitted were as follows: "(1) Did defendant's engineer, fireman, or servants unlawfully and wantonly halloo, make noises, and sound the whistle of the engine for the purpose of frightening the horses of the plaintiff, and was the plaintiff injured thereby? Answer. Yes. (2) What damages, if any, is plaintiff entitled to recover? Answer. $1,000." Under the charge the jury answered the first issue "Yes," and to the second issue "$1,000." It is assigned for error in the determination of the first issue: "That on the facts presented, the judge below should have held that the defendant was not liable."

These facts tend to show that plaintiff was on the public highway, where he had a right to be, and doing all that he could to shield himself, and has suffered a grievous injury from the employés of defendant company, while operating its engine and train in the course of the company's business, and, if the position of defendant can be maintained, plaintiff is left without any means of substantial redress; for we know that, as a rule, the employés, individually, are not pecuniarily responsible. A decision which works this untoward result calls for most careful scrutiny, and, to my mind, is based neither upon right, reason, nor well-considered authority. As I understand it, the contention proceeds upon the theory (1) that by his allegation and testimony the plaintiff is confined to a recovery for a willful and malicious tort; (2) that on the entire evidence no case for such a recovery is made out. I do not think that either position should prevail. Treating them in reverse order, there is no need to combat the proposition urged upon our attention with such fullness of learning, that, to hold a corporation or other employer responsible for the malicious torts of its agents or employés, the wrong must, as a general rule, be one committed by authority of the employer, either expressly conferred or fairly implied from the nature of the employment or the duties incident to it. This was announced as correct doctrine by this court in Sawyer's Case, 142 N. C. 1, 54 S. E. 793, but with this important and essential modification, "that the test suggested applies only when the question of fixing responsibility depends exclusively on the relationship of master and servant," and does not apply when the wrong complained of is a violation of some duty which the master owes directly to the injured person. Nor is there any question made of the principle so well announced and sustained in Jackson's Case, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738: "That authority for the wrong on the part of an employé will be implied, and responsibility imputed, when the wrong is done in the scope and course of the servant's employment." And further: "That a servant, acting in the course of his employment, when he is engaged in that which he was employed to do, and is at the time about his master's business. He is not acting in the course of his employment when he is engaged in some pursuit of his own." Mr. Jaggard, in his work on Torts, suggests that the term "course of employment" is the better term in these cases, as both most accurate and comprehensive. It may be that, under the principles maintained in both of these cases, responsibility for the wrong could well be imputed here to the defendant company, because done in the course of its employment, for, as said in Tiffany on Agency, p. 270, quoted with approval in Jackson's Case, supra: "A servant is acting in the course of his employment when he is engaged in that which he was employed to do, and is at the time about his master's business. But he is not acting in the course of his employment if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility, but, if there is a total departure from the course of the master's business, the master is no longer responsible for the servant's conduct."

But there is an additional principle present in the case we are now considering, which is to my mind controlling, and which the argument on the part of the defendant seems to entirely ignore, and that is, when the master or employer owns and operates in his business dangerous instrumentalities, and authorizes their use in places where harm to others is likely to arise, unless a very high degree of care is shown, the

employer, in such case, must be held to responsibility for injuries wrongfully caused by such agencies while engaged in his work, whether the injury was brought about by the negligent or intentional misconduct of his employés. When this occasion for responsibility should be referred to a breach of an independent duty owing direct from the owner to the injured party, being the limitation on the general doctrine we are considering, suggested in Sawyer's Case, supra, or whether it arises because, the danger being great, public policy requires that the corporation and employer shall be held to insure this careful handling so far as the general public is concerned—which seems to me only a different way of stating the same doctrine—the principle is well grounded in reason and is fully sustained by authority. It is stated by Mr. Jaggard in his work on Torts as follows:

"Sec. 86. The master is liable for the conduct of his servant within the course of his employment, not only (a) where responsibility would attach under the test of scope of his employment, but also (b) where the conduct is not intended to be for the master's benefit, but for the servant's malicious, capricious, or other private purpose, and (c) whenever a duty rests on the master to avoid doing harm to the third persons and the servant violates that duty in the course of his employment.

"Sec. 87. The duty owed by the master to third persons may arise from contractual or conventional relationship of the master to the person seeking to charge him for his servant's wrong, especially where the master's premises, instrumentalities, and facilities of business made the harm possible, or where the master will be held estopped to deny liability.

"Sec. 88. The master's duty to third persons may arise from ownership or custody of dangerous things, and it may extend to (a) the conduct of the servant, though forbidden, and for the servant's private purpose and not for the master's benefit."

Pursuing this last statement, the author says: "When the master owns, uses, or controls such instrumentalities, he is bound to perform that duty, and he cannot escape it by the exercise of care in the selection of his servants. Therefore the master was held liable for the forbidden act of his employés who frightened horses by blowing steam from an engine of which they had full charge." And the statement of the doctrine is supported by a large number of well-considered decisions in this and other jurisdictions: Railway v. Scoville, 62 Fed. 730, 10 C. C. A. 479, 27 L. R. A. 179; Railway v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Railway v. Dickson, 63 Ill. 151, 14 Am. Rep. 114; Akridge v. Railway, 90 Ga. 232, 16 S. E. 81; Railway v. Triplett, 54 Ark. 289, 15 S. W. 831, 16 S. W. 266; Bittle v. Camden, 55 N. J. Law, 615, 28 Atl. 305, 23 L. R. A. 283; Cobb v. Railway, 37 S. C. 194, 15 S. E. 878; Railway v. Starnes, 56 Tenn. 52, 24 Am. Rep. 296. And recovery on this principle has been sustained in direct decisions of our own court in Everett's Case, 121 N. C. 519, 27 S. E. 991; Brendle's Case, 125 N. C. 474, 34 S. E. 634; Foot's Case, 142 N. C. 52, 54 S. E. 843. This last case is in all of its essential features like the one before us, except in that case the implement was a hand car operated on the defendant's road—a difference which makes in favor of the present recovery, if any weight is to be attached to it. In Foot's Case, the evidence is not set out in full, but an examination of the record shows that the plaintiff was in a buggy, driving on a highway, and was injured by loud cries and noises made by defendant's employés while operating a hand car of the company and done with the intent to frighten the horses. A recovery was sustained. In Bittle's Case, supra, cited in 9 Am. Corp. & Ry. Cases, 472, because no doubt considered especially instructive, the plaintiff had been nonsuited by the lower court and the nonsuit was set aside and a venire de novo awarded, and the case is very similar to the one we are considering. There, the plaintiff was holding his horse on a highway which ran parallel to defendant's road, and the horse was frightened by blowing the whistle of the engine. It was claimed by the plaintiff that this blowing was an unnecessary, wrongful, and willful act on the part of the engineer. The evidence on the part of the plaintiff as to blowing the whistle was as follows: "I did not think of them blowing the whistle there because he was just beyond the crossing when he blew the whistle, and he was looking, with his head out of the cab window, and saw me, and he was smiling, and he just reached up and pulled the whistle, as I call it, wide open, and the instant he did that the horse jumped. As soon as he saw me he reached right up and pulled the whistle." The witness never heard a shriller whistle in his life; it was a great deal louder than usual, and was so blown for 200 yards; that it did not blow until it was beyond the crossing, opposite the point where the plaintiff was with a horse and wagon, and the whistle has never been since blown at that point; and at the time it was so blown in this manner there was nothing on the track ahead to provoke such a whistle. It was held that on the plaintiff's claim he had a cause of action to be presented to a jury, and in laying down the principle the court said: "The rule obtains generally that a master is not responsible in damages for the wanton and malicious acts of his servant; yet this immunity is not generally extended to railroad corporations whose servants are intrusted with such extensive means to do mischief. Accordingly, it has been established that if such servants, while in charge of the company's engines and machinery and engaged about its business, negligently, wantonly, and willfully perverted such agencies, the com-

pany was responsible in damages; and this is the principle deducible from the authorities upon this subject." In Railway v. Dickson, supra, it is held that: "Where the servants of a railway company, while in the discharge of their duties, pervert the appliances of the company to wanton and malicious purposes to the injury of others, the company is liable for such injuries." In Railway v. Harmon, supra, the court, in upholding the principle, not inaptly said: "The life and property of individuals cannot be lightly or wantonly placed in jeopardy. If that might be done, then these great instruments of prosperity and agents in the development of the resources of the country and promoters of its commerce, instead of a blessing, would become a nuisance, if not a curse, to our citizens. If the lives of men and their property must be endangered in the pursuit of their ordinary and legitimate business while lawfully passing over our public highways, and no person can be held responsible, then it has become an injury instead of a blessing that they were constructed." Again: "The appellee had the undoubted right to travel this public highway, and the appellants had no right, by their agents, to unnecessarily hinder him or his property while thus exercising his right. Both parties have the right to pass and repass over the roads in the modes adapted to their construction, and each is under equal and reciprocal obligation to observe the rights of the other; and neither can willfully, wantonly, or negligently endanger, obstruct, or delay the other in the enjoyment of his rights without incurring liability for the injury, and each party, in the exercise of his rights, must observe the highest degree of prudence, circumspection, and skill to avoid the infliction of injury." And further: "It can make no difference whether the escape of steam was negligently permitted or willfully done by the engineer, any more than if he had willfully run his engine against the appellee's wagon and team and thus produced the injury. The question whether it was negligently or intentionally done can, we think, make no difference in the result." These authorities, and the principle on which they rest, are, in my opinion, decisive of the question, and show that, on the facts disclosed, the defendant is responsible for the misconduct of its employés while operating the engine whether the demand be asserted as for a malicious or negligent tort. And it is in ignoring this important and wholesome principle of imputed authority that the error of defendant's position consists. (6) It is, in this respect, entirely unlike the case of an owner sending his wagon to town by a driver, as suggested in (7); and the further suggestion that the engine whistle is no part of its necessary or operating machinery is not a pertinent or permissible view of the question. The engine may be dangerous to persons on the train by reason of its operating machinery; but to persons on the highway, the engine and its sounds are the chiefest elements of danger. The whistle is put on the engine for the purpose of warning, and is desirable chiefly by reason of the startling sounds it may make; and, where the injury has occurred to one on a highway, to suggest that the whistle is no part of the structural or operating part of the engine's machinery, and to make deductions from it prejudicial to the plaintiff, is to assume out of the case the controlling, and certainly the most important, element. In nearly every authority cited and relied upon as upholding a contrary view, certainly (8) in those I have examined, it will be found either that the implement used was not one that essentially imported danger to outsiders, or the act complained of was not done while operating or using the instruments in the course of the employé's business. Thus in Smith v. Railway, 78 Hun, 524, 29 N. Y. Supp. 540 (the Torpedo Case), the agent was acting entirely outside of the course of employment; and so in similar cases suggested and relied on by counsel—as if an engineer should shoot another from the cab, and intentionally striking another with a piece of coal or wood. None of these acts are within the course of employment. They could be likened to the case of Roberts v. Railroad, 143 N. C. 176, 55 S. E. 509, where two employés had a fight, and it was held that the mere fact that the fight occurred while they were both on duty did not import responsibility of their common employer for injury inflicted by one upon the other. And in Evers v. Krouse, 70 N. J. Law, 653, 58 Atl. 181, 66 L. R. A. 592, the hose used by the little boy did not import an injury threatened or reasonably contemplated to one who was going along the street, and the father was therefore excused.

Of the cases cited by the court, which I have examined, the only one which tends to uphold the decision upon the facts of the present case is that of Stephenson v. Pacific Railway, from California. This case may possibly be distinguished on the ground of the defense suggested, that the engineer was not at the time running the engine for the company, but intentionally moved it for the purpose of frightening the passengers, and so did not do the wrong while operating the engine in the course of defendant's service. The case is published in 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223, with the comment by the editor that it possibly ignores the principle of responsibility in the use of a dangerous agency, and, to the extent that it does this, I think the case is clearly against the almost uniform current of authority.

I have thus far endeavored to show that the defendant company, on the facts of this case, is responsible for the wrongs of its employés, whether redress is sought for a malicious or a negligent tort. But I think the other proposition asserted in behalf of defendant is equally untenable—that on the

facts and testimony the plaintiff is confined to recovery as for a malicious or willful tort—predicating such a position on some former decision of this court (Loubz v. Hafner, 12 N. C. 185), in which it was held that, for an injury wrongfully caused by beating a drum and thereby causing a plaintiff's horse to run away, the action should be in trespass and not in case; this last being the technical term for actions of negligence. The position seems to admit that recovery could be had if redress had been sought for negligence, but holds that relief should be denied because of the allegation and evidence to the effect that the noises were willfully and wantonly made. It would roll back our procedure to perplexing subtleties of a bygone time to deny relief on any such ground as this. Judge Gaston, in speaking of these actions, trespass and case, in Dodson v. Mock, 20 N. C. 282, 32 Am. Dec. 677, said: "The distinction between injuries which are the proper subject of an action of trespass and those which are to be redressed by an action on the case, between injuries immediate and those which are consequential, is sometimes very subtle and attenuated." It was largely on account of just such distinctions that our Legislature felt called on to interfere and establish our present beneficent method of procedure. The change had for its basic principle an abolition of these very distinctions. In section 354 of the Revisal of 1905 it is said: "The distinction between actions at law and suits in equity and the form of all such actions and suits are abolished, and there shall hereafter be but one form of action for the enforcement or protection of private rights and the redress of private wrongs." Carrying out the idea in section 467: "The complaint shall contain a plain and concise statement of the facts constituting a cause of action." Construing this legislation, the court has by numerous and well-considered decisions established that the plaintiff now recovers on facts, and is entitled to any relief, to which the facts alleged and proved show him to be entitled. Hendon v. Railroad, 127 N. C. 111, 37 S. E. 155. And if these facts which are fully set out show that the plaintiff is entitled to recovery for a negligent wrong, he should not be barred of relief because he has gone farther than the case required and stated his cause as for a willful injury.

It is urged, however, that plaintiff cannot maintain this last position, because the issue shows that the cause has been determined on the theory of a willful wrong, and that, if only recovery for negligence is allowable, the verdict should be set aside. There is doubt if the allegation and issue make out more than a claim for a negligent wrong. It is not stated or found that the employés of defendant intended to harm or injure the plaintiff, but that they intended to frighten the horses, whereby the damage was caused. As we have held in Foot v. Railroad, supra, it is only where the injury was willful that the idea of negligence is necessarily eliminated. Negligence is there defined to be a breach of duty causing unintended damage. "The breach of duty can be willful and the action can still be maintained for negligence if the harm was not intended." The allegation, evidence, and issue establish that the breach of duty was intentional, but not the injury done. But assuming that the recovery was had for a willful wrong when it should have been for negligence, the results of the trial should not be disturbed unless this difference has wrought in some way to the defendant's prejudice. Cherry v. Canal Co., 140 N. C. 422, 53 S. E. 138, 111 Am. St. Rep. 850, where it is said, quoting from Ashe, J., in Butts v. Screws, 95 N. C. 215: "A new trial will not be granted when the action of the trial judge could, by no probability, injure the appellant." In this aspect of the case it is urged that no issue of contributory negligence was submitted, and that this defense would have been open to the defendant in an action for negligence. There was, however, no evidence tending to show contributory negligence. All of the witnesses on both sides seem to have been examined, and, in the entire absence of any evidence tending to sustain it, the error in declining to submit an issue as to contributory negligence was harmless.

Again, it is submitted that the jury were allowed to give punitive or exemplary damages. But the jury have found that the wrongful act of the defendant's employés was unlawful and wanton, and done for the purpose of frightening the plaintiff's horses, whereby the injury was caused. While there are some decisions to the contrary, the great weight of authority is to the effect that, in such case, a corporation may be held responsible in exemplary damages for the torts of its agents under such circumstances, whether the demand be asserted for a malicious or a negligent wrong. Hale on Damages, 218; Joyce on Damages, § 139; Sutherland on Damages, § 410; Sedgwick on Damages, § 380; Railway v. Steem, 42 Ark. 321; Western Union Tel. Co. v. Seed, 115 Ala. 670, 24 South. 474; Goddard v. Railway, 57 Me. 202, 2 Am. Rep. 39; Hanson v. Railroad, 62 Me. 84, 16 Am. Rep. 404; Baltimore v. Blocher, 27 Md. 277; Traction Co. v. Orbann, 119 Pa. 37, 12 Atl. 816. In our state the doctrine is firmly established. Hutchinson v. Railway, 140 N. C. 123, 52 S. E. 263, and numerous decisions of the court could be cited to same effect. In Sedgwick, supra, it is said: "I find it is held in many, perhaps most, jurisdictions, that a corporation is liable to exemplary damages, if to any, for an act of its servant which would subject the servant to exemplary damages." In Hale, supra, quoting from decisions of high authority, it is said: "It is usually held that corporations are liable for exemplary damages for the acts of their agents or servants

in cases where the agent or servant would be liable for such damages. This is placed on the ground that otherwise corporations would never be liable for exemplary damages, since they can act only by agents or servants." If this is the correct principle, then punitive damage could be awarded, whether the action be considered one for a malicious or negligent tort. There was, therefore, no harm done to the defendant in trying the cause on the issue submitted, and I am of opinion that the verdict and judgment should not be disturbed.

The facts show that the plaintiff, on the public highway, where he had a right to be, and doing all he could to save himself, has been subjected to an outrageous wrong, causing serious bodily injuries, by the misconduct of the defendant's employés, operating an engine in the defendant's service on its tramroad, and, when called on to answer, the defendant's reply is: "Yes, I sent out the engine, an instrument essentially dangerous and not unlikely to frighten your horses, and my employés, by their misconduct in operating my engine in the course of my employment, did you a grievous wrong, but I should not be held responsible, because in sounding the whistle my engineer was not then acting in the course of my business, but was only doing it for his own diversion and to see the horses jump." But for the sanction given it by my Brethren, for whose learning and ability I have the greatest respect, I should say that such an answer is not deserving of serious consideration, and that the plaintiff, on the allegations, evidence, and the issues as they now stand, should be allowed to recover either for a negligent or a malicious tort, and the judge below made a correct ruling in allowing the jury to award punitive, as well as compensatory, damages.

CONNOR, J. (dissenting in part). I dissent from so much of the opinion of Mr. Justice BROWN as decides that any cause of action is shown, either in the pleadings or proof, against defendant. I concur with so much of the opinion as decides that in any point of view the defendant could be liable only for actual damages. I have given to the case my most careful and anxious consideration and investigation, because of the divergent views of the judges and the far-reaching effect of the holding upon the liabilities of all of our citizens in their business and industrial life. The plaintiff, by his allegation and proof, has narrowed the question to its simplest possible form. He has carefully excluded any suggestion of negligence, resting his action upon a willful, wanton tort. In Loubz v. Hafner, 12 N. C. 185, Taylor, C. J., said: "For beating a drum in the highway where a wagon and team are passing, by which the horse takes fright, runs away and damages the wagon, the action is properly brought in trespass." So it is held that willfully discharging a gun, whereby a sick person is frightened, is an indictable assault. Com. v. Wing, 9 Pick. 1, 19 Am. Dec. 347, citing Cole v. Fisher, 11 Mass. 137. The evidence fully sustains the allegation; the blowing of the whistle, hallooing, and shouting of the hands was wanton and willful, without any purpose to, or having any connection with, the discharge of any duty to the plaintiff or the public. One witness swears that the engineer said he did it "to see the horses jump about." His honor correctly interpreted the complaint, and therefore declined to submit an issue in regard to contributory negligence, because it did not arise upon the pleadings. There can be no contributory negligence when the defendant has been guilty of no negligence to which plaintiff's negligence could contribute. "An assault and battery is not negligence." Beach, Cont. Neg. § 65. The cause of action is the unlawful, wrongful act, resulting in injury; the frightening of the horse—the damage which proximately flowed from the wrong—measures the extent of the recovery. The wrongdoer is liable for all damages which proximately flowed from the act. Ramsbottom v. Railroad, 138 N. C. 38, 50 S. E. 448; Johnson v. R. R., 140 N. C. 574, 53 S. E. 362; Hale on Damages, 36-38. Hence the plaintiff's cause of action is the wrongful act of the engineer and other servants, and he recovers for the damage sustained by him in his efforts to control the horses after being frightened, because such damage proximately flowed from the wrongful act. We then have this case: Defendant, for the purpose of hauling logs to its mill, and such other purposes as its business required, owned and operated a "tramroad," located some 20 feet from, and running parallel with, the public highway. On May 20, 1903, the plaintiff was passing along the highway at the point named, not a public crossing, when he met the engine, operated by the engineer and several hands, firemen, etc. The highway and tramroad ran parallel some 300 yards; the engine was that distance from plaintiff when he first saw it. His horse and mule were gentle, and not afraid of the usual noise of trains; had been around them, and were not frightened. When about 75 yards from plaintiff, the engineer began blowing the whistle, and continued for about 75 yards after passing him; giving short, quick, and loud shrieks and blasts. The hands on the train waved their hats and hands toward plaintiff and "hollowed" very loud. This conduct was, on the part of the engineer and other servants, willful and wanton, and "for the purpose of frightening the horses of the plaintiff," and he was "injured thereby." This is the case as stated by the plaintiff and found by the jury. Is the defendant liable for the injury thus sustained by plaintiff, and, if so, is it liable for punitive or vindictive damages? The engineer and the other persons engaged in the conduct described are criminally liable, and in a civil action may be held to compensatory and vin-

dictive damages. The natural indignation aroused by a recital of their conduct, in the light of the gross, wanton wrong done plaintiff, must not be permitted to disturb our judgment in inquiring into the liability of the defendant. There is no suggestion, otherwise than is shown by their conduct on this occasion, that the servants employed by defendant to conduct its legitimate business were unfit persons. There is no negligence alleged or shown in regard to their selection for the business for which they were employed. Nor is there any suggestion that the tramroad was negligently placed, so that, in the proper and careful operation of the engine, the horses of the plaintiff or other persons would have been frightened. The plaintiff says: "The mule and horse were both gentle and not afraid of the usual noises of the train." This case is clearly distinguished from Daniel v. Railroad, 117 N. C. 592, 23 S. E. 327. There the liability of the defendant was based upon the fact that, at the time of the shooting by the station agent, plaintiff's intestate was a passenger. The principle upon which that case is decided is uniformly recognized and enforced. A full note, with the citation of many decided cases, may be found in 4 L. R. A. (N. S.) 485, where Daniel's Case is reported. I also concur in the principle upon which this court sustained a recovery in Pierce v. Railroad, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316, Cook v. Railroad, 128 N. C. 333, 33 S. E. 925, and Hayes v. Railroad, 141 N. C. 195, 53 S. E. 847. All of these, and similar cases, rest upon the fact that, in ejecting persons wrongfully on the cars, the servant, in the discharge of his duty, used excessive force. It was held in those cases that the fact that defendant's servant acted wantonly and willfully was immaterial. I have no purpose to call into question the decision in either of these cases. There are but two cases in our Reports which, in the slightest degree, militate against the conclusion reached by me in this case. I will refer to them later. The principle involved in the case differs in no respect from one in which a farmer, owning a threshing machine attached to a portable engine, operated by his servants by the side of a public highway, finds himself sued for damages because his servant, for some purpose of his own, either wantonly or maliciously blows the whistle or makes some other noise of which the machine was capable, but not necessary in its operation, whereby some person, passing along the highway, is injured. Nor can I see any difference in principle between this case and one in which a person owning and operating a steam cotton gin near the roadside, whose servant, for some purpose of his own, and not to manage or control the movement of the gin, blows the whistle and frightens a horse. In neither case is there any negligence. Formerly, it was held that a master was not liable for the tort of his servant, although committed in the scope of his employment, when the tortious act was wanton or willful. Campbell v. Stalert, 6 N. C. 389; Harris v. Mabry, 23 N. C. 240. These and many other cases decided in other jurisdictions follow the decision in McMannus v. Cricket, 1 East, 105; Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 509; Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 315. This view has been abandoned by the courts, both in England and in this country, and it is now generally held that the test of liability is not whether the wrong is willful, wanton, or malicious, but whether it is done in the scope of the employment. This court, without expressly overruling the earlier cases, has adopted the modern view. It is said in Pollock on Torts (7th Ed.) 91: "A master may be liable for willful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes; and this, no less than in other cases, although the servant's conduct is of a kind actually forbidden by the master. Sometimes it has been said that a master is not liable for the 'willful and malicious' wrong of his servant. If 'malicious' means committed exclusively for the servant's private end, or 'malice' means private spite, this is a correct statement; otherwise, it is contrary to modern authority." It is uniformly held, at this time, that the test of liability of the master for the torts of his servant is whether, at the time he did the act complained of, he was acting within the scope of his employment. Various theories are advanced by juridical writers and judges as the basis of the doctrine, but all of them concede that none are entirely satisfactory. If we adopt the maxim respondeat superior as the basis, we find ourselves but little advanced in the solution of many cases. It is very easy to say, let the principal be responsible for the acts of his agent. We are at once confronted with the question: What acts? The answer is, those which he has employed him to do. Mr. Jaggard finds the same difficulty when he invokes the maxim, "Qui facit per alium facit per se," a maxim which, he says, "in the law of torts, has created much confusion." 1 Torts, 88. In many of the cases the liability is based upon the theory that the act which the servant does is commanded by the master, and he is liable for the manner in which the command is executed. This is illustrated in Cook's Case, supra. The master imposes the duty upon his servant to eject persons wrongfully on the train. This the master has a right to do, and, if he use excessive force or acts from anger, he is liable. When he commands his servant to act, the act of the servant is his act, with all of the legal consequences growing out of the manner of doing it. Mr. Jaggard says: "If a master assists a servant in an assault, they are actual joint tort-feasors. If he commands his servant to assault, they are constructively joint tort-feasors. This is also true when he directs his servant to do something which necessari

ly or naturally involves an assault. But when a servant, contrary to orders, and without the knowledge of the master, assaults, for example, the master's customer or the master's passenger, the master is sometimes held responsible, not because the tort is really his, but because of the relationship he bears both to the servant and to the injured man. If he sustain no relationship to the complainant which imposes on him a duty which his servant violates, there is no responsibility." Torts, 39. As is said by Mr. Justice Hoke in Sawyer v. Railroad, 142 N. C. 1, 54 S. E. 793, quoting from Wood on Master & Servant: "The question usually presented is whether, as a matter of fact or law, the injury was received under such circumstances that, under the employment, the master can be said to have authorized the act; for if he did not, either in fact or law, he cannot be made chargeable with its consequences, because not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim previously referred to does not apply. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it." Justice Walker in Daniels v. Railroad, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, puts the principle clearly: "The act of the servant must be something done in attempting to do what the master has employed the servant to do." If the liability grow out of the idea that the master has commanded his servant to do the thing of which complaint is made, or has commanded him to do something which involves—that is, renders necessary to its accomplishment—the thing complained of, how is the defendant liable for the servant's act in this case? The servants were employed to operate the engine over the tramroad. This was not in itself wrongful or dangerous, unless negligently done. While it is not alleged or proven, we know from observation and experience that engines have attached to them an appliance, by the use of which the steam is made to escape in a way to make a loud noise. We know also that this appliance is no part of the motive power of the engine; it does not contribute to, or regulate, its movement, but is intended and used only to give notice of the starting, approaching, or stopping of the train, for the various purposes commonly understood. For these purposes it may fairly be supposed the master commands the engineer to use the appliance known as the whistle, and for the manner in which this command is executed the master is liable. We know equally well, and the plaintiff evidently knew, that it was no part of the duty or business of the engineer to blow the whistle or of the hands to wave their hats and halloo to persons passing along the highway, except at certain times and places and for the usual purposes. There was, therefore, no command, either actual or constructive, to do so. Hence, the plaintiff truthfully alleged that they did so, not for the purpose of operating the train, but "for the purpose of frightening his horse." Unless, therefore, the master be liable upon some other ground than that of a command or authority to do the act, it cannot be so at all. If he did not command the act, neither the maxim respondeat superior nor qui facit, etc., apply. It is impossible, upon this theory, to conceive how the master can be liable for an act which he neither actually nor constructively commanded or authorized to be done. It no more commanded the act, of which plaintiff complains, than the farmer, who sends his wagon and mules to town by his servant, commands the servant to strike a person by whom he is passing. It is inconceivable how one can be said to do, by another, an act which he neither commands nor authorizes another to do.

This brings us to inquire whether the act of the servants was in the scope of their employment. There was no duty resting on the master to sound the whistle or wave hats at the place described, no such duty was either imposed upon or delegated to the servants, and any suggestion that the servants were acting for the master or in the discharge of any duty resting upon it is expressly negatived by the fact that they did it for a purpose of their own; that is, to frighten the plaintiff's horses. All of the authorities concur in the statement that the master is liable for the tort of his servant when committed in the scope of his employment, and is not liable when the act is not within the scope of such employment, or, as said by Jaggard, "is the independent tort of the servant." Torts, 276. It will be observed that Sir Frederick Pollock, probably the most accurate writer on the subject, is careful to say that while the master is liable for even willful and deliberate wrongs committed by the servant, "provided they be done on the master's account and for his purposes, sometimes it is said that the master is not liable for willful and malicious wrong of his servant. If 'malicious' means committed exclusively for the servant's private ends, or 'malice' means private spite, this is a correct statement." The law is well stated and frequently formulated as laid down in Smith, Master & Servant, 151; 2 Foundations Legal Liability, 470. Haralson, J., in Goodloe v. Railroad, 107 Ala. 233, 18 South. 166, 29 L. R. A. 729, 54 Am. St. Rep. 67, says: "What is meant by the words 'while acting within the range of the authority of the employment of the servant' is made the ground for contention in each case. * * * It is said on the point under consideration that the rule of the responsibility of the master for the acts of his servant does not apply simply from the circumstance that at the time when the injury is inflicted the person inflicting it was in the employment of another, but that in

order to make the master liable, the act inflicting the injury must have been done in pursuance of an express or implied authority to do it; that is, it must be an act which is fairly incident to the employment." In Railway v. Baum, 26 Ind. 70, it is said: "It is not to be understood, however, that the master is never liable for the willful and malicious acts of the servant, unless he has directed those specific acts to be done. The rule is not so broad as that. If the act of the servant complained of was necessary to be done to accomplish the purpose of the servant's employment, if it was essential as a means to attain the end directed by the master and was intended for that purpose, then it was implied in the employment and the master is liable, though the servant may have executed it willfully and maliciously. But when it is unnecessary to the performance of the master's service and not really intended for that purpose, but is committed by the servant merely to gratify his own malice, though under pretense of executing his employment, it is not done to serve the master, and is not in fact within the scope of the employment, and the master is therefore not liable. It will not do to say that he shall answer in damages because, by employing the servant, he gives him an opportunity to maltreat those with whom he comes in contact in discharging his duties."

The disastrous results of adopting the reasoning repudiated in the opinion are apparent. The difficulty experienced by the courts in applying the term "scope of employment," or, as is sometimes said, "course of employment," is illustrated in a large number of cases. In a well-considered case, the Court of Errors of New Jersey, discussing the changes made in the original rule, says: "The rule has been gradually extended until it may be said that the liability of the master now extends to every case when the act of the servant is done with a view to the furtherance and discharge of his master's business and within the scope and limits of his employment. Beyond the scope of his employment, the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master. The rule, as it is now established by the later judicial declarations, should be strictly held within its defined limits. It is a rule capable of great abuse and much hardship, and the courts should guard against its extension or misapplication." Holler v. Ross, 68 N. J. Law, 324, 53 Atl. 472, 59 L. R. A. 943, 96 Am. St. Rep. 546. Lord Holt in Middleton v. Fowler, 1 Salk. (10 Wm. 111) said: "No master is chargeable with the act of his servant but when he acts in execution of the authority given by his master." In McMannus v. Cricket, supra, Kenyon, C. J., said: "Now when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such acts." It is said by the reporter "that this cause was very much discussed at the bar, and the court took time to consider of their judgment." It is said "the modern law largely has its roots" in the words of Lord Kenyon. In Craft v. Allison, 6 E. C. L. 528 (4 Barn. & Ald.) 590, it is said: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strikes the horses of another person and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable, being an act done in pursuance of the servant's employment." Creswell, J., in Mitchell v. Crasweller, 13 C. B. 76, E. C. L. 257, said: "No doubt if a servant, in executing the orders, express or implied, of his master, does it in a negligent, improper, and roundabout manner, the master may be liable. But here the man was doing something which he knew to be contrary to his duty and a violation of the trust reposed in him. I think that it would be a hardship upon the employers to hold them to be responsible under such circumstances." The case of Limpus v. Lon. Omnibus Co., L. J. 1863 N. S. 32, 35, is regarded as the controlling authority on the subject. All of the judges wrote opinions. Williams, J., said: "If a master employs a servant to drive and manage a carriage, the master is, in my opinion, answerable for any misconduct of the servant in driving or managing it, which can fairly be considered to have resulted from the performance of the functions intrusted to him, and especially if he was acting for his master's benefit and not for any purpose of furthering his own interest or for any motive of his own caprice or inclination." In Poulton v. Ry. Co., L. R. 1866, 2 Q. B. D. 534, the English cases were reviewed, Blackburn, J., saying: "Then comes the question we have to determine: Can there be said to be any evidence from which it may be inferred that the railway company authorized the station master to do an act which it appears on every view of the facts he would be utterly unauthorized to do? We think not; we do not think it is within the scope of his authority, in what he was authorized to do, to bind the company. It was an act out of the scope of his authority and for which the company would be no more responsible than if he had committed an assault or done any other act which the company never authorized him to do." The case of Gaff v. Ry. Co., 30 L. J. Q. B. 148, 107 E. C. L., Seymour v. Greenwood, 30 L. J. Ex. 328, 7 H. & N. 358, and the Limpus Case, supra, are noted and distinguished, saying, "If the station master had made a mistake in committing an act which he was authorized to do, I think in that case the com-

pany would be liable, because it would be supposed to be done by their authority." To the same effect are the American authorities. In Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361, it is said: "If the servant (intrusted with removing timber from the roof of a house), for some purpose of his own, intentionally threw material upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to effect some purpose of his own. In Rounds v. Del., Lack. & W. Railroad, 64 N. Y. 129, 29 Am. Rep. 597, Andrews, J., says: "It seems to be clear enough from the cases in this state that the act of the servant causing actionable injury to a third person does not subject the master to civil responsibility in all cases where it appears that the servant was, at the time, in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business. On the other hand, the master is not exempt from responsibility in all cases, on showing that the servant, without express authority, designed to do the act or the injury complained of. * * * If, however, the servant, under the guise and cover of executing his master's orders, and exercising the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury to another, the master is not liable. The relation of master and servant, as to that transaction, does not exist between them." To the same effect are Mott v. Ice Co., 73 N. Y. 543; Ochsenbein v. Shapley, 85 N. Y. 214. Smith v. N. Y. Cent., etc., R. R., 78 Hun, 524, 29 N. Y. Supp. 540, is an instructive case on this subject. Plaintiff was standing on the platform. A local freight stopped and switched some cars, and was about to start, when Riker, defendant's station agent, stepped out and placed two torpedoes on the track under one of the freight cars, and then ran back into the station house. The train moved off, the torpedoes exploded, causing a sharp fragment to strike and injure the plaintiff. The agent testified that he placed the torpedoes on the track to hear the explosion and with no object of signaling the train, the purpose for which the torpedoes were furnished. Haight, J., said that the only question was whether the agent in placing the torpedoes on the track was acting within the scope of his employment in the performance of a duty imposed upon him by the company. "If so it was negligent and dangerous to explode the torpedoes in the vicinity of the station where persons were standing upon the platform, the company is liable; but if, by doing what he did, he went outside of his employment in order to effect a purpose of his own, in exploding the torpedoes for his own amusement, and not for the purpose of signaling the train, then the company would not be liable."

The leading case in Massachusetts is Howe v. Newmarch, 94 Mass. 49. Hoar, J., in a well-considered opinion, reviews the English and American authorities, and says: "In an action of tort in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if the servant, wholly, for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong be occasioned by negligence or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner." In Brown v. Jarvis Eng. Co., 166 Mass. 75, 43 N. E. 1118, 32 L. R. A. 605, 55 Am. St. Rep. 382, Lothrop, J., says: "The act of defendant's servant was not a necessary or natural or proper result of anything that the servants were employed to do." Obertoni v. B. & M. R. R., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422. In Berry v. Boston El. Ry., 188 Mass. 536, 74 N. E. 973, referring to the act complained of, the court say: "The boys were well known to the conductor, and it was apparent from the evidence that the conductor was playing a practical joke on the policeman." Held, that defendant company was not liable. In Cobb v. Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909, the master was held not liable for wrongful arrest of a person by his clerk, who knew that no goods had been stolen, but made the arrest for the purpose of extorting money from the plaintiff. In Ry. Co. v. Baum, 26 Ind. 70, the authorities are reviewed and the general principles clearly set forth. In Cousins v. R. R., 66 Mo. 572, it is said: "Two classes of cases have arisen under the rule now being considered in which the master is not liable for the acts of his servant. The first is when the servant was, at the time the injury was inflicted, engaged in the performance of the service which he was engaged to render, but the act which occasioned the injury did not pertain to the particular duties of the employment. Thus, if an engineer, while running a train, should shoot an unoffending man upon the roadside, the injury would be inflicted while the engineer was engaged in serving his master, but the act causing the injury would have no connection with that service and could not be considered as done in the course of the servant's employment." Alvey, C. J., in Fletcher v. Ry. Co., 6 D. C. App. Cas. 385, says: "The person who threw off the piece of wood that injured plaintiff was not in the performance of any duty required of him, but his act was wholly independent of any duty im-

posed upon him by his employment to work for defendant. In other words, his act was not one within any limit or scope of authority derived from the defendant, as agent or servant, in the performance of duty." In Stephenson v. R. R., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223, the action was for injuries sustained by the action of the engineer in moving his engine with the intent to frighten the passengers on a street car. De Haven, J., said: "The engineer was not acting within the scope of his employment, if his object in moving the engine was simply to frighten the passengers in the street car. Such an act, done for such a purpose, was entirely foreign to the object of his employment. The work which the engineer was to perform for defendant was to manage the engine while it was engaged in switching cars, and if he started the engine, not for the purpose of employing it in the service of the defendant, but to accomplish an independent purpose of his own, * * * it is immaterial that he used the engine of the defendant in order to accomplish his purpose." By way of illustration he says: "It would not be contended that one who employs another to sprinkle his garden, and places in his hands a hose to be used for that purpose, would be civilly responsible in damages if, stepping aside from that employment, the servant should, either in sport or from malice, turn the same upon a person passing along the street. * * * In all the affairs of life, men are constantly obliged to act by others; but no one would venture to so act if the mere circumstance that he employed another to act for him about any general or particular business made him an insurer against all wrongs which such persons might possibly commit during the period of such employment." The distinction is clearly stated in Little Miami R. R. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373. The action was for an assault committed by the servant. The court said: "The assault was in no way calculated to facilitate or promote the business for which the servant was employed by the master; nor could it have been supposed to be, or intended, as an act with that view or object. It is not a case of excess of force and violence in executing the authority of the master, but rather an act beyond such authority or foreign to the objects of the employment." Gilliam v. R. R., 70 Ala. 268. In Louisville & N. R. R. v. Rout (Ky.) 76 S. W. 513, the Supreme Court of Kentucky held that the company is not liable for the act of a locomotive fireman in purposely throwing a piece of coal at one standing beside the track, not with any purpose of protecting the master's property or furthering "its interest." In International & G. N. R. Co. v. Cooper, 88 Tex. 607, 32 S. W. 517, the court says: "The distinction is this: That if the act done was one authorized to be done by the servants, and was at the time being done in the discharge of their duty as such servants, then the master would be responsible for the consequences to the plaintiff, although the servants might, in the discharge of their duty, maliciously or mischievously have thrown the water upon the plaintiff. It cannot be said that the act of putting the water upon the plaintiff must have been authorized, because such an act would never be authorized by a master; but it is the act itself of discharging the hot water that must have been done in the course of the employment of the servant, and for the purpose of forwarding the business of the master. It does not matter that the servant might have used the same appliances in the discharge of a duty to the master, but the question definitely and distinctly presented is, was the servant, in the particular case, in the discharge of such duty?"

The last case from which we quote is Evers v. Krouse, 70 N. J. Law, 653, 58 Atl. 181, 66 L. R. A. 592. There the infant son of defendant was directed to sprinkle water on the lawn in front of the house. While engaged in this work, plaintiff left a horse tied near by. The boy turned the hose on the horse, so frightening it that it ran away and was killed. In an action for damages against the father, he took an exception to the instruction that he would be liable if the boy "through a mischievous disposition threw the water upon or over the horse." Gummere, C. J., wrote an interesting opinion for the unanimous Court of Errors and Appeals sustaining the exception. Referring to the case of Holler v. Ross, supra, he said that while the rule laid down in that case had been followed in other jurisdictions, there had been much contrariety in its application. "This is due to the assumption in some courts that an act done by a servant, while engaged in the master's work, is necessarily an act within the scope of the former's employment. But this is conspicuously a non sequitur. An act done by the servant while engaged in the work of his master may be entirely disconnected therefrom, not as a means or for the purpose of performing that work, but solely for the accomplishment of the independent, malicious, mischievous purpose of the servant. Such an act is not, as a matter of fact, the act of the master, in any sense, and should not be deemed to be so as a matter of law." The learned justice notes the distinction between that case and Bittle v. Ry., 55 N. J. Law, 615, 28 Atl. 305, 23 L. R. A. 283. In the last-named case, the statute required the company to blow 300 yards distant from a highway crossing. The evidence showed that the engineer saw that plaintiff's horse had become frightened at the approach of the train, when he wantonly and maliciously blew an extraordinarily loud and shrill blast from the whistle. The company was held liable because it was the duty of the engineer to blow the whistle at that point; it was within the scope of his employment, and because of

that fact the rule of respondeat superior applied. The question has been before almost every court in this country, and, with a very few exceptions, decisions have been in harmony with those from which we have quoted. Turley v. R. R., 70 N. H. 348, 47 Atl. 261; Railway v. Little, 67 Ohio St. 91, 65 N. E. 861; Healy v. Patterson, 123 Iowa, 73, 98 N. W. 976; Ry. Co. v. West, 125 Ill. 320, 17 N. E. 788, 8 Am. St. Rep. 380; Slater v. Thresher Co., 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; Smith v. Ry. Co., 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72; Porter v. R. R., 41 Iowa, 358; Ch. & N. W. Ry. v. Bayfield, 37 Mich. 205; Palmer v. Elec. Co., 131 N. C. 250, 42 S. E. 604. In Daniel v. R. R., supra, and Sawyer v. R. R., supra, this court applied the principle upon which we have decided this case. In Jackson v. Tel. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738, the master was held liable upon the same principle. Brendle's Case is noted in Foot v. R. R., 142 N. C. 52, 54 S. E. 843, but the question presented here was not involved. Mr. Jaggard says that the English courts, at an early period, recognized the doctrine of a particular command in the test of liability, hence the maxim respondeat superior was usually invoked. By the modern view the test is generally held to be the scope of employment, but when we reason back to the principle, we find that, as said by many courts and writers, the basis in either view is the same—the master commands the servant to do the particular thing, and, by construction, such other things as are necessary to execute the command; such things being thereby brought within the scope of the employment. For the manner of doing the thing commanded to be done, including such things as are involved therein, the master is liable. When we use the term "command," we do not overlook the fact that the failure to obey instructions in the manner of executing the command does not absolve the master. If the servant keep within the scope of his employment, and with the purpose of discharging his duty to his employer depart from the orders given, or wantonly and willfully injure another in doing his master's business, the master is liable. In many cases, the extent of deviation from the orders of the master which will absolve him is presented. No such question arises here, and I simply refer to these phases of the question for the purpose of excluding the suggestion that I have overlooked them. It is said that in Everett v. R. R., 121 N. C. 521, 27 S. E. 991, s. c., 122 N. C. 1010, 30 S. E. 334, and Brendle v. Spencer, 125 N. C. 474, 34 S. E. 634, the defendant was held liable upon an allegation and proof similar to that made in this case. I have examined the original record in these cases. In Everett's Case the complaint discloses an action for negligence pure and simple. The allegation is that defendant's servants "willfully, maliciously, negligently, and unnecessarily" blew the whistle, etc., and "did frighten the plaintiff's horses," etc. The issue was in the usual form: "Was the plaintiff's horses injured by defendant's negligence as alleged?" The question under discussion was not raised or suggested, except in an instruction asked by the defendant: "Unless the jury believes that the person who blew the whistle blew it wantonly or maliciously, for the purpose of frightening the horses, he is not entitled to recover." The instruction was refused. The court instructed the jury that if the servant blew the whistle negligently, for the purpose of frightening the horses, the defendant was liable. It is evident from the record and the language of the court that the question was not raised or considered respecting the "scope of employment." The petition to rehear raises no such question. In Brendle's Case the complaint was in the same language, the action being for the injury to the driver upon the same occasion. It is true that the issue there contained the words, "for the purpose of frightening the horses," etc.; but there was no such allegation. Both were actions for negligence and not for assault. Neither court nor counsel, nor does this court, consider the question presented here. The case is simply referred to in Foot v. R. R., 142 N. C. 52, 54 S. E. 843, and not commented upon. I do not think that, in view of the facts appearing in the record, the cases can be regarded as establishing the principle that a master is liable for the tort of his servant committed while on duty, but for his own purpose, and not in furtherance of his employment. In this case there is no suggestion that the defendant was negligent in the placing of its tramroad, the construction or condition of its engine, the employment of, or instruction to, its servants, or that it in any way ratified or approved the conduct of its servants. To hold it liable simply because it employed servants who departed from their duty without any regard to the purpose of their employment, and for a purpose of their own wantonly and willfully diverted the instrumentality furnished for a legitimate use to the injury of the plaintiff, is, I respectfully submit, doing violence to the principles of both natural justice and sound law. Undoubtedly, persons, natural or corporate, should be required to exercise due care to be measured by the peril to others in intrusting dangerous instrumentalities in the hands of their servants, and it is but just to hold them liable for a breach of duty in that respect; but, in the absence of any suggestion of want of such care, "it would be a hardship on the employer to hold them liable" for acts committed outside the scope of the employment.

The basis upon which the master is held liable for the acts of his servant is restated by the editor, in an exhaustive discussion of the subject, in 26 Cyc. 1518: "The master may be liable for the acts of his servant on either of the following grounds: (1) Negligence of the master in selecting his servants or instructing them as to the duties of their

position; (2) an express demand to the servant to do the act resulting in the injury to the third person; (3) acquiescence in, or assent to, former like acts of the servant, or to the act in question; (4) the fact that the act of the servant was within the scope of his employment and in the line of his duties while engaged in such employment; and (5) ratification by the master of the act of the servant causing the injury to the third person." It is manifest that this case does not come within either of the above classes.

It is strongly insisted, however, that because of the dangerous instrumentality used, and the manner and place of its use, the owner is held to insure that persons passing along the highway shall not suffer any injury. This duty, if it rest upon the defendant, removes the case from the domain of negligence and of the law regarding the liability of the master for the acts of his servant. It falls within the class known as absolute duties, and is based upon the maxim, "Sic utere tuo alienum non lædas." If the instrumentality in the manner and place of its use comes within the principle involved in the maxim, no question of care, either in regard to the selection of the servant or his conduct, can arise. It is the fact of sending the engine upon his premises, near the highway, resulting in injury to the plaintiff, which makes him liable. No amount of care or caution relieves the owner of liability in the use of such instrumentalities. If the engine used, as described by plaintiff, is so essentially dangerous that, in contemplation of law, any damage flowing from its operation is actionable, although the complaint is drawn upon an entirely different theory, the plaintiff is entitled to at least actual damages.

The principle is thus stated by Pollock: "The law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbor to such risk is held, although his act is not of itself wrongful, to insure his neighbor against any consequent wrong not due to some cause beyond human foresight and control." The learned and accurate author says: "A rule casting the responsibility of an insurer on innocent persons is a hard, though it may be a just, one, and it needs to be maintained by very strong evidence or any clear grounds of policy. * * * The liability seems to be rested only in part on the evidently hazardous character of the state of things artificially maintained by the defendants on their land. In part, the case is assimilated to that of a nuisance." Torts, 480. The principle in its application is illustrated in a large number of cases in the Reports. The case of Rylands v. Fletcher, L. R. 3 H. L. 330, has been very much modified both in this country and in England. In this state the liability for setting fire to adjacent buildings or woods by the engines of railroad and lumber companies is confined to negligence either in the construction or operation of the engine or of the condition of the right of way. Anderson v. Steamboat Company, 64 N. C. 399; Aycock v. R. R., 89 N. C. 321; Craft v. Lumber Co., 132 N. C. 151, 43 S. E. 597; Simpson v. Lumber Co., 133 N. C. 95, 45 S. E. 469; Knott v. R. R., 142 N. C. 238, 55 S. E. 150. In Thomason v. R. R., 142 N. C. 300, 55 S. E. 198, the liability for injuries sustained by an adjacent owner and resident by noises, smoke, cinders, etc., in the operation of steam engines, is made to depend upon an allegation and proof of negligence; and in plaintiff's appeal (page 318 of 142 N. C., and page 205 of 55 S. E.) a demurrer was sustained because it was not alleged that the injury was caused by a negligent use of the engines. For killing stock, the liability is dependent upon negligence. I should hesitate to hold that a steam engine operated over a tramway near to a highway for hauling logs, or stationary for ginning cotton, or sawing lumber, or for any of the numerous lawful uses to which it is applied, is, in the absence of negligent construction, condition, or use, within the principle fixing liability upon the owner as an insurer. In Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623, the action was for the recovery of damages caused by the explosion of a boiler attached to a steam engine operated by defendants, throwing parts of the iron on plaintiff's premises and building, injuring his property. The plaintiff contended that, in the absence of negligence, defendant was liable for a trespass. Earl, J., reviewed the authorities, including Rylands v. Fletcher, concluding an able opinion: "In this case the defendants had the right to place the steam boiler upon their premises. It was in no sense a nuisance, and the jury have found that they were not guilty of any negligence." In Wabash & St. L. Ry. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696, Mitchell, J., discussing the liability for damages caused by frightening a horse by the operation of a portable engine near the highway, says: "The work contracted to be done was not, in itself, unlawful, nor was it necessarily a nuisance to operate a portable steam engine in a careful manner in close proximity to a public highway." The same is held in a very strong opinion by Cooley, C. J., in Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522. Judge Thompson, after discussing the question, concludes: "The sound view would seem to be that such an engine, as a means of locomotion, is not necessarily a nuisance, and the question whether its use as such has, in a particular instance, been so negligently managed to the injury of others as to give rise to a right of action, is one of fact for the jury, as a question of reasonable conduct and management." 1 Neg. 1312. It would be difficult to distinguish this case from one in which sparks are emitted, setting fire to woods or buildings, or where noises, smoke, etc., injure persons and property. Why would it not follow, applying the maxim sic utere, etc., that any blowing of the whistle,

whether excessive or otherwise, or any other noise made by the engine, by which a horse passing along the highway is frightened, gives a cause of action. Certainly, if the same rule of liability be imposed as in the case of dangerous animals escaping from one's premises, the doctrine must be carried to its logical results or the law made to adjust itself to each case as it comes before the courts. No matter how perfect the machine, how competent and careful the engineer, the instrumentality on or near the highway being under the ban of the law, all injuries caused by its use are actionable. The principle, within proper limitations, is sound and just. If I wish to keep a dangerous or vicious animal on my premises, it is but just that I should pay for any damage which my neighbor sustain by its escaping and going upon his premises, or to one passing along the highway. If, however, I wish to gin my cotton, bale my hay, or saw the timber on my land into boards, or haul my logs to the mill, and for either of these purposes use a steam engine, it has heretofore been supposed that my duty to my neighbor and the public was met by a proper placing, construction, selection of my servants, and careful operation of the engine; that for a breach of duty, in either of these respects, I am liable—in the first case, as an insurer for any damage which my animal does; in the last, I am liable for negligence either on my own part or of my servants, and for torts committed by them, within the scope of their employment. It may be that the defendant's tramway was negligently placed so that any blowing of the whistle would have frightened the horses of persons passing the highway, or that it did not exercise due care in selecting its engineer, but none of these things are alleged. As the case goes back for a new trial, it is within the discretion of the court to permit amendments to the complaint presenting these or any of these questions which would be for the jury. I am of the opinion that, in the present condition of the pleadings, the defendant is not liable, no negligence being alleged or shown. I am not able to say, as a matter of law, that the engine, as operated, was so essentially dangerous as to impose upon the owner the absolute duty of insurance against all damage. Much that is said upon the principal question assumes that the term "while in the employment" is synonymous with "in the scope or course of the employment." The line is not always easy to draw, yet, if not drawn, the employer is made responsible for every tort committed by the employé during the time of his employment. No one has ever so contended, and certainly no court has ever so held. I have examined many of the authorities relied upon to maintain the liability of defendant. Many of them are actions for negligence in blowing the whistle, and all of them assume that the injurious act is done in the scope of the employment. In some of the cases there is a manifest confusion of expression and thought upon the subject, and an evident desire to confine the departure from principle and precedent to railroad companies. If conditions be such that the law should be so made, it would be much better for the Legislature to do so, defining clearly its limitations. I must confess that I am unable to see where the court is to fix the line of responsibility when it departs from principle and authority. My acquaintance with, and observations of, the character and conduct of locomotive engineers—men into whose care, and to whose skill, courage, and fidelity, we daily commit our own and the lives of our families, to say nothing of property—does not impress upon my mind the necessity for departing from the ancient landmarks and making exceptions to the universal principles of law. It is hardly probable, and the records of the courts do not show, that these men who, with heroic courage, wonderful skill, and almost uniform fidelity, expose their lives driving these locomotives through the country by day, and through the darkness, will wantonly, willfully, and maliciously use steam whistles for the purpose of destroying life and property. They may do so negligently, and for this it is but just that their employers should be responsible. The relative rights and duties growing out of the relation of principal and agent, master and servant, employer and employé, both as between the parties and third persons, in the complex business of modern life, are of the utmost importance. I do not suppose that in the application of the general principle any distinction is to be made between natural persons and corporations. In Railroad Co. v. Baum, supra, it is said: "Nor will sound policy maintain the application of a rule of law to railways or corporations on this subject which shall not be alike applied to others, as has been intimated in some quarters." All of the courts recognize this principle. It can be of no concern to us whether the stockholders of the defendant are operating as a corporation or a partnership, or, for that matter, each individual conducting the business separately. In either case, the necessity for employing servants is the same. The defendant insisted, and introduced evidence tending to show, that the whistle was blown and the other noises made because they were approaching a crossing, and that no more noise was made than was necessary for that purpose. This contention was properly presented to the jury. They found against it.

The defendant requested the court to instruct the jury that, in the absence of any evidence tending to show a command or ratification of the act of its servants, they were not authorized to award punitive or vindictive damages. This the court declined, and instructed the jury that, if they answered the first issue, "Yes," they could, in their discretion, give the plaintiff such damages. This court has frequently held that for assaults

committed by the employés of a railroad upon passengers, the jury could, if they found wanton, malicious, or even excessive force used, give punitive or vindictive damages. Holmes v. Railroad, 94 N. C. 318; Kelly v. Traction Co., 132 N. C. 368, 43 S. E. 923, and many other cases. To what extent these decisions, and those to the same effect in other states, are applicable to a case like this, may be open to discussion. The general rule may be found in 3 Joyce on Damages, 2034: "In order to recover punitive damages against a master for the wrongful, negligent, or grossly negligent acts of his servant, such acts must have been authorized, affirmed, or ratified by the master, or they must have been done in the line of the servant's duty or employment, or the master must have known of the servant's unfitness, and, if the servant's acts are wanton, willful, or malicious, the master is liable for exemplary damages, if such acts are authorized, directed, or ratified by him, or the latter was implicated therein or instigated the same, or they were done for the master in the line of the servant's duty, or were generally within the scope of his authority." This language quoted does not appear to us very clear. Of course, if the wrongful acts are wanton, willful, etc., and if expressly commanded or authorized or ratified, they become the acts of the master in fact, and there can be no question of his liability to the same extent as the servant—they are joint tort-feasors. But if the liability attaches by reason of the doctrine of representation as a matter of law—that is, because within the scope of employment—a much more serious question arises. One may direct his servant to perform an act, giving express command respecting the manner of its performance, carefully warning him against negligence. If in doing the act, obeying his command in that respect, but in utter disregard of his directions and caution, he, by wanton, willful negligence, injure another, the master is liable for at least compensatory damages. Is he liable for vindictive damages?

The Supreme Court of Tennessee in Ry. Co. v. Starnes, 56 Tenn. 52, 24 Am. Rep. 296, held the company liable for the conduct of the engineer, and in passing upon the exception to the instruction given the jury in regard to exemplary damages, he said: "But this is not a case, we think, in which exemplary damages can be allowed. The act complained of was manifestly done without defendant's knowledge or consent, and was the willful and unauthorized act of the servant alone. If the action had been against the actual tort-feasor, the rule would be otherwise." This language opens up the original question of liability for the act of the servant. If the act was "unauthorized," how did any liability attach? There is much confusion of language in the decisions growing out of the extension of the liability of the master for wanton, willful torts of the servant. Doubtless the court in the cases cited hesitated to carry the doctrine of liability to its logical conclusion. The question is discussed in an extensive note to Crane v. Bennett, 101 Am. St. Rep. 722. The line of distinction between the cases in which the master's liability for punitive damages is coextensive with the servant's and those in which it is confined to compensatory damages has not been drawn.

WALKER, J. (dissenting). I concur in the opinion of Justice CONNOR. It seems to me that a master cannot be liable for the malicious tort of his servant committed, not in the line of his duty, nor within the scope of the authority which is conferred upon him by the master, but of his own head and imagination, and prompted solely by his own vicious disposition. As we said in Daniel v. Railroad, 136 N. C. 522, 48 S. E. 818, 67 L. R. A. 455, which is cited with approval by our Brethren who differ from us: "It is not intended to assert that a principal cannot be held responsible for the willful or malicious acts of the agent when done within the scope of his authority, but that he is not liable for such acts, unless previously and expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment and beyond the scope of his authority, as when the agent steps aside from the duties assigned to him by the principal to gratify some personal animosity or to give vent to some private feeling of his own (McManus v. Crickett, 1 East, 106); and, as is forcibly stated by Lord Kenyon in the case cited, quoting in part from Lord Holt: 'No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him. Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for his acts.'" What better authority can we invoke in support of our position than the opinions of the Court of King's Bench as delivered by Lord Holt and Lord Kenyon? But this court has gone very far, though not by any means to the verge, in sustaining what I conceive to be the only just and safe rule in cases of this kind. The principle announced (in the case to which I refer) by the present Chief Justice, speaking for the court, is this: That a master is not responsible for any illegal action taken or directed by his servant which he did not advise, consent to, or participate in, and which was not justified by any authority he had given. Moore v. Cohen, 128 N. C. 345, 38 S. E. 919. I quote almost literally from the opinion, and certainly the substance of what was decided is given. Numerous authorities are cited for this position as fully settling the principle. Ferguson v. Terry, 1 B. Mon. (Ky.) 96; Welsh v. Cochran, 63 N. Y. 181, 20 Am.

Rep. 519; Brown v. Kendall, 8 Allen (Mass.) 209; Fire Ass'n v. Fleming, 78 Ga. 733, 3 S. E. 420; and Cooley on Torts, 131. In that case (Moore v. Cohen) an attorney who had been employed to collect a claim undertook, in good faith, to have the defendant arrested upon the ground of fraud committed in contracting the debt, without any express authority of his principal, or any subsequent ratification by him. That would appear to be more nearly within the scope of the attorney's authority than the malicious and wanton act of the engineer in blowing the whistle of his engine for no other purpose than to frighten the horses on the public highway, and, as a necessary consequence, injuring the plaintiff, was within the scope of his employment, and yet the court held in Moore v. Cohen that the principal was not liable for his attorney's unwarranted act. As said by Justice Blackburn, in discussing a somewhat similar tortious act, when it was attempted to charge the master with liability, there is no difference, and can be none, between a railroad company, which is a corporation, and an individual. The principle must apply to every class of employment, and every merchant will be responsible for a similar act of his agent, and every person for the act of his butler or coachman. To pursue this idea further, the farmer will be mulcted in heavy damages for the willful and malicious act of his employé or laborer who is in charge of stationary or portable machines, or of implements, just as liable to frighten an animal as a steam engine operated by steam; the owner of an automobile for a similar act of his chauffeur; and so on, indefinitely. We cannot coin a principle and restrict it to special cases if it is, in its very nature, inherently applicable to all other cases of a similar kind; for then we must extend it to them, and thus carry it by logical sequence to its natural result. When we stop short of so applying it, because of any hardship which may ensue in the particular case, we virtually admit its unsoundness; for a just and correct legal principle should naturally and consistently apply to all cases which may legitimately come within its reach. The true doctrine is well stated in Ferguson v. Terry, 1 B. Mon. (Ky.) 96, as follows: "No one is liable for trespasses committed by others in his employ unless he gives previous authority or command to do the tortious act, or afterwards assents thereto, or it is done in the discharge of the business which the agent was appointed to do. In the last two cases the law will imply authority to do the unlawful act." See Daniel v. Railroad, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455; Jackson v. Tel. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

In Roberts v. Railroad, 143 N. C. 176, 55 S. E. 509, Justice Hoke, quoting from Wood on Master & Servant, § 307, and approving what is said therein, and also what is decided in Sawyer v. Railroad, 142 N. C. 1, 53 S. E. 793, to the same effect, thus states the doctrine: "The simple test is whether they were acts within the scope of his employment —not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may be fairly said to be authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and written orders. An employer who leaves to an employé to do certain acts for him, according to the employé's judgment and discretion, is answerable for the manner or occasion of doing it, provided it is done bona fide and within the scope of the servant's express or implied authority, *and not from mere caprice or wantonness, and wholly outside of the duties conferred upon him.*" (Italics mine.) And again, in the same case, at page 180 of 143 N. C., and page 510 of 55 S. E., quoting and approving what is said in Mott v. Ice Co., 73 N. Y. 543, he says: "For the acts of a servant in the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interests, the latter is responsible, whether the act be done negligently, wantonly, or even willfully. The quality of the act does not excuse. *But if the employé, without regard to his service, or to accomplish some purpose of his own, act maliciously or wantonly, the employer is not responsible.*" (Italics mine.) He then adds: "The general doctrine on the subject is fully considered in the case of Daniel v. Railroad, 136 N. C. 527, 48 S. E. 816, 67 L. R. A. 455," which case, and Jackson v. Tel. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738, were approved in Sawyer v. Railroad, 142 N. C. 8, 54 S. E. 793. I think the case of Sawyer v. Railroad, supra, is also, in principle, clearly in conflict with the doctrine now about to be announced. Justice CONNOR has so lucidly and fully explained the distinguishing characteristics of the principles, in the law of torts, which determine the liability or nonliability of the master for the acts of his servant, that discussion is rendered useless. I could not, though, be silent when the court is establishing a precedent which, in my judgment, is calculated not only to extend the liability of the principal for the act of his agent, and the master for the act of his servant, far beyond the settled principle of the law relating to that question, but to seriously embarrass and hamper the business transactions of the merchant, the farmer, and every person who, in his ordinary affairs, must employ agents or servants to assist him. My apprehensions will be fully justified if the doctrine thus settled by the decision in this case is hereafter logically and fairly applied, as it should be, to all cases of a like kind, coming within its scope. When we charge

the defendant with liability upon the facts stated in this record, for the reason that it, a lumber company, is using its track and appurtenances for its own purposes, even if it had carried passengers or freight for accommodation, we are going a long way towards unsettling the foundation upon which the law of torts has rested for so long a time, and I view this radical departure from the cardinal principle of that law not only with apprehension, as I have said, but with alarm. We must sooner or later abrogate or greatly modify the rule as thus formulated, or business of this state, which is largely conducted through agents and servants, must be seriously hindered, to say the least. This court cannot well afford to state a principle of law, as applicable to the ordinary and every-day affairs of our people, and then refuse to give it the full scope to which it is entitled, when it may be found to operate oppressively. It must be remembered that we are making precedents for all time to come, and not merely deciding cases.

As I do not think the plaintiff should recover at all, I must, of course, agree with Justices CONNOR and BROWN that he cannot, in any event, be awarded vindictive damages.

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(145 N. C. 495)

## STATE v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 4, 1907.)

1. CRIMINAL LAW—TIME OF TRIAL—DENIAL OF PROPER TIME TO PREPARE DEFENSE.

Where it appears that a railroad company and its agent indicted for charging a passenger rate of more than 2¼ cents a mile in violation of the Act of March 2, 1907, the maximum passenger rate act (Acts 1907, p. 250, c. 216), were given every reasonable opportunity, not only for entering pleas and submitting motions, but for trying the case and defending on the merits, and the presiding judge distinctly announced that the court would sit as long as it was necessary to develop all the facts of the case, even though the term of the court should be extended beyond the time allotted by statute, as he has the power to do under the express provisions of Revisal 1905, § 3266, the complaint that proper time was not given to prepare the defense and that defendants were forced hurriedly into the trial is untenable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1305.]

2. COURTS—UNITED STATES COURTS—JURISDICTION—INTERFERENCE WITH EXECUTION OF CRIMINAL LAWS BY STATE.

Full play should be given to the procedure of the state courts in the prosecution of its criminals, where the latter have the right of appeal to the court of last resort in the state, to the judgment of which a writ of error will lie from the Supreme Court of the United States, as to any question as to an invasion of a right under the federal Constitution, laws, or treaties.

3. INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—ENJOINING CRIMINAL PROSECUTION.

A federal court cannot enjoin a criminal prosecution for a violation of the act of March 2, 1907, the maximum passenger rate act (Acts 1907, p. 250, c. 216), prohibiting a railroad company to charge a passenger rate in excess of 2¼ cents a mile and imposing a penalty on the railroad company for a violation thereof, and declaring any agent of the railroad company violating the same guilty of a misdemeanor, under the general principle in the law of injunctions, which governs in courts of equity, that equity courts are without jurisdiction to interfere by injunction with other courts in the due course of administering and enforcing the criminal laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 178, 179.]

4. CARRIERS—MAXIMUM RATE LAW—SELF-EXECUTION.

The provision of the act of March 2, 1907, the maximum passenger rate act (Acts 1907, p. 251, c. 216, § 2), that the North Carolina Corporation Commission shall publish the rates fixed by the act on or before June 1, 1907, for the information of the public and the railroads, is directory, and was not intended to stay the operation of the act beyond July 1, 1907, on and after which date section 7 (page 252) provides that the act shall be enforced, should the Commission fail in the performance of that duty, nor in law, by any reasonable construction of the act, does it have any such effect, and the maximum passenger rate prescribed by section 1 as 2¼ cents a mile was unconditionally effective on and after July 1, 1907, and the act therefore self-executing.

5. COURTS—STATES—LIABILITY TO BE SUED IN FEDERAL COURTS—CONSTITUTIONAL PROVISIONS.

A suit in a federal Court against the North Carolina Corporation Commission, the Attorney General, and Assistant Attorney General to enjoin the enforcement of the act of March 2, 1907, the maximum passenger rate act (Acts 1907, p. 250, c. 216), prohibiting a railroad company to charge a passenger rate in excess of 2¼ cents a mile, and imposing a penalty on the railroad company for a violation thereof, and declaring any agent of the railroad company violating the same guilty of a misdemeanor, is a suit against the state within Const. U. S. Amend. 11, declaring that the judicial power of the United States shall not extend to any suit against a state by a citizen of another state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 844½; vol. 44, States, §§ 191, 192.]

6. CARRIERS — CHARGES — OFFENSES—IMPOSITION OF PENALTY — LIABILITY TO INDICTMENT.

The act of March 2, 1907, the maximum passenger rate act (Acts 1907, p. 250, c. 216, § 1), prohibits a railroad company from charging a passenger rate in excess of 2¼ cents a mile, and section 4, p. 251, imposes a penalty on the railroad company for a violation of the act to be recovered by the person aggrieved, and declares any agent of the railroad company violating the same guilty of a misdemeanor. *Held*, that under the rule that, where a statute creates a new offense and declares that the same shall be punishable in a specified manner, the offender must be punished in that manner only, a railroad company was not indictable for a violation of the act, but was subject to the penalty only, and that this was true notwithstanding the prohibition to charge in excess of the maximum rate and the penalty for a violation were not found in the same section, but in different sections.

7. SAME.

The doctrine of accessory before the fact, and that all accessories in misdemeanors are principals, did not apply so as to render a railroad company subject to indictment the same as its agent.

8. STATUTES — CONSTRUCTION — PRESUMPTION OF KNOWLEDGE OF LAW BY LEGISLATURE.

The Legislature is presumed to know the existing law and to legislate with reference to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 300–306.]

9. INJUNCTION—SPECULATIVE INJURY—SUFFICIENCY OF SHOWING.

The operation of a statute should not be suspended, even on an allegation that complainant's property is about to be confiscated, or some other constitutional right is about to be impaired, except on a full disclosure of all the facts in complainant's possession, and on the clearest showing that the threatened injury will at least probably result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 11.]

Clark, C. J., dissenting in part.

Appeal from Superior Court, Wake County; Long, Judge.

The Southern Railway Company and T. E. Green, its agent, were convicted of a violation of the act of March 2, 1907, the maximum passenger rate act (Acts 1907, p. 250, c. 216), and the railway company appeals. Judgment arrested.

This is an indictment against the defendant for the violation of the provisions of chapter 216, p. 250 of the Public Acts of 1907, ratified March 2d of that year, commonly known as the "Passenger Rate Law." The act does away with the requirement that all railroad companies shall furnish first and second class passenger accommodations and establishes a uniform rate of 2¼ cents per mile for passenger travel.

The material portions of the act necessary to an understanding of the questions decided by the court are as follows:

"Section 1. That no railroad company doing business as a common carrier of passengers in the state of North Carolina, except as hereinafter provided, shall charge, demand or receive for transporting any passenger, and his or her baggage not exceeding in weight two hundred pounds, from any station on its railroad in North Carolina to any other station on its said road in North Carolina, a rate in excess of two and one-quarter cents per mile, and for transporting children twelve years of age or under, one half of the rate above described.

"Sec. 2. The rate for carrying passengers on leased lines shall be the same as is prescribed for the lessor or company operating the same, and the corporation commission shall publish the rates fixed by this act for the several railroad companies operating in this State, on or before the first day of June, 1907.

"Sec. 3. [Refers to mileage books.]

"Sec. 4. That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars for each violation, payable to the person aggrieved by such violation, and recoverable in an action to be instituted in the name of said person in any court of this State having competent jurisdiction thereof. And any agent, servant or employé of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, in the discretion of the court.

"Sec. 5. [Relates to free transportation.]

"Sec. 6. That section 2618 of the Revisal of 1905 is hereby repealed, and all laws and clauses of laws in conflict with this act are hereby repealed.

"Sec. 7. That this act shall be in force from and after its ratification."

On May 8, 1907, the defendant, Southern Railway Company, filed a bill in equity in the Circuit Court of the United States for the Eastern District of North Carolina, on behalf of itself as complainant, against Franklin McNeill, Samuel L. Rogers, Eugene C. Beddingfield, North Carolina Corporation Commissioners, and Robt. D. Gilmer, Attorney General, and Hayden Clement, Assistant Attorney General, defendants, for an injunction against the enforcement of said act, and on that day his honor, J. C. Pritchard, United States Circuit Judge, issued a temporary restraining order, and required the said defendants to appear before him at Asheville on Wednesday, the 26th day of June, 1907, to show cause why an injunction pendente lite should not be issued. On June 29th, after a hearing in which the jurisdiction of the Circuit Court was challenged by the defendants, an interlocutory injunction was granted upon the bill of complaint and the answer thereto treated as affidavits, and upon affidavits filed therein by the complainants, and the cause was referred to the Honorable W. A. Montgomery, Standing Master of the Circuit Court for the Eastern District of North Carolina, to take and report to the court such evidence on any of the issues therein as either party might offer, and to make all needed computations, and to report fully to the court all the facts therein, and the cause was set down for hearing before the Circuit Court in the city of Asheville on the first Monday in October, 1907.

In the meantime, at the July term, 1907, of Wake superior court, the defendant having refused and failed to obey the said statute, and having sold tickets to passengers throughout the state at a greater rate than 2¼ cents per mile, the grand jury indicted the defendant and its agent at Raleigh, T. E. Green, for the violation of said act. At the trial of the indictment at said term, the defendant, Southern Railway Company, entered a plea to the jurisdiction of the superior court of Wake county, and put in evidence the proceedings of the Circuit Court of the United States, in which the injunction was granted. The bill of complaint in the equity suit alleges certain facts from which the complainant draws the conclusion that the act of 1907 is confiscatory, and in other respects violates its constitutional rights. It is averred in the bill that the Corporation Commissioners are given by the laws of this state such general control and supervision as is necessary to carry into effect the statutory regulations in regard to railroad companies and corporations engaged in the carrying of freight or passengers, and have the power to obtain such information as may be necessary to en-

force the provisions of the said law, and that it is provided by the law of this state that any railroad company doing business in the state, or any railroad company organized under the laws of any state and doing business in this state, is made liable to heavy penalties if it fails to comply with the provisions of the law concerning the charges for freight and passengers, and in such case it is made the duty of the Corporation Commission to notify the Attorney General, who shall take such proceedings in regard thereto as he may deem expedient. The Assistant Attorney General is invested with the same powers, and is required to perform the same duties, as the Attorney General, including the duties and powers just mentioned. It is further averred that the Corporation Commission is required by the act of 1907 to publish the rates fixed by that act for the several railway companies operating in this state on or before June 1, 1907, and, for the reasons just stated, the members of the commission and the Attorney General and his assistant are made defendants to the suit.

The complainant also alleges certain matters tending to show its net earnings from intrastate traffic for the year 1906 to be $324,754.64, under the rate existing prior to the operation of the act of 1907, when the passenger rate was 3¼ cents per mile, and then concludes (without any satisfactory statement of the facts or reasons as to how the result is reached) that, under the new rate, the maximum of net earnings for the same year would have been $28,007.47, showing a reduction by reason of the reduced rate of $296,747.17. It then tabulates the figures so as to show how the maximum of net earnings for the year 1906 was ascertained, from which table it appears that the maximum earnings from intrastate traffic in this state, after paying the cost of operation for said year, amounted to $453,811.41, and that the ratio of the intrastate gross traffic in this state for said year to the entire gross traffic, both inter and intra state, was 27.60 per cent. and by deducting from the total amount of the maximum earnings for intrastate traffic ($453,811.41) the proportion of the taxes chargeable to it, and based upon said ratio ($74,423.73) and its proportion of the cost of improvements and betterments not capitalized ($54,633.64), the maximum net intrastate earnings would be $324,754.64. The complainant then attempts to show that the new rate would, as it says, inevitably affect its interstate business, by reason of the fact that many of its intrastate rates and all, or nearly all, of its interstate rates for passengers, are made, and necessarily made, on a combination of "locals," or by the use of "locals" as factors in the computation, and, when the local rate in this state is reduced, the effect would be to reduce the rate upon its interstate traffic, and consequently the loss of the complainant in the equity suit, the defendant in this criminal action, would be much more appreciable, and much greater than is represented by the figures already given.

The complainant in the bill then recites several acts of the General Assembly which it alleges would also diminish its income; for example, the assessment of railroad property in stock law territory for local benefits, the act prescribing the hours of service for employés of railway companies engaged in the operation of trains, the law authorizing the Corporation Commission to require railroads to erect and maintain depots, and an act to enlarge the powers of the Corporation Commission, which, upon examination, seems to confer upon that body ample authority to keep the railway corporations of the state within the law and under proper control. These acts are virtually alleged to be hostile to the interests of the railway companies and to impose additional and heavy burdens upon them, too grievous to be borne, with a reduced passenger tariff. The complainant in the equity suit, and defendant in this indictment, further complains that there is a difference between the commercial value of property in this state, and its value as assessed for taxation, and this applies to all classes of property subject to taxation, and that the value at which its property is assessed for taxation is not really the true value, which is much more, and that the real or commercial value (which we assume to be its market value) should be considered only in determining what is a fair and reasonable passenger and freight rate in its business, as a common carrier and in performing the public service required of it by the law, but it alleges that the state should be estopped to deny that the property is not worth as much as its assessed value. The complainant then tabulates certain figures showing (as it avers) the ad valorem assessment of its property, which it thinks should be apportioned to its intrastate traffic as the basis of determining the reasonableness of the legislative rate for the carriage of passengers, to wit, $7,213,222.74, and showing also other items, such as the amount of its bonded indebtedness, which is a lien upon its property in this state ($24,623,078.29), the interest thereon ($714,103.08), the annual trackage and rentals paid for lines used by it here ($481,189.99), the net income for intrastate business which should contribute its pro rata part to the payment of said interest ($329,900.89), and the total net earnings under the new rate based upon pre-existing conditions, showing, according to its calculation and the basis upon which it proceeds, a deficiency of $301.893.42 for the fiscal year ended June 30, 1906.

It then alleges that there has been an increase in the operating expenses since June, 1906, which will reduce the net result proportionately. It admits that the general commercial conditions in this state are of a prosperous kind, and that intrastate passenger traffic is large, but it avers that there will be no comparative or substantial increase in its

business or tonnage resulting from the proposed reduced rates, passenger and freight. It further alleges that its operations have been economically conducted, and insists that, as the cost of performing the service to the public has been increased, the former rate of 3¼ cents per mile, instead of being reduced, should be raised still higher so as to meet the increased cost of operation. The complainant in the bill then avers that the former rate, or the one existing prior to July, 1907, when the said act became effective, is a reasonable one, and fairly and properly adjusted, in its proportion, to the value of its property and its sources of income in this state, and to diminish it would result in taking its property without due process of law, and in depriving it of that equal protection of the law, to which it is entitled under the Constitution. It complains of the provision in regard to mileage books, and especially the requirement that it must accept the mileage books of other railroad companies for transportation of passengers over its own lines, without any proper limitation as to the time for redemption of such books. There is a special allegation in the bill that, if the defendants are not restrained by the process of the court, the complainant will be exposed to a multiplicity of suits for penalties which it will be impossible to defend by proving the facts in each case which would show the confiscatory, and otherwise unconstitutional character of the said legislation, and that, by reason thereof, its credit will be injured and its business and property wrecked, whereas in the said suit in equity the said matters can be fully shown, once for all, and great expense and unnecessary litigation avoided. The said suit was instituted for the purpose of determining, in an orderly and conclusive way and by a proceeding in which all the diverse interests can be represented, the essential questions in controversy between the complainant and this state in respect to the validity of the said legislation and of obtaining injunctive relief to preserve the status quo, until the final decision is made. In this connection it avers its willingness to protect the rights of the traveling public, if the suit shall finally be decided against the complainant, by giving a transferable coupon to each passenger representing the difference between the old and the new rate, and to secure the payment of the same by proper and sufficient indemnity.

The defendants appeared and answered the bill of complaint, denying its material allegations, except as to the official character of the defendants, and they aver, and support their averment by the statement of pertinent facts, that the state in enacting the legislation which is assailed by the complainant in the equity suit was only exercising its sovereign power and authority, and that the legislative will, as thus expressed, should be respected and obeyed until its enactment is declared by a court of last resort to be invalid, and that the general charges and speculative theories of the complainant based upon incorrect averments of facts and inaccurate estimates contained in the bill should not be allowed to stay the immediate and effective operation of the act of 1907, and that the complainant has, in the ways mentioned, been selling tickets at 2 cents and 2¼ cents per mile. They aver that the figures and estimates as given by the complainant in its table do not agree with those it reported under oath to the Corporation Commission, as it was required by the law to do, and that, if the calculation is made upon the basis of the reports thus made to the said Commission, it will show conclusively, or "demonstrate," that the increase for the year ended June 30, 1906, should have been considerably in excess of a just and reasonable compensation for the value of the service rendered by the complainant or the use of the property employed by it. They aver that the maximum earnings of complainant for the year ended June, 1906, were nearly twice as much as is stated in its bill of complaint, and, instead of being $453,811.41, they were in fact $823,546.80, as shown by its sworn report of November 9, 1906, and, deducting therefrom the amount of taxes chargeable to intrastate business ($74,423.79) and the cost of betterments ($54,633.04), the maximum net earnings for the said year were $694,490.03, which would produce an income of 9¾ per cent. on $7,213,322.74, the proportionate assessed value of the complainant's intrastate property and franchises, and, if the reduction in the rate would diminish the net earnings to the extent of $296,747.17 (which is denied), there would still be left net earnings to the amount of $397,742.86, instead of $28,007.47, as stated in the bill, which amount would yield a net income of 5½ per cent. on the said value, and that even this percentage of income is far below the real per cent. of the actual net income as shown by verified reports of the complainant to the Corporation Commission, which is more than 9 per cent. The true result is shown in this way: The gross earnings in the state, including freight, passenger, express, mail, and miscellaneous earnings, were $3,159,156.89, and the operating expenses charged against such intrastate traffic were $2,335,610.09. The amount of operating expenses is clearly erroneous, as shown by the items thus reported to the Commission. These are set out in the answer and reduce the above amount ($2,335,610.09) to $2,063,726.19, which is 65.48 per cent. of the gross earnings in this state ($3,159,156.89), and the actual earnings therefore were $1,080,420, instead of $823,346, as alleged by the complainant in the bill. Deducting the amounts properly chargeable for taxes and betterments—that is, $74,423.73 and $54,633.04, respectively—and the maximum actual net earnings were $951,363.23, instead of $324,764.64, and, if by the act of 1907 the reduction in the earnings would be $296,747.17, there would still be left $654,616.06, as against $28,607.47, the amount stated in the bill,

which would have been more than 9 per cent. of the assessed value of its property used in intrastate commerce, and, even if the said property were assessed at its commercial or true value, instead of its value for taxation, the business of the complainant would yield a fair profit thereon. If the interstate, as well as the intrastate, business of the complainant in this state, is taken into the calculation, the net earnings, after paying taxes and making all other proper deductions, would have been $3,967,218.13, and, assuming that the loss of income will be $296,747.17, as alleged by the complainant, there would still be left net earnings on the business in this state of $3,690,476.96, which would yield 14 per cent. of the assessed valuation of its property. The defendants further aver that large sums have been paid for grossly extravagant salaries, and for improper and unlawful purposes, by the complainant, which should be excluded from the computation, and there should be excluded also sums paid out by the complainant on account of the negligent management of its property; that the sum of $672,543.14 was paid out on account of its interstate business which is not chargeable to its intrastate traffic, and which should not be included in the calculation. The defendants then aver that the earnings of the complainant for the year 1906 were greatly increased over those of the previous year, and, counting back of that year, and comparing each year with its successor, a very large increase is shown, while there was a steady decrease in the operating expenses. The figures are given as shown in complainant's report to the Corporation Commission. It is also alleged that the stock of the defendant is "watered," or, in other words, is larger in proportion than the real value of its property, and that its bonded indebtedness is also largely in excess of the actual value of its property. They deny that there has been any discrimination against the complainant in the legislation of the state relating to stock laws, hours of service of railroad employés, or in any other respect, and they aver that the legislation so complained of is merely for the protection of life and property and reasonably required for the proper and humane operation of railroads. The defendants further allege that the complainant has grossly discriminated against the traffic and the shippers of this state in its scale of rates, and states circumstantially why this charge is made.

The defendants insist, upon the facts stated in the bill and upon the several legislative acts mentioned therein, that the Attorney General and his assistant and the Corporation Commission are not charged with any duty, the performance of which is essential to the complete operation of the act of 1907, from and after the time when it is therein declared to have effect and that the act is therefore self-executing. They then deny the right of the United States Circuit Court to enjoin the said officers from discharging their duties in the enforcement of the criminal laws of the state. Affidavits were filed in support of the bill to show what was a fair return for capital invested in industrial enterprises, the increase in the cost of the operation of railroads, and that there is no discrimination by the defendant as between individuals or localities in this state, and that, if there is any increase in travel by reason of the reduced rates, there must be a corresponding increase in expense to provide additional facilities to accommodate it. These affidavits, though, are of a most general and unsatisfactory nature, and seem to be the expression of witnesses, experts, though, they declare themselves to be, as to what may happen in the future, under changed conditions produced by the enactment of the law of 1907. Upon the showing made by the complainant, the United States Circuit Judge issued an interlocutory injunction to the final hearing, by which the defendants were restrained from proceeding to perform the duties assigned to them under the laws of this state with reference to the enforcement of the act of 1907. The defendants filed a plea to the jurisdiction of the superior court, which was based upon the proceedings in the Circuit Court of the United States, and which was heard as upon demurrer thereto by the state, and overruled by the court. The defendant excepted upon the ground that the United States Circuit Court had acquired jurisdiction of the suit therein pending and of all matters pertaining thereto, and that the proceeding in the state court is void and deprives it of due process of law and of the equal protection of the laws under the fourteenth amendment to the Constitution of the United States. The defendant then requested the court to pass upon its motion to quash the bill previously made in apt time. The motion was overruled. The defendant moved for a continuance, which motion was also overruled; but this court is of the opinion that the motion, as appears from the record, was dilatory and was properly overruled, even if the ruling of the court upon such a discretionary matter can be reviewed in this court. There were various objections taken to the rulings of the court upon other questions raised during the course of the trial, but, if any of them are tenable, they are not material in the view we take of the case. The court then required the defendants to plead to the indictment, and gave them time to do so. They declined to do so, and the court directed the clerk to enter for each of the defendants the plea of "not guilty."

The defendant requested the court to charge the jury as follows: "(1) The court instructs the jury that the statute on which the indictment in this case is founded does not make the railroad company guilty of a misdemeanor for selling a ticket or causing a ticket to be sold at more than 2¼ cents per mile, and that, therefore, the jury must

disregard the second count in the indictment, and cannot find the Southern Railway Company guilty. (2) The act under which the bill of indictment is drawn does not make the defendant railroad company guilty of a violation of the criminal law by selling passenger tickets at a greater rate than two and one-quarter cents per mile, and upon the second count the court charges the jury that they shall render a verdict of 'not guilty.'" These instructions were refused by the court and the defendant excepted. So much of the charge of the court to the jury, as is necessary to be set out, was as follows: "This is an indictment under an act of the Legislature of North Carolina ratified on the 2d day of March, 1907 (Pub. Acts 1907, p. 250, c. 216), which has been read in your hearing, and which declares that no railroad company doing business as a common carrier of passengers in the state of North Carolina, except as in the act provided, shall charge, demand, or receive for transporting any passenger and his or her baggage, not exceeding 200 pounds in weight, from any station on its road in North Carolina to any other station on its road in North Carolina, a rate in excess of 2¼ cents per mile, and for transporting children under the age of 12 years one-half of the above rate prescribed. One of the counts in the bill is against the defendant T. E. Green, and the other count includes in the indictment the Southern Railway Company. The court instructs you that the common law obtains in North Carolina, except when it is changed or modified by statute. If a statute of the state prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command of a statute injurious to the public, being misdemeanors at common law, are punishable by indictment. A crime or misdemeanor may be defined to be an act committed or omitted in violation of a public law, either forbidding it or commanding it; in other words, a crime is any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name. Therefore, under the laws of the state of North Carolina, a railroad company doing business as a common carrier of passengers and selling tickets from one point on its line of road in the state of North Carolina to another point in the state, and having and operating more than 60 miles of road, and not being exempted from the provisions of the act as read in your hearing, which sells passengers such tickets for a greater rate than 2¼ cents per mile, is guilty of a violation of the law and of the commission of a misdemeanor. If you find, therefore, from the evidence, and beyond a reasonable doubt, that the defendant the Southern Railway Company is a corporation doing business as a common carrier of passengers in the state of North Carolina, and that on the 8th day of July, 1907, or on any other date since the 1st day of July, 1907, and before the finding of the bill of indictment in this case, sold, through its servants or agents at Raleigh, or any of them, to W. F. Jones, a ticket from Raleigh to Cary, from which the coupon introduced in evidence was detached, at a greater rate than 2¼ cents per mile for the distance between these stations, and charged, demanded, and received such amount in excess of 2¼ cents per mile in transporting the said Jones as a passenger, then, upon such finding made by you, the court charges you that the defendant the Southern Railway Company would be guilty of the misdemeanor charged in the bill, and your verdict as to the Southern Railway Company, upon such finding would be guilty." The jury returned a verdict of guilty. The defendant, Southern Railway Company, moved for a new trial, and, the motion being overruled, it excepted. The said defendant then moved in arrest of judgment. The motion was also overruled and the defendant excepted. The court, on motion of the solicitor, and upon the verdict of the jury, adjudged that the defendant Southern Railway Company pay a fine of $30,000, it appearing that the defendant railway company had been violating the Act of Assembly since the 1st day of July, 1907, throughout the State. Before imposing the fine the court stated that, if the Southern Railway Company would agree to obey the law until a court of last resort could pass upon the questions involved, it would impose a light sentence upon it, as it had done upon the defendant T. E. Green. The railway company refused to comply with the law, but announced that it would stand upon its rights.

The judgment, as aforesaid, was thereupon entered and the defendant, having duly excepted to all the rulings and to the judgment, appealed to this court.

A. P. Thom, W. B. Rodman, F. H. Busbee, A. C. Avery, J. H. Pou, and A. B. Andrews, Jr., for appellant. Assistant Attorney General Clement, Aycock & Daniels, E. J. Justice, and S. G. Ryan, for the State.

WALKER, J. (after stating the facts as above). This in one respect is a case of supreme importance. It involves the right of the state to enforce its criminal laws without interference by the national government or its courts. If the defendant is right in its contention, the authority or separate sovereignty of the State is a myth, and not, as we had supposed, a reality. We had taken it to be settled, without leaving room for cavil or controversy, that a federal court could not stay the arm of a sovereign state in the execution of its criminal laws. If any exception to this just and necessary rule exists, it must be a very rare one, and cannot, for a moment, be considered as applying to this case. But before analyzing the ingenious, but specious, argument advanced in favor of so astounding a doctrine as that up-

on which the defendant relies, and showing its utter fallacy, let us consider, first, the preliminary questions raised by the defendant. It is but fair to the able, learned, and just judge who presided at the trial that we should do so. The defendant complains that it was not given proper time to prepare its defense; in other words, that it was forced hurriedly into the trial, and, too, with such undue haste as to deprive it of the ability to concert its defense. This is a grave charge to make, and, if substantiated by the record, it was a violation of the defendant's constitutional rights, we admit; but we are able to state that it is met conclusively and disproved by the facts as they appear in the case. We are convinced that every reasonable opportunity was afforded the defendant, not only for entering its pleas and submitting its motions, but for trying the case and defending itself upon the real legal merits. The presiding judge distinctly announced that the court would sit as long as it was necessary to develop all the facts of the case, even though the term of the court should be extended beyond the time allotted by the statute. This the judge had the power to do. Revisal 1905, § 3266. Could the defendant expect to receive a more liberal allowance of time? The other positions taken are equally untenable, and we overrule all of the preliminary motions as dilatory, and declare that the judge's rulings thereon did not affect any substantial right of the defendant. We will not refer to the other exceptions, as the view we take of the case renders it unnecessary to do so. The defendant received absolutely fair treatment from the court in every respect.

We now proceed to consider the case upon its legal merits. Two questions are raised: (1) Did the proceedings in the United States Circuit Court constitute a defense to the indictment or prevent the grand jury from returning the bill and the state court from taking cognizance of the same and trying the case? (2) Is any criminal offense charged in the bill of indictment? These are the pivotal and decisive questions in the case. We would not discuss the first question stated, in view of our ruling upon the second, but for the fact that the arguments of counsel and their briefs are largely devoted to its consideration, and it is a question of the greatest magnitude and gravity. We think, though, that it has been conclusively settled against the defendant's contention by the rulings of the court of last resort having the power and jurisdiction to finally pass upon it. It is so serious a question, and so far-reaching in its consequences, if the defendant be right in respect to it, that it cannot, perhaps, be too often decided against its present contention, if this is to remain a government of the people, by the people, and for the people, as originally contemplated by its framers, and the rights of the states are to be preserved unimpaired. If it is ever held, as it surely will not be, that the federal courts can virtually take charge of our state governments by the process of injunction, the separate sovereignty of the states, as distinct from that of the federal government, will be completely extinguished. It has been said, at least once, by the court of highest authority: "We have already had occasion to remark at this term that 'the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existance,' and that 'without the states in union there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states and the maintenance of their government are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states." Texas v. White, 7 Wall. (U. S.) 725, 19 L. Ed. 227; Lane v. Oregon, 7 Wall. (U. S.) 71, 19 L. Ed. 101. And this was so said since the thirteenth and fourteenth amendments to the Constitution of the United States were ratified. Can this possibly be so, if the defendant's contention as to the effect of the equity proceedings in the federal courts is the correct one? The trend of the argument they now make was clearly seen at once by the Supreme Court of the United States, and they paused to examine it, and refused finally to accept it, as based upon the correct theory of our government. If we adopt it as sound, and carry it to its logical result, it would destroy the proper functions of the states.

We will first refer to the latest exposition of the Constitution in this respect and quote from the most recent case upon the subject, decided in 1906, at the last term of the Supreme Court of the United States (Urquhart v. Brown, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760, opinion by Justice Harlan): "It is the settled doctrine of this court that, although the Circuit Court of the United States and the several justices and judges thereof have authority under existing statutes to discharge upon habeas corpus one held in custody by state authority in violation of the Constitution or of any treaty or law of the United States, the court, justice, or judge has a discretion as to the time and mode in which the power so conferred shall be exerted, and that, in view of the relations existing under our present government between the judicial tribunals of the Union and of the several states, a federal court or a federal judge will not ordinarily interfere by habeas corpus with the regular course of procedure under state authority, but will leave the applicant for the writ of habeas corpus to exhaust the remedies

afforded by the state for determining whether he is illegally restrained of his liberty. After the highest court of the state, competent under the state law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination. The exceptional cases in which a federal court or judge may sometimes appropriately interfere by habeas corpus in advance of final action by the authorities of the states are those of great urgency that require to be promptly disposed of, such, for instance, as cases involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations. The present case is not within any of the exceptions recognized in our former decisions. If the applicant felt that the decision upon habeas corpus in the Supreme Court of the state was in violation of his rights under the Constitution or laws of the United States, he could have brought the case by writ of error directly from that court to this court."

The same court, in Reid v. Jones, 187 U. S. 153, 23 Sup. Ct. 89, 47 L. Ed. 116, said that one convicted for an alleged violation of the criminal statutes of a state, and who insists that he is held in violation of the Constitution of the United States, "must ordinarily first take his case to the highest court of the state in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases, of which the present is not one, will a Circuit Court of the United States, or this court upon appeal from a Circuit Court, intervene by writ of habeas corpus in advance of the final action by the highest court of the state." So in Drury v. Lewis, 200 U. S. 1, 26 Sup. Ct. 229, 50 L. Ed. 343, it was held that, in case of the custody by state authorities of one charged with crime, the settled and proper procedure is for a Circuit Court of the United States not to interfere by habeas corpus, "unless in cases of peculiar urgency, and that, instead of discharging, they will leave the prisoner to be dealt with by the courts of the state; that after a final determination of the case by the state court the federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the federal court upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom."

It is true, and we will give the defendant the full benefit of this concession, that in Urquhart v. Brown, supra, the court was considering a question which arose upon a petition for the writ of habeas corpus; but it is not so much the particular form of the controversy, as the principle involved in it, that controls as a precedent. The point intended to be decided was that full play should be given to the procedure of the state courts in the prosecution of its criminals, provided the latter have the right of appeal to the courts of last resort in the state, to the judgments of which a writ of error will lie from the Supreme Court of the United States to review the judgment of the state court, when any question as to an invasion of the constitutional rights of the defendant may be presented. Instead, therefore, of pleading the proceedings in the federal court, the defendant should have set up its defense upon the merits in the state court and have brought any unfavorable or adverse rulings of the court below here for review, and, if it had been deprived of any constitutional right or guaranty, we would have corrected the error. If we should have decided against the defendant's contention, for example, that its property was about to be confiscated and its constitutional rights denied, it still would have had the remedy by writ of error to review the judgment of this court; that is, if Urquhart v. Brown states the correct principle and will continue to stand as a precedent, and we think without doubt that it will.

But there is a more serious and conclusive answer to the defendant's contention. It is stated with great clearness and force in the briefs of counsel for the state, where the true doctrine is ably and learnedly presented. The question of separate state sovereignty may not directly and necessarily be involved, but it is incidentally. Can a judge of the Circuit Court of the United States stay proceedings by the state in the prosecution of its criminals? This is not too broad a statement of the proposition upon the affirmative of which the learned counsel for the defendant rest their case. Let us see what this court, and the Supreme Court of the United States, whose decisions we must respect and obey, have said upon this subject. It should require no labored argument to demonstrate the fallacy of the defendant's position. The question is merely what has been decided, for the identical matter has frequently been considered and determined by this court and by the Supreme Court of the United States. There can now be no doubt as to how this court has ruled upon it, and that ruling is in perfect harmony, as we think, with the determination of the highest court. If anything, the latter has been more pronounced in denying to the federal courts the jurisdiction now asserted to reside in them. The question was fully considered by this court in Paul v. Washington, 134 N. C., at page 380, 47 S. E. 793, 65 L. R. A. 902, and, without quoting liberally from the opinion, we will extract therefrom the general principle established. It is there substantially said that there are two objections to the plaintiff's right to maintain this action: First, the courts cannot enjoin the enforcement of the criminal law or of municipal ordinances imposing fines or penal-

ties. In regard to the first objection, we must bear in mind that, if the court should issue an injunction against the institution of a criminal prosecution, it would not only interfere with the due administration of the criminal law, which is of the first importance in any well-ordered system of government, but it would have to restrain action by the state in whose sovereign name and capacity all criminal cases are commenced and prosecuted, and the state is not even a party to the action, and her rights cannot be prejudiced without notice and a hearing, even if we could entertain for a moment, with any seriousness, the proposition that a court of equity can interfere by injunction with the administration of the criminal law. The violation of a town ordinance is made by our statute a misdemeanor. Code, § 3820. If it is contended that the ordinance imposes a penalty for each violation of it, and that a court of equity will interfere on behalf of the plaintiff to prevent vexatious litigation and a multiplicity of suits, one answer, and a conclusive one, is that a court of equity will never assume jurisdiction in such a case until the rights of the complaining party, or, in this particular case, the validity of the ordinance, has been first determined in an action at law. In Wallack v. Society, 67 N. Y. 28, the general rule is stated to be that a court of equity will not restrain a prosecution at law when the question is the same at law and in equity. An exception exists where an injunction is necessary to protect a defendant from oppressive and vexatious litigation. But the court acts in such cases by granting an injunction only after the controverted right has been determined in favor of the defendant in a previous action. On this ground the chancellor, in West v. Mayor, 10 Paige (N. Y.) 539, dissolved a temporary injunction restraining the defendant from prosecuting suits against the complainant for violation of a municipal corporation ordinance claimed to be invalid. The unconstitutionality of the act of 1872, he said, would be a perfect defense to a prosecution for the penalties given by it, and the question as to the validity of the act has not been determined. It would doubtless be convenient for the plaintiff to have the judgment of the court upon the constitutionality of the act before subjecting himself to liability for accumulated penalties. But this is not a ground for equitable interference, and to make it a ground of jurisdiction in such cases would, in the general result, encourage rather than restrain litigation. The question as to the validity of a corporation ordinance does not properly belong to this court for decision, where the complainants, as in the case presented, have a perfect defense at law if the ordinances are invalid, or if they do not render the complainants, or those in their employ, liable for the penalties. And it would be a usurpation of jurisdiction by the court if it should draw to itself the settlement of such questions when their decision was not necessary in the discharge of the legitimate duties of the court. The court would not grant an injunction to protect him against the multiplicity of suits until his right to such protection had been established by a successful defense at law in some of the suits.

We find the rule stated in 16 Am. & Eng. Enc. of Law (2d Ed.), at page 370, as follows: "It is a well-settled rule, both in England and America, that a court of equity has no jurisdiction to interfere by injunction to restrain a criminal prosecution, whether the prosecution be for violation of statutes or for an infraction of municipal ordinances. The rule applies whether the prosecution is by indictment or by summary process, and to the prosecutions which are merely threatened or anticipated, as well as those which have already been commenced. So it is not within the power of the parties to waive the question relating to the jurisdiction of the court and to compel it to try the cause. If the prosecution is under an ordinance, no ground for enjoining it is constituted by the fact that the ordinance is void or that the party seeking the injunction has not committed a violation of the ordinance, or that the complainant in the prosecution under the ordinance states no cause of action." We have no case, however, says the court, in Burnet v. Craig, 30 Ala. 138, 68 Am. Dec. 115, "where chancery has restrained a simple trespass or succession of trespasses on either the person or personal goods. The utmost extension of the principle which has come under our observation embraces only trespasses to realty, where the remedial agency is shown to be necessary to prevent multiplicity of suits or to avert irreparable mischief. The judgment and sentences of the town council, of which the appellant complains, were quasi criminal proceedings. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of novel impression. We have not been able to find any principle or adjudged case which justifies an injunction to stay a prosecution, either criminal or quasi criminal, or to restrain a trespass to the person or personal property. We think such a precedent would be an alarming stretch of equity jurisdiction. In considering this case, simply on the equity of the bill, we have necessarily regarded its averments as true. It is not intended by this to intimate an opinion on the validity or invalidity of the ordinance or of the fines imposed on the appellant. They will be considered when properly presented." And later, in Moses v. Mayor, 52 Ala. 198, it was held by the same court that courts of equity will not interfere to stay proceedings in criminal matters, or in any case not strictly of a civil nature. They will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition. The courts of law have complete jurisdiction to punish the commission of crimes, and can interpose to prevent their

commission by imprisoning the offender or binding him to keep the peace. But courts of equity have no jurisdiction over such matters. At least a court of equity cannot entertain a bill on this ground alone. A bill in chancery to restrain a malicious or unfounded prosecution is certainly of the first impression, and there is neither principle nor authority to support it. Municipal authorities, it is said, would be paralyzed in discharging the public duties intrusted to them if every offender against the ordinances they have proclaimed could by injunction arrest them, or could by multiplying his offenses invoke the interference of a court of equity. The counsel for the appellant sought to withdraw the case presented in the bill from the operation of this general principle and the authorities by which it is supported, upon the ground that the interference of a court of equity is necessary in this case for the prevention of vexatious litigation and of a multiplicity of suits. It could well be said in answer, that the litigation and multiplicity of suits apprehended are criminal in their character and without the jurisdiction of the court. In Hottinger v. New Orleans, 42 La. Ann. 629, 8 South. 575, the court refused to exercise its equity jurisdiction to restrain the enforcement of an ordinance penal in its nature upon the ground that "the ordinance was enacted in pursuance of the police power vested in the city, whether rightfully or wrongfully is not to be determined in this suit. It was a police regulation in the interest of public health, with a penalty for its violation. The pecuniary loss in the enforcement of the ordinance cannot, therefore, be considered in determining the question of jurisdiction. The enforcement of the ordinance is vested by the Constitution and law of the state in the recorder's court of the city of New Orleans. If the ordinance is unconstitutional, as alleged, the plaintiff can suffer no injury, as she has her remedy and can urge her defense in the recorder's court. Failing there, she has her remedy by appeal to this court." See, also, Devron v. First Municipality, 4 La. Ann. 11; Beach on Injunction, § 520; Elridge v. Hill, 2 Johns. Ch. (N. Y.) 281; Field v. Western Springs, 181 Ill. 186, 54 N. E. 929; 1 Spelling, Inj. & Extr. Rem. § 694; Burch v. Cavanagh, 12 Abb. Prac. N. S. (N. Y.) 410; Wardens v. Washington, 109 N. C. 21, 13 S. E. 700; Scott v. Smith, 121 N. C. 94, 28 S. E. 64; Vickers v. Durham, 132 N. C. 880, 44 S. E. 685; Busbee v. Lewis, 85 N. C. 332; Busbee v. Macy, 85 N. C. 329; Pearson v. Boyden, 86 N. C. 585.

In Cohen v. Commissioners, 77 N. C. 3, the court held that if the defendants have an unlawful and void ordinance, and have arrested and fined the plaintiff, he has a complete remedy at law, by exception and appeal, and cannot resort to the jurisdiction of a court of equity for relief. "We are aware of no principle or precedent for the interposition of a court of equity in such cases." All the cases we have cited were approved by this court in Paul v. Washington; the opinion in which the principle was considered and the cases relied on were reviewed having been concurred in by four of the members of the court as then constituted, the Chief Justice, Justice Douglas, Justice Connor, and the writer of this opinion, and becoming thereby the opinion of the court upon that question, which really decided the case (as Justice Douglas well said) without regard to the question as to the validity of the ordinances. In the leading opinion the correctness of some of the decisions is questioned, but the learned justice, who spoke for the court, frankly states that, while "the writer of this opinion is in sympathy with the argument of the counsel of the appellant, the majority of the court are of the opinion that the law as laid down in the cases above cited is correct in principle and applies to the facts of this case, and to all others in which the attempt may be made to test the validity of a municipal ordinance by injunction." So that the doctrine may be considered as settled in this state against the right of a court exercising equitable jurisdiction to interfere by injunction with other courts in the due course of administering and enforcing the criminal laws of the state. Whether this rule is of universal application, or will, in extreme circumstances, admit of exception, when justice would otherwise be defeated, we need not decide, as the principle thus established is clearly applicable to the facts of this case. If the court of a state will not thus interfere with another court of the same state and arrest by injunction the prosecution of a defendant for a crime, surely it will not recognize the power of a court in another and practically a foreign jurisdiction to do so. We must adhere to our own rulings, which have become settled precedents upon this subject, and hold that the United States Circuit Court had no power to enjoin the prosecution of the defendant in the court below, and the proceedings of that court introduced in evidence, and on which the defendant relies, can afford it no protection against the indictment or prevent a conviction thereunder.

This places our decision, so far, upon a general principle in the law of injunctions which governs in courts of equity. But the same doctrine, to the extent that it affects this case, and as obtaining in the federal courts, is fully stated by Justice Gray in Re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402: "Under the Constitution and the laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. The office and jurisdiction of the court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon

of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses or for the removal of public officers, is to invade the domain of the courts of common law, or the executive and administrative department of the government. Any jurisdiction over criminal matters that the English Court of Chancery ever had became obsolete long ago, except as incidental to its peculiar jurisdiction for the protection of infants, or under its authority to issue writs of habeas corpus for the discharge of persons unlawfully imprisoned. 2 Hale, P. C. 147; Gee v. Pritchard, 2 Swanst. 402, 413; 1 Spence, Eq. Jur. 689, 690; Atty. Gen. v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371, 387. From long before the Declaration of Independence it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the Court of Chancery, whether those proceedings are by indictment or by summary process. Lord Chief Justice Holt, in declining, upon a motion in the Queen's Bench for an attachment against an attorney for professional misconduct, to make it a part of the rule to show cause, that he should not move for an injunction in chancery in the meantime, said: 'Sure chancery would not grant an injunction in a criminal matter under examination in this court, and if they did this court would break it and protect any that would proceed in contempt of it.' Holderstaffe v. Saunders, 6 Mod. 16. Lord Chancellor Hardwicke, while exercising the power of the Court of Chancery, incidental to the disposition of a case pending before it, of restraining a plaintiff, who had by his bill submitted his rights to its determination, from proceeding as to the same matter before another tribunal, either by indictment or by action, asserted in the strongest terms the want of any power or jurisdiction to entertain a bill for an injunction to stay criminal proceedings, saying: 'This court has not originally and strictly any restraining power over criminal prosecutions.' And again: 'This court has no jurisdiction to grant an injunction to stay proceedings on a mandamus, nor to an indictment, nor to an information, nor to a writ of prohibition, that I know of.' Mayor and Corporation of York v. Pilkinton, 2 Atk. 302 (s. c. 9 Mod. 273); Montague v. Dudman, 2 Ves. Sr. 396. The modern decisions in England by eminent equity judges concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by the party to a suit already pending before it, and to try the same right that is in issue there. Atty. Gen. v. Cleaver, 18 Ves. Jr. 211; Turner v. Turner, 15 Jur. 218; Saull v. Brown, L. R. 10 Ch. 64; Kerr v. Preston, L. R. 6 Ch. D. 463. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Story, Eq. Jur. § 893. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under the statutes of the state or under municipal ordinances"—citing many cases to sustain the principle.

There is, perhaps, a more conclusive reason why we should hold that the suit in equity pending in the United States Circuit Court and the restraining process issued therein by the circuit judge cannot be of any avail to this defendant, so as to prevent a prosecution against it in a state court for the commission of a crime. The Circuit Court of the United States had no jurisdiction to entertain a suit to enjoin a state, brought by a citizen of any other state or country, even though it may appear that the law upon which the prosecution in the state court is founded conflicts with the Constitution of the United States and is therefore void. This rule is evolved from the eleventh amendment to the Constitution, which provides as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state." It is well known that this provision was inserted in the Constitution as a result of the decision in Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. Ed. 440, decided in 1793, and it was construed in Osborn v. Bank, 9 Wheat. (U. S.) 738, 6 L. Ed. 204, in which case the court said "that in all cases where jurisdiction depends upon the party, it is the party named in the record. Consequently the eleventh amendment, which restrains the jurisdiction granted by the Constitution over suits against the states, is of necessity limited to those suits in which a state is a party on the record." But that narrow interpretation of the amendment has long since been rejected by the same court, and by many successive decisions it has firmly established the principle to be that, if the state is substantially or really a party to the record against whom the suit is directed, she comes within the protection of the amendment. In Ex parte Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216, a leading case upon this question, it appeared that Ayers, as Attorney General of the state of Virginia, and the commonwealth attorneys of the several judicial circuits, were authorized by a legislative act to bring suit against delinquent taxpayers, who had tendered coupons which had been taken from the bonds of the state in payment of taxes; the burden of proving the genuineness of the coupons being placed by the act upon the defendants. A suit in equity was brought in the United States Circuit Court to restrain and enjoin the said Ayers from bringing actions under the act or attempting to enforce its provisions, and an injunction was issued from that court according to the prayer of the bill. Ay-

ers refused to obey the writ, and was accordingly attached for contempt, whereupon he applied for and obtained a writ of habeas corpus from the Supreme Court of the United States and at the hearing was discharged from custody. With reference to these facts the court, by Justice Matthews, said: "The question really is whether the Circuit Court had jurisdiction to entertain the suit in which that order was made, because the sole purpose and prayer of the bill was by final decree perpetually to enjoin the defendants from taking any steps in execution of the act of May 12, 1887. The principal contention on the part of the petitioners is that the suit nominally against them is in fact and in law a suit against the state of Virginia, whose officers they are, jurisdiction to entertain which is denied by the eleventh amendment to the Constitution, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.' It must be regarded as the settled doctrine of this court, established by its recent decisions, 'that the question whether a suit is within the prohibition of the eleventh amendment is not always determined by reference to the nominal parties on the record.' Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185. This, it is true, is not in harmony with what was said by Chief Justice Marshall in Osborn v. Bank of U. S., 22 U. S. (9 Wheat.) 738, 6 L. Ed. 204. Accordingly, in Cunningham v. Macon & B. R. R., 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992, it was decided that in those cases where it is clearly seen upon the record that a state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. * * * The relief so sought is against the defendants, not in their individual, but in their representative, capacity as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virginia in its name and for its own use. If the state had been made a defendant to this bill by name, charged according to the allegations it now contains, supposing that such a suit could be maintained, it would have been subjected to the jurisdiction of the court by a process served upon its Governor and Attorney General, according to the precedents in such cases. If a decree could have been rendered enjoining the state from bringing suit against its taxpayers, it would have operated upon the state only through the officers who by law are required to represent it in bringing such suits, namely, the present defendant, its Attorney General, and the commonwealth's attorneys for the several counties. For a breach of such an injunction these officers would be amenable to the court as proceeding in contempt of its authority, and would be liable to punishment therefor by attachment and imprisonment. The nature of the case, as supposed, is identical with that of the case as actually presented in the bill, with the single exception that the state is not named as a defendant. How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, attorneys, and agents? And if all such officers, attorneys, and agents are personally subject to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant? It is, however, insisted upon in argument that it is within the jurisdiction of the Circuit Court of the United States to restrain by injunction officers of the state from executing the provisions of state statutes void by reason of repugnancy to the Constitution of the United States, that there are many precedents in which that jurisdiction has been exercised under the jurisdiction of this court, and that the present case is covered by their authority." The court, after reviewing the authorities at length, denied the contention of the complainants, and held, with the petitioner, that the suit was one against the state, and the proceeding against him for the alleged contempt in disobeying the order of injunction therein issued was consequently null and void. Referring again to the suit in equity for an injunction as being one essentially against the state of Virginia in its sovereign capacity, though nominally against its prosecuting officers, the court said: "It is therefore within the prohibition of the eleventh amendment to the Constitution. By the terms of that provision it is a case to which the judicial power of the United States does not extend. The Circuit Court was without jurisdiction to entertain it. All the proceedings in the exercise of the jurisdiction which it assumed are null and void. The orders forbidding the petitioners to bring the suits, for bringing which they were adjudged in contempt of its authority, it had no power to make. The orders adjudging them in contempt were equally void, and their imprisonment is without authority of law."

The next case in order, which presented the precise question we have here, is Reagan v. Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. It was attempted in that suit, as here, to enjoin the Corporation Commission and other officers of the state of Texas from enforcing a statute authorizing them to prescribe the maximum rate of charges by railroads as carriers. The court laid down certain specific propositions as having been settled by its former adjudications. The great question involved is stated to be the right of the state to regulate or limit traffic charges, and it was held that the Legislature has the power to fix rates and the ex-

tent of judicial interference is protection against unreasonable rates. The question of the validity of a rate charge for transportation in respect to passengers or freight, involving as it does the element of reasonableness, both as regards the company and as affecting the public, is eminently one for judicial investigation, requiring the process of law for its determination. Railway Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970. The power thus to regulate the affairs of corporations, and, in the case of carriers, to limit their charges for transportation, is not without limit. It is not a power to destroy, and regulation is not the equivalent of confiscation. Under the pretense of prescribing a maximum charge for fares and freights, the state cannot require the carrier to transport persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law. Stone v. Loan & Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. Ed. 841. It was also decided by the court that the undoubted general power of a state to regulate the fares and tolls which may be charged and received by railroad or other carriers can be exercised through the medium of a commission or administrative board created by the state for that purpose and in order to execute the will of the state as expressed by its legislation. Stone v. Loan & Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636. In that case it was held to be the settled doctrine of the court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. General statutes regulating the use of railroads in a state, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the state of its property without due process of law, within the meaning of the fourteenth amendment to the Constitution of the United States, nor take away from the corporation the equal protection of the laws. While the principles thus stated were recognized and affirmed in Reagan v. Loan & Trust Co., supra, the court distinctly adopts as a rule equally well established what is said in Ex parte Ayers, supra. Justice Brewer, delivering the opinion of the court, refers to that decision and classifies the cases in which interference by injunction is and is not permitted. He says: "We are met at the threshold with the objection that this is a suit against the state of Texas, brought by a citizen of another state, and therefore, under the eleventh amendment to the Constitution, beyond the jurisdiction of the federal court. The question as to when an action against officers of the state is to be treated as an action against the state has been of late several times carefully considered by this court, especially in the case of Ex parte Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216. To secure the manifest purpose of the constitutional exemption guaranteed by the eleventh amendment, requires that it should be interpreted not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives where the state, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectually operates. It is well settled that no action can be maintained in any federal court by the citizens of one of the states against a state without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides: 'No state shall pass any law impairing the obligation of contracts.' This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not so construed as to place the state within the reach of the process of the court. Accordingly it is equally well settled that a suit against officers of a state to compel them to do the acts which constitute a performance by it of its contracts is, in effect, a suit against the state itself. In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that different views have been presented. The first class is when the suit is brought against the officer of the state, as representing the state's action and liability, making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state."

In the Reagan Case the suit had proceeded to final hearing and decree, and a perpetual injunction was granted upon the findings of fact, which showed that the rates were confiscatory, and, besides, the Legislature did not itself prescribe the maximum of charge for transportation, but left that matter to be determined by the commission. The provisions of the act were not enforceable, except by the commission. In this particular that case and this one are clearly distinguishable. Before proceeding to discuss further the rul-

ings in the Supreme Court of the United States upon this important and far-reaching question which now engages perhaps more of the attention and anxious consideration of the public and of the courts of this country than any other, as it should, for it vitally concerns the due and lawful exercise of the powers conferred by the Constitution upon the federal government and those reserved respectively to the states or to the people, and should be settled definitely and conclusively in order to avoid unfortunate judicial conflicts, we will pause to decide one question involved in this case, which also differentiates it from Reagan v. Loan & Trust Co. There is nothing in our act which makes its operation depend at all upon anything to be done by the Corporation Commission, or the Attorney General, or his assistant. The said officers last named are required to prosecute in the name of the state any crime committed in violation of the act; but Ex parte Ayers is direct authority that they cannot be reached by an injunction while in the performance of this official duty. Besides, can it be said, with any show of reason, or even with the sanction of plausible argument, that a suit for an injunction directed against the Attorney General in the prosecution of criminal cases, in which the state under our law, and the sovereign under all law, is the plaintiff of record, and, too, the real plaintiff, is not in its very nature, and in its natural and necessary effect, a suit against the state? Can it be said, in answer to this suggestion, that the state can proceed against criminals, and yet at the same time that she can be deprived of all power to do so by her duly constituted law officers, charged with the duty of enforcing the criminal law? The injunction had just as well be issued against the grand juries or the judges who preside in her courts. The act provides (Pub. Acts 1907, p. 252, c. 216, § 7) that it shall be in force from and after July 1, 1907, and the provision that the Corporation Commission is required to publish the rates "fixed by this act" on or before June 1, 1907, for the information of the public and the railroads concerned, is directory, and was not intended to stay the operation of the act beyond July 1, 1907, should the Commission fail in the performance of that duty, nor in law, by any reasonable construction of the act, does it have any such effect. The maximum rate prescribed by the act was unconditionally effective from and after July 1, 1907, and the act was therefore self-executing. For this reason alone, if for no other, the suit in equity pending in the United States Circuit Court cannot be permitted to affect the proceedings in the court below in this case.

The case of Railway Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970, so much relied on by the defendant's counsel, is also far from being an authority against the ruling we now make. The act construed and held valid in that case provided that the tariff of rates as made and published by the Railroad Commission should be final and conclusive as to what are equal and reasonable charges, and that there should be no judicial inquiry into the matter for the purpose of determining the reasonableness of the rates so prescribed—quite a different case from this one. We do not say that a judicial inquiry cannot be made in a proper way, but that the state, in the exercise of its sovereign power, cannot be enjoined under the guise of restraining her officers in the performance of a duty which is not required to make the rate act effective. Nor can the state be controlled by the federal courts in the execution of her criminal laws. But it may be remarked, in passing, that the opinion of the court in Railway v. Minnesota, as well as the concurring opinion of Justice Miller, especially cited by the defendant's counsel as controlling this case, was met by an exceedingly strong dissent from Justices Bradley, Gray, and Lamar, who asserted that what is a reasonable charge is not a judicial question, but is "pre-eminently" a legislative one, involving considerations of public policy as well as of remuneration, and that the Legislature may itself fix the maximum and thus exclude judicial inquiry, or it may merely provide that the rate shall be reasonable, or that reasonable rates shall be determined by a commission or by the common law, when the question of reasonableness is open to judicial investigation. They further asserted that the court in Railway v. Minnesota, had virtually overruled Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and the cases afterwards decided and based upon the principle of that case. When we consider the real nature of a corporation, the source of its creation, and the tenure, if we may so speak, by which it exercises its privileges and franchises, and, indeed, holds its property, the reserved power of the state with respect to them, and many other facts and reasons that can easily be adduced, it may well be a question whether the advantage and strength of the argument in that case was not all with the dissenting justices. But, accepting the principle announced by the majority of the court as the law with us—and we so accept it—it does not bear upon this case and should not control our decision. We also think the many other cases on which the defendant's counsel rely are equally inapplicable to the facts of this case. There is no evidence in this case, and, of course, no adjudication binding upon us, that the rate prescribed by the act of 1907 is confiscatory; nor do we understand the defendant to rely upon the record of the proceedings in the federal court as establishing that fact (for it would not be evidence for that purpose), but merely as showing that complete and exclusive jurisdiction of the entire matter was in that court by virtue of the suit therein pending, and that its order of injunction extends so far, in its broad sweep, as to stop the state in the ordinary enforcement of its criminal laws.

This would be a very alarming doctrine, if true; but, fortunately, it is not.

Recurring to that part of our opinion where we digressed, in order to consider the nature of the act of 1907 and to determine when it became effective and to distinguish from the case at bar certain cases decided by the Supreme Court of the United States, which it is contended by the defendant are decisively in its favor, we will refer to one other case recently decided by that court. In Fitts v. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535, it was attempted to enjoin the Attorney General of Alabama and the solicitor of one of her judicial circuits from prosecuting suits for penalties provided for violations of an act fixing the maximum tolls to be charged by a bridge company for the use of its bridge across the Tennessee river. The Supreme Court denied the jurisdiction of the Circuit Court of the United States, and the case, as we understand, establishes three propositions, as follows: "(1) A suit to restrain officers of a state from taking any steps by means of judicial proceedings, in execution of a state statute to which they do not hold any special relation, is really a suit against the state, within the prohibition of the eleventh amendment to the federal Constitution. (2) The Circuit Court of the United States sitting in equity is without jurisdiction to enjoin the institution or prosecution of criminal proceedings commenced in a state Court. (3) The power of the federal courts to interfere by habeas corpus with the trial of indictments found in state courts, on the ground that the state statutes under which the indictments are found are repugnant to the federal Constitution, laws, or treaties, will not be exercised in the first instance, unless there are exceptional or extraordinary circumstances to require it, but the party will be left to make his defense in the state court." In the course of the opinion Justice Harlan says: "Let them appear to the indictment and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. Ed. 542. And if the question is determined adversely to the defendants in the highest court of the state in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted constitutes no reason why a federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court." The court then proceeds to distinguish the cases cited in the defendant's brief filed in this court, upon the ground that the state officer in each of them was committing, or about to commit, some specific act or trespass to the injury of the complainant's rights. Other equally satisfactory reasons could be assigned why the suit in equity now pending in the Circuit Court of the United States should not be allowed to defeat the prosecution of the indictment in the court below; but we do not deem it necessary to consider or even state them, as what we have already said upon this point is sufficient to convince us that the federal court was and is without jurisdiction to stay the institution of criminal proceedings in a state court, and we would affirm the judgment in this case, if it did not appear that no criminal offense is charged in the bill of indictment.

We will now consider that question. The state contends that the first section of the act of 1907 contains a distinct prohibition against common carriers of passengers charging more than 2¼ cents per mile, and that, while a penalty is imposed for a violation of that section, it is done by a subsequent section of the act, and where this occurs, although the offense may be a new one, or one not existing at the common law, the state can proceed by indictment to punish a violation of the first section, and the party specially aggrieved thereby may also at the same time recover the penalty; it being conceded, as we understand, that if the penalty had been imposed in the first section, where the prohibition is found, this would not be so, and an indictment would not lie. If there is any respectable authority for such a position, and we do not think there is, it is not only inherently unsound, but exceedingly refined and technical; and Mr. Bishop says that it is not only refined, but is contrary to all reason. It is a distinction without a difference, in law or in fact. The act prohibits a charge above 2¼ cents and then provides in a subsequent section (4) that any railroad company violating its provisions shall be liable to a penalty of $500 for each violation, recoverable by the person aggrieved in a civil action, and any agent of the company violating the act shall be guilty of a misdemeanor. How could the Legislature more clearly or convincingly have expressed its intention to discriminate, as to the consequences, between a violation of the railroad company and a similar violation by its agent? And what practical difference can it make whether the penal provision is in the first or the fourth section of the act? Does not the latter section distinctly refer to the former, the same as if it had been incorporated with it? The rule of construction relied on by the state seems to have arisen from a total misconception of the English authorities and a rank dictum of Justice Ashurst in Rex v. Harris, 4 T. R. 205, with no authority cited to support it. Lord Kenyon, who wrote the leading opinion in the same case, expressly states that the offense created by the act of Parliament (St. 26 Geo. II, c. 6, § 1), namely, disobedience of an order of the king in council, was in itself an offense at common law; and Lord Ashurst afterwards in his opinion explains, if he does not destroy, his dictum by confining it to the special facts

of that case. The law is thus stated by Bishop in his work on Statutory Crimes (Ed. 1873, § 250): "The doctrine is that, where an offense is created by statute, and the same statute prescribes the penalty, or the mode of procedure, or anything else of the sort, only that which the statute prescribes can be followed. But, where the offense is at common law, statutory provisions not directly repugnant to the common law are cumulative, and either law may be followed. And where a statute forbids a thing before lawful, but provides no penalty, the indictment for the offense is at common law. So, where it prescribes no mode of prosecution, the common-law indictment lies." He cites numerous cases in the note to that section, among them several English cases, which sustain his statement of the rule, and under it the case of Rex v. Harris, supra, was correctly decided, because the penalty imposed by the statute construed in that case was for an offense which previously existed at the common law.

The authorities cited by the learned counsel for the state can be easily reconciled with the principle as stated by Mr. Bishop, if they are read with reference to the particular facts being considered in them. Reg. v. Buchanan, 8 Ad. & El. (55 E. C. L.) 883, was a case of like kind with Rex v. Harris, as the offense of an attorney practicing without having been duly admitted or called to the bar, or enrolled, was made a contempt of court, which, we know, and it is so held in the opinion by Lord Denman, was also a misdemeanor at common law. It is intimated by the Chief Justice that if a penalty had been imposed, instead of the remedy by attachment for contempt given, the result in that case would have been different. Section 237, cited from 1 Bishop, Cr. Law, is, in our opinion, inferentially against the state's contention. We reproduce it here: "It is obvious that to prohibit a thing by a statute is to bring it within the jurisdiction of the tribunals. Whence we see, carrying in our minds what is stated in the last section, how and why, as explained in another volume, when a statute forbids a thing affecting the public, *but is silent as to any penalty*, the doing of it is indictable at the common law." (Italics ours.) In Rex v. Wright, 1 Burr. 543, it was held that "indictment lies not upon an act of Parliament, which creates a new offense and prescribes a particular remedy." Lord Mansfield said in that case: "I always took it that, where new-created offenses are only prohibited by the general prohibitory clause of an act of Parliament, an indictment will lie: but where there is a prohibitory particular clause, specifying only particular remedies, there such particular remedy must be pursued. For otherwise the defendant would be liable to a double prosecution; one upon the general prohibition, and the other upon the particular specific remedy." And, when afterwards informed that the counsel for the crown "gave up the matter," he replied: "I do not wonder at all at it. I thought he would do so. I have looked into it, and there is nothing in it. That Case of Crofton (where the contrary is supposed to have been decided) has been denied many times." In Rex v. Robinson, 2 Burr. 799–803, the great Chief Justice (Lord Mansfield) said: "But where the offense was antecedently punishable by a common-law proceeding, and a statute prescribes a particular remedy by a summary proceeding, there either method may be pursued, and the prosecutor is at liberty to proceed either at common law or in the method prescribed by the statute, because there the section is cumulative, and does not exclude the common law punishment. 1 Salk. 45. Stephens v. Watson was a resolution upon these principles. In that case keeping an alehouse without license was held to be not indictable, because it was no offense at common law, and the statute which makes it an offense has made it punishable in another manner." And again in the same case, when discussing the same point, he sums up, at page 805, as follows: "The true rule of distinction seems to be that, where the offense intended to be guarded against by a statute, was punishable before the making of such a statute prescribing a particular method of punishing it, there such particular remedy is cumulative and does not take away the former remedy; but, where the statute only enacts 'that the doing any act not punishable before shall for the future be punishable in such and such a particular manner,' there it is necessary that such particular method, by such act prescribed, must be specifically pursued, and not the common-law method of an indictment." In Castle's Case, 2 Cro. Jac. 644, it was resolved that where a statute imposes a penalty for doing a thing which was no offense before, and provides how it shall be recovered, it shall be punished by that means, and not by indictment. The offense being new, the particular mode of punishment must be pursued. The generally accepted rule upon this subject is thus stated in 1 McClain's Cr. Law, § 8: "If the act prohibited has been previously an indictable offense, it will be presumed that the civil penalty therefor is cumulative; but when the act creates a new offense, and makes that unlawful which was lawful before, and prescribes a particular penalty and mode of procedure, that penalty alone can be enforced." See, also, 16 Enc. of Pl. & Pr. 239; Reg. v. Wigg, 2 Salk. 460; Com. v. Bridge Co., 68 Mass. 67; State v. Maze, 25 Tenn. 17; People v. Hislop, 77 N. Y. 331; Com. v. Evan, 13 Serg. & R. (Pa.) 426; McElhiney v. Com., 22 Pa. 365; Hellings v. Com., 5 Rawle (Pa.) 63; Journey v. State, 1 Mo. 428; Com. v. Howes, 32 Mass. 231; State v. Sinnott, 15 Neb. 472, 19 N. W. 613; U. S. v. Laeseki (D. C.) 29 Fed. 699; Pentlarge v. Kirby (D. C.) 19 Fed. 501; Carle v. People, 12 Ill. 285; Reed v. Railroad, 33 Cal. 212; People v. Craycroft, 2 Cal. 243, 56 Am. Dec. 331; Battleboro v. Wait, 44 Vt. 459;

Moles v. Sprague, 9 R. I. 541; Confrey v. Stark, 73 Ill. 187.

But the case of State v. Snuggs, 85 N. C. 542, is exactly in point, for the act of issuing a marriage license to persons under 18 years of age was forbidden in one section, and the penalty was imposed in another section. Ruffin, J., for the court, said: "The statute not only creates the offense, but fixes the penalty that attaches to it, and prescribes the method of enforcing it, and the rule of law is that, wherever a statute does this, no other remedy exists than the one expressly given, and no other method of enforcement can be pursued than the one prescribed. The mention of a particular mode of proceeding excludes that by indictment, and no other penalty than the one denounced can be inflicted. 1 Russell on Crimes, 49; State v. Loftin, 2 Dev. & Bat. (N. C.) 31." It was held, therefore, that no criminal offense was charged in the indictment, and it was quashed. In this connection, Ruffin, J., at page 544, further said: "We are convinced that his honor's ruling in quashing the indictment is correct, in view of the fact that the statute *creates* the offense, affixes the penalty and prescribes the mode of proceeding; the mention of the *particular* method operating to the exclusion of every other." (Italics ours.) In Loftin's Case, 19 N. C. 31, which is relied on by the court in Snuggs' Case, and which states the same rule, Judge Gaston, who wrote the opinion, cites with approval Castle's Case, Cro. Jac. 64, 1 Salk. 45, and Rex v. Robinson, 2 Burr. 803, which we have already mentioned as English cases sustaining the rule. The case of State v. Snuggs was expressly approved in State v. Bloodworth, 94 N. C. 918, and by the strongest implication in State v. Parker, 91 N. C. 650, and State v. Addington, 121 N. C. 538, 27 S. E. 988. There is no sound reason for, and, not intending to use too harsh a term, no practical sense in, the distinction between a statute which prohibits an act to be done, and then in the same section denounces the penalty, and one in which the penalty is imposed in a separate section; and especially can no such rule be applicable to the statute we are now construing, as the legislative intent is unmistakably expressed that for disobedience to the provision of section 1 the carrier shall pay a penalty only to the party aggrieved, and the agent shall be liable to indictment for a misdemeanor, and counsel for the state, on the argument, answered a question from the court in such a way as clearly recognized this to be the intention. Being asked why the Legislature had discriminated against the agent, the reply was (and undoubtedly the correct one), it was supposed that the penalty could not be recovered from the agent, while it could be from the carrier.

But it is suggested that the defendant, while not liable as a principal for doing the act itself, is liable criminally as accessory before the fact, having counseled, aided, and abetted the agent in the sale of the ticket, and, as all accessories in misdemeanors are regarded as principals, the defendant thereby became a principal under the law. This is a very strange, and to our minds a very illogical, argument, and a palpable non sequitur. The judge, who presided at the trial, evidently did not take this view of the case, for he charged the jury upon no such theory. He plainly thought that the sale of the ticket by the agent made the defendant, his employé, liable per se; in other words, that the act of the agent was the act of the principal under the first section of the act and the doctrine of State v. Kittelle, 110 N. C. 560, 15 S. E. 103, 15 L. R. A. 694, 28 Am. St. Rep. 698. But he failed inadvertently to take into account the fact that in the case cited (if it can be considered as stating a correct rule) there was no special provision in the statute under which Kittelle was indicted for penalizing the employer, as there is in the act of 1907, which brings this case directly within the decision in State v. Snuggs, and takes it out of the principle decided in State v. Kittelle. In the latter case Kittelle was held liable for the act of his employé because he held the license to sell liquor, and, further, upon the principle, applying to the law of contracts and civil torts, that the principal must answer for the acts of his agent (respondeat superior), and that he who does an act through the medium of another party is in law considered as doing it himself (qui facit per alium, facit per se). The difference between that case and this one is manifest. Besides, the defendant here is a corporation, and can act only by its agents. It has no personality or individuality. The principal can do no more by his agent than if he were personally present and acting. The very thing the agent does, whether he be the agent of a corporation or of an individual, marks the extent of the principal's liability. It cannot go beyond the limits of the agent's act. So in this case, when the agent sold the ticket, even under the order of his principal, the defendant, he did the very thing and the only thing prohibited by Acts 1907, p. 250, c. 216, for which he and his principal are made liable by the act—he to an indictment for a misdemeanor, and the principal to a penalty. How could the defendant, a mere legal entity, commit the act prohibited by the statute, except by its agent? The statute itself, by its very terms, recognizes this fact—that the corporation can act only by its agent, and therefore that the act of its agent is what renders it liable for the penalty. If a corporation can act only through its agent, and thereby becomes, in law, completely identified with its agent, how can it be an accessory to his act? For in such a case it must be accessory to its own act, which is a legal absurdity.

It appears from the act of 1907 that a penalty is denounced against the carrier, and the agent is made criminally liable for the same offense, namely, disobedience of the prohibi-

tion in section 1 against charging more than 2¼ cents per mile. The Legislature, by an elementary rule of statutory construction, is presumed to have had the law as settled by State v. Snuggs in mind when it passed the act of 1907, and that act will be construed according to the rule as therein stated. The Legislature is presumed to know the existing law and to legislate with reference to it. The Case of Kittelle and cases of its class do not apply, as no special punishment was provided for the principal in the law upon which they were decided, while in the act of 1907 there is a special remedy against the principal. The doctrine of accessories does not apply, as we have shown, and the corporation would, even under that doctrine, commit the identical act for which the penalty is provided, and, besides, no one can be an accessory to his own act, as already explained. The legislative intent is so clear and unmistakable that it would seem to be impossible to misunderstand what is so plainly expressed.

Much is said in the briefs about the equity of the suit in the federal court and the complainant's right to an injunction. We would not agree with the learned judge who issued the interlocutory injunction, if that matter were strictly before us and we were required to pass upon it; for we do not think there was a sufficient disclosure of the facts, which are necessarily within the knowledge of the complainant in that suit (the defendant in this indictment), to entitle it to the favorable consideration of a chancellor. It is a very serious matter to suspend the operation of a public statute and to postpone the execution of the people's will at the instance of a private suitor, even upon the allegation that his property is about to be confiscated, or some other constitutional right is about to be impaired; and it should not be done except upon a full disclosure of all the facts in the complainant's possession, and upon the clearest showing that the threatened injury will at least probably result. "It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at the final hearing, the writ should be denied." Hall Signal Co. v. Railway Signal Co., 153 Fed. 907, 82 C. C. A. 653; City Signal Co. v. Railroad Co. (C. C.) 75 Fed. 1004. It has been held by at least one federal court, when considering the identical question presented in this case, that it would be impossible to decide whether the reduction of a rate will be confiscatory in the absence of an actual test of the same. The court held that whether it would be so or not was speculative and mere guesswork, and that the testimony of an ordinary business man, expressing his opinion, or even of railway experts, also giving opinions and illustrating them by the use of many figures based upon past experience, was not satisfactory, and did not relieve the doubt and uncertainty sufficiently to warrant the issuing of a preliminary injunction. Railway Co. v. Hadley (C. C.) 155 Fed. at page 225. In this case the reports of the defendant to the corporation commission do not tend to diminish the uncertainty as to what effect the lower rate will have upon the defendant's income, but rather to increase it. It would be natural to suppose that a lower rate would cause increased travel, and, while additional facilities must be provided for it, the relative increase of the cost of the latter and of the remuneration from the natural increase in passenger traffic cannot be determined with any degree of certainty except by actual trial. We have carefully examined the opinion of the federal court in this matter, and have not been convinced thereby that we have erroneously decided any of the questions growing out of the equity suit.

We refer especially to Ex parte Wood (C. C.) 155 Fed. 190, in which the petitioner, a ticket agent of the defendant, who applied for the writ of habeas corpus, was granted the writ and then discharged for a violation of the act of 1907. The decision is based upon the ground that the sale of tickets was "an act done in pursuance of an order, process or decree of a court of the United States or judge thereof," under Rev. St. U. S. § 753 [U. S. Comp. St. 1901, p. 592]. This is giving a very broad and liberal construction to that section. Can it mean that the criminal laws of a state shall be suspended by the order of a single federal judge, even if they conflict with it? We cannot give our assent to such a construction, and we are quite sure that our Chief Justice did not intend to sanction it in the quotation made by the learned circuit judge in Ex parte Wood from State v. Boone, 132 N. C. 1108, 44 S. E. 595. He was speaking there of a duty enjoined by a valid federal law not being punishable by the state as a crime, and not merely of one imposed by the order of a federal judge. But it is unnecessary to continue this comment any further, as the defendants in the equity suit must avail themselves of any erroneous ruling therein by exception and an appeal from the decree entered in that suit at the final hearing. We do not think, upon the question of the jurisdiction of the federal court, that Manufacturing Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778, and Dobbins v. Los Angeles, 195 U. S. 241, 25 Sup. Ct. 18, 49 L. Ed. 169, which are cited in Ex parte Wood, bear any analogy to the equity suit wherein the order of injunction was issued, under which Wood is alleged to have been acting when he sold the tickets. In the former case (189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778) Justice Brown clearly distinguishes the two classes of cases from each other. The state in this proceeding is enforcing her criminal laws.

It must not be understood, by what we have said, that we are criticising the decision of the federal court, but merely examining the grounds and reasons upon which it rests,

with a view of determining whether it should have any influence upon our conclusion in this case. We always discuss respectfully the decisions of other courts, however much we may disagree with them, and it is our pleasure, as well as our duty, to do so, for any other course would be most unseemly. The question here is not whether one who advises or commands a criminal act to be committed is himself liable, nor whether that admitted principle applies to corporations, for it clearly does; nor is it whether a railroad company is liable civilly for any damages caused by the unlawful act of its agent, which he has been required by the company to do, or which it has afterwards ratified. All these principles are elementary, but they have no application to the facts in this case, no more than the right of a creditor to enforce the payment of a debt legally due to him by his debtor could have. The question, and the only one, is whether the Legislature has created a new offense and prescribed a specific punishment or penalty for its commission, and, if so, whether this does not exclude the common-law remedy by indictment. We cannot pervert the meaning of plain words and change the intent of the Legislature because able lawyers may have been members of that body. If that be so, more is the reason why we should construe the statute according to its clearly expressed meaning. What the executive shall do, if any emergency has arisen requiring him to act, is not a question in this case; and we have, and should have, no suggestion to make as to his duty in the premises. We are assured that, in the independent exercise of his high official functions, he will act wisely and well and for the best interests of the people.

Since this opinion was prepared, we have found that the Supreme Court of the United States in Yates v. Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002, has decided the very question presented in this case, precisely as we have in regard to the right to indict. It says: "The civil liability of national bank directors, then, in respect to the making and publishing of the official reports of the condition of the bank—a duty solely enjoined by the statute—being governed by the national bank act, it is self-evident that the rule expressed by the statute is exclusive, because of the elementary principle that, where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed in the statute is the exclusive test of liability"—citing Bank v. Dearing, 91 U. S. 35, 23 L. Ed. 196. So, in a note to Leathers v. Tobacco Co. (a case decided by this court), which is reported and annotated in 9 L. R. A., at page 349, it is said at page 392: "If a statute imposes a new duty, and creates a new right, and at the same time provides a specific remedy to punish the neglect of the one and to secure the other, that remedy is exclusive, and no other action lies for an infraction of the statute. But if a statute recognizing an old right imposes another duty in respect of it, and provides a method of enforcing it, the remedy provided in the statute is cumulative, and existing rights of action are unaffected unless expressly taken away." These authorities treat the principle as elementary and undeniable.

Upon a review of the whole case our opinion is that the federal court had no jurisdiction to enjoin the finding and prosecution of this indictment, and that the suit in that court is virtually one against the state within the meaning and intent of the eleventh amendment to the Constitution of the United States. But it is clear that, as no criminal offense is alleged in the indictment, there is nothing for us to do but to arrest the judgment.

Judgment arrested.

CLARK, C. J. (dissenting from the conclusion and from that part of the opinion upon which it is based). Laws 1907, p. 250, c. 216, provides:

"Section 1. No railroad company doing business as a common carrier of passengers in the state of North Carolina, except as hereinafter provided, shall charge, demand or receive for transporting any passenger and his or her baggage, not exceeding in weight 200 pounds, from any station on its railroad in North Carolina to any other station on its said road in North Carolina, a rate in excess of 2¼ cents per mile, and for transporting children under 12 years of age, one half of the rate above described."

"Sec. 4. * * * And any agent, servant or employee of any railroad company violating this act shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned or both in the discretion of the court."

It is elementary and hitherto uncontroverted law that any one who commands and directs another to commit a misdemeanor is himself guilty of a misdemeanor. He need not be actually present at the time, but, if he knowingly, willfully, and unlawfully commands and directs another to violate the law, he himself is equally guilty with that other. A printed order from the passenger department of the defendant company was put in evidence without objection, wherein the agents were commanded, instructed, and directed to sell tickets at the old rate, disregarding, and in open violation of, the law of this state, above set forth. This order the defendant Green, agent of the defendant railroad, obeyed, instead of the statute. This made him guilty of a violation of law. He was found guilty, and has not appealed. It also made the defendant railroad guilty, because it commanded, ordered, and directed the said agent to violate the law. The brief of the defendant railroad filed in this case admits that it issued to the defendant Green and other agents the order to sell tickets at a rate in excess of that allowed by above statute. It is now universally conceded that

a corporation can commit a crime just as an individual can. There have been too many indictments against corporations sustained in this court, as for issuing free passes, running trains on Sundays and a hundred other acts, necessarily done through its agents, for this to be a debatable question. It has always been law, founded upon reason, that he who aids in the commission of, or procures another to commit, crime, is also guilty, and this is as true when a corporation procures the commission of a crime as when it is an individual that procures it to be done. If the act is a misdemeanor, both are guilty of the same misdemeanor and can be indicted together.

If one man commands another to strike a third person, and his command is executed, and physical injury results, the person who gave the command may be indicted alone, or jointly, for the battery, and this though the first party may be liable also for actual and punitive damages. If any other person or corporation than the defendant railroad procured or induced the defendant Green to violate this law, or any other law, it will not be denied that such person or corporation would be indictable with Green. Upon what principle is it that this railroad is exempt from punishment for the identical act which would be criminal if committed by any other corporation or individual in the state? Our laws are not thus wont to discriminate. The defendant railroad is the more guilty, and not guiltless, because it had more and greater powers of persuasion to cause its agents to violate the laws of their state. It could persuade to crime because it could coerce. It had its hand upon the livelihood of its agents. It boldly defied the act of the Legislature and commanded its agents to disregard and violate it openly, daily, and hourly. Can it be heard to say that it is not guilty of the violation of law which it has commanded and forced its agents to commit? Is there one law for the defendant railroad, which exempts it from liability, when it compels so many men to commit crime, and another which subjects those very men to liability for the act, and would subject any one else who would advise or procure them to break the law?

It is inconceivable that the Legislature of this state should make such an exemption in favor of the defendant company from the settled law of the ages that he who procures or causes another to commit a crime is himself guilty. If the Legislature intended to so order, it would surely have made its intention clear and beyond dispute. It has not written a line into this law to indicate such intention. It is inconceivable that the General Assembly of North Carolina should wish to punish the agents and conductors, its own citizens, criminally for an act from which they would receive no profit and should at the same time withdraw from any liability to the criminal law the great and powerful corporation which compels them to commit the crime, and which receives the sole profits therefrom—profits which, in fact, it is contending, will be very great. It has not only always been human law that he who causes another to commit crime is equally as guilty as he who does the act, but it is the divine decree in the first recorded judgment. The serpent received no part of the fruit. It did not compel Eve to eat. But because it suggested and encouraged the violation of the law it received the heavier sentence. Here the railroad both compelled the act to be done and received all the profits of the crime. Adam did not procure the violation of the law, but only received part of the fruit. Yet was he also punished.

It is true that the rate is established in section 1, and its violation is made a criminal offense in section 4. But the court well says, in the opinion in this case: "What practical difference can it make whether the penal provision is in the first or fourth section of the act? Does not the latter section distinctly refer to the former, the same as if it had been incorporated with it?" And, of course, exactly the same is true of the criminal provision of the act. When it made any one indictable for selling a ticket at a rate higher than that named in the law, the statute thereby made indictable any one who should procure or compel such person to sell tickets at the forbidden rates. "Agents, conductors, and employés" are named only because they are those who usually sell tickets, but the use of those words is not an implied exemption from liability of those who procure or force the persons named to break the law, and the evidence and admission here is that the defendant company issued its orders to the defendant Green and its other agents to do that very thing, and to sell tickets at a price forbidden by law. The contention that the Legislature has exempted the defendant company from that liability which rests now, and has always rested, upon all others who aid in or procure others to break the law, is placed upon the sole ground that the same chapter (section 4) gives to any one who shall be forced to buy a ticket at an illegal rate a civil action for a specified sum. But that is only an additional remedy to aid in the enforcement of the law.

These are opinions that are exactly in point. In Moore v. State, 17 Tenn. 353, it is held: "If an act creates an offense, and in a different clause gives an action for a penalty, it shall be considered as an accumulative remedy, and an indictment will lie for a misdemeanor upon the prohibiting clause." Exactly the same ruling is made in Phillips v. State, 19 Tex. 159, citing as authority Whart. Cr. Law (3d Ed.) 80; 2 Hale P. C. 171; 1 Burr. 545; 1 Arch. Pl. 1, 2; King v. Harris, 4 Term R. 205. In School Directors v. Asheville, 137 N. C. 510, 50 S. E. 281, Connor, J., says: "A party violating a town ordinance may be prosecuted by the state for the

misdemeanor and sued by the town for the penalty"—citing State v. Taylor, 133 N. C. 755, 46 S. E. 5. In a more recent case—State v. Holloman, 139 N. C. 642, 648, 52 S. E. 408, 410 (Fall term, 1905)—a unanimous court held: "The state prosecutes for the misdemeanor, and the board of supervisors can sue for the penalty." It is not incompatible in any way with the state's enforcement of the law by its own process in the criminal courts. It is not unusual, indeed it is very frequently the case, that there is both a civil remedy and a criminal one. Indeed, Revisal 1905, § 353, expressly provides: "Where the violation of a right admits of both a civil and a criminal remedy, the right to prosecute the one is not merged in the other." This recognizes that both remedies may coexist, and that one does not exclude the other. The state might, coexistent with its criminal process, have given to its own officers the right to sue for a civil penalty. But the Legislature simply thought it better policy to give the penalty to the citizen, reserving to itself its criminal process to enforce observance of its law. It could not have thought that by giving the citizen a civil remedy it was abdicating its power, a power it has in regard to every one, to enforce the observance of its laws by its criminal courts. It did not intend thereby to give the chief and real law breaker an "indemnity bath." Had such an unprecedented thing been intended, it was without conceivable motive and would have been clearly expressed.

But it is said that State v. Snuggs, 85 N. C. 541, has had that effect, and therefore that the Legislature did so exempt the defendant company, even if "unbeknownst" to itself. If State v. Snuggs can have that construction, then it should follow the fate of Hoke v. Henderson, 14 N. C. 12, Barksdale v. Commissioners, 93 N. C. 472, and hundreds of other cases in which this court has held that preceding decisions were not rendered by infallible judges. But in my humble judgment State v. Snuggs has not the remotest application to this case. In that case the Legislature forbade the issuing of a marriage license without proper inquiry and gave a civil action for $200 for issuing a license without such inquiry. The statute did not make it a misdemeanor, and the court simply so held. It did not hold, and could not have held, that if a criminal proceeding had been added it would have been void because the civil remedy had been given to the citizen. In every case, without exception, cited to sustain Snuggs' Case, there was (unlike this case) no provision making the act indictable. In Yates v. Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002, the question is not raised whether the directors are indictable, but it is held they are not civilly liable for negligent conduct when the statute makes them liable only for known violation of the act. In this case the civil remedy is given to the citizen, and also the selling the ticket is expressly made a misdemeanor in the agent. The two remedies coexist. When the agent or conductor sells the ticket, or collects fare, in excess of the legal rate, then, by immemorial and hitherto uncontroverted law, any person or corporation who procures the agent or conductor to do the illegal act, or knowingly receives the fruits of it and orders its repetition, is equally indictable.

Most certainly the Legislature did not intend, and the words of this statute cannot be construed to intend, that the enforcement of the law against this great and powerful corporation should be left to the chance and haphazard of a civil action by citizens for a penalty, when it is well known that with unlimited resources the defendant company would make each case cost the venturesome plaintiff more in lawyer's fees, witness' tickets, delay, vexation, and expense than the recovery would amount to. The state did not intend to reserve to itself the enforcement of the law only against the agents and conductors, who have no money to spend in lawsuits, while shoving off on casual or possible plaintiffs the sole enforcement of the law against the great and wealthy corporation itself. The state of North Carolina has never yet thus shirked a contest, nor placed the burden and brunt of the execution of its laws upon individual patriotism. The remedy by civil action given to the citizen makes the company liable for what the agent has done, whether the company ordered it done or not. This is a principle of civil liability. But the company is not indictable for what the agent did (on which alone the civil action is based), but on what it did itself, on the principle, old as the Garden of Eden, that he who aids or influences another to commit crime is himself guilty of the crime. In State v. Snuggs there was no misdemeanor. Here there is, and the defendant company is the promoter and sole cause of its commission. As was well said by Walker, J., in State v. Hicks, 143 N. C. 693, 57 S. E. 443, though this law is "of a penal nature and to be construed strictly, yet it must at the same time receive a reasonable interpretation so as to discover the real intention of the Legislature and to execute its will." Every one knows that the intention of the Legislature was to use the full power of the law to make the defendant company obey the law, and there is no line in the statute indicating an intention to repeal, in favor of the railroad companies, the world-old principle received and held semper ubique et ab omnibus, always and everywhere, that he who procures the commission of a crime is himself guilty. This would be to exempt the real criminal and punish those it forced to its work.

It would have been surplusage for the General Assembly to have provided in the act that any person commanding an agent of a railway company to sell a ticket at a rate in excess of that allowed by law shall be guilty of a misdemeanor. This has always

and everywhere been law. If this is true as to a natural person, it is equally so as to any corporation, especially one having power to compel the illegal act and actually receiving the money derived therefrom. There were many excellent lawyers in the General Assembly, and every one of them knew that if the persons named—agents, conductors, and employés, who usually sell tickets and collect fares—were made indictable, that the company itself, or any one else, who could be shown to have procured or aided in the act, would be equally liable. If, therefore, there had been any intention, for any inconceivable reason, to exempt from criminal liability this great corporation while making its agents liable, the Legislature would have clearly so said. It is true a corporation acts only through its agents, but when the corporation, acting as such, directs those agents to violate the law, it is criminally liable like a natural person, not for the act of the agent, but for its own act in aiding and procuring the violation. Indeed, the opinion of the court in this case says that the principle that he who aids or procures another to commit a crime is himself guilty "clearly applies to corporations." The corporation has an entity and volition of its own. It speaks and acts, orders, and directs through its officers. In the case of Stewart v. Lumber Co. (recently filed) 59 S. E. 545, some of the court contended in their opinions that the corporation was not responsible for the willful and wanton act of its agent in blowing the whistle, unless the corporation directed the agent to do it or ratified his act. It could only so direct an agent through one of its officers. Here it is admitted and proven that the corporation did direct and command its agents to do this act. The statute makes that act a misdemeanor. As this is a motion in arrest of judgment, the only question is: Can this corporation be indicted for procuring its codefendant, Green, to commit the act which the corporation further ratified by putting the money thus illegally collected into its treasury?

The defendant company could not deny, if it would, that it was the corporation itself which procured and ordered Green to violate the law, for it has pleaded in this case, and set up as an exhibit, a copy of the proceeding brought by the corporation in its own name in the federal court, in which it averred that it was causing its agents to sell tickets above the rate allowed by the statute, and asking an injunction against interference with it in so doing. I concur cordially with the court, for the reasons it so well gives, that the act of the federal court in enjoining the civil remedy given by the act, and also in withdrawing by habeas corpus the agents of the defendant company from the criminal process of the state courts, is unwarranted and contrary to the decisions of the United States Supreme Court. But this can avail naught, and is merely obiter dicta. The sole remedy left the state is by the enforcement of its criminal process against the defendant company, which daily and hourly and defiantly violated the state statute till stopped by this proceeding, though no court has yet held the act void or unconstitutional. It was only by this enforcement of the criminal law, which the federal court could not enjoin, and against a corporation for whose intangible body the federal judge could not issue his habeas corpus, that the executive of this state was able to put the statute in force. It is due to this alone that for three months our citizens have been able to use the passenger trains without being compelled to pay illegal fares. There is a great contest going on, not only here, but elsewhere, whether the people are powerful enough to enforce their laws against these great artificial creatures of their own statutes. Till of late years they have been powerful enough to prevent legislation not to their liking. Now that such statutes are being passed in response to a public demand which can no longer be disregarded, efforts are made in the courts by resort to injunctive proceedings, to restrain, prevent, or nullify the action of legislative bodies. The Legislature of North Carolina well knew from the experience of other states that this would be attempted here. Hence, to secure enforcement of the law, it gave both the civil remedy for penalties to the ticket buyer, if compelled to pay an excessive and illegal fare, and made the selling a misdemeanor which must be enforced in our own courts and cannot be enjoined, as is well shown by the opinion of the court in this case. The Legislature neglected no means to cause our laws to be respected and obeyed.

The remedy by indictment of the defendant company not only cannot be enjoined by another jurisdiction (even illegally), nor can the defendant company be spirited away by habeas corpus, as has been done with individual agents; but there is the further consideration that the facts set up to defeat the operation of the law must be found in the constitutional mode by a jury of 12 men, and are not to be found by a judge, or his clerk, as in the injunction or habeas corpus proceedings which have been resorted to. Besides, in the trial before a jury, matters beyond a very limited time will not be shut out from a fair and full investigation.

It is scarcely possible that the state will submit to be controlled by injunction proceedings against the enforcement of its laws. If this court concludes that the act is defective, a special session of the General Assembly can, of course, be called, which can still more clearly express the determination of the freemen of North Carolina that the law shall apply to all alike, and that this corporation is not exempt from its power. It is a matter of regret that this great expense shall be thrown on the taxpayers, and the defendant company

exempted from liability to a fine which was justly imposed for its open, continued, and contemptuous disregard of a statute which no court has yet held void or unconstitutional.

BROWN, J. (concurring). I would be content to simply concur in the very able and exhaustive opinion prepared for the court by Mr. Justice WALKER, without any expression of my own, but for a suggestion made in the dissenting opinion that our decision probably necessitates the calling of a special session of the General Assembly, and the regret therein expressed that so heavy an expense should be incurred by the taxpayers.

In view of what this court has decided in this case, it is hard to believe that any one should seriously entertain the idea that a special session of the General Assembly is either necessary or advisable as a result of its decision. We have held: (1) That the federal courts have no power whatever to interfere in this matter with the enforcement of our statute. (2) That every agent of the defendant, from the president down, who sells a ticket or directs the sale of one above the statutory rate may be indicted, fined, and imprisoned. (3) That for each ticket so sold the corporation itself, as a distinct, inanimate entity separate and apart from its agents who control it, may be mulcted to the extent of $500. With the proper enforcement of this statute, as expounded by us, no railway company could survive a week's violation of it. The railway officials know this, and for that reason it is universally understood that they have entered into an agreement to keep in force the statutory charge until the rate litigation pending in the federal court, and referred to in our opinion, shall have been finally determined by the Supreme Court of the United States. That the railroad companies will continue to obey the law until then, and notwithstanding our decision, no reasonable man can scarcely doubt. But considerations of that kind ought not to control our decision when we are firmly convinced of its inherent soundness. We have based our decision upon that part of section 4 of the statute which does not appear in the dissenting opinion, but does appear in the opinion of the court, and is in these words: "That any railroad company violating any provision of this act shall be liable to a penalty of five hundred dollars for each violation," to be recovered by the party aggrieved. We find that the following principle of statutory construction is imbedded in our law and has been acted upon from time immemorial: That where a statute creates a new offense (an act which was not an offense before), and imposes a money penalty for its violation, and provides how that penalty shall be recovered, the offender shall be punished by that method only, and the remedy by indictment is forbidden. The application of that established principle of statutory construction to this case, necessarily destroys this indictment. Any lawyer or layman who reads the opinion of Mr. Justice WALKER will see that he has traced the establishment of this principle down through the centuries from the earliest days of the common law to recent decisions of this court and fortified it by an unbroken and overwhelming line of judicial precedents and the opinions of the most eminent textwriters, none of which is controverted or denied. It is suggested, however, that we should overrule our decisions if they stand in the way of sustaining the indictment against this corporation. There are some decisions which have been overruled because experience has shown their inutility. But the authorities relied on by us establish a great and beneficent principle of human rights, applicable to individuals as well as to corporations, and that is that no one shall receive double punishment, and never unless the power to inflict it and the intent to impose it is perfectly clear.

It is plainly manifest that the General Assembly did not intend that double punishment should be inflicted in this case. No penalty is imposed on the agents, who control and act for the railway corporation. They are indictable for a simple misdemeanor, as they are responsible human beings who control and act for the corporation and may be punished. But inasmuch as the corporation itself is an inanimate thing and cannot be punished by imprisonment, the General Assembly wisely determined it should be punished by money penalties, and that, instead of the penalties going to the state, they should go to the traveling public, who suffer by a violation of the law. We have decided this case upon a construction of our statute, and that we have decided it according to the established law of the land I have no doubt will be the conclusion of the fair-minded and unprejudiced lawyers and laymen who may read these opinions. "It is the function of a judge," says my Lord Coke, "not to make, but to declare, the law according to the golden metewand of the law, and not by the crooked cord of discretion."

(3 Ga. App. 197)

SMITH et al. v. HIGHTOWER. (No. 558.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

BILLS AND NOTES — ACTION ON NOTE — EVIDENCE.

No error of law was committed, and the verdict was warranted by the evidence.

(Syllabus by the Court.)

Error from City Court of La Grange; Frank Harwell, Judge.

Action by M. H. Hightower against C. W. Smith and others. Judgment for plaintiff, and defendants Alice and Mattie Smith bring error. Affirmed.

D. J. Gaffney and Hatton Lovejoy, for plaintiffs in error. Isaac Jackson, E. T. Moon, and A. H. Thompson, for defendant in error.

HILL, C. J. Hightower brought suit in the city court of La Grange against C. W. Smith, S. A. Smith, Alice Smith, and Mattie Smith on a note secured by a mortgage. The amount on the face of the note was $450.48. There were certain credits on the back of the note, and the amount sued for was for the balance after deducting these credits. The plaintiff, by an amendment to his petition, asked, in addition to the general judgment against the defendants, a special judgment, setting up his lien against the mortgaged property. No defense was filed by C. W. Smith and S. A. Smith. Alice and Mattie Smith answered that the note was without consideration as to them, but was for supplies furnished by the plaintiff to the defendants C. W. Smith and S. A. Smith to make a crop for the years 1900 and 1901, and that they were persuaded and overreached by their father and brother and induced to sign the note with them, which they did under protest, and that they had never received any benefit whatever from the note. The jury found a verdict against all of the defendants, in the following language: "We, the jury, find for plaintiff $450.48, with interest of $106.34, less the credits made on the note, with cost of suit against the defendants below, C. W. Smith, S. A. Smith, Alice Smith, and Mattie Smith, and the lien on the land as mentioned in the mortgage deed." Upon this verdict, the court entered a judgment in favor of the plaintiff and against all the defendants for the sum of $282.23 principal, and $106.34 interest, to date of judgment, with interest thereafter, with 8 per cent. on the principal amount, and that the judgment be made a special lien upon certain real estate, describing it. Alice and Mattie Smith excepted to the judgment, because it did not follow the verdict, and because it was unauthorized by the verdict and the pleadings in the case. These exceptions were overruled; and to this rulings exceptions pendente lite were filed. These defendants also made a motion for a new trial on the three general grounds and on the following special grounds set out in their amended motion: (1) Because the court erred in admitting the note sued on, because it was a copy and was admitted without sufficient accounting for the original. (2) That the court erred in not charging, as requested in writing, "that, in order to bind the defendants Mattie and Alice Smith, the consideration on which the plaintiff seeks to so bind them, it must appear that the consideration was brought to their attention, and that they had knowledge of the consideration to C. W. Smith." The court, instead of so charging, charged as follows: "If the consideration for the signing of this note by defendants Mattie and Alice Smith was an extension of time given to C. W. Smith, this would be sufficient consideration to bind Mattie and Alice Smith, and, if the defendants Mattie and Alice Smith signed this note knowing this consideration, they would be bound thereby." (3) Because the verdict is void for uncertainty, and is not warranted by the pleadings. The credits to be deducted are not stated in the verdict, nor does the verdict show to what or in what way or on what the credit is to be applied. The verdict does not show the credits which are intended to be made, and does not show whether they are to be applied to the sum of $450.48 or to the interest of $106.34.

1. We do not think the plea constituted any defense. It could only be considered as a plea setting up that the two defendants were sureties or accommodation indorsers on the note sued; and, if only sureties or accommodation indorsers, the consideration to their principals was sufficient to bind them. Besides, the note was under seal; and this imported a consideration as to both makers and indorsers or sureties. Civ. Code 1895, § 3656; Sivell v. Hogan, 119 Ga. 167, 46 S. E. 67. Of course, the averment in the plea that they were persuaded and overreached by their father and brother and induced to sign said notes could not affect the rights of the payee unless he was a party to such conduct; and no such allegation is made.

2. The written request to charge does not contain a correct principle of law, and, in any event, the charge requested was substantially given by the court, and was entirely favorable to the defendants.

3. As to the introduction of the copy of the note, the trial judge states, in a note verifying this ground of the motion, that the copy had been established by the court in lieu of the lost original before it was introduced. Besides it is largely within the discretion of the trial court to decide when a sufficient foundation has been laid for the introduction of the contents or secondary evidence of lost papers; and, unless such discretion has been manifestly abused, a reviewing court will not interfere. In this case both the defendants had admitted that the copy of the note attached as an exhibit to the petition was a correct copy of the original note signed by

them, and this admission would have been sufficient to let in the copy as evidence, without any other proof.

4. The verdict was not void for uncertainty. "Verdicts are to have a reasonable intendment and are to receive a reasonable construction, and are not to be avoided unless from necessity." Civ. Code 1895, § 5332. The verdict was for the amount on the face of the note, and for interest to the date of the verdict, less the credits on the note. An inspection of these credits showed the amount to be deducted, leaving the verdict as the net balance. If the verdict was not certain, it could easily have been made certain, and was, in fact, made certain, by an inspection of the pleadings. The familiar maxim, "Id certum est quod certum reddi potest," applies. In entering the judgment these credits were deducted from the principal of the note; and the balance of the principal, after deducting the credits with interest to the date of the judgment, constituted the amount for which the judgment was rendered. A calculation of the amount due on the note will show that the foregoing judgment was for somewhat less than the sum due the plaintiff, and consequently the defendants could not have been hurt by the verdict. Indeed, there was no issue as to the amount of the note or as to the credits.

We do not think there is any merit in the exceptions to the judgment on the ground that it did not follow the verdict, and was not authorized by the verdict and the pleadings. We think the verdict was demanded by the evidence, and the judgment rendered was in all respects valid.

Judgment affirmed.

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(3 Ga. App. 204)

SYKES v. SUTTON. (No. 601,)

(Court of Appeals of Georgia. Dec. 9, 1907.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

The disconnected instructions taken from the charge, when considered with the charge as a whole, contain no material error. The evidence was in conflict, and we cannot say the trial judge abused his discretion in refusing a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3935–3937.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action by R. L. Sutton against Arthur Sykes. Judgment for plaintiff. Defendant brings error. Affirmed.

Payton & Hay, for plaintiff in error. Perry & Williamson, for defendant in error.

HILL, C. J. Sutton sued Sykes for $75 "boot" in a horse swap. Sykes made two defenses: (1) That the trade was not to be consummated until he had tried Sutton's horse and was satisfied, and that he had tried the horse and was not satisfied, as he found that it was lame; (2) that Sutton's horse was unsound when the swap was made, and was known to Sutton to be unsound. Both of these defenses were vigorously combated by Sutton. There was direct conflict in the testimony of the particeps dramatis, and some conflict in the respective corroborating testimony. Sykes insisted that the horse which he got from Sutton in exchange for a sound and serviceable horse was actually lame when the exchange was made, and that the lameness was known to Sutton, and it so rapidly increased in severity that in a few months the horse when he laid down to rest (which was very frequent), could "not get up again without assistance." Sutton insisted that the horse he exchanged for Sykes' horse was a steed of splendid mettle and qualities, was perfectly sound, with no indication of lameness, but had been driven too fast and furiously by Sykes pater in his many electioneering tours throughout Worth county while canvassing for votes, and this hard use had caused and aggravated the lameness of the horse. The elder Sykes admitted the use of the horse, but denied its severity, contending that to properly canvas for votes the driving must be slow and the stops frequent, in order to give full opportunity "to talk to the voters." All of the various conflicts in the evidence were settled by the jury in favor of the plaintiff.

We have read with much interest and attention the evidence in the record, and we must admit that we are not fully in accord with the jury in our conclusion from the facts; but the fairness of a horse swap is peculiarly a question for a jury of the vicinage. The character and abilities of the respective "swappers," as well as the temptations inherent in such transactions, and to what extent excusable, are largely ethical questions, far better understood by the jurors on the ground than by reviewing courts at a distance. To our uninitiated mind it seems that the old horse trader with 10 years' experience in his special line got somewhat the best of the youthful novice. At the conclusion the old trader had both horses, and a judgment against the adolescent novice for $44.20 principal, interest, and costs. This result evinces great skill and finesse on the part of the experienced client and his able attorneys. It is a little puzzling to those who do not understand the mysteries of horse trades and jury trials. But the charge of the court in the main was fair, accurate, and comprehensive, clearly covering all the material issues in the case. The disconnected excerpts, when considered in connection with the entire charge, contain no serious or harmful error. This court will not have the judicial temerity to permit its conclusion to crystallize into judicial opinion at variance with that of the jury on the facts in connection with a horse trade about which they were, by rea-

son of propinquity to the parties and witnesses and to the scene of action, the better judges.

Judgment affirmed.

(3 Ga. App. 197)

MACON, D. & S. R. CO. v. WOOD. (No. 534.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

RAILROADS—KILLING STOCK—EVIDENCE.

A mule grazing in a field 30 or 40 feet from the railroad track suddenly ran on the track a few feet in front of an engine and cars running 30 miles an hour. On seeing the mule approaching the track, the engineer, according to his undisputed testimony, did everything in his power to avoid killing or injuring the mule, but his efforts were unavailing. *Held*, that the killing of the mule was an unavoidable accident, and the verdict against the railroad company was without evidence to support it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1608–1620.]

(Syllabus by the Court.)

Error from City Court of Dublin; J. E. Burch, Judge.

Action by M. W. Wood against the Macon, Dublin & Savannah Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Minter Wimberly and Akerman & Akerman, for plaintiff in error. W. C. Davis, for defendant in error.

HILL, C. J. Judgment reversed.

(3 Ga. App. 219)

LYTLE et al. v. SOUTHERN RY. CO. (No. 670.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

VENUE—NONRESIDENT RAILWAY COMPANY—ACTION EX DELICTO.

A suit ex delicto against a nonresident railway company, arising out of its failure to deliver safely a shipment of goods at a point in another state, may be brought in any county in this state in which legal service of process can be made.

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by L. Lytle and others against the Southern Railway Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Lytle and Shead brought suit against the Southern Railway Company in the city court of Floyd county, alleging that the defendant was a common carrier having an office and agent in said county; that in November, 1905, the plaintiffs delivered to said railway company at Rome, in said county, a car load of cattle, which it accepted and agreed to transport to Tampa, Fla., and "said cattle were consigned to and to be delivered to said plaintiffs at Tampa, Fla., but, * * * notwithstanding that two Jersey cows and four calves were delivered to said company and placed on board the cars of said company at Rome, Ga., the said company failed to deliver the same to petitioners at Tampa, Fla., or at any other place, and failed and refused to account to petitioners for said cows and calves or to pay them therefor. Petitioners are unable to state what the said company did with said cows and calves, but petitioners show that the said company disposed of said cattle in some way unknown to petitioners, and failed and refused to deliver the same to petitioners, and failed to pay petitioners the market value thereof." The plaintiffs proved their case as alleged in the petition, except that they showed that, when they delivered the shipment to the agent at Rome, they gave information that they would desire to add to it as it passed through Atlanta. No bill of lading was issued until the cattle arrived in Atlanta. The freight was paid from Rome to Atlanta. Upon their arrival in the latter city, the cattle were unloaded and fed, and several more cows were added to the shipment. Although the bill of lading was issued in Atlanta, one of the plaintiffs testified that he made a through contract from Rome to Tampa, and that all of the lost cattle were shipped from Rome. The court granted a nonsuit on the ground that the venue was not shown.

M. B. Eubanks, for plaintiffs in error. Shumate, Maddox & McCamy and Geo. A. H. Harris & Son, for defendant in error.

POWELL, J. (after stating the facts as above). Our statute fixing the venue of suits against railway companies is found in section 2334 of the Civil Code of 1895, as follows: "All railroad companies shall be sued in the county in which the cause of action originated, by any one whose person or property has been injured by such railroad company, its officers, agents or employés, for the purpose of recovering damages for such injuries; and also on all contracts made or to be performed in the county where suit is brought; any judgment rendered in any other county than the one in which the cause so originated shall be utterly void. But if the cause of action arises in a county where the railroad company liable has no agent, then suit may be brought in the county of the residence of such company." The venue of all cases not falling within the provisions of this section is governed by the general law. The Southern Railway Company is a nonresident corporation. Such corporations are within the purview of this section as to contracts made and torts committed in this state. Hazlehurst v. Seaboard Air Line Railway, 118 Ga. 858, 45 S. E. 703; Mitchell v. Southern Ry. Co., 118 Ga. 845, 45 S. E. 703; Coakley v. Southern Ry. Co., 120 Ga. 960, 48 S. E. 372. The statute, however, does not cover the case of a tort committed in another state by a nonresident corporation. South Carolina Ry. Co. v. Dietzen, 101 Ga. 730, 29 S. E. 292; Reeves v. Southern Ry.

Co., 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513.

The trial court evidently took the view that from Rome to Atlanta there was one complete shipment, from Atlanta to Tampa another. While the evidence was such that we do not think the court was justified in holding this to be so as a matter of law, for there was evidence from which the jury could have concluded that as to the cattle lost a through contract was made from Rome to Tampa, yet it is not material whether the contract was made in Rome or in Atlanta, because the action is not based upon the contract. It is elementary that a shipper may elect, in case the carrier loses the goods, between suing upon a breach of the contract of carriage, in which event his suit takes all the incidents of actions ex contractu, or upon the wrong arising from the carrier's breach of public duty, in which event the suit takes all the incidents of actions ex delicto. When a petition can be construed either as a suit on contract, or as an action for a breach of duty arising out of the contract, and the plaintiff has not been required to relieve the duplicity by demurrer, the latter construction, at least in cases where it is necessary to sustain the plaintiff's action, will be adopted. Seals v. Railway Co., 102 Ga. 820, 29 S. E. 116; Central Ry. Co. v. Chicago Portrait Co., 122 Ga. 11, 49 S. E. 727, 106 Am. St. Rep. 87; King v. Southern Ry. Co., 128 Ga. 288, 57 S. E. 507; Central R. Co. v. Pickett, 87 Ga. 734, 13 S. E. 750. The suit is none the less ex delicto because a contract is alleged by way of inducement, or as showing the relation existing between the parties. Rushin v. Central Ry. Co., 128 Ga. 726, 58 S. E. 357; Georgia Southern Ry. Co. v. Pearson, 120 Ga. 284, 47 S. E. 904. In this case, the defendant having agreed to safely deliver the cattle to the defendant at Tampa, Fla., a breach of legal duty occasioned by the failure to deliver arose in that city. Friedman v. Seaboard Air Line Ry., 124 Ga. 472, 52 S. E. 763; Askew v. Southern Ry. Co., 1 Ga. App. 79, 58 S. E. 242; Southern Ry. Co. v. Montag, 1 Ga. App. 649, 57 S. E. 933. The gravamen of the complaint is not any particular act of negligence by which the cattle were lost, but the legal wrong of failing to deliver at the destination. Louisville & Nashville R. Co. v. Warfield (by Supreme Court of Georgia, November 13, 1907), 59 S. E. 234. Possibly the venue might be laid upon the basis of a tort committed in the place where the cattle were actually lost or destroyed; but, if so, this is cumulative. See Central Ry. Co. v. Chicago Portrait Co., supra; Parris v. Atlanta, K. & N. R. Co., 128 Ga. 434, 57 S. E. 692; Central Ry. Co. v. Dorsey, 116 Ga. 722, 42 S. E. 1024; Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769; Southern Ry. Co. v. O'Bryan, 112 Ga. 130, 37 S. E. 161. The plaintiff having sued on a cause of action ex delicto which arose beyond the limits of the state, and the defendant being a nonresident, the suit could be maintained in any county where service could be perfected. See Bell v. N. O. & N. E. Ry. Co., 2 Ga. App. ——, 59 S. E. 102.

Judgment reversed.

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(3 Ga. App. 188)

## FURR v. KEESLER et al. (two cases). (Nos. 415, 416.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. USURY—PLEA.

A plea which alleges that the defendant signed the note sued on, which contained a waiver of homestead, merely as surety for the principal maker; that the note on its face bore interest at 8 per cent. per annum; that the principal of the note was $125 and the time one year; that unknown to them the payee, in addition to taking the full lawful interest, reserved or took at the time the note was delivered $25 usury, whereby they were released—is good in substance.

2. SAME—INTENT—EVIDENCE.

While to constitute usury it is essential that there should be at the time the contract is executed an intent on the part of the lender to take or charge for the use of the money a higher rate of interest than that allowed by law, yet this intention and the device or contract whereby usury is to be taken or reserved may be shown by circumstantial as well as by direct proof. There was sufficient evidence to justify the verdict.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by P. F. M. Furr against R. M. Keesler and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. C. Edwards, for plaintiff in error. C. R. Faulkner and McMillan & Erwin, for defendants in error.

POWELL, J. J. C. Acrey, R. M. Keesler, and S. O. Keesler executed two joint promissory notes with homestead waiver for $62.50 each, payable one year after date, at 8 per cent. per annum, and made them payable to Mrs. H. M. Edwards or bearer. Furr sued upon them as bearer. However, he took the notes after maturity, and the defendants were therefore allowed to set up any defenses they might have asserted against the original payee. Acrey was not served. The two Keeslers pleaded and proved that they were securities only. They further pleaded "that the notes were given for $125; that, as soon as the money was paid over to J. C. Acrey, he paid back to Edwards $25, which amount was usurious; that the notes bear interest on their face for 8 per cent. from date; that the whole of the $25 is usury; that the defendants R. M. and S. O. Keesler did not know of the contract of usury until after they had signed the notes; that they were released from the notes by the usury that was in it." The evidence for the plaintiff showed that after the notes had been executed, and the $125 paid by Mrs. Edwards to Acrey, he handed her the notes and also $25 of the money, saying, "Here is the interest

on these notes." The securities, when they signed, were ignorant that more than lawful interest was to be charged. Mrs. Edwards testified that the $25 was not paid as interest on the notes; but was paid upon a different transaction. The trial judge submitted the question fairly and clearly to the jury, which returned a verdict for the defendants.

1. It is insisted by the plaintiff that the plea of the defendant was legally insufficient to justify a submission to the jury of the question whether the securities were discharged by the alleged contract of usury unknown to them; also, that there is no proof sustaining a finding in the defendant's favor on this question. We think the plea was sufficient. The fact of suretyship was alleged in a portion of the plea prior to that quoted. It appeared on the face of the record that the note contained a homestead waiver, that the principal of the debt was $125, the time one year, and therefore that the maximum interest legally collectible under the contract was $10. Also it appeared from the note itself that interest from date at the maximum rate was to be paid at maturity together with the principal. The plea alleges that there was a contract to take the $25 as usury, and that this was unknown to the sureties, and they were therefore released. Having pleaded specifically a release from the contract by reason of the facts stated, it was not necessary for the plea also to set up that of which the court will take judicial cognizance, namely, that, under the law, such a state of facts does operate to release a surety. A cursory examination of the first headnote in the case of Weldon v. Ayers, 116 Ga. 181, 42 S. E. 473, is likely to convey the impression that a plea such as the one now under consideration is not sufficient. However, a closer examination of that case will show that such is not the ruling there. It must be remembered that the security under the circumstances named has the option of claiming a total release from liability or of merely demanding an expurgation of the unlawful interest. If he insists upon a release, he should set it up in his pleading; and when he adverts to the usury, but does not assert a release, the court may presume his willingness to pay the principal and lawful interest. In the Weldon Case no release was asserted. In the present case it is pleaded.

2. While, as ruled in the case of Bellerby v. Goodwyn, 112 Ga. 306, 37 S. E. 376, "to constitute usury, it is essential that there be at the time the contract is executed an intent on the part of the lender to take or charge for the use of money, a higher rate of interest than that allowed by law," still this intent and the usurious device or agreement may be shown by circumstantial as well as by direct testimony. The trial court very fairly submitted this question to the jury, and their finding is, as to us, final. The case of Walker v. Hillyer, 124 Ga. 857, 53 S. E. 313, cited by counsel for plaintiff in error, is not applicable to the facts here. The doctrine there announced is applicable only where the defendant, by his conduct or by his silence at a time when disclosure is in good faith demanded, has induced the plaintiff to buy the note in ignorance of the defense afterwards sought to be asserted.

Judgment affirmed.

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(3 Ga. App. 226)

LEE v. HIGHTOWER. (No. 697.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. BILLS AND NOTES—ACTION BY TRANSFEREE—DEFENSES.

The act of 1897 (Acts 1897, pp. 82, 83) does not restrict or abridge the right of the defendant, in an action brought by the transferee of a note, to plead that the plaintiff is not an innocent purchaser, but purchased the note with full knowledge of all the equities between the original parties, nor does it prevent him from pleading and proving that the holder never purchased it, provided the defendant has a good defense against its payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 976.]

2. SAME—DESCRIPTION OF THING SOLD.

Nor does this statute require a more definite description of the article or thing sold (the purchase price of which is the consideration of a note given for a patented article or a patent right) than such an explicit statement that the thing sold is patented, or is a patent right, as will put a prospective purchaser of the paper on notice and at the same time enable him, by the exercise of ordinary care and diligence, to obtain, if he desires, further information as to the nature and character of such article.

3. SAME—BONA FIDE PURCHASER.

That one is the purchaser of a note which evidences indebtedness for the purchase price of a patent right, before maturity and for value, does not affect the operation of the act of 1897. The policy of the state recognizes no innocent purchasers if the note is properly identified as having been given for a patent right or any interest in a patent.

(Syllabus by the Court.)

Error from City Court of Dublin; M. H. Blackshear, Judge pro hac.

Action by M. J. Hightower against H. C. Lee. Judgment for plaintiff. Defendant brings error. Reversed.

J. S. Adams, for plaintiff in error. Ira S. Chappell, for defendant in error.

RUSSELL, J. Hightower sued Lee on a promissory note. The court refused to allow the amendment which the defendant offered to his plea, struck the plea of the defendant already of file, and entered judgment as in case of default, in favor of the plaintiff, for principal, interest, attorney's fees, and costs. We are satisfied that the court erred in both rulings. The judgment must therefore be set aside, the amendment of the defendant be allowed, and a new trial be had.

The note sued upon, so far as now material, is as follows: "$125.00. Dublin, Ga. Dec. 14, 1904. On or before the 14th day of March (fixed) we promise to pay to I. N. Hollingsworth, or order, the sum of one hundred and twenty-five dollars, value received.

This note given for patent right No. 771,015, patented Sept. 27, 1904." In addition, the note contains waivers of certain exemptions and a provision for attorney's fees. Indorsed upon the note is the following transfer from Hollingsworth, the original payee, to the plaintiff: "I hereby transfer the within note to N. J. Hightower without recourse on me. March 2, 1905. I. N. Hollingsworth." The defendant pleaded, among other things, total failure of consideration and fraud in the procurement of the note. In the amendment to his plea, which the court refused to allow, he set up that the plaintiff was not an innocent purchaser without notice, but that he bought the note with full, actual knowledge of the fact that it was wholly without consideration; and, further, that the plaintiff had never in fact purchased the note, had paid nothing for it, and had no interest in it except to aid in the fraud of the original payee. Unless the defendant had a meritorious defense which he would otherwise be debarred from presenting, it was of no concern to him whether the holder had a good title; but, as to one who claims to be a purchaser in good faith for value before maturity, it can always be shown, in order to open the way for a defendant's meritorious defenses, that the holder is not an innocent purchaser, or that he purchased the paper after maturity. We presume, therefore, that the court disallowed the amendment upon the ground that the plea presented no defense. The answer and plea were stricken on plaintiff's oral motion, upon the sole ground, as stated by the judge in his order, that, "said note being given for a patent right, the consideration expressed in the face of said note is not such a compliance with the act of 1897 as will permit the defendants to set up the facts contained in said plea against the transferee." It is certified by the trial judge that the amendment was offered before the order striking the plea was granted, though after the motion to strike was made. We think the amendment should have been allowed irrespective of the act of 1897. Acts 1897, p. 81. So far as the rights of the defendant are concerned, that statute was not intended to diminish in any wise the existing defenses which were the right of makers of promissory notes. On the contrary, the manifest purpose of the act was to extend and enlarge the rights of defendants by adding an entirely new defense through making it possible that the rights of bona fide purchasers might be abridged. The act of 1897 simply declares that if the consideration of a note is a patent or patent right, and is so expressed therein, the holder can never be an innocent purchaser so as to exclude "equities existing between the original parties." This is a provision expressly beneficial to the maker and detrimental to and in derogation of the rights of the holder of such a note, although the holder may have purchased the note in good faith before its maturity. But certainly there is nothing in the act tending to take from a defendant the right, always previously accorded him by law, of showing, if he can, that the holder is not an innocent purchaser, and is subject to all the equities existing between the original parties, because he bought the paper with full knowledge of the facts. The defendant's amendment should have been allowed without regard to the act of 1897.

2. In our opinion the court erred in sustaining the motion to strike the defendant's plea, upon the ground that, the consideration of the note being for the purchase price of a patent right, the article or thing was not sufficiently described, and that, therefore, the defendant could not set up his defense. Section 1 of the act of 1897 (Acts 1897, p. 81) reads thus: "Be it enacted that from and after the passage of this act all promissory notes, contracts or other evidence of debt taken by any person, agent, company or corporation, for the purchase price of any patent, copy or proprietary right, or territory for the sale of any such right, or for the sale of any patented article or thing, or copyrighted article or thing, or where there is a proprietary ownership or right, and sold by such person, agent, company or corporation, through or by any peddler, agent or traveling salesman, traveling for the purpose of making such sales, shall have expressed on the face of such note, contract, or other evidence of debt, the consideration of the same, stating the thing or article for which the same was given." The statement in the note, descriptive of "the thing or article for which the same was given," is: "This note is given for patent right No. 771,015, patented Sept. 27, 1904." We think this is ample to express the "thing" which is the consideration of the note. The exact point as to what is a sufficient description or identification of the articles referred to in the act of 1897 has not heretofore been expressly decided, but we have no doubt as to the sufficiency of the description in this case, when we consider the purpose of the lawmakers in the passage of that act. We agree with the learned counsel as to the rule by which the act of 1897 should be construed, though we reach a different conclusion. The rule is elementary, but the expression of counsel for the defendant in error is so apt that we quote from his brief: "As to the construction of the act of 1897, we must look to the old law, the evil, and the remedy. The old law was that the same protection was thrown around bona fide purchasers before maturity, for value and without notice, of patent-right notes, as purchasers of all other kinds of notes. The evil was that unscrupulous persons foisted upon unsuspecting farmers and others worthless articles, for the purchase of which they took notes, and immediately, at a great discount, sold them to innocent purchasers before maturity; the remedy which the law prescribed was to make it a misdemeanor for a person of this kind to

take a note for a patent right without stating in the face of the note the article or thing for which it was given, and the additional remedy upon the purchaser was that, if he should buy such a note with this consideration expressed on its face, he took it subject to all equities between the original parties." We add that the main purpose was to so mark this class of notes that, if possible, purchasers would hesitate to buy them even before maturity; and thus, behind that was the purpose to protect, if possible, those of our population who are too gullible, both by decreasing the number of such purchases (generally of worthless articles) and by affording to those so unwary as to be caught rights which, as to bona fide purchasers, are not allowed to any other class.

Counsel for defendant in error insists that the statute should be strictly construed because innocent purchasers are favorites of the law. Generally this is true. But the act of 1897 preferred the poor prodigal son, who fain would fill himself with "the husks which the swine do eat" (in the form of patent rights), rather than the elder son—innocent purchaser—and, if the prodigal has a plea which will enable him to find his way home, he may, by the aid of the evidence, be able to enjoy "the fatted calf" in the form of a verdict, while the older son, Mr. Innocent Purchaser, would have no just cause for complaint. In considering whether the description in notes of the kind referred to in the act of 1897 is sufficient, it should not be forgotten, for it is a matter of common knowledge that these notes generally (doubtless it is true in the present case) are made on a printed form prepared and proposed by the payee, and, if in his hands or in the hands of one who bought with full knowledge of the facts relative to the transaction, should be construed more favorably to the maker. If, where a suit is brought by the payee upon one of such notes, there be doubt whether the patented thing sold is sufficiently expressed or described in the note, if it appears that the note was prepared by the seller, the doubt should be solved in favor of the maker of the note. In such an event, either the payee or the maker is likely to suffer; and, the payee having been the cause of the doubt, it would manifestly be unjust to hold the maker responsible for the act of the payee. Should any other rule be adopted, it would generally be within the power of persons selling patent rights or patented articles (provided only they are willing to risk the chances of prosecution) to so frame the description that, if the note can be sold before maturity, the maker will be powerless to defend, no matter how greatly he may have been wronged. We hold that the description of the article or thing sold meets the requirements of the act of 1897 whenever the instrument which evidences an indebtedness for the whole or a part of the purchase price of a patented article (or of any right or interest connected with or accruing from a patent) contains such an explicit statement that the thing sold is patented, or is a patent right, as puts a prospective purchaser of the paper on notice, and at the same time enables him, by the exercise of ordinary care and diligence, to obtain further information as to the nature and character of the article. To require a minute description of many of the thousands of the articles patented would be impracticable. The rule we have announced is certainly fair and in accord with the intention of the Legislature. The description in the note in this case measures up to the requirement. In its care for innocent purchasers the intention of the Legislature was to protect them by making the note a storm signal, notifying any one inclined to buy a patent-right note that none of the favor and assistance allowed to purchasers of other notes would be his, and that, in any conflict between the maker and himself, he must carry all the payee's burdens as well as his own. We know of no better way in which notice can be given than to say in the face of the note: "This note is for a patent right. Beware! If you want more knowledge, here is the patent number, and the date the grant was made." Counsel for defendant in error cites the cases of Hatcher v. National Bank, 79 Ga. 542, 5 S. E. 127; Walters v. Palmer, 110 Ga. 776, 36 S. E. 79; Parr v. Erickson, 115 Ga. 873, 42 S. E. 240. The well-known rule of law, that, where a negotiable note payable at a future date is indorsed by the payee to the plaintiff, the presumption arises that the plaintiff took before maturity for value and without notice, is announced in each of these cases. But none of these decisions furnishes any authority upon the question before us, nor does the principle, though sound in the abstract, affect the act of 1897. Nor is the case of Smith v. Wood, 111 Ga. 221, 36 S. E. 649, cited by counsel for defendant in error, in point, though the argument supports our holding. The specific point now before us is not decided in the Smith Case. The intimation, however, is very strong that, had the question been raised as to the sufficiency of the description of the article sold contained in the note, the court would have held that the mere words "for a patent right" were enough to inform the purchaser of the note in compliance with the act of 1897. Only two things were expressly decided in the Smith Case: First, that not even complete failure to state the thing or article sold in a note given for a patent or patent right does not render the note void; and, secondly, that, under the evidence in that case, the defendant was, by his own admissions, estopped from setting up his plea of partial failure of consideration. But, while the court puts its decision on only two points in the case, the following very significant language (used while discussing the plea of failure of consideration, which was controlling) is found on

page 227 of 111 Ga., 36 S. E. 649: "The note, while not complying with the statute by stating the particular thing for which it was given, did show that it was given for a patent right. While it is only when the consideration of a note given for the purpose of a patent right 'is expressed in the face thereof as required in section 1' of the act of 1897 that the note carries upon its face such notice of its consideration as necessarily subjects any one who purchases the note before its maturity to the equities which may exist between the original parties, in view of the policy of the law, as shown by the act of 1897, with reference to notes given for the purchase of patent rights, it may be that the statement of the consideration in this note was sufficient to put a prospective purchaser upon inquiry as to its consideration, and what equities, if any might exist between the maker and the payee. Granting this to be true, we are of opinion that, under the evidence, the defense of partial failure of consideration was not available as against the plaintiff." The Supreme Court thus recognizes that there is a wise policy (established by the act of 1897) with reference to notes given for the purchase of patent rights and patented articles in the interest of those who are so easily deceived and imposed upon as that they would seem to need the guardianship of paternalism in government.

Judgment reversed.

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(2 Ga. App. 550)

## DOUGLAS, A. & G. R. CO. v. SWINDLE.
(No. 260.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. CARRIERS—INJURY TO PASSENGERS—PETITION—DEMURRER.

The test of the sufficiency of a petition to resist a general demurrer is the ability of the defendant to admit all that is alleged therein and yet escape liability altogether. A general demurrer to the petition should not be sustained and the suit dismissed because the plaintiff would not be entitled to recover all he asks, if the petition sets up a good cause of action as to any portion of his demand. Judged by this rule, there was no error in overruling the demurrer to the petition as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 105.]

2. SAME.

The special demurrers were properly overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 486–490.]

3. SAME—SPECIAL DEMURRER.

A demurrer addressed to a particular paragraph of the pleadings is not necessarily, for that reason, a special demurrer. "A general demurrer enables the party to assail substantial imperfections in the pleadings of the opposite side, without particularizing any of them in his demurrer. A special demurrer goes to the structure merely, and not to the substance, and obliges the party demurring to lay his finger on the very point." Martin v. Bartow Iron Works, 35 Ga. 323, Fed. Cas. No. 9,157.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 491, 512.]

4. SAME.

"Demurrer, being a critic, must itself be free from imperfections."

(Syllabus by the Court.)

Error from City Court of Nashville; H. B. Peeples, Judge.

Action by W. L. Swindle against the Douglas, Augusta & Gulf Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Wm. H. Barrett and J. W. Quincey, for plaintiff in error. Hendricks, Smith & Christian, for defendant in error.

RUSSELL, J. This is a suit to recover damages for personal injuries alleged to have been sustained by the plaintiff as a passenger on a train of defendant. Within the time required by law the defendant company demurred to the petition. The court overruled the demurrers, and the defendant company excepted. The question to be determined, therefore, in our search for error is whether the court erred in overruling any of the demurrers or whether it erred in overruling them all. There can be no possible doubt as to the ruling as to the first demurrer, which is denominated a general demurrer, and none as to the second, third, fourth, and fifth; and the seventh was cured by proper amendment. Upon our first reading of the twelfth paragraph of the petition and of the demurrer thereto, numbered "sixth," we were inclined to think that the court erred in not sustaining that demurrer; but, upon more mature reflection, we are satisfied that the trial judge committed no error in likewise refusing to strike the twelfth paragraph. This paragraph is open to a special demurrer; and, if a proper special demurrer thereto had been offered, it should have been sustained, but the demurrer insisted upon was a general demurrer. To have sustained it would have been to strike the entire paragraph, the major portion of which is properly alleged, and is pertinent and germane to the cause of action.

The petition, in the first, second, third, and fourth paragraphs, after alleging that the defendant company is a corporation having an office and agent in Berrien county, sets up that the petitioner was a passenger with a ticket, which had been surrendered to the conductor, entitling him to be carried from Sparks to Nashville, Ga. The train stopped at Massee, Ga., and, the weather being cool and it being unpleasant away from the fire, the plaintiff went to the stove for the purpose of warming, it being necessary for him to get near the stove to warm. He was standing with his face towards the west, when the employés of the defendant company running the train went on the side track to get certain cars loaded with lumber to "make up" their train, and said employés carelessly "kicked" the loaded cars off the side track onto the main line, and allowed them to run

wild down said main line at a rapid rate of speed without any one upon them to control them, and they collided with such force with the cars and a flat car in front of the passenger coach aboard which was the plaintiff that he was knocked off his feet, thrown backwards across the top of the stove in which was a fire and by which he was warming, and injured and damaged as thereinafter set forth, in the sum of $10,000. The remainder of the petition is as follows: "Sixth. That the cars of the defendant company were allowed to run wild or shoved in by the engine in such a rapid rate of speed until it bucked or doubled the flat car between the passenger coach and the two box cars attached to the flat between said box car and said passenger coach. Seventh. Defendant was further negligent in that, when they 'kicked' said cars in and upon said main track or shoved them in and upon said line with their engine as aforesaid, they rang no bell, nor blew any whistle, nor gave any alarm by which the plaintiff could be on his guard, thereby throwing him backwards upon said stove in the manner and form aforesaid. Eighth. The plaintiff was injured and damaged as follows: That by reason of said sudden and violent collision of the cars, caused by the carelessness of the defendant company and the throwing of the plaintiff against and upon the stove as aforesaid, the lumbar region of his body striking the top of said stove, breaking two of his lower ribs on the left side of his spinal column, and breaking or fracturing the third rib and scalding and burning the lumbar region of his body, he is injured and damaged in the sum aforesaid. Ninth. The plaintiff, by reason of the aforesaid injuring, was unconscious for several minutes, and that he was unable to stand, walk, or navigate without assistance, and that his spinal column is severally and permanently injured. Tenth. That, by reason of the aforesaid injuries, that the spinal column of the plaintiff, at and near the lumbar region of his body, by reason of the concussion caused by the injuries aforesaid, has caused his spinal column to become the seat of the inflammation and pressure, thereby causing his spinal column, as aforesaid, quick and tender and easily hurt, your petitioner therefore suffering the most excruciating pains, which are permanent and lasting. Eleventh. That, by reason of the injuries aforesaid, the concussions of the spinal column at the lumbar region have caused the plaintiff to lose almost entirely the use of his left leg, and that he can walk only by a violent effort in limping and dragging his leg as aforesaid. Twelfth. The plaintiff alleges that less than two years prior to his injuries as aforesaid he was severely and almost fatally injured by the defendant's road in the city of Nashville, Ga., and that by reason of his last injury the old wounds and injuries have been causing him great annoyance, pain, and suffering. Thirteenth. That each of the hips of the plaintiff has unceasing and severe pains in them, caused by the injuries inflicted upon him as aforesaid, the seat of said injuries being in the lumbar region of the spinal column of petitioner, as aforesaid described, and all of which injuries are permanent and lasting, and causes your petitioner the most severe mental pain and suffering. Fourteenth. Your petitioner further shows that he was entirely without fault in the transaction, and that his injuries were caused by the wrong and negligence of the said defendant, its agents, and servants, as aforesaid, nor could he, by the exercise of ordinary care upon his part, have prevented the consequence to himself of the defendant's negligence. Fifteenth. That petitioner at the time he sustained his injuries as aforesaid was earning from $75 to $100 per month; that he was 50 years of age, and had a reasonable expectancy of ——— years of life."

The defendant company filed the following demurrer, and the action of the court thereon is the error complained of: "(1) That there is no cause of action set out in the said petition. And said defendant demurs specially: (2) Because it is not made sufficiently plain in paragraph sixth or elsewhere what is meant by the allegation that it 'bucked' or doubled the flat car between passenger coach and the two box cars. (3) Because it does not appear in paragraph 7 or elsewhere that there was any duty upon the defendant to ring a bell or blow a whistle or give any other alarm when it shoved or 'kicked' cars upon its main track. (4) Because the said petition fails to show that the plaintiff did not know of the approach of the said cars to the coach in which he is alleged to have been standing, and of the alleged rapidity of motion of the moving cars. (5) Because the said petition does not set forth sufficiently definitely in what way or manner the lumbar regions of his body were injured. (6) Defendant demurs to paragraph 12 as being irrelevant and impertinent, and prays that the same be stricken. (7) Because it does not appear in paragraph 15 what was the age of plaintiff at the time of the injury." We shall consider these demurrers, so far as it is necessary to further discuss them, seriatim.

1. The reading of the petition is absolute demonstration of the fact that there is no merit in the first paragraph of the demurrer. A cause of action is set forth in the petition, because its allegations cannot be admitted without the plaintiff being entitled to recovery. The plaintiff was a passenger, had paid his fare, and the railroad was bound for extraordinary diligence for his safety. The cars were negligently "kicked" against the car in which he was a passenger, and this negligence, as alleged, threw him against the stove, where he was warming, broke two of his ribs, and scalded and burned the lumbar regions of his body, causing the petitioner the injuries aforesaid, and to entirely lose the

use of his left leg, and to suffer the most excruciating pains. Without the amendment stating petitioner's age, he could only have recovered for pain and suffering; but the petition nevertheless set forth, to that extent, a good cause of action and would resist a general demurrer. As sustaining the above decision, we cite, among many other cases which could be cited, Glenn v. Western Union Tel. Co., 1 Ga. App. 821, 58 S. E. 83; Ga. R. Co. v. Rayford, 115 Ga. 937, 42 S. E. 234; Ferrill v. Perryman, 34 Ga. 576; Eagle & Phenix Co. v. Welch, 61 Ga. 444; Pullman Car Co. v. Martin, 92 Ga. 161, 18 S. E. 364; Western Union Tel. Co. v. Jenkins, 92 Ga. 398, 17 S. E. 620; Bank v. O'Neal, 101 Ga. 673, 28 S. E. 973; Blackstone v. Central R. Co., 105 Ga. 380, 31 S. E. 90; S. C. & Ga. R. Co. v. Augusta Southern R. Co., 111 Ga. 420, 36 S. E. 593. The test as to whether a petition can resist a general demurrer is whether the defendant could admit all that is alleged and escape liability. Glenn v. Western Union Tel. Co., supra.

2. There is no merit in the special demurrer numbered 2, for the reason that the words "bucked" or "doubled" are words of such common usage, as that knowledge of their meaning must be presumed. The third and fourth paragraphs of the demurrer will be considered together, and can be determined in a few words. Both of these grounds of the demurrer assumed that there is a duty on the part of the passenger to know of the approach of cars to the coach in which he was riding, and to govern his conduct accordingly. A passenger who is in his rightful place has the right to rely upon the protection of the carrier until he is informed of extraordinary danger. The fifth special demurrer was properly overruled. It was addressed to the eighth paragraph of the petition, which alleges that the sudden and violent collision of the cars threw the plaintiff against the stove, the lumbar region of his body striking the top of said stove, scalding and burning the lumbar region of his body. We think the court was right in considering this a very definite statement designating the injuries and the portion of the body injured.

3. In the sixth division or subhead of the demurrer the defendant moves to strike the twelfth paragraph of the petition as being irrelevant and impertinent. We think that the court properly overruled this demurrer. The twelfth paragraph of the petition was subject to demurrer in so far as it stated or attempted to charge that defendant was the cause of his previous injury, and we can well see how the statement that his prior injuries were caused by the defendant can be made prejudicial to the defendant. This latter portion of the twelfth paragraph is impertinent and irrelevant. It is wholly immaterial how the plaintiff came to be injured on a former occasion or who occasioned the injury; but it is relevant and pertinent to the plaintiff's case to state the fact he was so unfortunate as to be in such physical condition as to require extraordinary diligence at the hands of the carrier. It is immaterial how his condition of physical weakness and suffering originated; but the fact is material that he had previously been injured, and thereby his safety was more easily endangered, and his suffering, if he should receive an injury, would likely be more acute. The fact that the resultant consequences were likely to be serious and permanent is relevant for the consideration of the jury. If the defendant had filed a special demurrer to that portion of the twelfth paragraph which is irrelevant, and pointed out the specific defect (the fact that that portion of the paragraph contained matter immaterial and prejudicial), for the reasons to which we have referred, the court would have required an amendment accordingly. If the defendant intended to demur specially, he failed of his mark. That a demurrer is addressed to special paragraph of a petition, instead of to the petition as a whole, does not of itself change it from a general to a special demurrer. The same characteristics which obtain as to the term "general demurrer," when applied to the petition as a whole, still pervade it when addressed to a particular paragraph. And the legal result is the same. If the controlling thought or prayer of the paragraph is pertinent and germane, such paragraph will not be stricken because some other portion of such paragraph is, for any reason, impertinent, immaterial, or even prejudicial, unless that portion of the paragraph which is legally objectionable is particularly and especially pointed out.

4. For these reasons, the sixth demurrer was properly overruled, whether it be denominated a general or a special demurrer. If intended as a special demurrer, it is itself demurrable. It failed to lay its finger on the point and specifically mention (as able counsel does in his brief), wherein and for what reason paragraph 12 of the petition (which in part is relevant and pertinent) is "irrelevant and impertinent." "Demurrer, being a critic, must itself be free from imperfections." If, as above stated, the sixth demurrer was intended as a general demurrer, it was properly overruled, because it was proper for the plaintiff to refer to the fact that he had been previously injured, an illustration of his physical condition, and as imposing upon the carrier the duty of additional diligence for his safety. While it was improper for the plaintiff to state that such former injuries were caused by the defendant company, unless such allegations were relied upon as an additional cause of action, still, if the demurrer had been special, looking merely to the structure of the paragraph, it would have been within the power of the court to require the plaintiff to so amend the paragraph as to speak in accordance with his rights and the relief sought. If, as it appears, the statement was made

simply to enable the plaintiff to charge the defendant with greater diligence, or to show that the plaintiff had suffered more pain by reason of his previous injury and thereby would be entitled to greater damages, the court would, no doubt, have caused the statement that those former injuries were caused by the defendant to be stricken from the petition. Or, if the plaintiff insisted that his suit asked for compensation for the former injury as an additional cause of action, the plaintiff would have had an opportunity to perfect the paragraph to meet that view of the case. The demurrer was not good unless it particularized the imperfections. As stated in Martin v. Bartow Iron Works, 35 Ga. 323, Fed. Cas. No. 9,157, there is a clear distinction between a general and a special demurrer, which has no reference to whether it is addressed to the whole of the petition or some particular part thereof. "A general demurrer enables the party to assail every substantial imperfection in the pleadings of the opposite side, without particularizing any of them in his demurrer. * * * A special demurrer goes to the structure merely, and not to the substance, and * * * obliges the party demurring to lay, as it were, his finger on the very point." And Judge Erskine proceeds further to say, as showing the advantage of a special demurrer, that, "when a party demurs specially, he may, in argument, attack substantial errors." We regret that there was no special demurrer to the evident evil in the twelfth paragraph, because every case should be tried without the introduction of matters extraneous or prejudicial, confined strictly to the legitimate issues involved. But we are unable to say that the trial judge erred because he ruled according to law. And, as he no doubt would have stricken that portion of the paragraph objected to by the defendant if his attention had been thereto properly and specially directed, so we have no doubt that the learned trial judge will, upon the trial of the case, exclude from the consideration of the jury those prejudicial elements pointed out by the defendant, and confine the evidence, so far as that part of the paragraph is concerned, to its allegations. In any event, the defendant cannot transmute the defect in its demurrer into an error on the part of the trial court.

Judgment affirmed.

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(3 Ga. App. 222)

## CARTER v. CENTRAL OF GEORGIA RY. CO. (No. 671.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

TRIAL—NONSUIT.

There was no error in awarding a nonsuit. The evidence, at most, merely raises a suspicion or conjecture that the fire was caused by sparks from an engine which had passed. The evidence does not authorize a reasonable inference that the fire was set out by the defendant's engine. This case is controlled by Ga. Ry. & Elec. Co. v. Harris, 57 S. E. 1076, 1 Ga. App. 714; G. J. & S. R. Co. v. Edmondson, 29 S. E. 213, 101 Ga. 747; Southern Railway Co. v. Myers, 33 S. E. 917, 108 Ga. 166.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 359.]

(Syllabus by the Court.)

Error from City Court of Floyd County; Harper Hamilton, Judge.

Action by C. W. Carter against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

M. B. Eubanks, for plaintiff in error. J. Branham and G. E. Maddox, for defendant in error.

RUSSELL, J. Judgment affirmed.

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(3 Ga. App. 225)

## EMANUEL COUNTY v. THOMPSON. (No. 695.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. SALES—CONDITIONAL SALE—REMEDIES OF BUYER.

One in possession of personal property may recover for a tort thereto, although a third person holds the legal title as security for a debt. Especially is this true where the debt is paid prior to the institution of the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Pledges, § 95.]

2. BRIDGES—DEFECTS—CONTRIBUTORY NEGLIGENCE.

The other ground of error is controlled by Samples v. Atlanta, 95 Ga. 110, 22 S. E. 135.

(Syllabus by the Court.)

Error from City Court of Swainsboro; Frank Mitchell, Judge.

Action by J. E. Thompson against Emanuel County. Judgment for plaintiff. Defendant brings error. Affirmed.

Saffold & Larsen and Z. D. Harrison, for plaintiff in error. Williams & Bradley, for defendant in error.

POWELL, J. Mrs. Thompson recovered a verdict against Emanuel county on account of a fatal injury occasioned to one of her mules by a defect in a public bridge. The county in this court presents two reasons why the verdict should be set aside and a new trial granted: First, that under the evidence Mrs. Thompson did not have legal title to the mule, that, while she was in possession of it and had paid a part of the purchase price before the injury and the remainder prior to bringing suit, the original vendors had taken a reservation of title as security for the unpaid purchase money, and the legal right to sue was in them at the time of the injury; also that the plaintiff's agent by using the bridge with knowledge of defects in its condition was guilty of such contributory negligence as to preclude a recovery.

1. In Brown Store Co. v. Chattahoochee Lumber Co., 121 Ga. 809, 49 S. E. 839, the plaintiff was in possession of the property

destroyed through defendant's negligence, but a third person held from the plaintiff a deed thereto to secure a debt for unpaid purchase money. The Supreme Court held that this would not defeat the plaintiff's right to recover.

2. The other point is controlled adversely to the plaintiff in error by the decision of the Supreme Court in Samples v. Atlanta, 95 Ga. 110, 22 S. E. 135.

Judgment affirmed.

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(3 Ga. App. 187)

## LOUISVILLE & N. RY. CO. v. WARFIELD & LEE. (No. 375.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

CARRIERS—CARRIAGE OF GOODS.

The decision of the Supreme Court upon the questions certified by this court in this case (129 Ga. —, 59 S. E. 234) settles the only doubtful question presented by the record. There was no error in overruling the demurrer or in refusing a new trial on any of the grounds presented.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Warfield & Lee against the Louisville & Nashville Railway Company. Judgment for plaintiffs, and defendant brings error. Case certified to the Supreme Court (59 S. E. 234), and on the judgment thereof affirmed.

Hardeman & Jones, for plaintiff in error. Jos. H. Hall and Warren Roberts, for defendants in error.

POWELL, J. Judgment affirmed.

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(107 Va. 596)

## NORFOLK & W. RY. CO. v. OBENSHAIN, et al.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907.)

1. DISMISSAL—WATERS AND WATER COURSES—OBSTRUCTION—BILL TO RESTORE RIGHTS—PARTIES.

A bill against a company and an individual defendant to restore an obstructed water right was properly dismissed as to the latter, where the only reference to him was that he had pretended to convey the right to the company though not owning it, and no relief was asked against him, and where the company's answer was not filed as a cross-bill, and he was not made a party to it.

2. WATERS AND WATER COURSES — CONVEYANCE—SUFFICIENCY OF DESCRIPTION.

Under Code 1904, § 2443, providing that every deed shall, unless an exception be made therein, be construed to include all appurtenances belonging to the land, a conveyance of all the grantor's right, title, and claim of whatever kind in land, included a water right reserved as an easement appurtenant to the land in a conveyance of a railway right of way by his remote grantor.

3. SAME—ABANDONMENT.

That a water right reserved in the conveyance of a railway right of way has not been used for several years does not show that it has been extinguished or abandoned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 183.]

Appeal from Circuit Court, Botetourt County.

Bill by D. C. Obenshain against the Norfolk & Western Railway Company and James Mundy. From a decree dismissing the bill as to defendant Mundy, and a decree for complainant, defendant company appeals. Affirmed.

E. M. Pendleton, for appellant railway company. Benjamin Haden, for appellant Mundy. W. B. Simmons, for appellee.

HARRISON, J. This bill in chancery was filed by the appellee, J. C. Obenshain, against the appellant and James Mundy, to have restored a certain water right alleged to have been obstructed by a wide and high fill made by the Norfolk & Western Railway Company over the route of the race and trunk formerly used in conducting the water over the right of way granted by J. J. Echols to the Shenandoah Valley Railroad Company in August, 1881. The complainant claims that he owns this water right, and is entitled to have it flow from its source unobstructed to his foundry and machine shops, and that he has acquired this right under his purchase of this property from his grantor and her predecessors in title.

By decree of September, 1905, a demurrer to the bill by James Mundy was sustained, and the bill dismissed as to him, and in June, 1906, the cause was considered on its merits, upon the proceedings had therein, and a decree entered, holding that the complainant was entitled to the water right in question as appurtenant to his foundry and machine shop lot; and the court, not being then advised as to the best method of affording the complainant relief, recommitted the cause to its master commissioner, who was directed to inquire and report whether the defendant railway company should be required unconditionally to remove the obstruction, or whether it should be required to provide a passageway for the water through its fill, and, if the latter, to locate the point at which such passageway should be constructed and the size of the same. From both of these decrees this appeal has been taken.

We are of opinion that the circuit court committed no error in sustaining the demurrer of James Mundy and dismissing the bill as to him.

The only reference to James Mundy in the bill is that by his deed of April 30, 1901, he had attempted and pretended to convey the water right in question to the appellant company, charging that Mundy did not own such water right, and that the railway company, therefore, acquired no rights under such pretended deed, which was void. The bill charged that the water right had been obstructed by the Norfolk & Western Railway Company making a fill across the water course. It does not charge that Mundy had obstructed the water right, that he owned any land

through which the water would run, or that he had any control over or right to the water. It does not allege that Mundy can, or should be required to, restore such water right if the complainant is entitled to it. No relief is prayed for against Mundy; the prayer of the bill being that the appellant railway company be required to remove the fill, or that it be required to pay a money compensation in lieu of such removal, and that it be enjoined from further interfering with the flow of the water. There is no issue made by the pleadings between Mundy and the appellant railway company. The answer of the appellant was not filed as a cross-bill, and Mundy was not made a party to it, and was not required to take any notice of its allegations. If it be claimed that Mundy is under a liability to the railroad company by reason of his deed of April 30, 1901, he is entitled to be properly impleaded by the company before a hearing of the controversy, in which controversy, so far as this record shows, the appellee, Obenshain, appears to have no interest.

We are further of opinion that there is no error in the decree of June, 1906, holding that the appellee, D. C. Obenshain, is entitled to the water right in question.

The record shows that in the year 1873, the property in controversy, together with other property, was sold and conveyed to one J. J. Echols by L. Linkenhoker, a special commissioner of the court. This deed from Linkenhoker, commissioner, to Echols, conveys the water right in controversy to Echols, and by the citations it contains shows that for many years prior thereto this water right was recognized and reserved in the deeds conveying this foundry and machine shop property. In August, 1881, J. J. Echols granted and conveyed to the Shenandoah Valley Railroad Company, the predecessor in title to the appellant, a right of way for its railroad through these lands. In this deed the grantor expressly reserved the right to have this water continue to flow uninterruptedly to his foundry and machine shops, and the Shenandoah Valley Railroad Company covenanted to so protect such water way over the land conveyed to it as not to diminish the flow or affect the fall of the water in its passage to the machine shops. Subsequently, in October, 1881, Echols conveyed the foundry and machine shop lot, as to which he had reserved the water right in his deed to the Shenandoah Valley Railroad Company, to James Mundy, making special reference to the Linkenhoker deed as the source of his title and for a particular description of the property he was then conveying. In October, 1890, James Mundy conveyed all of his right, title, claim, and interest, of whatever kind, in the controverted property, to the Riverside Land Company, and it has passed, with its appurtenances, from that company through several alienations to the appellee, Obenshain, whose deed from Emma J. McLaughlin is dated February 26, 1902.

In April, 1901, the appellant railway company, the successor in title to the Shenandoah Valley Railroad Company, desiring to do away with the trestle then in use and to substitute the fill complained of across the water way, obtained from James Mundy, who had theretofore parted with the property, a deed reciting the covenant of the Shenandoah Valley Railroad Company to protect the water right, and releasing the appellant from all obligation with respect to such water right, and authorizing it to fill up the space over the water way theretofore spanned by the trestle.

The contention of the appellant is that there is no express grant of the water right in the deed of October, 1890, from James Mundy to the Riverside Land Company, and nothing therein to indicate an intention to convey any water right; that the foundry and machine shops were then in a state of decay; and that the Riverside Land Company bought the property to be divided up into town lots, which was done, and the plat thereof recorded.

Mundy conveyed to the Riverside Land Company all of his right, title, and claim, of whatever kind, in and to the controverted property. Among these rights which he owned was the water right in question which had been conveyed to him by Echols, and the preservation and protection of which had been expressly guaranteed to the property by the recorded covenant of the Shenandoah Valley Railroad Company before Mundy became the owner. It is true that the water right was not specifically mentioned in the deed from Mundy to the Riverside Company; but it was not reserved or excepted from that grant and hence the easement passed from the grantor, as an appurtenance passing with the land, as fully as the buildings or other rights appertaining thereto.

The Code provides that "every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the lands therein embraced." Code 1904, § 2443.

This right of easement originated by express grant, and is shown to be reasonably necessary to the beneficial enjoyment of the property in question, to which it is an appurtenance. Its preservation as an important appurtenance to the property was carefully guarded and protected when the right of way was granted to the Shenandoah Valley Railroad Company, and it has passed without qualification or reservation as a property right from those who originally created it, through successive owners, to the appellee, D. C. Obenshain. As late as April, 1901, the appellant, in changing its track from a trestle to a fill, recognized the existence of this water right and its value by attempting to buy it from James Mundy, and to obtain from him a release of the obligation it was under, by reason of the covenant of its pred-

ecessor, to preserve and protect the same.

It is true, as contended, that this property has for a long time been in a dilapidated condition, and that the water right in controversy has not been used for a number of years; but the mere nonuser of an easement which has been created by grant does not extinguish it, or show that it has been abandoned. Angell on Water Courses, § 252.

In Watts v. Johnson R. E. Corp., 105 Va. 519, 525, 54 S. E. 317, 319, it is said, citing numerous authorities: "The doctrine, too, is well settled that mere nonuser of an easement created by deed for a period however long will not amount to abandonment. To show this there must be acts of the owner showing an intention to abandon, or an adverse user by the owner of the servient estate, acquiesced in by the owner of the dominant estate. Nothing short of a user by the owner of the servient estate, which is adverse to the enjoyment of the easement by the owner thereof, for a period sufficient to create a prescriptive right, will destroy the right granted."

The record in the case at bar does not justify the conclusion that the appellee, Obenshain, has abandoned the water right in controversy, or that it was ever abandoned by those under whom he claims.

For these reasons, the decrees complained of must be affirmed.

Affirmed.

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(107 Va. 846)

## MIDGETS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Nov. 13, 1907.)

CRIMINAL LAW — WRIT OF ERROR — BILL OF EXCEPTIONS.

Where the bills of exceptions in a criminal case were not signed by the trial judge at the term at which the rulings excepted to were made, or in vacation within 30 days after the end of the term, or at a time at which the parties by consent entered of record at the term had agreed on, a writ of error will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2847.]

Error to Corporation Court of Alexandria.

George Midgets, alias William Johnson, was convicted of murder, and brings error. Dismissed.

Howard W. Smith and R. D. Brumback, for plaintiff in error. William A. Anderson, for the Commonwealth.

PER CURIAM. This day came again the parties by counsel, and the court having maturely considered the motion of the commonwealth to dismiss the writ of error awarded in this case and the answer of the defendant thereto, and it now appearing to the court that the several bills of exception of the plaintiff in error were not signed by the judge of the corporation court of the city of Alexandria at the term at which the opinions and judgment of said court to which exception is taken were announced, or in the vacation of said court within 30 days after the end of such term, or at a time at which the parties by consent entered of record at said term had agreed that they should be so signed, but were signed by the said judge at a subsequent term of his said corporation court, the court is of opinion that the said writ of error was improvidently awarded. It is therefore considered that the said writ of error be dismissed, and that the commonwealth recover of the plaintiff in error her costs by her about her defense herein expended, which is ordered to be forthwith certified to the said corporation court of the city of Alexandria.

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(62 W. Va. 602)

## PATRICK et al v. STARK et al.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. LIMITATION OF ACTIONS—SUITS IN EQUITY.

Statutes of limitation are never applicable to causes of action falling within the exclusive jurisdiction of courts of equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 169.]

2. TRUSTS — ENFORCEMENT — EQUITABLE RELIEF.

Enforcement of a resulting trust in land, being a proceeding for the vindication of mere equitable title, not recognized in courts of law, is cognizable in equity only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 565.]

3. SAME—LACHES.

The equity rule of laches is applicable to proceedings to enforce all trusts, affecting title to land, for the establishment of which resort must be had to parol evidence, without regard to classification as express, implied, resultant, and constructive trusts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 571–573.]

4. EQUITY—LACHES—EXCUSE FOR DELAY.

Generally, any legal disability, such as infancy or coverture, will excuse delay in suing for the enforcement of a purely equitable right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 241.]

5. SAME.

When equity does not apply the statute of limitations by analogy (as it does to demands purely legal and those as to which there is concurrent jurisdiction at law and in equity), the averments of matter to excuse delay need not be of the degree of certainty and particularity that is required to make out a case of exception from the statute of limitations, on the ground of fraudulent obstruction of the prosecution of the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 227.]

(Syllabus by the Court.)

Appeal from Circuit Court, Taylor County.

Bill by Thomas J. Patrick and others against Larkin J. Stark and others. Decree for defendants, and plaintiffs appeal. Reversed and remanded.

Elmer F. Goodwin, Thomas Coleman, and H. P. Camden, for appellants. Dent & Dent, for appellees.

POFFENBARGER, J. The circuit court of Taylor county entered a decree sustaining a demurrer to the bill of Thomas J. Patrick, Simon Crouse, Viola Crouse, and Eliza J. Stuart, on the ground of laches and staleness of demand, and they have brought it to this court for review.

The bill was filed against Larkin J. Stark and Louie Stark, his wife, to establish a resulting trust in certain land situate in said county. The material facts alleged are about as follows: In February, 1865, Sylvester Patrick and his brother, Jacob Patrick, residing in Wood county, and being the owners of real estate therein situate, sold the same for the sum of $14,000 in cash. Jacob Patrick took this money, belonging equally to himself and Sylvester, and invested it in what is known as the "William Mallonee Farm," in Taylor county, near Meadland, containing about 339 acres, for which he paid $16,900 in cash, of which $7,000 belonged to Sylvester, and took a deed in his own name, bearing date March 15, 1865. Soon afterward, both Jacob and Sylvester, unmarried, took possession of the newly purchased farm and continued to reside there, or in the neighborhood thereof, until both died. Part of the time they occupied the mansion house on the farm, and part of the time one of them resided elsewhere, but both enjoyed the rents, issues, and profits until the death of Sylvester, which occurred about March 29, 1886. Jacob married Mary Jane Robinson, by whom there was born to him an imbecile son, Bruce, and he (Jacob) died about September 13, 1888, leaving both wife and son surviving him, and the son died about July 17, 1896. Sylvester married Eliza J. Snyder about January, 1876, and there were born to them five children, Clifton, Ernest, James, Viola, and Thomas, of whom Thomas and Viola, plaintiffs in the bill, are still living. Clifton was born November 1, 1874, and died August 17, 1892. Ernest was born February 28, 1876, and died April 13, 1901. James was born October 2, 1877, and died November 18, 1896. Viola was born September 15, 1880, and Thomas November 24, 1883. Eliza J. Patrick, mother of all these children and widow of Sylvester, married Bryson Stuart, who has since died. Mary Jane, widow of Jacob Patrick, married Larkin J. Stark, one of the defendants, and died in the year 1897, leaving a will, by which she devised to said Stark all of her property except certain sums of money which she gave as specific legacies to sundry persons, amounting, in the aggregate, to about $800. Under this will Stark took the legal title to the land, since Bruce inherited it from his father, Jacob, and, dying without issue, left it to his mother. Under the will Stark claims, and is in possession of, the entire farm, which now consists of about 260 acres, a portion thereof having been sold in April, 1890, to Charles W. Reynolds, to satisfy the debts of Jacob Patrick, in a suit in equity brought by Allen Nuzum, his administrator. After the death of Mary Jane, Stark married Louie Rogers, the other defendant. On the 18th day of March, 1902, Larkin J. Stark and wife conveyed 28.8 acres of the land to Jeriah Stark, who, with his wife, reconveyed it to the defendants by deed dated April 7, 1905. Tacitly the bill says the plaintiffs have not received any rents or other profits of the land since the death of Sylvester Patrick, March 29, 1886, for it fails to allege the fact, and charges that "Mary Jane Patrick inherited the interest of her said son in said farm, and that the said Bruce Patrick and the said Mary Jane, his mother, held the said 'William Mallonee Farm,' from the date of the death of the said Jacob Patrick down to the date of the death of the said Mary Jane in the year 1897, as hereinafter alleged, subject to the equitable estate of the heirs of the said Sylvester Patrick"; and, further, that Jacob and Sylvester operated said farm jointly and together enjoyed the rents, issues, and profits thereof from the time of the purchase thereof until they died.

As the bill sets up a cause of action cognizable only in equity, an equitable title to real estate withheld by the defendants, the statute of limitations cannot apply, either directly or by analogy, no matter what the form or nature of the trust may be. Whether the statute will be applied in equity depends upon the nature of the demand asserted in that court. If it be a purely legal demand, or if it be one of concurrent jurisdiction, equity will apply the statute by analogy. Newberger v. Wells, 51 W. Va. 624, 632, et seq., 42 S. E. 625; Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795; Bland v. Stewart, 35 W. Va. 518, 14 S. E. 215; Woods v. Stevenson, 43 W. Va. 149, 27 S. E. 309; Trader v. Jarvis, 23 W. Va. 101; Pusey v. Gardner, 21 W. Va. 470. The bill sets up what is known in equity as a resultant trust, and, no matter whether it be an express trust or not, it can be enforced in an equitable forum and not elsewhere. The character of the bill is determined partly by the nature of the transaction to which it relates, and partly by its form and the relief it seeks. If Jacob Patrick, having in his hands $7,000 of his brother's money, without any authority, invested it in land, and took the deed in his own name, the brother had an option to waive the wrong and ratify the act and claim title to a share of the land, proportionate to the amount of his money, or to proceed as for a wrong, treating the other party as a trustee ex malificio, and follow up the fund and charge it upon the land and exact it therefrom. In the former case, he would set up a resultant trust, an equitable title in the land, which a court of equity would sustain, on the presumption that it was the intention of the parties to make the one holding the legal title a trustee for the other. In the latter case, the bill would allege what is known in equity as a construc-

tive trust, resting upon a fraud which made the perpetrator thereof a trustee for the injured party. Marshall's Ex'r v. Hall, 42 W. Va. 641, 26 S. E. 300; Crumrine v. Crumrine, 50 W. Va. 226, 40 S. E. 341, 88 Am. St. Rep. 859; Webb v. Bailey, 41 W. Va. 463, 23 S. E. 644. His bill would assert a right in respect to the land, but it would be only a lien for the security of the wrongfully diverted fund. The statute of limitations could not apply in either case, for both would be cognizable in equity only. That it does not apply to all constructive trusts was expressly decided in Newman v. Newman, 60 W. Va. 371, 55 S. E. 377. That it does apply to some, namely, when the demand arising out of it is cognizable either at law or in equity, as the cestui que trust may elect, has been decided in Beecher v. Foster, 51 W. Va. 605, 42 S. E. 647, and in Thompson v. Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795. In Beecher v. Foster, the demand set up was not the assertion of a lien upon land, but the recovery, by a mere personal decree, of a sum of money which had been wrongfully diverted by a trustee. It was not a purely equitable demand.

Though the statute of limitations does not apply, the rule of laches is applicable to all constructive, resultant, and other trusts for the establishment of which resort to parol evidence is necessary. Troll v. Carter, 15 W. Va. 567, held as follows: "Whenever the courts permit parol evidence to be received to establish a trust, they always require such evidence to be clear and unquestionable, to produce such result. And they will never enforce such a parol trust, where a great lapse of time has intervened since the absolute deed was executed, and where the grantee, during such time, has acted as the absolute owner of the property, unless, the laches of those claiming to be cestuis que trust is satisfactorily explained." That resultant trusts, though express, are subject to this rule has been judicially declared. Woods v. Stevenson, 43 W. Va. 149, 27 S. E. 309; Heiskell v. Powell, 23 W. Va. 717; Miller v. Blose's Ex'r, 30 Grat. (Va.) 744. It is sometimes interposed in the case of an express trust, evidenced by a written instrument, after the trustee has repudiated the same and brought home to the cestui que trust knowledge of his repudiation thereof. Bargamin v. Clarke, 20 Grat. (Va.) 544. "It is often suggested that the lapse of time constitutes no bar in cases of trust, but this proposition must be received with its appropriate qualifications. As long as the relation of trustee and cestuis que trust is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the cestui que trust. But, when this relation is no longer admitted to exist, or time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties, or other circumstances, give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief, upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust, and, a fortiori, it will apply with increased strength to cases of implied or constructive trusts." 2 Story's Equity, § 1520a, quoted with approval in Bargamin v. Clarke, cited.

Long lapse of time raises a presumption of abandonment, and puts upon the plaintiff the duty of excusing or explaining it in his bill. Without such excuse his bill is bad on demurrer; but if the explanation made lays hold upon the conscience of the chancellor and satisfies it that the plaintiff has been free from inequitable conduct, and has had some good reason for not asserting his demand at an earlier date, which negatives the presumption of abandonment, the delay is overlooked, and the bill held good. The excuse set up here is infancy on the part of two of the plaintiffs, and that is amply sufficient to free them from the charge of laches during the period of their infancy, for, generally, laches is not imputable to any person who is laboring under disability such as infancy or coverture. Waldron v. Harvey, 54 W. Va. 608, 617, 46 S. E. 603, 102 Am. St. Rep. 959; Baker v. Morris' Adm'r, 10 Leigh (Va.) 284; Knight v. Watts' Adm'rs, 26 W. Va. 175; Robinett v. Robinett's Heirs (Va.) 19 S. E. 845; Hogg's Eq. Pr. § 289, p. 418. This seems to be a general rule, subject to exceptions, and not an invariable one. In Knight v. Watts' Adm'rs, Judge Green said: "An infant or lunatic ought not to be prejudiced because of the failure of a next friend to institute such a suit, if such suit is brought promptly after there is some one upon whom the law imposes the obligation to guard the interests of the infant or lunatic." While it may be said to depend somewhat upon the circumstances, if it appear that, at the time the cause of action accrued, the plaintiffs were infants of tender years, they are seldom, if ever, turned away as having come too late. Lamar's Ex'r v. Hale, 79 Va. 147; Wilson v. Branch, 77 Va. 65, 46 Am. Rep. 709. It may be that infancy would be no protection, if laches had begun to run against the ancestor, since the running of the statute of limitations does not cease, in favor of heirs, by reason of the death of the ancestor against whom it had already commenced to run; but this question need not be considered or disposed of here, for time had not commenced to run against the ancestor. The bill alleges that, up until the time of his death, Sylvester Patrick shared with his brother in the rents, issues, and profits of the land; and, so long as the trust relation was thus acknowledged, and not repudiated, forbearance to sue for the legal title did not constitute laches. Bargamin v. Clarke, 20 Grat. (Va.) 544; Reed v. Bachman (W. Va.) 57 S. E. 769. As long as there is an assertion of

an equitable right by the party claiming it, recognized, acknowledged, and acceded to by the other party, laches does not run. In other words, the fact of such continuous demand, recognition, and accession excuses lapse of time. Southern Ry. Co. v. Gregg, 101 Va. 308, 43 S. E. 570; Griffin v. McCaulay's Adm'r, 7 Grat. 476; Beverly v. Rhodes, 86 Va. 415, 10 S. E. 572; Alexander v. Byrd, 85 Va. 690, 8 S. E. 577.

This suit was instituted on the 23d day of August, 1905, less than one year after Thomas Patrick attained his majority, and less than four years after Viola Crouse attained hers. In view of their disability until dates so near the institution of the suit, the demurrer should have been overruled, and, for the error of the court below in failing to do so, the decree will be reversed; but we refrain, in the present state of the case, from indicating any opinion as to when the trust was disavowed, if at all, since, on the final hearing, the facts will be more fully developed, and the circumstances to be disclosed may be such as to deny relief, on the ground of laches, notwithstanding the disability under which the plaintiffs have labored. As we are not here applying the statute of limitations by analogy, the excuse for delay need not be alleged with the certainty and particularity required by the rule declared in Newberger v. Wells, 51 W. Va. 624, 42 S. E. 625, in which it was necessary for the plaintiffs to bring their case within the exception to the statute, relieving from its operation, when prosecution of the action has been obstructed by the fraudulent conduct of the defendant. There the right to sue was absolutely barred, and, to relieve themselves, the plaintiffs were called upon to establish an affirmative act of obstruction on the part of the defendants. Here the plaintiffs are required to overcome a mere rebuttable presumption, arising from delay; wherefore the averment in the bill of matter of excuse for the delay need not develop the whole case, nor all the facts bearing on the inquiry as to laches, nor set forth the facts with that degree of certainty required when the object is relief from the bar of the statute of limitations.

For the reasons stated, the decree will be reversed, the demurrer overruled, and the cause remanded.

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(62 W. Va. 650)

## STYLES v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. TRIAL—INSTRUCTIONS.

Where instructions are given both for the plaintiff and the defendant touching the same subject, and some are incomplete, but state the law properly as far as they go, and other instructions are given which supply the defect, they will all be taken and read together; all being the instructions of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703–717.]

2. SAME.

The purpose of instructions being to advise the jury what the law is on the subject-matter of the instructions, to carry out that purpose, all instructions given in the case, whether for either or both parties, must be read together each in the light of the others, and they must constitute a consistent whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703–717.]

3. APPEAL—REVIEW—VERDICT.

Point 3, Syl., Bosley v. Railroad Co., 54 W. Va. 563, 46 S. E. 613, 66 L. R. A. 871, approved and applied.

(Syllabus by the Court.)

Error to Circuit Court, Fayette County.

Action by Samuel H. Styles against the Chesapeake & Ohio Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Simms & Enslow, for plaintiff in error. Dillon & Nuckolls, for defendant in error.

McWHORTER, J. This was an action in case brought in the circuit court of Fayette county by Samuel H. Styles against the Chesapeake & Ohio Railroad Company, a corporation, to recover damages from said company by reason of its failure to carry and transport the plaintiff from Glenjean station on a branch of its said road to Thurmond, another station, and for personal injuries to the said plaintiff caused by ejecting him from a freight train of the said defendant while said train was in motion; the plaintiff having purchased a ticket at the said Glenjean station to the said station at Thurmond and return on March 19, 1904.

While a demurrer to the declaration was overruled, there is no complaint of the action of the court in so doing. The only point raised in the case, except the claim of excessive damages allowed by the verdict of the jury, is as to the instructions given on behalf of the plaintiff. Instructions Nos. 1, 2, 3, and 4 are objected to, as it is claimed "they are all based on the theory that a common carrier of passengers is bound to receive just as many people as apply for carriage, no matter what their number or how crowded the cars may be," and no other objection or exception is made to said instructions or either of them. On motion of the defendant, the court gave the following instruction touching that point: "The court instructs the jury that a railway company is not required to carry an unusual number of passengers who without any previous notice apply for passage at a local point and the company is not required by law to carry passengers on freight trains or the freight cars, and, although a ticket may have been sold plaintiff to go on a certain train, if that train was full when it arrived at the point where the ticket was sold, the plaintiff has no right of action, if the defendant's agents offered to refund the money, which plaintiff paid for ticket." The instructions of plaintiff and the said instruction of defendant given by the court fully instructed the jury on the theory contended for by the

defendant. The instructions taken all together present the issue fairly to the jury. In State v. Cottrill, 52 W. Va. 363, 43 S. E. 244, Syl. point 1, is as follows: "When an instruction is incomplete in not going far enough to put the law upon its subject, but other instructions do state the law omitted, and taken together they properly state the law upon the subject, no error can be based on the defect of such instructions to reverse the judgment, as the other instructions cure the defects in it." It is there further held: "All instructions given are instructions of the court, regardless of who requests them, and are to be considered together." And in State v. Prater, 52 W. Va. 133, 43 S. E. 230, it is held: "When an instruction given is incomplete, but states the law correctly as far as it goes, and the omitted part is supplied by other instructions given, such omission is not error."

The second assignment is that the court erred in giving, on behalf of the plaintiff, the following instruction: "The court further instructs the jury that if they find for the plaintiff that they have a right to assess the actual damages that may have been sustained by the plaintiff, and, in addition thereto, they may find such damages, if any, as the plaintiff may be entitled to by reason of any physical pain or mental anguish suffered by the plaintiff as direct result of the negligence or breach of contract on the part of the defendant." It is argued by plaintiff in error that said instruction was improper to be given, "as the evidence showed that plaintiff had sustained no physical injury, and under the law he cannot recover damages for mental anguish unaccompanied by bodily injury," and cite several authorities to sustain its position. It is not true that according to the evidence the plaintiff sustained no physical injury. He states in his testimony that he was hurt upon the head, and that by his fall in jumping to the ground from the car he was badly shaken up, and, when he got to the train upon which his wife and child were, he was a nervous wreck and in a pretty bad condition. The question as to the amount of damages is one for the jury. In Trice v. Railroad Co., 40 W. Va. 271, 21 S. E. 1022, where plaintiff was ejected from the train at a regular station and no physical injury inflicted, he having purchased a mileage ticket good for one year from date of issue which the agent had stamped by mistake the 4th day of March, 1892, instead of 1893, plaintiff tendered the ticket on the 24th of April, 1893, in the payment of fare, which was refused, and he was ejected for nonpayment of fare. It is there held that, where the case is one of indeterminate damages and the law gives no specific rule of compensation, the decision of the jury upon the amount of damages is generally conclusive, unless the amount is so large or small as to induce the belief that the jury was influenced by passion, partiality, corruption, or prejudice, or misled by some mistaken view of the case. In that case a verdict for $550 was sustained; the plaintiff being wrongfully requested to leave the train. No force was used to put him off, and there was no physical injury inflicted. See, also, Suth. Dam. § 953; Farish v. Reigle, 11 Grat. (Va.) 697, 62 Am. Dec. 666; Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485; Boster v. Railroad Co., 36 W. Va. 318, 15 S. E. 158; Sheets v. Railway Co., 39 W. Va. 475, 20 S. E. 566. The verdict in case at bar is only $200, and, if the plaintiff is entitled to recover at all, this verdict cannot be complained of as excessive. The plaintiff was very anxious to reach Thurmond to meet the passenger train from the East upon which his wife and child were. After being removed from the passenger train by the conductor, he had used every means in his power to be transported to Thurmond, a distance of 8½ miles, and according to the defendant's own testimony he had permission from the superintendent to ride upon a freight train, was directed by the superintendent to walk to Harvey—about a mile on the way to Thurmond—where he was told he would find a freight train upon which he could take passage. He was acting in good faith, trying to get the carrier to render him the service which he had paid for, and to carry out the order of the superintendent in relation to his riding upon a freight car. He got upon the train found standing at a station, and, after the train had started, he was required by the conductor thereof to jump from the moving train, although he told the conductor that he had a ticket and had instructions from the superintendent to ride on a freight train. The conductor told him that "it didn't make a damned bit of difference," that he would have to get off, and forced him to jump off in a dangerous place from a height of some seven feet while the train was in motion, whereby he received the injury complained of. Whether plaintiff was rightfully or wrongfully on that freight train the defendant had no right to eject him therefrom in the manner it was done, while the train was in motion and in so dangerous a place. The damages are not excessive in any view of the case. Bosley v. Railroad Co., 54 W. Va. 563, 580, 46 S. E. 613, Syl. point 3, 66 L. R. A. 871, it is held: "Where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court, unless manifest wrong or injustice has been done, or unless the verdict is plainly not warranted by the evidence."

For the reasons here given, the judgment of the circuit court is affirmed.

(62 W. Va. 599)

## JOHNSON v. GOULD et al.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. APPEAL—REMAND—LAW OF THE CASE.

A circuit court has no power, in a cause decided by the appellate court, to rehear it as to any matter so decided, and, though it must interpret the decree or mandate of the appellate court, in entering orders and decrees to carry it into effect, any decree it may enter that is inconsistent with the mandate is erroneous and will be reversed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4661–4665.]

2. SAME—MODIFICATION OF DECREE.

A decision of the appellate court, declaring the right of the owner of land, on which there is a spring of water, to have the spring supplied from the land of an adjoining proprietor, to the extent of the natural flow of water therefrom, remanding the cause for such proceedings may be necessary to carry the decision into ct, cannot be modified by the court below so to give to the spring owner only the quantity water afforded by the flow on a given date.

Ed. Note.—For cases in point, see Cent. Dig. 3, Appeal and Error, §§ 4696–4700.]

Syllabus by the Court.)

Appeal from Circuit Court, Wood County.

Bill by Nannie K. Johnson against Fannie Gould and others. From a decree, plain- appeals. Modified and affirmed.

See 53 S. E. 798.

Dave D. Johnson, for appellant. Wm. ard, for appellee Fannie M. Gould.

POFFENBARGER, J. After the chancery ise of Johnson v. Gould, decided by this irt, February 20, 1906, and reported in 60 Va. 84, 53 S. E. 798, had been remanded the circuit court of Wood county, and mandate entered there, a decree was pre- ed by the counsel for Mrs. Johnson, and sented to the court for entry. There- on counsel for Mrs. Gould objected to the ry thereof, on the ground that it did not iform to the mandate and opinion of this irt, and the court modified it before allow- ; it to be entered. Feeling that the decree entered did not give her the full measure relief to which she is entitled, as de- mined by the decision of this court, Mrs. hnson has appealed.

The mandate required such decree or de- es of the lower court as should, among ier things, "be necessary to carry into ect the principles stated and directions en in the written opinion" filed. In the iclusion of the opinion, it is said: "She rs. Johnson) is entitled to an injunction against the maintenance by Mrs. Gould of the new spring, the tunnel, or ditch, and all other constructions made by her, in so far only as the same materially interfere with, impair, or destroy the easement to which Mrs. Johnson is entitled for her land. Mrs. Johnson, under the circumstances of this case, is also entitled to have the land of Mrs. Gould restored to the condition in which it was at the time of the partition, if that can be done (except where such condition has been changed by natural causes), so far as necessary to restore the natural issuance or flow of water therefrom supplying the old spring."

The decree as prepared and tendered by counsel for Mrs. Johnson seems to conform in all respects to the terms and import of the quoted portion of the opinion, and that portion harmonizes with the stated principles and conclusions preceding it. The modification complained of consists of the insertion, at several places, of the qualifying phrase "to the extent and in the quantity that flowed at the time of such partition," or the equivalent thereof, the effect of which is to prevent Mrs. Johnson from having restoration of the spring with the full quantity of water it will naturally flow, and limit her to so much water as did flow into the spring at the time of the partition. The two propositions are vastly different. No doubt, the quantity of water afforded by the spring varies with the seasons and the changes of the weather. This court had before it no means of ascertaining the quantum of the flow at the date of the partition, or any other time, and the case was fully made up and finally decided here and remanded, not for new pleadings and evidence on the merits, or a decree predicated upon some theory, differing from that stated in the opinion. Plainly the former decision required the restoration of the spring, with all its natural flow, if that be reasonably practicable, and, if not, then as nearly as possible, and the right of Mrs. Gould to maintain the new spring on her land and give Mrs. Johnson the mere overflow was most emphatically denied. The attempt of the court below to so limit Mrs. Johnson's right was the very ground of complaint on the former appeal, and the opinion expressly says the natural issuance and flow of water to the old spring cannot be materially impaired or interrupted by Mrs. Gould. No inquiry as to the soundness of the former decision herein can now be prosecuted. Right or wrong, it is the law of the case. Its binding force lies, not in the rule stare decisis, but in the principle res judicata. It is a decision in the same case, forever and irrevocably determining the rights of the parties. No court now has any power or control over it other than the ascertainment of the intent and meaning of the decision, from the terms of the mandate, in entering such decrees as are necessary to carry it into effect.

For the reasons stated, we are clearly of the opinion that the decree now complained of varies from the requirements of the mandate. Therefore it will be modified by striking from the third, fourth, fifth, and sixth paragraphs thereof the parenthetical phrases "to the extent that said lands of Mrs. Gould did supply the old spring at the time of the partition aforesaid," and "to the extent of permitting the original supply to the old spring as aforesaid" and all others of like

INSPECTED BY L. EFFINGER

and similar tenor and import; and as so modified the decree will be affirmed, and the cause remanded for such further proceedings as may be necessary to carry into effect said decree as modified and affirmed, as well as the former decision of this court in this cause.

(62 W. Va. 671)

## GULLAND v. GULLAND.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. DIVORCE—PROCEDURE—CONTINUANCE.
In suits for divorce, because of the interest of the state and public therein, more liberality should be observed in granting continuances than is usual in other civil cases; but this discretion should be equitably and carefully exercised.

2. SAME — APPEAL — REVIEW — DISCRETION OF COURT.
But, even in such suits, where the question of a continuance is involved, the appellate court must, before reversal, be able to say that there has been an abuse of its discretion by the lower court.

3. CONTINUANCE—ABSENCE OF WITNESSES.
No continuance based on the absence of witnesses will be granted, unless it appears that the absent evidence is material to the issues as made by the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 69–71.]

4. SAME.
Where by judgment or decree a fact has been adjudged by the court to have been defectively pleaded, a continuance should not be granted to obtain evidence of such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, § 70.]

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Action by John Gulland against Sarah Elizabeth Gulland. Decree for plaintiff, and defendant appeals. Reversed and remanded.

Jared L. Wamsley and Harding & Harding, for appellant. Samuel T. Spears, for appellee.

MILLER, P. In a suit for divorce by husband against wife, upon bill, answer, and the demurrer and special replication of the plaintiff thereto, and upon evidence on behalf of the plaintiff alone, there was a decree in his favor dissolving the marital bonds, without alimony or other provision for her. The answer denied the grounds of divorce alleged, and, with some particularity as to persons, time, place, and circumstances, countercharged against the plaintiff adultery and other violations of the marriage vows, which would not only preclude him from a decree, but would entitle her to a divorce. In this answer the defendant asks suit money for support, and division of the property alleged to have been acquired by joint efforts, but does not specifically pray for divorce. There was a demurrer and a special replication to the answer, which demurrer was not specifically acted upon, but, through inadvertence perhaps, ignored.

While the petition for the appeal challenges the sufficiency of the pleadings and proof to support the decree, we do not understand the point to be seriously presented on this hearing; nor do we think the decree amenable to these criticisms.

The only other question presented is the motion of the defendant for a continuance. In addition to the facts otherwise appearing in the record, this motion is supported by the affidavits of the defendant and her attorney; and the question is, was there abuse of its discretion by the circuit court in overruling it? In disposing of this question, we are to remember that the public, as well as the parties immediately concerned, are interested. This court and the courts of other states have said that the state must be regarded as a party to all such suits. Wass v. Wass, 41 W. Va. 130, 23 S. E. 537; Barnes v. Barnes, 95 Cal. 171, 30 Pac. 298, 16 L. R. A. 660. The latter, a divorce case, holds that, because of the public interest, more liberality should be observed in granting continuances than is usual in other classes of cases. This discretion, of course, as in all cases, should be equitably and carefully exercised. Buster v. Holland, 27 W. Va. 534. But, although divorce cases stand on their own footing in reference to continuances, even in these cases, the appellate court, before reversal, must be able to say there has been abuse of its discretion by the lower court.

What are the facts? The plaintiff brought his suit August 8, 1906. The same day he gave notice to take his depositions. In his affidavit for continuance defendant's counsel says that about the same day suit was brought plaintiff called on him at his office, representing that he had been requested by the defendant and her brother to employ him to look after her interests in the suit, but only to the extent of seeing that she was fairly dealt with, and that nothing unnecessarily harsh should get into the record, saying, also, that she did not want to defend the suit with any idea of defeating it, but recognized the fact that she could have no defense, which employment he accepted in good faith. Depositions on behalf of the plaintiff were begun and continued; the counsel so employed for the defendant appearing and cross-examining the witnesses. These depositions not being completed in time for the following September term of court, as anticipated, numerous adjournments were taken from time to time, on account of absence of witnesses, until they were closed on November 3d with the cross-examination of the plaintiff by the defendant's counsel, and were filed November 5th. September 8th the court on motion of defendant's counsel, without resistance by plaintiff, allowed her $50 to aid her in her defense, her counsel admitting on the record the previous payment to her by the plaintiff for her support of $250. In the affidavit of defendant's counsel for a continuance, he explains that this

admission was based wholly on what plaintiff had told him. In his special reply to defendant's answer the plaintiff says that, when he separated from his wife he notified her of his purpose to procure a divorce, and that, if she had any defense, he desired her to defend herself, and then gave her brother a check for $250, with instructions that the same be paid her as she might need it. In her answer the defendant says this check was given to her brother, without her knowledge, about the time she started with her brother to her mother's home in Maryland; that her brother gave her the check; that she had used the money for her support. After his employment, the defendant's counsel filed no plea or answer for her until after all the plaintiff's depositions had been concluded. In his affidavit he says that, while attending the taking of the depositions, he received a letter from defendant, mailed at Westernport, Md., in which she clearly intimated that she was expecting him to defend her interests in the matter, not only in accordance with his said employment, but to the extent of defeating the prayer of the plaintiff's bill; that he immediately informed the plaintiff of the contents of this letter, and notified him that he would at once confer with defendant, but would in the meantime in taking depositions act upon her suggestion regarding her defense; that about the time the order of September 8th was entered he received another letter from defendant, reiterating her intention to defend the suit, and her desire that he should do so to the best of his ability, which letter he immediately showed the plaintiff; that shortly thereafter, about September 15th, defendant came to Elkins, declaring her purpose to make complete defense; that, while plaintiff was taking his depositions during September and October, he notified defendant to prepare for the taking of her depositions as soon as plaintiff should close his, and that she got ready to do so, bringing one important witness from Pennsylvania; that it was deemed inexpedient, if not impossible, to hold said witness until plaintiff should close his depositions; that he also during the same time blocked out defendant's answer, which was made the foundation of her answer filed, and notified her to prepare for taking depositions. Only 10 days elapsed from the date of filing plaintiff's depositions until the beginning of the November term of court. Defendant in her affidavit corroborated her counsel in relation to her preparation for trial and the absence of the witness brought from Pennsylvania, and said that she had other witnesses by whom she would be able to prove her husband's infidelity to her, but whose attendance she had been unable to procure since the plaintiff had closed his evidence, and whose names she would disclose if requested by the court. The motion of the defendant for a continuance, made on November 22, 1906, the day of the final decree, was heard on the record and the affidavits of the defendant and her counsel and the counter affidavit of the plaintiff. The grounds of defendant's motion were, substantially, that counsel had been misled and deceived by plaintiff; want of time, after plaintiff concluded his depositions, in which to take her testimony; absence from the state especially of the witness whom she alleged she had brought from Pennsylvania to Elkins October 9th and detained there until October 12th, as long as she could, awaiting completion of the plaintiff's evidence, and whom she had not since her return home been able to reach, although she had been endeavoring by letter to do so, but whose evidence she had good cause to believe she would be able to procure, if given, a continuance until the next term, and by whom she believed she would be able to establish the charge of adultery against the plaintiff; also, the absence of other witnesses, whose names she proposed to give if requested, by whom, if given opportunity, she believed she could prove the infidelity of her husband, but whose depositions she had been unable to procure in time for a trial at the then present term.

Although conceding the liberal application thereof, it is argued by plaintiff's counsel that the rules respecting continuances are the same in divorce cases as in other civil cases; that one of these rules is that the absent evidence must not only be material as to the issue of fact involved, but, in order to warrant a continuance, must be material to the issues as made by the pleadings; and that a continuance will not be granted to obtain evidence upon an issue that has been defectively pleaded or never pleaded at all. For this position, we are cited to 9 Cyc. 107, which sustains the general proposition, but we think, upon this authority and others, it must be applied to cases where by judgment or decree the fact has been adjudged by the court to have been defectively pleaded. See Prather v. Young, 67 Ind. 480; Swift v. Ellsworth, 10 Ind. 205, 71 Am. Dec. 316. It is argued that the alleged failure of the answer to allege a particeps criminis, time, place, and circumstances rendered it demurrable, and hence no issue was presented thereby, although, besides the demurrer, the plaintiff made special reply thereto. In Trough v. Trough, 59 W. Va. 465, 53 S. E. 631, 4 L. R. A. (N. S.) 1185, this court said: "We do not say whether or no a bill for divorce for this offense [adultery] should contain the name of the particeps criminis or other matter of alleged defect in the bill, because the demurrer is general, and there are two grounds of divorce contained in the bill, one calling for full divorce, a vinculo matrimonii, the other partial divorce, divorce of separation, a mensa et thoro." But a distinction is there noted between cases where the relief is given, justifiable only on the bad matter, which is reversible error, and cases of defective statement of matter calling for relief—mere de-

fect of specification. "That," says this court, "takes the case out of the rule just referred to." The demurrer in that case, as in this, seems not to have been expressly acted on—"likely owing" as this court says, "to inadvertence; but we must regard it as overruled." It is conceded that adultery or the plaintiff, or other breach of the marriage contract which would justify a decree of divorce, will defeat his suit. Wass v. Wass, 41 W. Va. 130, 23 S. E. 537; Bart. Ch. 309; Martin v. Martin, 33 W. Va. 695, 704, 11 S. E. 12. In the English ecclesiastical courts, says Bishop, "when adultery is charged by way of recrimination merely, it is not necessary to prove such strong facts as would be requisite to convict on a direct proceeding for divorce"; but the distinction does not prevail in this country. 2 Bish. Mar. & Div. (5th Ed.) § 89; Martin v. Martin, supra.

The question recurs, then: Did the pleadings and facts presented call for the continuance asked? We think they did. Considering what occurred between plaintiff and defendant prior to the suit, the nature of the employment by plaintiff of counsel for defendant, the conduct of the defendant, and the character of the defense afterwards up to the filing of defendant's answer, there is at least the suggestion of a collusive arrangement for divorce, which the law condemns and against which the doors of the courts should be closed. But, if there was no collusion, there was cause for continuance. Only a few days had elapsed since the conclusion of plaintiff's evidence, barely time to have served the usual notice upon the plaintiff, before the commencement of the term of court at which the case was tried, with no time thereafter to complete her testimony. The defendant certainly had made some effort to get witnesses, having brought one from another state, but whom she says she was unable to detain until the plaintiff completed his testimony. It is true that defendant does not distinctly say in her affidavit for a continuance that she will be able to prove by her witnesses her own innocence of the charges in the bill against her; but proof of his guilt would defeat him, and it is argued that her purpose was to prove her innocence also. Moreover, the state is as much interested in debarring a plaintiff with unclean hands from entering its courts as the defendant in maintaining her own good name and fame and preserving her connubial rights, and the courts in administering the law especially guard the right of the state.

We think a continuance in this cause should have been granted.

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(62 W. Va. 639)

## BARKER v. HINTON et al.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. WILLS—EXECUTION.

The change in section 3135 (section 3, c. 77) Code 1906, made by chapter 84, p. 194, Acts Leg. 1882, making the additional requirement that witnesses subscribing a will should do so "in the presence of each other," applies only to wills executed, or re-executed or republished, or revived subsequent to the date of said act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 299–301, 330.]

2. SAME.

The law existing at the date of the execution of a will disposing of real estate, and not that at the date of the death of the testator, governs the formalities of the execution and attestation thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 249.]

3. STATUTES—CONSTRUCTION.

A statute should be construed so as to operate prospectively only, unless the language is so clear as to preclude all questions as to the intention of the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 342–344.]

4. WILLS—EXECUTION.

When a testator makes a will, formally executed according to the law existing at its execution, it would unjustly disappoint his right of disposition to apply to it a rule subsequently enacted, though before his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 249.]

5. WITNESSES—COMPETENCY—DEVISEE UNDER WILL.

A devisee or legatee who is not an attesting witness may be examined in support of the will like any indifferent person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 249, 250, 360–362.]

(Syllabus by the Court.)

Appeal from Circuit Court, Summers County.

Bill by Eliza Ann Barker against William Hinton and others. Judgment for defendants, and plaintiff appeals. Affirmed.

T. G. Mann and Geo. E. Price, for appellant. R. F. Dunlap and T. N. Read, for appellees.

McWHORTER, J. On the 7th day of March, 1901, the following paper was presented in the county court of Summers county for probate, having been filed in the clerk's office of said court February 4, 1901, to wit:

"In the Name of God, Amen.

"I Avis Hinton of the county of Monroe and state of Virginia being of sound mind and memory and considering the uncertainty of this frail and transitory life do therefore make publish and declare this to be my last will and testament; that is to say:

"First after all my lawful debts are paid and discharged the residue of my estate real and personal I give bequeath and dispose of as follows, to wit:

"To my three sons William and Joseph and Silas to be equal—my three sons to share equal at my death all my interests in all lands in Monroe and Mercer to be equally divided according to the above statement.

"Also as they are land in Raleigh and Greenbrier Counties to be in consideration with the balance between my three sons to share equal.

"My daughter Eliza Ann has had her legacy in the West as her share is there she my daughter is not to share only in the West according to the above arraingment and designations.

"My three sons William Joseph Silas to be divided equally between them share and share alike.

"Likewise I make constitute and appoint my son William and my brother Enos Gwinn to be executors of this my last will and testament hereby revoking all former—by me made.

"In witness whereof I have hereunto subscribed by name and affixed my seal the fourth day of February in the year of our Lord one thousand eight hundred and sixty-two.

her
"Avis X Hinton [Seal]
mark

"The above written instrument was subscribed by the said Avis Hinton in our presence and acknowledged by her to each of us and the at the same time published and declared the above instrument as subscribed to be her last will and testament, and *and* we at the testator's request and in her presence have signed our names as witnesses hereto and written opposite our respective places of residence the fourth day of February one thousand eight hundred and sixty-two

"Robert Commack,
of Mercer County at present.
"George W. Brafford,
of Fayette County.
"Evan Hinton,
of Mercer County."

And the following order was entered by said court admitting the above will to probate therein: "West Virginia, in Summers County Court, March 7, 1901: The last will and testament of Avis Hinton, deceased, filed in this office February 4, 1901, was this day presented in court, and Robert Commack and Evan Hinton, subscribing witnesses thereto being each dead, their signatures to said writing was proved by the oaths of E. H. Peck and Geo. W. Lilly, which being deemed by the court the best proof of said will obtainable, the same is deemed sufficiently proved and ordered to be recorded."

At the February rules, 1905, Ann Aliza Barker filed her bill in equity in the circuit court of Summers county against William Hinton, Joseph Hinton, and Silas Hinton, alleging that Avis Hinton, then a resident of Summers county, died on the 22d day of January, 1901, leaving surviving her as her only descendants, distributees, and heirs at law her children, the said three defendants, and the plaintiff, exhibiting a copy of the said paper and the order admitting it to probate as the last will and testament of Avis Hinton, and alleging that the said paper writing was not and is not the true last will and testament of the said Avis Hinton, deceased; that she never signed or executed the same in the manner required by law to make it a valid will; that neither the signature nor the body of said writing was in the handwriting of said Avis Hinton; that there was nothing in the record to show that the witnesses signed their names to said writing in the presence of each other, and in fact no legal evidence offered before said county court of the execution of said will by the said Avis Hinton; that there was not sufficient evidence to admit the alleged will to probate; and that the action of the county court in so admitting it to probate was null and void; and praying that the said order of the county court be set aside and annulled, and that a decree be entered declaring that said paper writing is not the last will and testament of the said Avis Hinton, and for such further relief as plaintiff might be entitled to. The defendants filed their demurrer and answer, to which answer the plaintiff replied generally. The answer denied the material allegations of the bill, averring that the will was executed according to the requirements of the statute and was sufficiently proven to entitle it to be probated and recorded. The demurrer was overruled, and, the defendants demanding a jury, the court impaneled a jury to try the issue and ascertain whether any, and if any, how much, of the said paper so admitted to probate was the last will and testament of the decedent, Avis Hinton. After hearing the evidence, the jury returned a verdict finding it to be the genuine last will and testament of said decedent. The plaintiff moved to set aside the verdict and grant her a new trial, when, the defendants agreeing and consenting thereto, the motion was granted. A jury was again impaneled, and, after hearing the evidence, returned a like verdict as that found by the former jury, and plaintiff by counsel moved the court to set aside the verdict and grant her a new trial, which motion the court overruled and entered a decree upon such verdict establishing the paper in controversy dated February 4, 1862, as the true last will and testament of the decedent, Avis Hinton, and dismissing plaintiff's bill, with costs. The plaintiff took a bill of exceptions to certain rulings of the court which is made a part of the record.

The main question involved here is the sufficiency of the attestation of the will. At the date of the execution of the paper in February, 1862, the law of Virginia required the attesting witnesses to sign their names in the presence of the testator, but did not require them to sign in the presence of each other, and this continued to be the law of the state of West Virginia until it was changed in 1882 by the Legislature of this state so as to require attesting witnesses to a will to sign not only in the presence of the testator, but also in the presence of each other, and the statute has so remained ever since. The testatrix, Mrs. Hinton, died Janu-

ary 22, 1901. The question presented is whether the statute in force at the date of the making of the paper, or that in force at the time of the death of the testator, controls in the execution of the will. Counsel for appellant contends that the statute in force at the date of the death governs, and cite several cases in support of their position. The first case cited is that of Sutton v. Chenault, 18 Ga. 1. It is there held that: "The act of February 16, 1852, requiring that from and after the 1st day of June thereafter all wills and testaments of personal property should be attested by three or four credible witnesses, and declaring that all laws of force in the state prescribing the mode of proof of devises of personal property (meaning doubtless real estate) shall be extended to wills of personal property, applies to and controls the proof of a will of personal property which had been executed before the passage of that act; the testator having died after the same had gone into effect." The opinion in this case, at page 3, after referring to Gilmore v. Shorter, 2 Mod. 310, and Ashburnham v. Bradshaw, 7 Mod. 239, says: "In the case of Downs v. Townsend, Ambler, 290, Lord Hardwicke is reported to have said that 'the general rule as to testaments is that the time of the testament, and not the testator's death, is regarded.' Probably basing their opinions upon the authority of these cases, other and more modern courts have adopted the rule that the mode of proof must be regulated by the law of force at the time the will is executed." This case distinctly recognizes a distinction between a will disposing of real estate and one disposing of personal property, and gives the reason why the rule in the case of devise of real estate should be the date of the execution of the will, and of personal property the date of the death of the testator. The case of Wakefield v. Phelps, 37 N. H. 295, cited by appellant, was a case of a married woman who made a will February 18, 1850, at a time when, under the statute, she was empowered to make a will. In 1854 a statute was passed taking from her the power to make a will. She died in 1856. The court held that, as no rights had vested under the will, its construction and validity depended upon the law as it stood at the time of the testator's death. The validity of the execution of the will at the time it was made was not in question. In that instance it was clearly the intention of the Legislature to take from married women the power to dispose of property by will. Other cases cited by appellant did not affect the question at issue in the case at bar, except the case of Langley v. Langley, 18 R. I. 618, 30 Atl. 465, where a will had been executed October 17, 1872, attested by only two witnesses, at which time the statute of the state prescribed that a will should be attested and subscribed by three or more witnesses, and the testator died August 2, 1873, at which time the law of the state had been changed so as to require only two witnesses to a will. It was held: "That the will having been executed in accordance with the law in force here at the time of the testator's death, it was properly admitted to probate here, and was effectual as a will in this state." This case discusses the question at some length, and finally reaches the conclusion above stated. The authorities are, however, somewhat conflicting on this question. Mr. Schouler on Wills, at section 11, says: "In general the legality of the execution of a will should be judged of by the law as it was when it was executed, and not as it was at the death of the testator" —citing Mullen v. McKelvy, 5 Watts (Pa.) 399, Prec. Ch. 77, Amb. 550, 3 Atk. 551, and in a note there says: "A statute which changes the rules of evidence relating to the execution of wills has no retrospective operations; and a will must be proved as the law required at the date of its execution. Giddings v. Turgeon, 58 Vt. 106, 4 Atl. 711. As where a will at the date of execution was invalid if one of the three witnesses was husband of a legatee, and the Legislature afterwards changed the rule. Id. Where a statute in force when the will was executed required witnesses to subscribe in the presence of each other, this course must be observed, or the will is invalid, notwithstanding a subsequent change of the statute. Lane's Appeal, 57 Conn. 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94. In this last-mentioned case the whole subject is discussed, and, while the rule of our text is sustained, it is admitted that the few decisions of American courts are not harmonious; South Carolina and Georgia seeming to take a contrary view. Houston v. Houston, 3 McCord (S. C.) 491; Hargroves v. Redd, 43 Ga. 142. Of course, if the local statute expressly reserves the validity of former wills, the point is clear. Lawrence v. Hebbard, 1 Bradf. Sur. (N. Y.) 252." In Langley v. Langley, supra, the court also quotes from Redfield on Wills, (3d Ed.) 406, § 30a 17, in support of the opposite doctrine, where it is said: "A will speaks from the death of the testator, and not from its date, unless its language, by fair construction, indicates the contrary intention." This is true, and yet it does not affect the question of the sufficiency of evidence to entitle the will to be recorded as the true will of the testator. The author was discussing the effect of the will especially as to property acquired after the making of the will, and not as to the attestation of the will or as to what evidence was sufficient to entitle the same to recordation. In Taylor v. Mitchell, 57 Pa. 209, it is held: "(1) A statute should be interpreted so as to operate prospectively only, unless the language is so clear as to preclude all questions as to the intention of the Legislature. (2) Retrospective laws generally, if not universally, work injustice, and ought to be so construed only when the mandate of the Legislature is imperative.

(3) When a testator makes a will formally executed according to the law existing at its execution, it would unjustly disappoint his right of disposition to apply it to a rule subsequently enacted, though before his death." At page 212 of 57 Pa., the court says: "While it is true that every one is presumed to know the law, the maxim in fact is inapplicable to such a case, for he would have an equal right to presume that no new law would affect his past act, and rest satisfied in security on that presumption." See, also, Endlich on Interpretation of Statutes, § 274.

The will in case at bar was executed and subscribed on the 4th day of February, 1862, and admitted to probate March 7, 1901, 39 years after its execution. In Clarke v. Dunnavant, 10 Leigh (Va.) 13, Parker, J., speaking for the court, said: "A will over 30 years old is said to prove itself, although the testator may have died recently because of the unreasonableness of requiring strict proof of so old a transaction. * * * If the witnesses are dead, we infer all the necessary requisites from proof of their handwriting, although the memorandum of attestation is silent as to the material ones." In case at bar the memorandum of attestation is by no means silent as to any material requisite under the law, as it was at the time of the execution of the will, and the change in the law since only makes the one additional requirement that the witnesses shall subscribe their names "in the presence of each other." Until the change made in the statute in 1882, the law never required the signing of the subscribing witnesses to be done in the presence of each other. At the time of the execution of the will of Avis Hinton, section 4 of chapter 122 of Revised Code of 1849 was in force, and was the same as section 3 of chapter 77 of the Code of 1868, which provided that no will should be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction in such manner as to make it manifest that the name was intended as a signature, and unless it be wholly written by the testator it should be done in the presence of at least two competent witnesses present at the same time and subscribing the will in the presence of the testator. And the twenty-first section of said chapter 77 provided that the preceding sections of the chapter should not extend to wills made before the 1st day of July, 1850, but the validity and effect of such law should be determined by the laws in force on the day previous to that day, and further providing that every will re-executed, republished, or revived by any codicil shall for the purposes of this chapter be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived, showing it to be the purpose of the Legislature that all wills, whether originally made or re-executed, republished, or revived after the amendment, should, in their execution, conform thereto, and to preserve the exception contained in the law as it stood in the Code of 1859 relative to wills executed prior to July 1, 1850. It is only by implication, if at all, that section 21 can be construed to include wills made and executed subsequent to July 1, 1850, and, prior to the date of the amendment as to the formalities of their execution, no language is contained in the statute which affirmatively applies its provisions to wills then in existence. In Goodsell's Appeal, 55 Conn. 171, 10 Atl. 557, it is said: "Previous to the act of 1885, a will was revoked by marriage and the birth of a child, but not by marriage alone. That act provides that: 'If after the making of a will the testator shall marry, or if a child is born to the testator, and no provision is made in the will for such contingency, such marriage or birth shall operate as a revocation of such will.' Held to be prospective only, and that it could not operate upon any will where the marriage or birth had already occurred at the time the act was passed, although the testator died afterwards." And it is there further held: "As a rule of interpretation, all statutes are to operate prospectively unless they contain language clearly retrospective." Acts 1882, p. 194, c. 84, re-enacted the whole chapter 77 of the Code and re-enacted section 21 in the same form as it stood in the Code, still preserving the exception as to wills executed prior to July 1, 1850, and by fair implication requiring that all wills made thereafter, and in terms providing that every will re-executed, republished, or revived by any codicil, should be brought within the purview of the new law. The fact that it provides in express terms that the re-execution, republication, or revision by any codicil of any will should be deemed to have been made at the time at which such re-execution, etc., took place, makes it certain that the Legislature did not intend by said act to affect in any way wills then in existence, and made subsequent to July 1, 1850, but to provide that, if a testator should thereafter undertake to re-execute, republish, or revive his will, it must be done with the same formality as he was required to observe in executing a will for the first time. If the amendment of 1882 was intended to apply to all wills in existence at the time of its passage, except those made prior to July 1, 1850, requiring re-execution thereof to conform to the formalities in execution, why mention at all the re-execution, etc., of wills? Mentioning the one class excludes all others. If the intention of the Legislature had been to render all wills void which had been executed prior to the passage of the amendment, not in conformity to its requirements, it would have made the last clause of section 21 read something like this: "All other wills executed prior to the passage of this act and not in conformity thereto are hereby revoked." From what has been said, it follows that the

law existing at the date of the execution of a will disposing of real estate, and not that at the date of the death of the testator, governs the formalities of the execution and attestation thereof.

The appellant assigns as error the giving of three instructions asked by appellees; but the first and third are not objected to by counsel for appellant in their brief, and the same do not in any way appear objectionable or prejudicial to appellant. The assignment as to them is not well taken. The second instruction is in the following words: "The court further instructs the jury that if they believe from the evidence that the subscribing witnesses to the writing offered in evidence as the last will and testament of Avis Hinton, deceased, viz., George W. Brafford, Robert Commack, and Evan Hinton, are dead, and that their handwriting affixed thereto is the true and genuine handwriting of such witnesses, and that the signatures of such witnesses thereto have been known to be genuine, then the jury has a right to presume, in the absence of other evidence, that the said written instrument was executed with all the formalities recited in the attestation to said instrument, and required by the law." This instruction is excepted to because of the last words therein, "and required by the law." This objection is based on the theory of the appellant that the law existing at the date of the testator's death controlled the form of the execution of the will, and the appellees, having failed to prove the fact that two of the subscribing witnesses signed their names in the presence of each other, had failed in establishing the will. Complaint is also made by appellant of the refusal of the court to give seven several instructions asked for by her; all being based on the proposition that to establish the will the burden was on proponents to prove that two of the witnesses had signed their names as subscribing witnesses "in the presence of each other." The court did not err in refusing appellant's instructions.

Counsel for appellees assign cross-error, in that Joseph Hinton was not permitted to testify in relation to the execution of the will of Avis Hinton. He was asked whether he was present at the execution of the will offered in evidence, and whether he saw the will executed, and who executed it, and whether he saw the attesting witnesses sign the same, and whether they were present at the same time and in the presence of each other, "and did they sign the will as witnesses in the presence of your mother and in each other's presence?" Objections were made to the answering of these questions and sustained by the court. Counsel for the proponents of the will stated to the court that they expected to prove by the witness that he was present at the time of the execution thereof, that the will was signed by Evan Hinton with the name of Avis Hinton in her presence and at her request as her own signature, and that said will was witnessed by George Brafford, Robert Commack, and Evan Hinton, who signed the same in the presence of the testatrix and at her request and in the presence of each other, all being present at the same time, the witness also then being present; but the court refused to allow the witness to testify. In Martz's Ex'r v. Martz's Heirs, 25 Grat. (Va.) 361, it is held: "Upon the presenting for the probate of a will, J., who is the nominated executor and propounder of the paper and also a devisee and legatee under it, is a competent witness to sustain the probate." It is there further held: "A will is not a contract, and an executor or legatee is not a party to it in the sense of the statute." "No witness who is not an attesting witness to a deed or will is incompetent to testify because of interest." 3 Minor's Inst. pt. 1, p. 542. In note on wills, 2 Munf. (Va. Rep. Anno.) 388, at the close of the case of Hughes v. Hughes' Adm'r, it is said: "A devisee or legatee, however, who is not an attesting witness, is not subjected to the terms of the statute, but may be examined in support of the will, like any indifferent person; interest being now no disqualification, except in the case of attesting witnesses. 2 Min. Inst. (4th Ed.) 1015; Martz's Ex'r v. Martz's Heirs, 25 Grat. (Va.) 361." The court erred in refusing to allow the testimony of Joseph Hinton to go to the jury. The verdict and decree of the court being in favor of the proponents of the will, they are not prejudiced by this error.

We find no reversible error in the decree, and the same is affirmed.

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(62 W. Va. 628)

## EUREKA PIPE LINE CO. v. SIMMS et al.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. ARBITRATION AND AWARD—AWARD—SUFFICIENCY.

Upon the question whether an award is within the terms of the submission, all fair presumptions should be made in favor of the award; and, if on any fair presumption the award may be brought within the submission, it should be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, §§ 280, 281.]

2. SAME—UNCERTAINTY.

An award will not be void for uncertainty, although it does not specify the exact amount to be paid, where it gives the rule or indicates the means by which such sum can be calculated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, § 305.]

3. SAME—SETTING ASIDE—EVIDENCE.

An award for damages for a right of way for a pipe line for the transportation of oil, which it is claimed "is so grossly excessive as to indicate misbehavior and partiality on the part of the arbitrators," will not be held void in a suit brought for the purpose of setting aside the award, where there is no evidence in the record as to the value of the land subjected to the easement, nor as to the damages sustained by the taking of such right of way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, § 417.]

(Syllabus by the Court.)

Appeal from Circuit Court, Putnam County.

Bill by the Eureka Pipe Line Company against Robert G. Simms and others. Decree for defendants, and plaintiff appeals. Affirmed.

Payne & Payne and A. S. Alexander, for appellant. Littlepage, Cato & Bledsoe and Chas. E. Hogg, for appellees.

McWHORTER, J. This was a suit in chancery filed by the Eureka Pipe Line Company in the circuit court of Putnam county against R. G. Simms and others for the purpose of setting aside an award made by arbitrators under an agreement in writing made between the plaintiff and defendants in a proceeding in condemnation begun in said court for the taking of a strip of land 15 feet in width through the three farms of the defendants which lie contiguous to each other, and for the purpose, also, of enjoining and inhibiting the defendants from taking proceedings at law to have such award entered up as the judgment of the court, which injunction was granted. On the 28th day of November, 1902, notice of application for appointment of commissioners in condemnation proceedings was given, and on the same day the parties entered into a written agreement to arbitrate the matters in difference between them, and providing how the arbitrators should be chosen, and that the award made by the arbitrators should be final and conclusive on the parties to the agreement without the right of either party to appeal, the costs to be borne equally by the parties to the agreement; that is, one-half to the plaintiff and one-half to the defendants, and that the award should be entered of record as the judgment of the court. It was further agreed that the arbitrators, in considering the matters submitted to them, should award the damages for the rights of way through the premises; "it being distinctly understood that no title to any part of the land of the said parties of the second part shall pass by reason of said proceedings or award, to the party of the first part, but only the rights of way, with ingress and egress to and from the same, and that the ditch which the party of the first part is to dig through the lands of the parties of the second part shall not be over three (3) feet wide, and to be properly filled up when the pipe has been laid; and that there be no pumping stations on said lands." And it was further provided and agreed that the pipe line company or its successors or assignees might at any time lay a second line of pipe alongside of the first line subject to the same conditions and not more than three feet from the first pipe line, for which it should pay to the defendants an amount equal to the award of the arbitrators for the first line, or, if either party desired, the amount should be ascertained and fixed by arbitration in the same manner as the arbitration provided for in the agreement, and it was agreed that the applicant should go on with the construction of its pipe line as soon as the agreement was signed. The agreement recited that it was the desire of the pipe line company to acquire the right of way for a pipe line, and to erect, maintain, and operate a telegraph line over and through the defendants' lands, but by indorsement on said agreement the pipe line company agreed not to build a telegraph line through said lands under the agreement, "and the damages therefore are not to be considered or allowed by the arbitrators." The arbitrators returned their award as follows: "Poca, W. Va., March 27th, 1903. To the Honorable F. A. Guthrie, Judge of the Circuit Court of Putnam County, W. Va.: We, the undersigned, do most respectfully report that we meet at Poca, Putnam county, W. Va., on the 26th day of March, 1903, in pursuance to the agreement herewith filed by The Eureka Pipe Line Company, a corporation, on the one side and J. B. Morgan, Jr., et al. on the other side, and in pursuance to our selection to act as arbitrators in respect to the matters in difference, as set out in said agreement, and after being duly sworn as required by law and after examining the farms and premises mentioned and right of way proposed to be taken and hearing evidence of witnesses thereon and in respect thereto and arguments of counsel and fully considering the same we find that the damages accruing to the defendants by reason of the said Pipe Line Company, taking the strip of land mentioned in said agreement for the purposes therein mentioned amounts to the sum of three dollars and fifty cents (3.50) per rod. That said line runs through the Morgan heirs a distance of 71 rods—and staked off and shown to us. That said line runs through J. B. Morgan, Jr.'s lands a distance of 212 rods, as staked off and shown to us—That the said line runs through the R. G. Simms farm a distance of 110 rods, as staked off and shown to us—That we began said view and hearing on the 26th day of March, 1903, and rendered this our award on this 27th day of March, 1903. All of which is respectfully submitted. Given under our hands and seals this 27th day of March, 1903. R. A. Salmons. James H. Martin. J. G. Cartmill." The plaintiff exhibited with its bill copies of the application for the condemnation, and notice thereof, the surveys, and maps, together with a copy of the agreement and of the award. The bill alleges that the award should be set aside for the reason that it is uncertain; that it was obtained by undue means; that the arbitrators made a mistake; that they were guilty of misbehavior, and because of the misbehavior of counsel for defendants, and because the same is grossly excessive and exorbitant; that the defendants procured the arbitrators to sit at Poca, where there was local prejudice against plaintiff of which plaintiff had no knowledge

and defendants had notice; that, on discovering the prejudice, plaintiff requested the arbitrators to go to the courthouse of Putnam county, some seven miles away, which was the home of all the arbitrators, so as to be free from the prejudice, but defendants refused to go, and that the misbehavior of the arbitrators consisted in their remaining at the village of Poca and completing their proceedings there when the prejudice was open and palpable; that, while there was no moral wrong, yet it was unjust, unfair, and improper for the arbitrators to continue the hearing at that place when they knew that the prejudice existed, and that the defendants were trying to avail themselves of such influence to procure an exorbitant and excessive award; that defendants' counsel did avail himself of it, and appealed to the arbitrators to be influenced by it, stating "that that whole section of Putnam county was ablaze with excitement, and that if they did not find a large award that the people in that section would be greatly disappointed in the arbitrators." And in speaking of the testimony of three of plaintiff's witnesses, who were reputable and men of character and intelligence, and whose testimony was unbiased, fair, and just, defendants' counsel said to the arbitrators, "May God help you if you are influenced by the testimony of these witnesses," or words to that effect, and alleging that the award was excessive and exorbitant; that since the award was made the pipe was laid through the lands in question, and that the distance was less than that found by the arbitrators; that the arbitrators admitted at the instance of defendants and over the objection of plaintiff, much illegal evidence; that they permitted defendants to testify that they would give $500 for each farm if plaintiff would not run its pipe line through said farms, and that one of the defendants had offered plaintiff $500 not to run it through his farm, and permitted witnesses to testify as to the damages the pipe line would do to the farms, which witnesses admitted they had no experience or knowledge of the existence or use of pipe lines through farm land or anywhere; that these witnesses testified to enormous damages the pipe lines would cause, some estimating the damages as high as $25 per lineal rod, others as high as $40 per lineal rod, while another said $100 would not be too much, and another that the damages would equal the value of the farms. While witnesses for plaintiff, who were tested as to their knowledge of the matter and who were familiar with it as their testimony showed, estimated the damages from 35 cents to $1 per rod; alleging that the arbitrators in making up their award were affected to some extent by such illegal testimony and by the prejudice which existed at Poca and by the improper appeals of defendants' counsel to such prejudice to the injury and prejudice of plaintiff.

Defendants filed their joint and separate answer, denying that the arbitrators made any mistake or were guilty of any misbehavior, or that they were influenced to any extent by illegal testimony admitted or by prejudice existing at Poca, or that such prejudice existed or that the award is uncertain, or that undue means were used by defendants or that they utilized the prejudice existing against the plaintiff at the place of hearing to procure a large award; averring that the place of hearing was mutually agreed upon by the parties, that the award is not excessive, but that it is less than defendants are entitled to; and denying that anything was said or done by counsel for defendants in the arbitration or in the submission of the evidence or argument before the arbitrators which might not be properly and legally done in any court.

On the 29th of December, 1904, the cause was heard upon the bill and exhibits, process duly served, proceedings at rules, upon the answer of the defendants and of the infant defendants by their guardian ad litem, with general replications to said answers "upon the depositions taken and filed in the cause on behalf of both the plaintiff and defendants," upon the former orders and proceedings and all papers filed in the cause, and upon defendants' motion to dissolve the injunction, when the court held that plaintiff was not entitled to the relief prayed for, dissolved the injunction, and dismissed plaintiff's bill, and decreed costs to defendants.

Have the arbitrators by their finding "that the damages accruing to the defendants by reason of the said pipe line company taking the strip of land mentioned in said agreement for the purposes therein mentioned amounts to the sum of $3.50 per rod" kept within the agreement of submission? It is contended by appellant that this language of the arbitrators necessarily implies the taking of the strip of land mentioned, notwithstanding the provision in said agreement to the contrary, where it is specifically provided that the land is not to be taken that no title shall pass, "but only the rights of way, with ingress and egress to and from the same." These words are by the act of the arbitrators as if written into their award; they having filed the agreement with the award. It will be observed that the language of the award is that the damages accruing to the defendants by reason of the company taking the strip of land mentioned was for the purposes therein mentioned. The possession of the strip of land was taken for the purpose of laying the pipe; but the land, the title, was not taken, nor was it intended to be taken. Reading the award with and in the light of the agreement, it cannot be said that the arbitrators intended by their words anything further than the use of the land for the laying of the plaintiff's pipe line and the use of the rights of way to maintain, operate, and remove the pipe line as provided by the agreement, and could not

have intended that the land should be taken in the sense in which the plaintiff by its condemnation proceedings was in the first instance attempting to take the land. The word "taking" is sufficiently qualified and limited in the award by the terms used in the agreement of submission. It is claimed that the arbitrators also considered the right of way for the telegraph line. The agreement of submission which is made a part of the award contains specific indorsement signed by plaintiff that the same should not be considered. The use of the language of the award will be presumed to mean for the laying of the pipe line, and the use of the land in maintaining, operating, and removing the same, and cannot be presumed to go beyond the agreement of submission, when, by giving it a fair construction, it is within the intent and language of the same.

It is further contended that the award is uncertain; that the location is not made therein. The agreement under which the award is made, and which sets out the proposed change in location according to the agreement of the parties, is made a part of the award and filed with the same, and, taken together, the location would seem to be definite as all parties were present when the line was staked out and shown to the arbitrators. It will be further seen that, in describing the right of way, the award takes up each parcel, or the line through each of the properties, and says "that said line runs through (A. B.'s) lands a distance of ——— rods as staked off and shown to us," giving the number of rods which the line runs through each of the said parcels of land. It is further contended that the line viewed by the arbitrators was not the line laid down on the maps, nor the line actually used. The line laid down on the map by the surveyor is not precisely that agreed upon in the agreement and used; but there is no evidence in the cause showing that the line agreed upon was not the line actually used. The award shows that the arbitrators adopted the line "staked off and shown to us." 'Shown to us," by whom? By the parties, of course, as both parties were present by themselves, or agents or attorneys and agreed upon the line. It is insisted that the award is so grossly excessive as to indicate misbehavior and partiality on the part of the arbitrators that the damages allowed are gerater per acre than the land is worth, although little damage is done. There is not a scintilla of evidence in the record relating to the value of the land, whether it is worth $1, $100, or $1,000 per acre. It appears from the record that the land through which the pipe line was laid was composed of three contiguous farms, and this is all the information the record gives concerning it. Is it the province of this court to take judicial knowledge of the values in litigation in the absence of any evidence in relation thereto? This court is confined to the record for information touching the facts, and cannot go beyond it. Should it do so and enter the realm of speculation, its guessing might prove disastrous to one or the other of the parties, and, in any event, it would not be in condition to render as just a decision as a board of arbitrators who are acquainted with the matters involved in the controversy, and who are mutually chosen by the parties because of their sound judgment and discretion and their peculiar fitness for the duties imposed upon them, and who not only viewed the premises, but had the aid of all testimony which the parties saw proper to adduce before them bearing upon the matters to be considered. We know not the testimony upon which the arbitrators acted.

A charge in plaintiff's bill is that defendants procured the said arbitrators to hold their sitting in the village of Poca, knowing that there was a decided prejudice existing in the said village against the plaintiff; that plaintiff was not aware of the said prejudice before the arbitrators began the hearing; that soon after the hearing began the plaintiff discovered the prejudice, and requested the arbitrators to go to the courthouse that they might be removed from such prejudice. This allegation is denied in the answer, wherein it is averred that the place of sitting was agreed upon by the parties, defendants and counsel for plaintiff, because of the convenience of the place to the rights of way to be examined, and it cannot be said that the arbitrators were guilty of misbehavior in refusing to change the place of sitting to a place seven miles distant upon the mere suggestion of the plaintiff, nor was it misbehavior on the part of the defendants' counsel to object to such change; it not appearing that any tangible evidence was brought to the attention of the arbitrators to support the motion for such removal. In Burchell v. Marsh, 58 U. S. 344, 15 L. Ed. 96, it is held: "If an award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact." In Brush v. Fisher, 70 Mich. 469, 38 N. W. 448, 14 Am. St. Rep. 510, it is held: "Awards are favored in law and reluctantly set aside. Every presumption is made in favor of their fairness, and the burden of proof is on the party seeking to set them aside to do so by clear and strong proof." At page 512 of 70 Mich., and page 447 of 38 N. W. (14 Am. St. Rep. 510) the court, quoting from Railway Co. v. Callanan, 61 Mich. 26, 34 N. W. 678, says: "There is power in a court of equity to relieve against awards in some cases where there has been fraud and misconduct in the arbitrators, or they have acted under manifest mistake, and perhaps in some defined and undefined cases. But it is evident that there are greater objections to any general interference by courts with awards. They are made by a tribunal of the parties'

own selection, who are usually, at least, expected to act on their own view of law and testimony more freely and less technically than courts and regular juries. They are also generally expected to frame their decisions on broad views of justice, which may sometimes deviate from the strict rules of law. It is not expected that, after resorting to such private tribunals, either party may repudiate their action, and fall back on the courts. And equity, on whatever pretext it may intervene in such cases, does so upon the reason that the tribunal has not really acted within the lines of the duty laid upon it, and has not in fact carried out the agreement under which it has obtained authority to proceed." Caldwell on Arbitration, at page 123, says: "It is a maxim of courts, both of law and of equity, never to raise a presumption for the sake of overturning an award; but, on the contrary, to make every reasonable intendment in his support."

Upon the question whether an award is within the terms of the submission all fair presumptions shall be made in favor of the award; and, if on any fair presumption the award may be brought within the submission, it should be sustained. Pollock v. Sutherlin, 25 Grat. 78; Richards v. Brokenbrough, 1 Rand. 449; Coons v. Coons, 95 Va. 438, 28 S. E. 885, 64 Am. St. Rep. 804; Armstrong v. Armstrong, 1 Leigh, 491. In Fluharty v. Beatty, 22 W. Va. 698: "Presumptions are not to be raised for the purpose of overthrowing awards, but the awards are to be liberally construed so as to give effect and operation to the intent of the arbitrators, where it can be done, and every reasonable intendment is to be made in their support." "When the value of the property in money is referred to arbitrators, and they fairly execute the submission, generally the award cannot be set aside or determined to be invalid upon the ground that the valuation is exorbitant." Point 16, Syl., Dickinson v. Railroad Co., 7 W. Va. 390. In his opinion in Underhill v. Van Courtlandt, 2 Johns. Ch. (N. Y.) 339, Chancellor Kent at page 360 says: "Much testimony has been taken to prove that the mill was greatly overvalued. I shall not enter into the discussion of that part of the proof. Every other point has been considered with all possible indulgence, and even so much so that a good deal of testimony has been read and considered, which, upon strict rule, and even upon principles of policy and justice, ought to have been suppressed. But here I think the settled decisions of the court interpose an insuperable obstacle to the investigation of the question respecting the measure of valuation. Admitting that there was no corruption or partiality in the arbitrators (and none is pretended) and admitting that there was no misconduct in them during the course of the hearing, nor of fraud in the opposite party (and none is established by proof) then, I say, the court cannot inquire into the charge of an over or under valuation, or of the reasonableness or unreasonableness of the award, but it is binding and conclusive. If every award must be made conformable to what would have been the judgment of this court in the case, it would render arbitrations useless and vexatious, and a source of great litigation; for it very rarely happens that both parties are satisfied. The decision by arbitration is the decision of a tribunal of the parties' own choice and erection. It is a popular, cheap, convenient, and domestic mode of trial, which the courts have always regarded with liberal indulgence. They have never exacted from these unlettered tribunals this rusticum forum, the observance of technical rule and formality. They have only looked to see if the proceedings were honestly and fairly conducted, and, if that appeared to be the case, they have uniformly and universally refused to interfere with the judgment of the arbitrators."

It is contended that the award should have ascertained the amount of damages, a sum certain, not so much per rod to be paid the defendants for the right of way, that a judgment could not properly be entered on the award. In 3 Cyc. 708: "When an award furnishes a substantial basis by and through which the parties can, by calculation, by reference to a fixed standard or rule of law, * * * work out the contemplated result in accordance with the principles settled by, and the rights of the parties declared in, the award, it will be regarded as sufficient. In such cases courts give much force to the maxim, 'Certum est quod certum reddi potest.'" And authorities cited. And in 2 A. & E. E. L. 758, it is said: "An award will not be void for uncertainty, although it does not specify the exact amount to be paid, if it gives the rule or indicates the means by which such sum can be calculated." And at page 778: "The weight of authority in the United States leans towards making absolute the certain and simple rule that the award of the arbitrators, when made in good faith, is final, and that it cannot be questioned or set aside for a mistake either of law or of fact" —citing decisions in support of the proposition not only several cases from the Supreme Court of the United States, but many decisions from at least 29 states of the Union, and the reason for this rule is well expressed by Chancellor Kent in the quotation I have made above from his very able opinion in Underhill v. Van Courtlandt, and also Shaw, C. J., in Boston Water Power Co. v. Gray, 6 Metc. 131. See, also, Pleasants v. Ross, 1 Wash. (Va.) 156, 1 Am. Dec. 449.

Appellant says the award should be set aside because the arbitrators admitted illegal evidence when the agreement of submission only authorized the admission of legal evidence. There is nothing in the record to show what evidence was before the arbitrators, except an allegation of the bill that mentions one or two fragments of testimony on behalf of defendants of which complaint is made.

In Bigelow v. Newell, 10 Pick. (Mass.) 348: "Where an action and all matters in dispute between the parties were submitted to referees, with authority to settle the rights of the parties, and to make such special award as the nature of the case might in their opinion require 'always having regard to the legal rights of the parties,' it was held that this clause was intended merely to prescribe a rule as to the principles upon which the referees were to decide, and was not intended to restrain them from determining questions of law as well as questions of fact; and consequently that their award was conclusive as well of the law as the fact." "The admission by arbitrators of improper or illegal evidence as the result of an honest mistake of judgment as to its admissibility or probative force is not ordinarily a ground for impeachment of the award. To constitute ground of impeachment, it must plainly appear that the award was so based upon the improper evidence that the decision would have been different but for its admission; and it has been held that the same rule applies to the rejection of legal evidence under circumstances not amounting to a refusal to receive such evidence on the merits, but only showing a mistaken construction of the rules of evidence." 3 Cyc. 737. And it is there further said: "An honest mistake of arbitrators in the effect or weight given by them to certain portions of the evidence is not such an impropriety as may be shown to impeach the award." There is no intimation of fraud or corruption on the part of the arbitrators in case at bar.

We find no reversible error in the decree of the circuit court; and therefore affirm it.

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(62 W. Va. 665)

## FELLOWS et al. v. CITY OF CHARLESTON.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. MUNICIPAL CORPORATIONS — ORDINANCES — CONSTITUTIONAL LAW.

An ordinance of the city of Charleston, requiring a permit from the city to build a house, is a valid exercise of police power under its charter, and is not repugnant to the federal Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1333; vol. 10, Constitutional Law, § 809.]

2. INJUNCTION — INVALID ORDINANCE — ENFORCEMENT.

Where property rights will be destroyed or their lawful enjoyment taken away by criminal proceedings under an invalid law or ordinance, equity has jurisdiction to enjoin them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 155.]

(Syllabus by the Court.)

Appeal from Circuit Court, Kanawha County.

Bill by Sallie Fellows and her husband against the city of Charleston. Decree for plaintiffs, and the city appeals. Reversed, and injunction dissolved, and bill dismissed.

L. E. McWhorter and Murray Briggs, for appellant. Ferguson & Ellison, for appellees.

BRANNON, J. Sallie Fellows and A. A. Fellows, her husband, claiming to own a lot of land on the bank of the Kanawha river between its low-water mark and Front or Kanawha street in the city of Charleston, were proceeding to erect a dwelling house on the lot, and, after they had partly constructed it, the city of Charleston caused a warrant to be issued for the arrest of A. A. Fellows on the charge, as the bill says, that the building of "said house was in violation of law and an ordinance of said city," and caused said Fellows to be arrested and stopped him, and forced him and his employés to abandon and quit work and leave the house unfinished, and frightened the employés from work, and forbade them thereafter to resume work, threatening them with arrest and criminal prosecution and fine and imprisonment should they do so. The bill says that the police judge of the city upon said warrant imposed on Fellows a fine of $10, and that Fellows took an appeal to the criminal court. Fellows and his wife filed a bill in the circuit court of Kanawha county against the city of Charleston, its mayor and other officers, praying an injunction against them to restrain them from further molesting, arresting, criminally prosecuting, and imposing fines upon the plaintiffs, their employés and servants, for being engaged in the erection of said house and until the final adjudication of the said criminal case on appeal, pending in the criminal court of Kanawha county, and until the completion of their said house on their said lot. The court awarded an injunction commanding the city and its officers to cease and abstain from further molesting, arresting, hindering, or in any way interfering with Sallie Fellows and A. A. Fellows, their employés or servants, in the erection of said building. The court overruled a motion to dissolve the injunction, and the city of Charleston took an appeal.

So confused and irregular are the bills and many orders in the case that it is quite difficult to get at the true merits for decision presented by the record. There was a bill filed at rules under the summons, which we should think would be the bill of the record; but before the court another bill was filed, and afterwards amended at the bar. It is claimed that the bill is insufficient. Open to criticism it is, but we shall treat it for all that it is worth and decide the case upon the bill filed in court, though it was not filed as an amended bill. The bill does not say what the offense was on which the warrant of arrest was predicated; but the answer and an exhibit later filed introduce an ordinance of the city, and we gather that the city issued its warrant for a violation of an ordinance requiring that before a building should be erected in the city there should

be a permit granted for its erection, and prohibiting its erection without such permit, and imposing a fine for the violation of the ordinance.

The first question arises upon the contention by the city that equity has no jurisdiction of the case, because equity will not enjoin a criminal prosecution. For this position we are referred to Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857, 3 L. R. A. (N. S.) 461. It holds the general principle that "it is a rule, subject to few exceptions, that a court of equity will not interfere by an injunction with criminal proceedings." But that case distinctly admits that, if criminal prosecution destroys civil property and its enjoyment, in protection of the property right equity may properly enjoin the criminal prosecution. Now, surely, the prosecution of criminal process illegally preventing the construction of a residence on real estate deprives the owner of a very important use of his land, practically taking it from him. 6 Pomeroy, Eq. (3d Ed.) § 644; 22 Cyc. 902; Dobbins v. Los Angeles, 195 U. S. 224, 25 Sup. Ct. 18, 49 L. Ed. 169. Therefore there is jurisdiction in equity for injunction. And, aside from that question, there stands the fact alleged that the city and its constituted officers were hindering and obstructing the erection of the house, and that itself, I think, would sustain the jurisdiction.

The plaintiffs' counsel assail the ordinance of the city of Charleston as void. If that be so, there would be no color of jurisdiction for the action of the city authorities. Hence we must inquire whether that ordinance is valid or void. The enactment of an ordinance directing and regulating the construction of buildings in cities, and requiring a permit from the city therefor, is an exercise of that great power called "police power." That power is vital and indispensable. Without it cities and towns could not exist. That power is vested in the state; but, it being utterly impracticable that the state Legislature and executive could regulate by their constant presence all the doings in cities and towns, it became indispensable that the state should delegate the exercise of such power to those petit states, the cities and towns. "Municipal corporations have exercised the police power eo nomine for time out of mind by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities; and this power of local legislation may be conferred upon the smallest village that the Legislature sees fit to incorporate, as well as upon the largest city in the state. The extent of their police powers depends upon the limitations of their charters. The power to be exercised is frequently restricted to the one phrase 'police powers,' and the ordinances must then be reasonable regulations upon subjects which are recognized as falling within the scope of such powers. * * * Delegation of police power.—The Legislature may delegate to a municipality the power to adopt ordinances on matters of local importance although there are general statutes on the same subject. An ordinance legally referable to any one of several delegated powers is valid." 2 Smith on Munic. Corp. §§ 1320, 1321. See 22 Am. & Eng. Ency. L. 919. But a municipal corporation cannot exercise this police power unless authority to do so is given by the Legislature to it. Morley v. Godfrey, 54 W. Va. 54, 46 S. E. 185; Judy v. Lashley, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 869. It can exercise those powers and no others granted expressly in its charter, and those necessarily implied or incident to the powers that are expressly granted, and those essential to the declared purpose of the corporation and indispensable to it. City of Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336.

Turning now to Acts 1895, p. 126, c. 58, amending and re-enacting the charter of Charleston, we find, in section 21 (page 131), that the council is given full power "to control the construction and repair of all houses * * * to provide for the regular building of houses or other structures, and determine the distance that they shall be built from any street or alley; * * * to abate or cause to be abated anything which in the opinion of the council shall be a nuisance." Section 22 (page 132) gives the council power, in order to carry out the powers enumerated in section 21, and "all others conferred upon the said city or its council expressly or by implication in this or any other acts of the Legislature," to "adopt and enforce all needful orders, by-laws and ordinances not contrary to the laws or the Constitution of the state, and to prescribe, impose and enforce reasonable fines and penalties, including imprisonment, under judgment and order of the mayor or recorder of said city." Under that statute it is very clear that the city had power to pass the ordinance requiring a permit from it for the construction of the house. The ordinance requires the person proposing to build to lay before the inspector of buildings plans and specifications of every building and obtain the approval of the inspector, and requires that the approval should go before the council, and the party obtain its approval and permit. This court has recognized the power of a city to demand such permit, and to regulate buildings by laying down principles which would thus empower the city. City of Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336. More particularly as to building permits, though they certainly would be included under such general powers as are spoken of in the act above mentioned. We find in McQuillin on Munic. Ordinances, § 471, this: "Where the charter power is ample, the local corporation may require a certificate or permit, issued by the proper official as a condition precedent to the erection of new buildings or the material alterations or ad-

ditions to buildings already erected; but whether such authority exists and the manner of its exercise depend upon the provisions of the charter and legislative acts applicable. Where the charter power is sufficient, an ordinance requiring a permit in order to alter or repair wooden buildings within the fire limits will be held constitutional." In 2 Smith on Munic. Corp. § 1331, we find it stated that, "as a protection against fire, a municipality may, as a legitimate exercise of police power, make reasonable regulations in regard to the construction, character, and nature of buildings within the corporate limits." And there we further find the statement of this legal proposition: "Thus it was held that such a grant of power would sustain an ordinance prohibiting any person from erecting buildings within the limits of the town without a permit from the governing board." They are required in almost all cities and in many towns. They tend to prevent disease and fires, and this is warranted by Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336.

Upon these and many other authorities, we may assert the power of the city of Charleston to demand a permit for the erection of this building. The invalidity of the ordinance cannot be predicated upon general law. No ground is specified to sustain the claim to invalidate this ordinance, except that it is a violation of amendment fourteen of the Constitution of the United States, in that the ordinance deprives an owner of his property without due process of law. Can it be thought for a moment that it was the design of that amendment to destroy a vital power vested in the state, and by its delegation vested in a city, a power vastly essential to a city? Let us cite some authorities from the National Supreme Court on this matter: In Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, we find the holding that: "The fourteenth amendment of the Constitution does not impair the police power of a state." So, also, holds the case of Minneapolis R. Co. v. Bechwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585. See Brannon's Fourteenth Amendment, 167. After writing to this point, I meet with the case of Wilson v. Eureka City, 173 U. S. 32, 19 Sup. Ct. 317, 43 L. Ed. 603, in which was involved an ordinance that "no person shall move any building or frame of any building into or upon any of the public streets, lots or squares of the city or cause the same to be upon or otherwise obstruct the free passage of the street, without the written permission of the mayor or president of the city council. A violation of this section shall on conviction subject the offender to a fine of twenty-five dollars." The court held that the ordinance was not in violation of the fourteenth amendment. An ordinance prohibiting the alteration and repair of any wooden building within certain limits without permission of the majority of the firewarden and approved by a majority of the fire department and mayor was held not in violation of the fourteenth amendment. Ex parte Fiske, 72 Cal. 125, 13 Pac. 310. These cases answer the charge that the federal Constitution is violated by the ordinance. And for its validity and reasonableness I add the following authorities: Easton v. Covey, 74 Md. 262, 22 Atl. 266; Hine v. New Haven, 40 Conn. 478; City v. Mann, 1 Wash. St. 389, 25 Pac. 337; Rochester v. West, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659. In Hasty v. City, 105 Ind. 540, 5 N. E. 559, an ordinance making it unlawful to erect a building within the city without making application to the clerk of the board of improvements was held valid. See McCloskey v. Kreling, 76 Cal. 511, 18 Pac. 533. See, also, Freund on Police Power, §§ 643, 644, for collection of cases on the subject. Also, Robinson v. Mayor, 84 Am. Dec. 633.

The bill charges that the ordinance was not, during the process of its enactment, published as required by law. The record does not sustain this charge. There is no evidence of it. So we find that the ordinance is valid.

The ordinance being valid, the plaintiffs must show that they had a permit from the city for the building of the house. The bill alleges that they had such permit. I do not think the evidence shows it. But I need not inquire as to that, for the answer flatly denies that there was any such permit, and says that the council refused the permit on consideration of the application. There is no replication to that answer, and, under well-settled principles of equity procedure, where an answer is filed, and no replication made, all the allegations therein, whether responsive to the bill or not, must be taken as true. Bierne v. Ray, 37 W. Va. 571, 16 S. E. 804. This ends the case. I will add that the answer denies the ownership of the lot by the plaintiffs. Denies the right to build on it, and thus denies the right to have any relief as to the property. The answer wholly denies all right in the plaintiffs. Though for the decision of the case it is not material, I will add that the answer states that the building in process of erection invaded the street. A survey of it shown by a plat filed shows that it invades the street. This being so, the city had a right to enforce its ordinance by the penal proceedings above referred to. Charleston v. Reed, 27 W. Va. 681, pt. 6. It is well settled that the building upon a street is a public nuisance. Pence v. Bryant, 54 W. Va. 263, 46 S. E. 275. The town has power to enforce its ordinance, and, if necessary for the abatement or removal of the nuisance, may remove or destroy the thing creating the nuisance, and it is not a taking of property without due process of law. Brannon's Fourteenth Amendment, 216, citing for authority Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, and Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499.

38 L. Ed. 385. But the town took no steps to remove the house, but simply the penal proceedings aforesaid.

Upon the principles above stated, we must dissolve the injunction and dismiss the bill.

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(62 W. Va. 685)

## BICE v. WHEELING ELECTRICAL CO.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. ELECTRICITY — ACTION FOR NEGLIGENCE — PLEADINGS.

In an action against an electrical company for injury from an electric wire, a count in the declaration alleging the duty of the defendant in respect to its electrical apparatus to be the exercise of "all possible care" to prevent injury, but charging by way of breach that it did not use "all possible care," and also that it did not use "reasonable care," is not demurrable because it so alleges the duty of the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 11.]

2. SAME—DEGREE OF CARE REQUIRED.

Electrical companies are required to exercise the highest degree of care in reference to the condition, maintenance, and inspection of their wires and appliances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 7.]

3. NEGLIGENCE—RES IPSA LOQUITUR.

Where the agency causing an injury is under the management and control of the defendant, and the injury is such as in the ordinary course of things does not occur if those having such management and control use proper care, it affords reasonable evidence, in absence of explanation by the defendant, that the injury resulted from negligence, and the rule of res ipsa loquitur applies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 218.]

4. TRIAL—INSTRUCTIONS.

In an instruction which tells the jury to consider, "among other things," certain facts in the evidence, the words quoted do not render the instruction bad as authorizing them to consider any and all things that might occur to them whether or not shown in evidence, as they are presumed to know that they can believe and act only on the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 534.]

5. NEGLIGENCE—MINORS.

The age and general information of an infant, when his contributory negligence is involved, are prominent facts bearing thereon which may be specially given in charge to the jury, although not to the exclusion of all other facts and circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 123.]

6. TRIAL—INSTRUCTIONS.

An instruction in reference to contributory negligence which singles out and calls the attention of the jury to a particular point in the evidence that is indecisive and a mere circumstance bearing upon such issue of fact, omitting reference, except by use of the words "in connection with the other facts and circumstances of the case," to all other important circumstances in proof, is erroneous and misleading as giving undue prominence to such indecisive point.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 577–579.]

7. SAME.

An instruction to support which there is no evidence in the case is improper, and should not be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 587–595.]

8. SAME—INTERROGATORIES TO JURY.

In this case, as all the evidence centered on the condition of the defendant's transformer, and alleged negligence with respect to proper inspection thereof, and this question, which was the only one the defendant had reasonably the right to propound to the jury for a special finding, was fully covered by an interrogatory given and answered, the following interrogatory was rightly refused as too general in its terms: "Did the defendant do everything that could reasonably be done under the circumstances to prevent the injury of which the plaintiff complains?"

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 834.]

9. SAME—ANSWER TO INTERROGATORIES.

In a case of negligence, where the rule of res ipsa loquitur is applicable, involving the defective condition of defendant's electrical transformer which caused the injury, the rebuttable presumption of negligence retains its original force until overcome by proof of affirmative acts of due care of the defendant; and, if the evidence is wanting of substantial proof of anything done by defendant to keep its transformer in order, the jury are justified in response to the interrogatory: "Did the defendant do all that could be reasonably done under the circumstances to keep its transformer in order?" in answering, "We do not know."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 849–853.]

10. ELECTRICITY—CONTRIBUTORY NEGLIGENCE.

Under the circumstances of this case, the question of the contributory negligence of the plaintiff, a boy between 16 and 17 years of age, was properly submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 11.]

(Syllabus by the Court.)

Error to Circuit Court, Ohio County.

Action by George Bice against the Wheeling Electrical Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Somerville, for plaintiff in error. Hubbard & Hubbard, for defendant in error.

MILLER, P. The plaintiff, George Bice, between 16 and 17 years of age, sustained severe and permanent injuries in March, 1904, by an excessive voltage of electricity from a flexible wire cord in the blacksmith shop of one Rogerson on Twenty-Ninth street, in the city of Wheeling. There were five of these cords in the shop, with incandescent lights attached, dropped from the main service wire above, all served with electricity from the defendant's main conductor carried from its plant upon poles over said street, one of which poles stood directly in front of the shop. The lamps on the inside wires were constructed to carry 104 volts. In order to reduce the voltage from the 2080 volts carried by the main conductor, a mechanism called a "transformer" was installed upon the pole in front of the shop. This transformer consisted of a primary and secondary coil of wire, separated by micanized cloth, all inclosed in a sheet-iron case filled with oil, the oil serving as additional insulation, the primary coil be-

ing connected, through the transformer, with the main conductor, and the secondary connected with the service wires inside the shop through the transformer and what is called a main cut-out; the cut-out being located in this instance immediately above the front door of the shop. This main cut-out consisted of a porcelain device fastened to the wall of the shop, so adapted as to connect alternating wires by meltible fuses. Other smaller cut-outs were installed at the point of connection of the flexible cords with the main service wire inside the shop. The wires in the shop were all insulated after the usual method. The secondary coil in the transformer was so adapted, if the latter was in order, to take up by induction through the insulation therein and convey to the service wires but 104 volts; but, if the insulation became defective from any cause, a much larger current, if not the entire voltage of the main conductor, would be served to the inside wires. These wires, with the cut-outs and transformer, had been installed for something over two years. The plaintiff was employed at intervals in the shop, and had frequently carried the lamps on the flexible cords from point to point in the shop to aid in the shoeing of horses. The injury of which the plaintiff complains occurred early in the morning, after a heavy rain during the night. In going to the shop on the morning in question, Rogerson found the doorknob charged with electricity, and could not open it, nor did a passerby who tried succeed in doing so, but it was finally opened by a man wearing rubber boots, which served as insulators. On going inside and picking up his leather apron, Rogerson found it electrified. He discovered, also, that some horseshoes hanging on an iron rod attached to the wall were also charged with electricity, and, as the plaintiff and others dropped into the shop that morning, some sport was made by procuring them to pick up or touch the shoes, resulting in slight shocks, more or less irritating according to the physical condition of the person, but no one sustained any injury therefrom; the electrical phenomena being attributed to the dampened condition of the building due to the rainfall. After a time it was observed by some one in the shop that the joist or beam from which one of the drop lights hung was smoking, and that the wire at that point was sparking. The attention of Rogerson being directed to this, he called upon the plaintiff to assist him in moving the wire; whereupon the plaintiff seized the flexible cord or wire, and, in the act of pulling it away, the current broke through the insulation on the wire. The current was so strong as to render him unconscious, burning his left hand severely and later necessitating amputation of three fingers thereof, also passing through his body and out at the heel and toe of his left foot, burning them also severely, and he sustained other injuries not necessary to refer to. The agents of the defendant, who made the only investigation after the accident, reported the main cut-out in order and the fuses intact, but that, on removing the transformer, the insulation between the primary and secondary coils was found punctured and the oil burned. One of the men in the shop discovered also, after the accident, in attempting to tie a horse to the iron ring on the pole on which the transformer was installed, that the ring was so electrified that he could not tie the horse; and another of the men who undertook to tie the horse to the ring was unable to do so, but did succeed in tying the strap around the pole. These were the main facts relied upon at the trial, resulting in the verdict and judgment for the plaintiff for $1,700.

The amended declaration, upon which the trial was had, in four counts charged it to be the duty of the defendant to use all possible care and prudence to keep said transformer in good working order, so that no quantity of electricity dangerous to human life and limb and sufficient to escape through the insulation should be permitted to pass beyond said transformer; to inspect at reasonably frequent intervals its wires and all appliances connected therewith, and to use all possible care and prudence to keep said wires and appliances in perfect order and repair; to provide, pursuant to the ordinance under which it operated, a cut-out at a point as near as possible to the entrance of the shop, so that any surplus quantity of electricity should be hindered from entering the same; to also provide, pursuant to said ordinance, whenever a connection was made between a larger and smaller conductor at the entrance to or in a building some approved automatic device, and introduce the same in the circuit of the smaller conductor, so as to interrupt the current whenever in excess of safe carrying capacity, "safe carrying capacity" being defined by the ordinance as a current which could be carried by the wire without becoming painfully warm when grasped in the closed hand. By way of assigning breach of defendant's duty, the first count charged that it did not use all possible care and prudence to keep its transformer in good working order, and did not use reasonable care to that end, but negligently allowed the same to become out of order and to permit dangerously large currents of electricity to pass into said shop, and sufficient to escape through the insulation on the wires therein into the body of the plaintiff; the second count, that the defendant did not use all possible care and prudence to keep its said wires in perfect order and repair, and failed to make proper inspection of its wires and appliances, but negligently permitted dangerous currents of electricity to pass through said wires into the body of the plaintiff; the third count, that the defendant failed to provide the cut-out required by

said ordinance, and negligently permitted a dangerously large quantity of electricity to enter said shop and pass over its wires into the body of the plaintiff; the fourth count, that the defendant failed to provide the automatic device required by said ordinance, and negligently permitted currents of electricity in dangerous quantities to pass over the same into the body of the plaintiff.

The overruling of the demurrer to this declaration and each count is the first error assigned. It is claimed that the first and second counts were bad for alleging the duty of the defendant to be the exercise of all possible care, when only reasonable care was imposed by law. The first count charged, not only that the defendant did not use "all possible care," but also that it did not use "reasonable care," while the second charged that the defendant failed to make proper inspection of its wires and appliances and to keep the same in good order—or, in effect, did not observe reasonable care therein, so that, even though the duty may have been alleged in excessive terms, the breach charged would not be within the range of the criticism. But our decisions require the defendant to use the highest degree of care, which we think cannot be construed to be less than all possible care. Snyder v. Electrical Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; Thomas v. Electrical Co., 54 W. Va. 395, 46 S. E. 217. We might supplement these cases by reference to and discussion of the wealth of other decisions to the same effect, but will refer to only two others: Alexander v. Light Co., 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475, and Electrical Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39. We think the demurrer was properly overruled. The plaintiff at the trial did not rely upon any proof of affirmative acts of negligence, but upon the rule of res ipsa loquitur, as applied in Snyder v. Electrical Co. and Thomas v. Electrical Co., supra. The defense was, in part, that there was no appliance known by which the transformer could be tested; that the insulation therein had probably been punctured by lightning in the thunderstorm the night before; but the main defense was alleged contributory negligence of the plaintiff. There was conflicting evidence respecting the practicability of inspection of the transformer. One witness for defendant, an expert and a salesman of this particular transformer, said that generally they take the cover off and make a casual inspection to see whether the parts are all right and the transformer is filled with oil; that one of the companies within his territory has the practice of from time to time examining its transformers on the poles; that such examination satisfies the company that the transformer is working under usual and normal conditions. Other witnesses for the defendant gave some evidence respecting this subject of more or less indefinite and uncertain character.

The other errors assigned relate to the giving and refusing of instructions, the refusal to submit to the jury one of the special interrogatories hereinafter referred to, the refusal to set aside the verdict and award a new trial, and to render judgment for the defendant non obstante veredicto.

First, with respect to the instructions. Two of the instructions given for the plaintiff were objected to and covered by bills of exception. The first was intended to invoke the rule of res ipsa loquitur. It told the jury that if they "believe from the evidence that the injury for which the plaintiff sues was caused by an excessive voltage of electricity from the defendant's plant, and that in the ordinary course of things such excessive voltage is not found in wires like that which injured the plaintiff, if those who have the management of the electricity use proper care," then the defendant "is called upon to offer some reasonable explanation of the occurrence, and, if such explanation is not furnished, the circumstance itself affords reasonable evidence that the injury was caused by the negligence of the defendant." We think this instruction propounds the law correctly upon the theory of the plaintiff, and is supported by the authorities already cited; and we do not think it subject to the criticism of unwarranted interference with the province of the jury.

The second instruction for the plaintiff was as follows: "The jury cannot find the plaintiff guilty of contributory negligence unless they believe from the evidence that he had fair reason to expect that his act in touching the wire would cause him serious injury. On this question the jury should consider, among other things, so much of the evidence as indicates the plaintiff's age, his knowledge of electricity, his knowledge of this particular wire, the general circumstances in the shop at the time of the accident, and the conduct of the other persons just before the accident with respect to the electricity in the shop." The criticism of this instruction is that the words "among other things" left the jury to infer that they might consider anything and all things that might possibly occur to them, whether or not shown in evidence; that it singles out certain facts and circumstances, regardless of others shown in evidence, and tells the jury to consider those facts and circumstances, thus giving them undue prominence, and omits certain facts and circumstances vastly more important, in determining the question of contributory negligence, than those referred to in the instruction. As illustrating the omitted facts, the conduct of the plaintiff and others in the shop prior to the accident, in what is termed "recklessly toying" with various objects therein charged with electricity, is referred to, and particular reference is made to the declaration of witness Gilmore to Rogerson in the presence of plaintiff that he had better go and telephone the electric

light people, that there was something wrong there. We do not think the jury could have been misled by the words "among other things." They must necessarily have understood that the other things which they were authorized to consider were other things shown in evidence. They are presumed to know that they can believe and act only on the evidence. Jarrett v. Stevens, 36 W. Va. 452, 15 S. E. 177. Neither do we think the instruction gives undue prominence to the plaintiff's age, his knowledge of electricity, his knowledge of this particular wire, etc., to the exclusion of the other circumstances referred to by counsel. The instruction compassed in general terms every fact or circumstance covered by the evidence applicable to the subject of contributory negligence, and certainly the testimony of Gilmore and the conduct of the other persons in the shop. The instruction, it is true, was intended to direct the minds of the jury to the age and intelligence of the boy with respect to the agency of his injuries; but not to the exclusion of any actual fact or circumstance, so as to bring the instruction within the condemnation of McMechen v. McMechen, 17 W. Va. 683, 41 Am. Rep. 682, and Storrs v. Feick, 24 W. Va. 606, cited by counsel. The age and general information of an infant in such cases are prominent facts which we think the authorities permit to be specially given in charge to the jury, although not to the exclusion of all other facts and circumstances. An infant's case is in that respect exceptional. Oakland Railroad Co. v. Fielding, 48 Pa. 320; Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; Kehler v. Schwenk, 144 Pa. 348, 22 Atl. 910, 13 L. R. A. 374, 27 Am. St. Rep. 633. See, also, Riley v. Railway Co., 27 W. Va. 163.

Five instructions were given at the request of the defendant; but the court modified the first and rejected four others, which actions of the court are made the subject of four additional bills of exception. As modified by the addition of the words italicized, the first instruction was: "The court instructs the jury that the defendant in this case was not an insurer of the safety of George Bice at the time he received the injury out of which this suit grows, and was only bound to use reasonable care, under all of the facts and circumstances of the case, to guard against injuring him; *but reasonable care under the facts and circumstances of this case means a very high degree of care.*" We are cited to Washington v. Railroad Co., 17 W. Va. 190, for the proposition that negligence is the doing of something which under the circumstances a reasonable person would not do, or omission to do something in the discharge of a legal duty which under the circumstances a reasonable person would do; and to Jordan v. Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859, for the rule that a party has a right to have an instruction given in his own language, if pertinent, unambiguous, and correct in law. There is no question about the correctness of these propositions, but the cases we have already cited hold that, in cases involving the employment of such a dangerous agent as electricity, reasonable care means the highest degree of care which skill and forethought can attain. Without the modification of the instruction by the court, the jury were liable to be misled. We perceive no error, therefore, in giving the instruction as modified.

As to the first three of the instructions of defendant refused, the action of the court thereon was, in our judgment, on the border line of error. If these instructions be not amenable to the rule against singling out certain facts to the exclusion of other facts of equal or greater importance, they come within the condemnation of the rule against calling the attention of the jury to particular points in the evidence which are indecisive and mere circumstances bearing upon the issue of fact, and omitting reference to other important circumstances in proof. Sackett, Instruc. 18; Graves v. Colwell, 90 Ill. 612; Chesney v. Meadows, 90 Ill. 430. The first calls the attention of the jury to the charged condition of the horse shoes and the amusement obtained therefrom, the second to the condition of the wire in question, the third to the evidence of any warning given those in the shop in the presence of Bice as to conditions there, and each told the jury to consider the circumstances specified, "in connection with the other facts and circumstances of the case," in determining the question of contributory negligence, neither calling the attention of the jury, except in the uncertain method indicated, to any other fact or circumstance covered by the evidence to which the instructions may have intended to allude. It is said in Hughes on Instruc. § 114, that singling out some particular question or point and calling the attention of the jury to it is not objectionable when the other questions involved are merely subordinate, and are sufficiently adverted to by other instructions. The instructions here involved, however, make prominent indecisive facts, not controlling ones, and give undue prominence thereto.

The fourth instruction of the defendant refused told the jury that, unless they believed from the evidence Bice was employed in the shop or connected with the operations thereof at the time of the injury, it owed him no duty in regard to protection of said shop from the overcharged condition of the electric wires therein, and that they should consider this, in connection with the other facts and circumstances of the case, on the subject of his contributory negligence. This instruction was not applicable to any evidence in the case. The evidence was positive that Bice had been from time to time employed by Rogerson as an assistant, and at the time he sustained his injuries he was called upon par-

ticularly by Rogerson to aid him in removing the wire. For this reason, as well as for the reasons given for the rejection of the three other instructions of the defendant, the court was justified in rejecting this one also. The rejected interrogatory was: "Did the defendant do everything that could reasonably be done, under the circumstances, to prevent the injury of which the plaintiff complained?" Plaintiff's counsel contends that the words "under the circumstances" rendered the meaning of this interrogatory uncertain; that it might exclude the duty of inspecting the transformer; that an affirmative answer to it might have ignored the doctrine of res ipsa loquitur, peculiarly applicable to cases like the present, where the agency causing the damage was peculiarly within the control of the defendant and the plaintiff without access thereto. The defendant's counsel claims that an affirmative answer to the interrogatory would have been decisive of the case, and that it was an abuse of the discretion of the court, for this reason, to reject it, as affirmed in Kerr v. Lunsford, 31 W. Va. 660, 8 S. E. 493, 2 L. R. A. 668; Bridge Co. v. Bridge Co., 34 W. Va. 155, 11 S. E. 1009; Andrews v. Mundy, 36 W. Va. 22, 14 S. E. 414. We are disposed to think the interrogatory was too general in its terms. It did not refer to any particular duty with respect to any certain part of the defendant's plant or appliances that it might be said to have done everything it reasonably could have done under the circumstances; nor did it point out what particular circumstances or affirmative acts that may have been shown in evidence, with respect to the discharge of its duties, were referred to. We think, as practically all the evidence centered on the condition of the transformer and alleged negligence with respect to proper inspection thereof, and this subject was fully covered by another interrogatory propounded, namely, "Did the defendant do all that could be reasonably done under the circumstances to keep its transformer in order?" to which the jury responded, "We do not know," thus covering the only question the defendant had reasonably the right to propound to the jury —there could be no reversible error in refusing to submit the rejected interrogatory.

The other errors assigned relate to the action of the court on the motions to set aside the verdict and award a new trial, and to render judgment for defendant non obstante veredicto, and to the question of contributory negligence of the plaintiff. It is argued, on said motions, that the only negligent acts charged in the declaration were failure to keep its transformer in good working order, failure to properly inspect its wires, and failure to provide a proper cut-out; that there was no proof of any defect in the wires; that the jury found in response to one of the interrogatories that the defendant had provided the cut-out required by the city ordinance; and that, therefore, nothing was left upon which the plaintiff's case could rest except the condition of the transformer. The defendant's counsel would thus separate transformer from wires and vice versa—a rather fine distinction, considering that the transformer is simply a system of wires connected, by insulation and the service wire in the shop, to the main conductor. In our opinion the charge in the declaration of the breach of duty of defendant at reasonably frequent intervals to inspect its wires and all electrical appliances connected therewith was sufficient to admit proof of want of proper inspection of the transformer. It is argued that there is no evidence tending to show anything wrong with this transformer prior to the morning on which the appellee was injured, and that the condition of the transformer may have resulted from the thunderstorm the night before the injury. But there was evidence tending to show the presence of an unusual amount of electricity in these wires prior to the morning the plaintiff sustained his injuries; and there was evidence showing a lack of oil in the transformer when subsequently inspected. The plaintiff's injuries were sustained in the month of March, when we take judicial notice of the fact that electrical storms are usually of slight force, not generally sufficient to materially injure or affect electrical apparatus such as here involved. Only one witness states that there was a thunderstorm the night before. A number refer to the rainfall, but he alone connects it with thunder, and no mention is made by him of any lightning. Besides, it is claimed that the direct question of the defendant's negligence with respect to the transformer was submitted in the interrogatory referred to, "Did the defendant do all that could be reasonably done under the circumstances to keep its transformer in order?" and that the answer of the jury, "We do not know," was inconsistent with the general verdict, which must necessarily imply an affirmative answer. As already indicated, witnesses gave on behalf of the defendant testimony that inspection of a transformer was possible. It was admitted by the defendant that it had never inspected its transformer from the time of installation. The evidence is wholly wanting of anything done by the defendant to keep the transformer in order. As was said in Reynolds v. Electric Lighting Co., 26 R. I. 457, 59 Atl. 393, a case relating to a defective transformer: "The questions, who purchased it, and when; how long was it in service, and what was its service; what was its condition at the time of its installation at the place where it gave out, was it worn out or suddenly disabled; was it ever inspected after its last installation? and others as pertinent,—remained unanswered." In this case these pertinent inquiries were not covered by the defendant's evidence; and the jury may well have answered, in response to the interrogatory propounded, "We do not know."

As was said in the Rhode Island case, so it may be said here: "The transformer was an apparatus wholly under the control of the defendant, and its breaking down, or functional derangement, is inferentially evidence of negligence on the part of the defendant, thus making out a prima facie case for the plaintiff, and casts upon the defendant the burden of rebutting the same to the satisfaction of the jury." It is evident from their answer that the jury did not consider the defendant had overcome the prima facie presumption of negligence arising from the defective condition of the transformer and the over-charged wires. The defendant's counsel says the general verdict for the plaintiff would necessarily involve the finding of negligence on the part of the defendant, based on a prima facie case. Was not the answer of the jury to the interrogatory equivalent to saying that the defendant, on whom the burden was, had not satisfied them it had done everything that could have been done to keep its transformer in order? We think this a reasonable construction of the answer of the jury. Until the jury were enabled from the evidence to give an affirmative answer to the interrogatory, the rebuttable presumption of negligence remained intact, and so long as it was not overcome, or remained in equilibrium, it held its original arbitrary character given it by law. See Graves v. Colwell, 90 Ill. 616 et seq. We do not think, therefore, the answer of the jury is destructive of the general verdict, or that the verdict was otherwise unsupported by evidence of negligence of the defendant; and the motions for a new trial and for judgment non obstante veredicto were properly overruled. The questions of fact were peculiarly within the province of the jury.

Was the verdict vitiated by contributory negligence of the plaintiff? Unless we can say as a matter of law, from the facts proven, the plaintiff was guilty of contributory negligence, this subject was also within the peculiar province of the jury. This we cannot do. The subject was properly submitted to the jury. Their general verdict denies it. In Oakland Railway Co. v. Fielding, supra, the injuries complained of were sustained by a boy between 16 and 17 years of age, who stepped into a hole in a railroad crossing while running after a fire engine at night. It was said: "Whether or not the plaintiff's son was guilty of negligence or misconduct which contributed to the injury was a question for the jury; and where they were instructed, in estimating the degree of care required, to consider the age, intelligence, and physical strength of the boy, and apply to his conduct the same standard that they would in judging of boys of like age, strength, and intelligence, and that, if it was common for such boys to run with fire engines, as the plaintiff's son did at the time of the accident, the jury should take the fact into consideration in determining whether his conduct was reasonably prudent when he was injured, the instruction was held not erroneous." See, also, Haynes v. Raleigh Gas Co. and Kehler v. Schwenk, supra. In Predmore v. Light & Power Co., 99 App. Div. 551, 91 N. Y. Supp. 118, an adult, an electrician by profession, in attempting to turn out the lights on an electric wire in a café, sustained injuries resulting in his death, for which the action was brought. He had just seen the proprietor of the café attempt to turn out the lights, and draw back his hand because of the shock received; and it was held that this fact did not establish that the deceased was guilty of contributory negligence as a matter of law, but that such question was properly submitted to the jury. We think these cases state the rule correctly and are applicable to this case. The question of contributory negligence was a jury question; and we cannot say their verdict was overborne by a preponderance of the evidence.

We are therefore of opinion to affirm the judgment.

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(62 W. Va. 677)

## TAYLOR v. GODFREY et al.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. MORTGAGES—RELEASE.
Whether a particular transaction amounts to a release of a lien is a question of intention on the part of the releasor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 904–911.]

2. SAME—CANCELLATION OF RECORD.
The cancellation of a mortgage on the record is only prima facie evidence of its discharge. The owner may prove that the cancellation was done by fraud, accident, or mistake, and, if he does so, his rights under the mortgage will not be affected by such cancellation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 904–911, 953.]

3. CANCELLATION OF INSTRUMENTS—MISTAKE.
Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman either as to fact or to law does not accomplish the purpose intended or violates it, equity will relieve from such mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 1–6.]

4. SAME—NEGLIGENCE.
Negligence may not of itself be sufficient to bar relief in equity on the ground of mistake, if the other party has not been prejudiced thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 1–6; vol. 19, Equity, §§ 14–20.]

5. SAME—EVIDENCE.
Mere neglect or omission to read or know the contents of a written instrument before execution is not necessarily a bar to cancellation thereof. Relief in such case is proper if the instrument, through mistake, fails to accomplish the purpose intended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 1–6.]

6. SAME.

Equity will grant relief on the ground of mistake, not only when the mistake is expressly proved, but also when it is implied from the nature of the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 1–6; vol. 19, Equity, §§ 14–20.]

(Syllabus by the Court.)

Appeal from Circuit Court, Mingo County.

Bill by R. N. Taylor against A. I. Godfrey and others. Decree for plaintiff. Defendants appeal. Reversed and remanded.

Stokes & Bronson, for appellants. Douglas W. Brown, for appellee.

MILLER, P. The material facts are few and not controverted. September 21, 1904, R. N. Taylor borrowed from H. M. Meyers $3,000, executing his 12-month note therefor. At the same time, as security, he executed to Meyers a paper entitled a "deed of conditional assignment" of certain royalty interests reserved in coal leases then being operated by the Chattaroy Colliery Company. Although a copy thereof was delivered to Meyers, and also to said colliery company for its information in paying to Meyers the royalties accruing to Taylor under said leases, Meyers, on account of its character, became dissatisfied with the assignment; and at his request Taylor on January 27, 1905, executed to A. I. Godfrey, trustee, a formal deed of trust, describing said note and reciting his desire to "more effectually secure the same," binding himself to pay it when due, and conveying to said trustee the said royalty interests (being one cent on each ton of coal mined and shipped by virtue of the above leases), in trust to receive and apply to the note said royalties as they accrued; providing that, in default of payment of sufficient royalties to pay said note at maturity, and the further default of said Taylor to pay the same at maturity, the trustee should, on request of the cestui que trust, proceed to sell said royalty interests, and from the proceeds discharge said note. This deed of trust was recorded January 28, 1905; and, on receiving it, Meyers surrendered to Taylor the "deed of conditional assignment." The money so loaned to Taylor had been borrowed by Meyers from a bank, on his note indorsed by his father, Israel Meyers; he pledging to his father as security for such indorsement certain stocks. And, his father afterwards demanding additional security, he assigned the deed of trust and note also to him February 3, 1905, reciting his desire to more effectually secure him in said indorsement, which assignment was recorded four days later. November 28, 1905, the following release, acknowledged November 25th, was admitted to record in Mingo county: "I, I. Meyers, hereby release a certain deed of trust made by R. N. Taylor to A. I. Godfrey, my trustee, and therein called an indenture, ed the 1st day of January in the year 1905, and of record in the clerk's office of the county court of Mingo county, West Virginia, in book of bonds, contracts and leases No. 6 at page 224. Israel Meyers."

This paper is the only subject of controversy in this suit. Taylor was no party to it, and knew nothing about it until his attention was afterwards called to it by H. M. Meyers and the mistake in its execution and recordation explained to him; and, as he admits, he then agreed to join in a paper to be recorded which would show the mistake, or to execute another deed of trust, but which promise he afterwards refused to make good —excusing himself by saying his promise was made on the spur of the moment, without proper consideration of the satisfaction by Meyers of his liabilities to other creditors, to secure preference of his father over whom Taylor claims was the purpose in substituting the deed of trust for the conditional assignment, and not, as Meyers claims, and the deed of trust itself recites, "to more effectually secure" the note of Taylor. November 29, 1905, Taylor having declined to fulfill his promise, Israel Meyers executed and placed on record a release to H. M. Meyers of the assignment of the deed of trust and note of February 3, 1905, in which release he also declared his mistake in executing the above release of November 25th, that Taylor had not satisfied the trust, and that he thereby nullified said release as having been executed through mistake and without consideration. It will be noticed that the release describes the trust as dated "the 1st day of January in the year 1905," while it appears to be dated January 27th. As no question is raised as to this, we assume the discrepancy is a clerical error in the transcript of the record. Default being made in payment of sufficient royalties, and by Taylor, to discharge the note, Godfrey, trustee, pursuant to the trust, on October 18, 1906, gave notice of sale of the property on November 24, 1906, to restrain which the present suit was brought. The bill was filed November 14, 1906, and the temporary injunction awarded was, upon final hearing January 15, 1907, on bill, cross-answers, and proofs filed, by final decree made perpetual.

The relief sought is based mainly on the claim that Israel Meyers was absolute owner of the deed of trust and note by assignment, with full power to release the lien; that his release thereof so made and recorded constituted a complete discharge, and a reinvestment of the title to the property in the plaintiff; and that, though executed in mistake and without consideration, yet, because of gross negligence of Israel Meyers and his son in the execution thereof, equity will afford them no relief. Some reliance is also placed on the charge of the bill, flatly denied in the answers, that the real purpose of the deed of trust, contrary to its recitals and terms, was to enable H. M. Meyers to secure his father in preference to other cred-

itors, and that, as these creditors had been paid, no legal or moral obligation rested on Taylor to restore the effect of the released security. In our opinion, however, the facts and circumstances shown do not support this charge. The conditional assignment was not such a paper as a good business man would accept as security for such a loan. It provided no time when, in default of royalty payments or default in payment of the note at maturity, the property assigned might be sold to pay the note. It limited the benefits thereof solely to the rather uncertain and indefinite amount of royalties to accrue, and lengthened out the time of possible payment far beyond the date of maturity of the note; the royalties collected little more than keeping pace with the interest. And it is most natural that Meyers should have wanted these deficiencies cured, as they were, by deed of trust. The facts on which Taylor founded his excuse for nonfulfillment of his promise to correct the mistake were as well known to him at the time as afterwards. Then the excuse did not occur to him. The trust was made primarily to secure H. M. Meyers, not his father; and, as between Taylor and Israel Meyers, the latter could not have released the deed of trust, without his consent, so as to defeat his rights thereunder.

Another ground of relief alleged, but apparently not relied on in proof or argument here, is that the defendants are concluded by the final decree in a suit brought by Godfrey, trustee, in February, 1906, against Taylor and others to enforce the lien of said deed of trust, in which it is alleged the defendants' answer pleaded said release in defense, and the final decree adjudicated its validity. The answer here of H. M. Meyers denies this averment, alleging that the bill in that suit was dismissed, not on the merits, but on demurrer, with saving of rights to the parties. As this cause was not heard upon the decree in that suit, we will treat the point as waived.

The answer of H. M. Meyers, defensive and praying for the affirmative relief of a sale of the property to satisfy the lien of said deed of trust, relates to the circumstances attending the making and recordation of said release. The facts alleged and proven are: That, about the time of the release, H. M. Meyers was negotiating with Taylor for the purchase of the interest in the property covered by the trust; that Tayor, professing now to have understood said negotiations were on behalf of Israel Meyers, had procured a deed to be drawn to the latter, as well as a form of release from Israel Meyers to him of the deed of trust; that this form of release in some way came into the hands of H. M. Meyers, who, assuming it was such a release of the assignment of the trust he had made to his father as he had told Taylor he would procure, had his father sign and acknowledge the paper and placed it on record, his father not reading the release, and neither discovering the mistake until some days afterward. The negotiations for the purchase of the property came to naught, and and the question now is: Shall the plaintiff be allowed to avail himself of the mistake in order to defeat enforcement of the trust?

Elaborate briefs are presented on both sides. While as a general rule many, if not all, of the propositions contended for by plaintiff's counsel are correct, and supported some of them by our own cases, yet, as we view the authorities cited, they are for the most part inapplicable to the facts here. They all relate to instances where releases have been upon consideration, or the rights of third persons have intervened, or the conditions or positions of the parties would be injuriously affected by relieving the party from his mistake or negligent act, and to transactions between the party claiming the benefit of the paper involved and the one asking relief therefrom. Under all such circumstances, a party will not be relieved from his negligent act in failing to read the paper or to inform himself of a fact within his reach necessary to a proper understanding of the contract. We need not refer to the numerous decisions of this court on the subject cited by counsel, for they do not cover this case.

Taylor was no party to the transaction between H. M. Meyers and his father relating to the release involved here, knew nothing about it, recognized the mistake afterwards, and promised to join in correcting it. Both parties agree that the paper signed did not express their agreement, but deprived them of rights they intended to preserve, and can we say equity opens not its doors to afford relief? We do not so understand the law. Generally speaking, whether a particular transaction amounts to a release of a lien is a question of intention on the part of the releasor. Stribling v. Coal Co., 31 W. Va. 82, 5 S. E. 321; Fidelity Co. v. Railroad Co., 32 W. Va. 266, 9 S. E. 180. The latter case holds that "cancellation of a mortgage on the record is only prima facie evidence of its discharge, and that the owner may prove that the cancellation was done by fraud, accident, or mistake, and, if he does this, his rights under the mortgage will not be affected by the improper cancellation of it."

Mistake against which equity will give relief has been defined as "some unintentional act, omission, or error arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence." Kerr, Fraud and Mistake, 396; Story, Eq. 108; Ferrell v. Ferrell, 53 W. Va. 519, 44 S. E. 187. The mistake in this case may be likened to that of a scrivener in drafting an instrument that does not express the agreement of the parties, which a court of equity will always correct. Troll v. Carter, 15 W. Va. 567; Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39; Lough v. Michael, 37 W.

Va. 679, 17 S. E. 181, 470. But not, says the latter case, to the prejudice of a lienor whose debt was contracted without notice thereof. In Russell v. Mixer, 42 Cal. 475, the mistake was very much like the one here. A release of a mortgage was made, by an agreement to which the mortgagors were not parties and of which they had no knowledge, when the understanding between the parties affected was for an assignment of the mortgage and the note secured. The court says: "There is no appreciable distinction between this case and that where a scrivener, through ignorance or inattention, fails to select or prepare such an instrument as effectuates the previous agreement of parties, and relief is always decreed in that case"—citing 1 Story, Eq. § 115. In the section of Story referred to, the author says: "If there had been any mistake in the instrument itself, so that it did not contain what the parties had agreed on, that would have formed a very different case, for where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman either as to fact or to law does not fulfill that intention, or violates it, equity will correct the mistake so as to produce a conformity to the instrument." In Heyder v. Association, 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49, it is held: "The lien of a mortgage duly registered will not be lost by a cancellation of record effected through accident, or the mistake or fraud of third persons." To the same effect are Dudley v. Bergen, 23 N. J. Eq. 397, and Dubois v. Schaffer, 23 N. J. Eq. 401. In Skillman v. Teeple, 1 N. J. Eq. 232, an agreement and release made without consideration, the only ostensible one being that the releasor should have a lien on the mortgaged premises after a third mortgage (she being entitled to priority and being induced to give up personal security on notes and take a place in a list of incumbrances on the mortgaged premises posterior to that to which she was. entitled), the court held evinced such ignorance, mistake, and misapprehension of her rights that the agreement should be set aside and held void, and that a court of equity should find no impediment in correcting it. It is there said: "Equity, in rescinding contracts, does not confine itself to cases of fraud. Cases of plain mistake or misapprehension of right, though not the effect of fraud or contrivance, are likewise entitled to the interposition of the court."

Failure to read an instrument before executing it is not always such negligence as will bar relief, even where the transaction is between the parties directly affected by it. Albany Savings Institution v. Burdick, 87 N. Y. 40; Andrews v. Gillespie, 47 N. Y. 487. And Pomeroy (2 Pom. Eq. § 856) says: "Even a clearly established negligence may not of itself be sufficient ground for refusing relief if it appears that the other party has not been prejudiced thereby." And, referring to the general rule that equity will never give relief from mistake if the other party could by reasonable diligence have ascertained the real facts, or where the means of information are open to both parties, and no confidence is reposed, he continues: "A moment's reflection will clearly show that these rules cannot possibly apply to all instances of mistake, and furnish the prerequisite for all species of relief. Their operation is, indeed, quite narrow. It is confined to the single relief of cancellation, and even then it is restricted to certain special kinds of agreements." "The mere neglect or omission to read or know the contents of a written instrument is not necessarily a bar to reformation. The relief is proper when the instrument fails to conform to the agreement between the parties, through mutual mistake or mistake coupled with fraud, however the mistake may have been induced." 6 Pom. Eq. § 680. "A court of equity will grant relief on the ground of mistake, not only when the mistake is expressly proved, but also when it is implied from the nature of the transaction." 1 Jones on Mortg. § 971, and note.

In our opinion, the defendant H. M. Meyers has brought himself within the principles of these authorities, and there should have been a decree in the circuit court, upon his cross-answer praying for affirmative relief, canceling the release of the deed of trust so executed by his father, and decreeing a sale of the property covered thereby to satisfy the mortgage debt, when ascertained by reference to a commissioner or otherwise.

The final decree of the circuit court is therefore reversed and annulled, and the cause remanded, to be further proceeded with according to the principles herein enunciated and the rules governing courts of equity.

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(62 W. Va. 700)

## DELMAR OIL CO. v. BARTLETT.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. CONTRACT — PERFORMANCE — QUESTION FOR JURY.

In an action to recover the price per foot for drilling, under a contract providing that an oil well should be drilled to a certain depth unless oil be found at a less depth in quantities satisfactory to the oil company, whether such well was drilled to a proper depth, in accordance with said contract and proper skill and workmanship, is a question of fact for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1543–1548, 1827.]

2. SAME.

If one party to a contract is compelled to abandon it because of the other's negligence or improper interference, he is excused from further performance, and may sue for the part performed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1430–1433.]

3. SAME—QUESTION FOR JURY.
Whether there has been such negligence or improper interference is also a question of fact for the jury.

4. EVIDENCE—OPINION EVIDENCE.
The opinion of a person skilled and of long experience in drilling oil wells and taking fastened tools therefrom is admissible as to the effect of running into a well 3,356 feet deep a bit dressed in a particular way, upon a large piece of iron left at the bottom of said well, and as to the effect of such a piece of metal on the tools themselves.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2356.]

5. TRIAL—REJECTION OF EVIDENCE.
Refusal of the court to permit a witness to answer a question which by its own terms and subject-matter, taken in connection with facts and circumstances already in evidence, shows its relevancy and materiality, is not available as prejudicial error on a motion for a new trial, if the expected answer of the witness was not disclosed to the court at the time of the ruling; and an appellate court, in reviewing a judgment on writ of error, cannot assume, in such case, that an answer favorable to the exceptor would have been given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 115.]

6. APPEAL — REVIEW — REJECTION OF EVIDENCE.
The party complaining in the appellate court of the rejection of evidence by the court below must state the facts and evidence in the bill of exceptions, from which, to cause reversal, it must affirmatively appear to the appellate court that he was prejudiced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2322–2324.]

7. TRIAL—INSTRUCTIONS.
When there is conflict of testimony, and evidence on one side supporting one theory, and evidence on the other side supporting another and conflicting theory, and the principles of law applicable to each theory are different, it is error for the court to give as instructions to the jury abstract propositions of law applicable to only one of said theories, without reference in such instructions to the evidence in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596–602.]

8. SAME.
An instruction which undertakes to cover the whole case and to state all the circumstances and conditions necessary to be considered by the jury in arriving at a verdict, but which omits an essential view of the case, is erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 527, 613–623.]

9. SAME.
While a party is entitled to have his view of the evidence stated hypothetically in an instruction, he has no right to call special attention to a part only of the evidence and the facts it tends to prove, to the exclusion of other evidence in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 577–581, 613–623.]

10. SAME.
The court ought not to give an instruction irrelevant to the case, though as an abstract proposition of law it may be correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 584.]

(Syllabus by the Court.)

Error to Circuit Court, Marion County.

Action by the Delmar Oil Company against F. W. Bartlett. Judgment for defendant, and plaintiff brings error. Affirmed.

W. M. Hess and U. N. Arnett, Jr., for plaintiff in error. W. B. Cornwell, for defendant in error.

MILLER, P. In its action of assumpsit on the common counts, the plaintiff's bill of particulars charged the defendant with certain oil well supplies and certain gas furnished for drilling, aggregating $486.25. The defendant, besides the general issue pleaded, filed his bill of sets-off, aggregating $7,861.40, the principal item of which was, as assignee of John W. Pool, "to drilling Talkington well No. 4, 3,356 ft. at $1.20 per ft., $4,027.20"; all other items being in his own right, for certain oil well supplies and use of others. There was a verdict and judgment in favor of the defendant for $4,027.20, the exact amount of the above item in his bill of sets-off.

As precluding consideration of every other question, counsel interposes the objection that the blank form of contract upon which the rights of the parties depend is not sufficiently identified to make it a part of the evidence certified; but reference to the original transcript of the record and the original bill of exceptions, together with the description of the paper by witnesses, satisfies us that it is so marked and identified as to leave no doubt that it is the document referred to in the bill of exceptions, and it will be considered as a part of the record. See De Board v. Railway Co. (W. Va.) 57 S. E. 279, and Chadister v. Railroad Co., 59 S. E. 523, recently decided by this court, and not yet officially reported.

Pool, a driller and contractor of long experience, had drilled a number of wells for the plaintiff. There had been no written contract executed for the drilling of the Talkington well; but it is conceded that it was drilled upon substantially the same terms as contained in the printed contract under which Pool had drilled the former wells, the blanks therein being supplied by oral agreement to suit this particular well. This printed form of contract, with the verbal terms supplied in reference to the Talkington well, provided, among other things, that the drilling should be prosecuted diligently until completion, without interruption except from unavoidable causes; that said well should be drilled 2,500 feet below the Pittsburg coal, unless oil or gas be found at a less depth in quantities satisfactory to the company, and, when drilled to the depth required, should be thoroughly cleaned; that, after the oil or gas bearing sand was reached, the "method of drilling" should be under the direction of the company; that an oil saver and steel measuring line should be furnished by the company; that Pool should keep such a record of the strata passed through in drilling as required by the company; that, when the well was completed and delivered, clear of all obstructions and free of all claims for work done or materials furnished, Pool should receive $1.20 per foot for the drilling there-

of. The well was drilled to a depth of 3,356 feet in all. Oil was struck at the depth of 3,346 feet "in quantities satisfactory" to the company. When this occurred, the well was measured by Backon, assistant superintendent of the company. Pool claims that Reardon, superintendent, then directed him to drill 10 feet deeper, but not through the sand; but Reardon contends he directed him to drill 15 feet deeper. Pool, corroborated by his tool dresser, testifies that at the depth of 3,356 feet the bottom of the sand was reached, as evidenced by its appearance, and that it was dangerous to go farther for fear of breaking through and destroying the well; that the driller began to clean out the well, and Pool notified Reardon to come and measure the hole; that it was deep enough. Reardon, in the absence of Pool, went to the well, and, with the help of the driller and tool dresser employed by Pool, using the steel measuring line provided by his company, and what is called in the record a two-inch stopcock core as a weight for a sinker, ran the line down in the well, ascertaining the depth to be as stated. All parties agreed that this core was a dangerous thing to use in the well. It was the same instrument used by Backon in the previous measurement, after he had lost in the well a piece of pipe used for that purpose. Pool claims, but Reardon denies, that he told Reardon, after learning it had been used by Backon, it was an improper tool to run in the well, and that Reardon replied: "Some people you can't learn anything." Reardon says: That when he made the measurement he was furnished this core by the driller and tool dresser. That he objected to it, saying he did not like the looks of it, that it did not look heavy enough, and that he would rather have a pipe weight. That the driller said: "We run that weight. It is a good weight." That he replied: "All right, if you can run it, I can." And so he ran it down. Reardon and the tool dresser were the only witnesses examined as to what took place at the well after the measurement. The tool dresser testified that Reardon was present giving directions when he and the driller proceeded to pull out the measuring line; that in the act of doing so the line was broken, leaving 800 feet of it and the piece of iron still in the well; that Reardon then gave directions to run the bailer and fish out the rest of the line; that they did so, and succeeded in getting out the rest of the line, but were unable to get the weight; that Reardon then gave direction to the driller and him, in the absence of Pool, to run another bit, knowing the iron was still in the hole, which they proceeded to do, using a newly sharpened bit, dressed half an inch less than the size of the hole to avoid sticking the tools, with the result that the tools became fastened. Reardon claims he was not present when the driller and tool dresser began to pull out the line, but was a short distance away aiding with the steam line; but he admits that, in the absence of Pool, he directed then to run another bit, claiming the well was not deep enough. Pool says that Reardon came to him shortly afterward, at another well on a nearby farm, and said he had measured the well, but had broken the line and left a part of it in the hole. Reardon says what he then told Pool was that the driller and tool dresser had broken the measuring line and left 800 feet of it in the hole. He, however, testifies in the same connection: "I said that we had gotten all of the line out, but the weight was left in, and that he had better go up and see about it." Pool further says, although contradicted by Reardon, that about noon of the same day, at the boarding house, the driller told him, in the presence of Reardon, that the tools were stuck, assigning as the cause the presence in the well of the stopcock core used in measuring; that he then asked Reardon if he had used that core as a weight, and he replied that he had. After a prolonged effort to fish out the tools, Pool gave it up and demanded his pay, notifying the oil company that he regarded the well completed. Subsequent negotiations between the company and the defendant Bartlett, to whom Pool had meanwhile assigned his claim for drilling the well, resulted in the assignee making an unsuccessful attempt to fish out the tools. The company nevertheless tubed the well, which continued to flow oil for some time, starting at 75 barrels per day, and continued to produce oil for something over a year, when it became flooded with water.

Counsel argue that it was not the duty of the company under the contract to measure this well, and that Backon and Reardon, having been requested by Pool to measure it, acted, in doing so, as his servants; he and not the company being responsible for any negligence on their part. But we do not think these rules, governing the relation of independent contractor and his servants in respect to injuries sustained by innocent third persons, are applicable here, where the parties are in privity of contract, and negligent interference by the plaintiff is claimed, especially in view of the clause in the contract reserving to the company the right to control the drilling through the oil-bearing sand.

The case was tried and is presented here, by each party, upon two theories: On the part of the defendant they are: (1) That the well was completed under the contract at the time Pool notified Reardon that it was deep enough and asked him to measure it; (2) that, even if the drilling through the oil-bearing sand was not at the risk of the company under the provision of the contract that the same should be under its direction, nevertheless, conceding it was not completed at the time of the last measurement, the negligent use and loss in the well by Reardon of the

stopcock core, resulting in the sticking of the tools, and the direction by Reardon to the driller and tool dresser to run another bit, while this dangerous piece of iron was still in the well, were such an interference by the company as will excuse nonperformance. The theories of the plaintiff are: (1) That Pool had not completed the contract at the time of the last measurement; (2) that, whether the loss of the weight in the hole was due to negligence of the employés of Pool, of Reardon acting for Pool, or of both, resulting in the sticking of the tools, Pool and not the company must bear the loss.

The construction placed upon the contract by the company is that it is the sole arbiter as to whether or when the same was completed. In our judgment, the contract does not make it so. According to the contract proven, the well was to be drilled 2,500 feet below the Pittsburg coal, unless oil should be found at a less depth in quantities satisfactory to the company. It clearly appears that oil had been found in satisfactory quantities, and the company had signified this fact, at the time of the measurement by Backon, by direction to Pool to drill 10 or 15 feet (as the fact may be) deeper, but not through the sand. Whether the well had been drilled to a proper depth, in accordance with the contract and proper skill and workmanship, was a question of fact for the jury. But, even if the jury determined this question in favor of the company, the important question would still remain whether, in the further effort of Pool to complete the contract, the company, without his consent or acquiescence, negligently interfered with or interrupted performance thereof, so as to excuse him and entitle his assignee to demand the contract price for part performance, for it is well settled that, if one party to a contract is compelled to abandon it because of the other's negligence or improper interference, he is excused from further performance, and may sue for the price of the part performed. Clark v. Franklin, 7 Leigh (Va.) 1; Kern v. Zeigler, 13 W. Va. 716; Lynch v. Sellers, 41 La. Ann. 375, 6 South. 561, 5 L. R. A. 682; Chicago v. Tilley, 103 U. S. 154, 26 L. Ed. 371; Little v. Mercer, 9 Mo. 218; 9 Cyc. 639. And whether or not there was such negligence or improper interference on the part of the company or its agents was also a question of fact for the jury.

The errors argued here relate to the refusal to set aside the verdict and grant a new trial, the giving of the two instructions for the defendant, the refusal of the seven instructions asked for by the plaintiff, and the refusal to admit the expert testimony of G. A. Schaffner.

First, as to the rejected testimony of Schaffner. This witness, who had been brought from Pennsylvania for that purpose, had fully qualified himself to speak as an expert with reference to drilling oil wells and fishing out tools. Pool had already testified as follows on behalf of the defendant: "Q. From your experience in drilling wells, what would be the probable effect on a string of tools or a bit in running it into the well or hole where a piece of iron of the character you have described (6½ inches long, 2½ inches in diameter at one end, and 2¾ at the other) was? A. It would be a dangerous tool for a string of tools to run on. The probabilities are that the stopcock core formed a wedge to stick the tools in the bottom of the hole." Schaffner, when afterwards called as a witness for plaintiff, was asked: "Suppose a two-inch stopcock core, similar to the one in evidence, in measuring the well had dropped to the bottom of the well, 3,356 feet deep, and that the tools with a fresh bit were run down on that stopcock core; the diameter of the hole being 6⅝ inches. I will ask you to state whether or not that would be sufficient to form a wedge and stick the tools so that they could not be removed." Objection to this question was sustained. Was this error? We think it was, especially in view of the above evidence of Pool admitted. We are told by counsel that this ruling was based on Overby v. Railway Co., 37 W. Va. 524, 16 S. E. 813, holding that: "If the facts in a case can be placed before the jury, and they are of such a nature that jurors generally are just as competent to form an opinion in reference to them and draw inferences from them as witnesses, then the opinions of experts cannot be received in evidence as to such facts. * * * The opinion of a witness who neither knows nor can know more about the subject-matter than the jury, and who must draw his own deductions from the facts already in the possession of the jury, is not admissible." This law, if applicable to the testimony of Schaffner, would also have excluded the evidence of Pool referred to; but we do not think it covers this case. How a bit of the size and dimensions given, dressed "shy," attached to stem and jars, and run into a hole of the depth and other dimensions given, would act upon the stopcock core at the bottom of the well; what would be the effect of such a piece of metal upon the tools themselves; and what would otherwise be the effect of running a bit, freshly dressed as this one was, into a hole of the character described—were questions of such a nature that jurors generally would not be as competent to give judgment upon them as would persons of long experience in drilling oil wells and fishing out tools. The rule applicable here, we think, is that of Welch v. Insurance Co., 23 W. Va. 305, in which Judge Green says: "Of facts which require proof by means of indirect evidence, says Starkie, there are some of so peculiar a nature that juries cannot without other aid come to a direct conclusion on the subject. In such instances, where the inference requires the judgment of persons of peculiar skill and knowledge on the particular subject, the testimony of such as to their opinion and judgment upon the

facts is admissible evidence to enable the jury to come to a correct conclusion." The rule admitting such testimony has been held to include the opinion of persons skilled in handling derricks as to the sufficiency in strength of the ropes used in connection therewith (Stone Co. v. Williams, 26 Ind. App. 131, 57 N. E. 558, 84 Am. St. Rep. 278), of a person skilled in shooting wells with glycerin (Torpedo Co. v. Fishburn, 61 Ohio St. 608, 56 N. E. 457, 76 Am. St. Rep. 437), of persons experienced in handling certain machinery connected with elevators (Slack v. Harris, 200 Ill. 96, 65 N. E. 669).

But can we say from the record that the plaintiff has been prejudiced by the ruling complained of? The question propounded to Schaffner was likely intended to elicit an answer contradictory to the evidence of Pool; but the answer may, for all we know or can see from the record, have corroborated him. The answer was not taken; nor does the record show what the plaintiff expected or intended to prove by the witness; and therefore we cannot say that the question itself imports an answer probative of facts material to the plaintiff's interest, so as to render the action of the court ground for reversal. Nease v. Capehart, 15 W. Va. 299; Jackson v. Hough, 38 W. Va. 236, 18 S. E. 575; Kay v. Railroad Co., 47 W. Va. 467, 35 S. E. 973; Scotland Co. v. Hill, 112 U. S. 183, 5 Sup. Ct. 93, 28 L. Ed. 692; Shinners v. Proprietors, 154 Mass. 168, 28 N. E. 10, 12 L. R. A. 554, 26 Am. St. Rep. 226; State v. Clifford, 59 W. Va. 1, 52 S. E. 981. In the latter case, it is said: "Refusal of the court to permit a witness to answer a question which by its own terms and subject-matter, taken in connection with facts and circumstances already in evidence, shows its relevancy and materiality, is not available as error on a motion for a new trial, if the expected answer of the witness was not disclosed to the court at the time of the ruling. An appellate court, in reviewing a judgment on writ of error, cannot assume, in such case, that an answer favorable to the exceptor would have been given." The party complaining in the appellate court of the rejection of evidence by the court below must state the facts or evidence in the bill of exceptions, from which it must appear affirmatively to the appellate court that he was prejudiced. Taylor v. Boughner, 16 W. Va. 327; Jackson v. Hough, and State v. Clifford, supra. Without prejudicial error thus made to appear, we cannot reverse the judgment on this ground.

What shall we say in reference to the instructions of the plaintiff refused? A statement of the general rules applicable will more readily enable us to dispose of the questions involving these instructions. We have already outlined the theories upon which the case was tried, and there was conflicting evidence tending to support each of these theories. "When there is conflict of testimony, and evidence on one side supporting one theory, and evidence on the other side supporting another and conflicting theory, and the principles of law applicable to each theory are different, it is error for the court to give as instructions to the jury abstract propositions of law which are applicable to only one of said theories, without any reference in such instructions to the evidence in the case." Webb v. Packet Co., 43 W. Va. 800, 29 S. E. 519, a case where the instruction given ignored the defense of contributory negligence. An instruction which undertakes to cover the whole case and to state all the circumstances and conditions necessary to be considered by the jury in arriving at a verdict, but which omits an essential view of the case, is erroneous. Railway Co. v. Mann, 99 Va. 180, 37 S. E. 849; Bowles v. Commonwealth, 103 Va. 816, 48 S. E. 527. While a party is entitled to have his view of the evidence stated hypothetically in an instruction, he has no right to call special attention to a part only of the evidence and the facts it tends to prove, to the exclusion of other evidence in the case. Thompson v. Douglass, 35 W. Va. 344, 13 S. E. 1015; Woodell v. Improvement Co., 38 W. Va. 23, 17 S. E. 386. The court ought not to grant an instruction irrelevant to the case, though as an abstract proposition of law it may be correct. State v. Thompson, 21 W. Va. 741; Blashfield on Instruc. § 86. Measured by these rules, we do not think the court erred in refusing the several instructions asked for by the plaintiff. The first was long and involved, and contradictory in itself, tending to mislead the jury. It ignored the theory of the defendant that at the time of the last measurement Pool had already completed the well. It assumes as a fact that it was the duty of Pool under the contract to measure the well, which in our opinion is not a true construction of the agreement. His request to Reardon to measure the well was with the view of getting his pay at the price per foot; his claim being that he had completed his job. Moreover, this instruction, as did also instruction No. 2, ignored the theory of the defendant that the dropping of the weight in the well by Reardon and those he engaged to assist him, and his direction to the servants of Pool, without the knowledge or consent of the latter to drill deeper, even assuming the well was not then completed, constituted an improper and negligent interference with the work, relieving Pool from further performance of the contract. Each of the other instructions asked for by the plaintiff ignored both the theory that the well had been completed when the measuring was done, and the theory of negligent interference by the plaintiff, and were properly refused.

As to the two instructions given on behalf of the defendant, the first presents the claim that the well was not completed at the time of the last measurement, the theory of the

plaintiff, and then presents the claim of negligent interference, the theory of the defendant; and there was no error therein of which the plaintiff could complain. With respect to the second, if its assumption was that there was evidence tending in an appreciable degree to show that prior to the measurement by Reardon the plaintiff had exercised its right under the contract to direct the method of drilling through the sand, we do not think the evidence would support such an assumption. But, as we interpret the instruction, its purpose was simply to tell the jury that by the terms of the contract, when the well reached the sand, the plaintiff had the right to direct the method of drilling through the same; and, inasmuch as the conclusion of the instruction is confined to the time after the measurement by Reardon and the sticking of the tools due to his negligent interference, according to the theory of the defendant, we do not think there was any error, in giving the instruction in the form stated, prejudicial to the rights of the plaintiff and calling for reversal.

It remains to consider the motion to set aside the verdict and grant a new trial. The ground therefor, not covered by the action of the court on instructions and the rejection of evidence, is that the verdict was contrary to the law and the evidence.

As there was conflicting evidence on all the controverted facts, the matter was peculiarly within the province of the jury; and, as we cannot perceive any rule of law has been contravened thereby, we are of opinion to affirm the judgment.

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(78 S. C. 531)

## FRETWELL v. CARTER et al.

(Supreme Court of South Carolina. Dec. 4, 1907.)

1. BILLS AND NOTES—DESIGNATION OF PAYEE—NECESSITY.

It is not fatal to a note that it is payable to order only, without naming any payee, but the same may be sued on by any bona fide holder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 45–49.]

2. SAME—BONA FIDE PURCHASERS — TAKING AS COLLATERAL SECURITY FOR PRE-EXISTING DEBT.

An indorsee who takes a note before maturity, and without notice as collateral security for a pre-existing debt, is a bona fide holder for value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 913–923.]

3. SAME — AUTHORITY TO FILL IN NAME OF PAYEE.

Where a note is payable to order only, without naming any payee, a holder thereof is authorized to fill in the name of his indorser as payee, and the same is done in substance by alleging in an action thereon execution and delivery of the note to the indorser as payee.

4. SAME—LIABILITY OF INDORSER—GUARANTY OF GENUINENESS OF MAKER'S SIGNATURE.

An indorser of a note engages that the signature of the maker is genuine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 667–673.]

5. SAME.

One who signs a note as maker or even as a surety is liable to a bona fide holder, though the signature of another who appears as a maker is a forgery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 673, 952.]

6. CHATTEL MORTGAGES—EXERCISE OF POWER OF SALE—PLACE OF SALE—STATUTORY PROVISIONS.

Though Civ. Code 1902, § 3004, providing that, where mortgaged personal property is to be sold, the mortgagee shall advertise the time and place of sale as therein prescribed in the county in which the personal property may be found, does not expressly provide the place of sale, the fair implication is that the place of sale shall be in the county in which that section requires advertisement to be made.

7. SAME—WAIVER.

The place of sale under a chattel mortgage required by the fair implication of Civ. Code 1902, § 3004, to be in the county wherein that section requires the advertisement to be made, like the requirement as to the manner and place of advertising, may be changed or waived in writing.

8. SAME.

A chattel mortgage authorizing a public or private sale at a city named outside the county where mortgagor resided and the property was found, and another chattel mortgage authorizing a sale, at will or pleasure, by private or public sale, were each sufficiently broad to authorize a sale outside the county of mortgagor's residence and where the property was found.

Appeal from Common Pleas Circuit Court of Laurens County; C. G. Dantzler, Judge.

Action by Joseph J. Fretwell, as survivor of the firm of Bleckley & Fretwell, against Ellen A. Carter and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded for new trial.

Simpson, Cooper & Babb, for appellant. F. P. McGowan and Ferguson & Featherston, for respondents.

JONES, J. The plaintiff, as sole survivor of Bleckley & Fretwell, brought this action to recover upon two promissory notes, each for $100, dated February 3d, and payable, respectively, November 15, 1897. The complaint alleged the execution and delivery of the notes by Ellen A. Carter to Z. Carter, and that defendant George S. McCravy, J. H. Wharton, and J. T. Crane, before the delivery of said notes, and for the accommodation of Ellen A. Carter, indorsed said notes by writing their names across the back thereof, and that thereafter, on February 28, 1897, the defendant Z. Carter also indorsed the same to Bleckley & Fretwell. The complaint also alleged due presentation for payment, protest for nonpayment, and notice thereof. J. T. Crane made no answer. Zimri Carter, J. H. Wharton, and George McCravy made answer with general denial and alleging payment. Ellen A. Carter answered, making general denial and alleging that, if she signed the notes described, it was for the accommodation of her husband, Zimri Carter, and was without consideration, and, further, that, if such notes were given, they were given for the debt of Zimri Carter for which plaintiff

held a chattel mortgage as collateral security, and the plaintiff either foreclosed or should have foreclosed said mortgage and applied the proceeds or the value of the property. The notes introduced in evidence did not contain the name of any payee, and were in the form: "Promise to pay * * * or order," etc. The plaintiff offered evidence tending to show the signature of Ellen A. Carter as maker, the delivery by her of the notes to Zimri Carter, her husband, the signatures of defendants George S. McCravy, J. H. Wharton, J. T. Crane on the back of the notes, the subsequent possession of the notes by Zimri Carter; that on February 27, 1897, Zimri Carter assigned and indorsed said notes to Bleckley & Fretwell as collateral to secure two other notes by Zimri Carter to them, one dated February 5, 1896, for $294.70, and the other dated August 27, 1897, for $70, which last-mentioned notes were secured by mortgage of certain mules, wagon, buggy, and harness; that in January, 1899, the mortgagee took these chattels under the mortgage from the possession of the mortgagor at his residence in Laurens county, informing him that the property would be taken to Anderson and there sold according to law, and that the mortgagor said all right; that the property was sold at public auction at Anderson in February, 1899, after posting three advertisements in as many public places in the city of Anderson for five days before the sale; that the wagon and harness were sold under the mortgage securing the $70 note to Mr. Campbell for $21.50, and that sum was credited on said $70 note, which had been credited with $43.50 on February 14, 1898; that the other property seized, four mules and a buggy and harness, were sold and bid in by the mortgagee for $54.50, and the proceeds credited on the note and mortgage for $294.70; that the property bid in was in bad condition, and was afterwards sold by Bleckley & Fretwell at private sale without any profit after adding expense of keep, the witness not being able to state the prices obtained; that no other payments had been made than the credits stated; that the notes in suit were duly protested for nonpayment and notice thereof mailed the indorser. The testimony in behalf of defendants tended to show that, while the signature resembled that of Ellen A. Carter, she did not think she signed the note; that she never gave a note to her husband, Zimri Carter; that the indorsers McCravy and Wharton signed the notes across the back at the request of Zimri Carter, supposing they were indorsing for the accommodation of Ellen A. Carter, and that McCravy was to get a mortgage of some personal property to secure the indorsers; that J. T. Crane first indorsed the notes, then McCravy, then Wharton; that notes were delivered by Wharton to Zimri Carter; that the value of the property sold under mortgages was considerably in excess of the mortgage debts; that the mules were not old, and in fair condition, and worth an average of $100 each; that the $294.70 note and mortgage were given to secure the purchase price of two of the mules and the buggy; that in the latter part of 1897 McCravy, after receiving notice of protest on notes in suit, notified Bleckley to exhaust the collateral before going on the indorsers, and that Bleckley said that he need not be uneasy, that there was enough property to pay the debt; Bleckley, however, testified that he did not remember having had such conversation. The jury rendered a verdict in favor of the defendants.

The first and second exceptions complain of instructions to the jury that it was incumbent upon the plaintiff to establish that Ellen A. Carter did execute and deliver the alleged notes before there could be any recovery. It is contended that this instruction was erroneous, as it made recovery against any of the defendants depend upon whether Ellen A. Carter had signed the note. We think this point is well taken. The notes were negotiable instruments. The fact that the name of the payee was left blank is not fatal. In 1 Dan. on Neg. Inst. § 599, it is stated: "The bill or note must point out with certainty the party who is to receive the money; that is, it must designate a payee. But the payee need not be named in person; it being sufficient if some one be indicated. Thus, if the instrument be payable to A, or bearer, or to bearer, or to the holder, or to order, it is intended to mean whoever comes in lawful possession, and the holder may sue upon it." The case of Davega v. Moore, 3 McCord, 482, holds that a note payable "to order" only, without mentioning the name of any payee, is considered as a note payable to a fictitious person, and may be sued upon by any bona fide holder. It is not disputed that Crane, McCravy, and Wharton at the request of Zimri Carter signed the notes by writing their names across the backs thereof, and after signing, handed them back to Zimri Carter. Even if it be conceded that Ellen A. Carter did not sign the notes, the other defendants signed them and put it in the power of Zimri Carter to do as he did, negotiate them to Bleckley & Fretwell. There was nothing to show that Bleckley & Fretwell had notice of any infirmity in the notes. An indorsee who takes a promissory note before maturity and without notice of its infirmity as collateral security for a pre-existing indebtedness is a bona fide holder for value. Bank v. Chambers, 11 Rich. Law, 657. The evidence also shows that Bleckley & Fretwell extended the time of the payment of the notes held by them in consideration of the transfer to them of these collateral notes. When Zimri Carter indorsed the notes to Bleckley & Fretwell, they were certainly authorized to fill in the blanks with his name. Carson v. Hill & Jones, 1 McMul. 76; Aiken v. Cathcart, 3 Rich. Law, 133, 45 Am. Dec. 764; Bank v.

Mahon, 75 S. C. 255, 55 S. E. 529. This they have elected to do, and have done in substance and effect by alleging execution and delivery of the notes to him as payee. Under these circumstances, even if Ellen A. Carter did not sign the notes, Zimri Carter would be liable because of his negotiation and indorsement to plaintiff, and McCravy, Wharton, and Crane would be liable whether they be regarded as indorsers or makers. If indorsers, their contract engages that the signature of the maker is genuine. Ford v. Bank, 74 S. C. 184, 54 S. E. 204, 114 Am. St. Rep. 986. If makers, having issued the note as genuine, even though as sureties, when it contained what purported to be the signature of Ellen A. Carter, they are bound to a bona fide holder, even though her signature be a forgery. 2 Dan. Neg. Inst. §§ 1314, 1354; Helms v. Wayne Agricultural Co., 73 Ind. 325, 38 Am. Rep. 147; Wheeler v. Traders' Deposit Bank, 107 Ky. 653, 55 S. W. 552, 49 L. R. A. 315, and cases cited in note; Meacher vs. Fort, 3 Hill, 228, 30 Am. Dec. 364; Witte v. Williams, 8 S. C. 290, 28 Am. Rep. 294.

The court instructed the jury that if the sale of the mortgaged property was made outside of the county where the mortgagor resided and where the property was found, and if the said property at the time of the sale was worth as much as the debt, the verdicts should be for the defendants, unless the mortgagor consented to the sale being so made. It is contended that this was erroneous, as the provisions of the statute (section 3004, Civ. Code 1902) were waived by the terms of the mortgages; the $70 mortgage authorizing a sale "at public or private sale for cash, with or without advertisement, at Anderson, S. C.," and the larger mortgage authorizing sale "at will or pleasure, by private or public sale, with or without advertisement. * * * In case of advertisement for sale the same shall be done by posting for five days in three or more public places." While section 3004 does not in express terms provide the place of sale, the fair implication is that the place of sale should be in the county in which the statute requires the advertisement to be made, as it would largely destroy the purpose of local advertising if the sale should take place in a wholly different county. The place of sale, like the requirement of the statute as to the manner and place of advertising, may be changed or waived in writing. Darnall & Susong v. Darlington, 28 S. C. 256, 5 S. E. 620. We think the terms of the mortgages are sufficiently broad to authorize a sale of the mortgaged property in Anderson county. One of the mortgages expressly so provides, and the other allows the mortgagee to sell "at will or pleasure, by private or public sale, with or without advertisement." It could hardly be doubted that the mortgagee was authorized to make private sale in Anderson county if he so willed, and the permission to make public sale is as broad. That such was the intention of the parties is rendered all the more natural and reasonable when it is considered that the plaintiff's place of business was in Anderson county, the papers were executed in that county, and notes were made payable at the bank of Anderson. The instruction given was not in conflict with the foregoing.

The judgment of the circuit court is reversed, and the case remanded for a new trial.



(78 S. C. 552)

## TAYLOR v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Dec. 4, 1907.)

1. CARRIERS—CARRIAGE OF PASSENGERS—INJURIES—PROTECTION OF PASSENGERS LEAVING STATION PREMISES.

The rule that, where a passenger has reached his destination and alighted, he is still entitled to protection as a passenger until he has had a reasonable time to leave the station premises, applies strictly to injuries resulting from any instrumentality or agency under the carrier's control.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1234–1244.]

2. SAME.

A carrier is not liable for injuries to a passenger from the conduct of third persons on the station premises, unless it knew of the existence of the danger or of circumstances from which the danger might have been reasonably anticipated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1128–1132, 1234–1236.]

3. APPEAL — REVIEW — QUESTIONS OF FACT — AMOUNT OF DAMAGES.

The Supreme Court has no jurisdiction to reverse a judgment on the ground that it is excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944–3947.]

4. SAME—DISCRETION OF LOWER COURT—CONTINUANCE.

Motions for a continuance are within the discretion of the trial court, except in rare cases, and will not be reviewed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3837.]

5. EVIDENCE — WEIGHT AND SUFFICIENCY — SCINTILLA OF EVIDENCE.

A scintilla of evidence is any material evidence that, if true, will tend to establish the issue in the mind of a reasonable juror.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2449–2455.

For other definitions, see Words and Phrases, vol. 7, p. 6351.]

6. CARRIERS—CARRIAGE OF PASSENGERS—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

Evidence in an action by a passenger who was carried by her station, and who alleged that on her return and while leaving the cars she was surrounded by a drunken crowd, who pushed against her and abused her with menacing speeches, using profane language, *held* not to support a verdict for plaintiff.

7. DAMAGES—MENTAL SUFFERING.

Recovery cannot be had for mental suffering in the absence of bodily injury, except under the mental anguish statute, with reference to telegraph companies.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Colleton County; Charles G. Dantzler, Judge.

Action by Emily Taylor against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

W. Huger Fitzsimons, for appellant. Griffin & Padgett, for respondent.

JONES, J. The complaint alleges that plaintiff at Charleston, S. C., on the night of June 12, 1904, boarded defendant's train from Charleston to Savannah as a passenger for Green Pond, S. C., to visit a sister who was ill and lived a few miles from said station; that the conductor was informed of her anxiety to reach her sister, and was requested to notify her of arrival of the train at Green Pond; that no notice was given her that her station was reached, and that no call of the station was made; that, in consequence, she was carried by her station to Yemassee, but was there transferred to defendant's return train and carried back to Green Pond; that her brother-in-law was at the station to meet her when she was carried by, but, upon learning that she had not gotten off, returned to his home, three miles distant. The remainder of the complaint is as follows: "That upon arriving at said station of Green Pond, and while leaving the cars thereat, this plaintiff, in the presence of the employés of the defendant company at the depot of said station, was surrounded by a drunken crowd of colored people, who violently pushed and jostled her and abused her with menacing speeches, using profane, violent, and obscene language, and that one of the employés of the defendant company ran off, telling plaintiff that he was going for his pistol in order that he might protect this plaintiff, and at the same time leaving her alone in the midst of a great throng of negroes and never returned, and plaintiff was carried to a house a distance of at least 200 yards by a colored woman, where the plaintiff begged to be cared for during the night, and was given lodging. That as a result of the wanton, gross, and reckless conduct of the defendant, Atlantic Coast Line Railroad Company, utterly disregarding the rights of the plaintiff in wantonly and recklessly carrying plaintiff by the station for which her ticket called, and to the station at which she requested to be put off, without so notifying her or without giving any of the notices usually given of the arrival of trains at said station informing passengers of their destination, and in not protecting plaintiff from the indignities placed upon her after her arrival at Green Pond depot, from Yemessee, or by not taking her to some place of safety for the night, thereby causing great mental and nervous shock and anxiety, to this plaintiff's injury and to her damage $10,000. Wherefore plaintiff prays judgment for the sum of $10,000 damages and costs." The jury within a few minutes after leaving their seats rendered a verdict for $10,000. A motion for a new trial was made and refused.

The court, after instructing the jury that it was the duty of the railroad company to exercise the highest degree of care to protect a passenger, charged that a passenger, after having reached his destination, is a passenger until he has had a reasonable time to get away. It is contended that this instruction was erroneous in view of the fact that the gravamen of the complaint was for failure to protect from indignities placed upon her by third persons after she had left the car at her destination, and that it should have been qualified so as to subject the carriers to the highest degree of care to protect a passenger from third persons on the station premises when the carrier had reasonable ground to apprehend such danger. The charge was not incorrect as a general proposition, but as applied to the particular case in hand it was incorrect and misleading. When one is on the carrier's station premises with a bona fide purpose of becoming a passenger, within a reasonable time before the departure of the train to be boarded, he is entitled to protection as a passenger. Johns v. Railway Co., 39 S. C. 162, 17 S. E. 698, 20 L. R. A. 520, 39 Am. St. Rep. 709; Hammond v. Railway Co., 15 S. C. 10. As a corollary of this rule, when a passenger has reached his destination and alighted from the train, he is still entitled to protection as a passenger until he has had a reasonable time to leave the station premises. 4 Elliott on Ry. § 1592; Brunswick, etc., Ry. Co. v. Moore, 101 Ga. 684, 28 S. E. 1000; Glenn v. Lake Erie, etc., R. R. Co., 165 Ind. 639, 75 N. E. 282, 2 L. R. A. (N. S.) 872, 112 Am. St. Rep. 255. This rule applies strictly when injury results from any instrumentality or agency under the control of the carrier. But, when the injury results from the conduct of a fellow passenger in the course of transportation, knowledge of the existence of the danger or of circumstances from which the danger may have been reasonably anticipated is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it. Franklin v. Railway Co., 74 S. C. 340, 54 S. E. 578; Anderson v. Railway Co., 77 S. C. 436, 58 S. E. 149. If this be the rule as applied to an injury from a fellow passenger during the course of active transportation, there is quite as great, if not greater, reason for holding such to be the law when the injury is alleged to have resulted from strangers upon the station premises.

It is further contended that there should be a new trial (1) because the complaint was solely for vindictive damages and there was no evidence to sustain such action; (2) because the verdict is so manifestly against the evidence and excessive that it was an abuse of discretion to refuse a new trial; (3) because defendant was prejudiced in the trial by the absence of a material witness, defendant's motion for continuance for that cause having been refused. As this court has no jurisdic-

tion to reverse a judgment on the ground that it is excessive, and as motions for a continuance are within the discretion of the trial court, except in rare cases, we will not further notice the second and third grounds of objection. But, after a painstaking examination of the testimony, we fail to find even a scintilla of evidence to support such a verdict. A scintilla of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror. The complaint is for willful misconduct, and it is essential that there be evidence of wantonness or willfulness as alleged. Notwithstanding the positive statement of the conductor that he called the Green Pond station twice, on this inquiry, we must accept as true the statement of plaintiff and her two friends with whom she was conversing as the train passed Green Pond that they heard no such call and that none was made. According to the plaintiff's testimony, when the conductor was informed that she had been carried by her station, the conductor stated that he had helped "old lady" or "a crippled lady" off at Green Pond, and had forgotten her. The undisputed evidence showed that the train was the Sunday excursion train from Charleston to Savannah, and on this occasion there were eight coaches, three for white passengers and five for colored passengers, the regular conductor, Capt. Symmes, being in direct charge of the coaches for colored passengers, and Capt. Seyle as assistant conductor being in charge of the coaches for white passengers, in one of which plaintiff rode. The coaches were crowded with passengers. The train reached Green Pond at 9:27 p. m., made the usual stop, taking on and putting off passengers, among those getting off being an old lady, Mrs. Grant, who was assisted by Conductor Seyle. When the conductor discovered that plaintiff had been carried by her station, she was assured that she would be returned to Green Pond on the next train. At Yemassee, 14 miles from Green Pond, she was transferred to train No. 22 from Savannah to Charleston, and returned without charge to Green Pond, the train arriving at 10:54 p. m., a delay to plaintiff of only 1 hour and 27 minutes. The evidence of plaintiff's witnesses shows that plaintiff was treated with every reasonable consideration and courtesy by the agents of defendant while she was on board the trains, except in so far as a breach of duty might be inferred from a failure to call the Green Pond station or notify plaintiff of arrival there; but the only inference possible from the facts as stated by plaintiff is that this failure was a mere inadvertence under the stress of the circumstances. The consequences of this failure of duty were not serious, a mere loss of a short time, the inconvenience of extending her trip to Yemassee and back, and the anxiety reasonably involved in passing her station under the circumstances. Although the complaint alleged that plaintiff's brother-in-law was at the station to meet her on arrival of train from Charleston and returned home because she did not get off, there was no evidence whatever on that subject. After leaving the train at Green Pond, she secured the services of a negro woman, who was in the employ of Mrs. Grant who kept a boarding house, and was escorted to the boarding house, where she lodged for the night. There was no evidence that she would have reached her sister's bedside any sooner if she had disembarked at Green Pond on arrival of train from Charleston, and there was no evidence that the failure to leave the train at Green Pond in the first instance deprived her of any protection she would otherwise have had. The verdict, therefore, should not stand because of any conduct connected with the failure of the conductor to call the Green Pond station. After stating that the conductor introduced her to Mr. Hughes at Yemassee, and told her he was the agent at Green Pond, that he would put her in his charge and send her back on the next train, that is plaintiff's version of what took place when she left the train at Green Pond: "A. We went on the platform together, and there was an abusive crowd of darkies there, and they were using awful language, such as I have never heard before, and I hope and pray I never will again, and he just said to them, 'Boys be quiet, there is a lady here.' Q. Miss Taylor, what happened then, if anything, on the platform? A. He stayed there a short time, sir, and begged me to excuse him, and said he was going to get a pistol and come back and protect me, and he left. Q. Where did he go? A. In the office. That is where I think he went. Q. Did you ever see him any more that night? A. I did not. Q. Were you touched in any way by those negroes that night? A. I should think I was. After he left me, I was completely unnerved. However, I did try to make my way around the crowd, and the result was I would only catch against the negro men, first one and then another; and that is exactly what I underwent. After being confident, I made my way through the crowd, and got a negro woman to carry me to a boarding house. Q. Where? A. To Mrs. Grant's." There is nothing in this testimony tending to show the allegations of the complaint. No one threatened, abused, molested, assaulted, or injured her. She merely touched, "caught against" some of the negro men as she made her way through the crowd at night. There is no suggestion that they purposely subjected her to any personal indignity. The crowd of excursionists and their friends were doubtless noisy, no doubt some of them were more or less intoxicated, and their language was offensive to the plaintiff. The agent, it appears, endeavored to remedy this, enjoining them to be quiet in the presence of the lady. Mr. Hughes' version of the matter was not given to the jury as the defendant was unable to locate him and secure his attendance. Rosa Bailey, an

employé of Mrs. Grant, the boarding house keeper, testified that Mr. Hughes brought plaintiff to her, and that she escorted her to the boarding house. The plaintiff, however, testified that this was not so, that she secured the services of Rosa Bailey herself. While plaintiff's version impeaches the courage and chivalry of Mr. Hughes, it makes no case of wanton injury inflicted on her by defendant. It is not the duty of a common carrier to provide escorts for unattended ladies until they leave the station premises. It is the duty of a common carrier when there is reasonable ground to apprehend injury to a passenger by third persons to use the highest degree of care to prevent it. But, where no injury has been sustained, there is no actionable breach of duty. The complaint alleges merely that the conduct of defendant caused "great mental and nervous shock and anxiety" to plaintiff. There is no allegation of physical or bodily injury. The law in this state does not allow recovery of damages for mental suffering in the absence of bodily injury, except under the mental anguish statute with reference to telegraph companies. Mack v. Railroad Co., 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; Lewis v. Telegraph Co., 57 S. C. 330, 35 S. E. 556.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

GARY, A. J., dissents.

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(78 S. C. 537)

## HARBERT v. ATLANTA & C. A. L. RY. CO.

(Supreme Court of South Carolina. Dec. 4, 1907.)

1. RAILROADS—ACCIDENTS AT CROSSINGS—ADMISSION OF EVIDENCE.

In an action for death at a railway crossing, evidence as to a pathway along the railway from a switch to the crossing in question was admissible, as explanatory of the locality where the injury was sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1129.]

2. APPEAL—HARMLESS ERROR—ADMISSION OF TESTIMONY.

Allowing a question and answer as to what another witness had stated at a certain time on a collateral matter is not prejudicial, when that witness was asked as to the same statement, and admitted making it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

3. WITNESSES — CONTRADICTION — INCONSISTENT STATEMENTS—LAYING FOUNDATION.

In an action for death at a railway crossing, it was not error, in the absence of a proper foundation for contradicting a certain witness, to reject testimony of one alleged to have been an agent of plaintiff to acquire information, as to whether the witness had not stated, in the presence of plaintiff, that he could not see the crossing, and was not the man they wanted, and that he could not see within 25 yards of the crossing, since the presence of plaintiff did not dispense with the necessity of such foundation and the matter did not appear material.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1233–1235.]

4. RAILROADS—ACCIDENTS AT CROSSINGS—INSTRUCTIONS—IGNORING ISSUES.

In an action for death at a railway crossing, where the alleged negligence of defendant was running the train at a high speed and failure to give statutory signals, charging that the burden of proof in the first instance was on plaintiff to show by a preponderance of the evidence the material allegations of the complaint not admitted by defendant, and that he would then be entitled to a verdict unless defendant proved its defense of contributory negligence by a preponderance of the evidence, was not error, when other instructions given showed that the law as to the defenses not mentioned was properly submitted to the jury, and there were instructions that, before plaintiff could recover, he must establish the allegations of his complaint by a preponderance of the testimony, and that the jury must be satisfied that there was a failure of the railway company to give the signals as required by law before they could find for plaintiff.

5. SAME—CONSTRUCTION.

A charge that, if deceased was negligent, yet notwithstanding that fact such negligence was not the proximate cause of the injury, but the proximate cause was the failure of defendant or its agents or servants to give the statutory signals, or if the defendant railway company, its agents, or servants were negligent in not keeping a lookout for travelers at the crossing, or in not giving warning signals of danger, and such negligence of defendant was the proximate cause of the injury to deceased, then plaintiff would be entitled to recover, was not a charge that defendant was liable if its negligence was the proximate cause of the injury, even if deceased's negligence contributed as a proximate cause thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1205.]

6. SAME—ISSUES NOT RAISED—INSTRUCTIONS RESPONSIVE TO TESTIMONY.

Even if the pleadings in an action for death at a railway crossing did not specifically raise the question whether defendant kept a proper lookout for travelers at the crossing, or gave due warning signals of danger, a charge requiring such care by the defendant was not error, where it was responsive to the testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1195.]

7. SAME—LAST CLEAR CHANCE.

A charge that, if deceased was negligent, yet if the defendant railway company, its agents, or servants, after the negligence of deceased, could have discovered and avoided inflicting the injury by ordinary care, and such negligence of the company, etc., was the proximate cause of deceased's injury, or if after the discovery of the danger defendant, etc., could have avoided inflicting the injury by ordinary care, if such failure was the proximate cause of the injury, and the negligence of the deceased was not a proximate cause of the injury, then plaintiff would be entitled to recover notwithstanding deceased's negligence, was, in substance, a charge that if defendant's negligence was the proximate cause of the injury, and deceased's negligence was not the proximate cause, plaintiff could recover, and hence the charge was not erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1214.]

8. SAME—WILLFUL OR WANTON INJURY.

Civ. Code 1902, § 2139, providing that a railway company shall be liable for injuries at a crossing contributed to by failure to give statutory signals, unless the person injured, etc., was guilty of gross or willful negligence or violation of law contributing to the injury, was not intended to vary the rule that contributory negligence is no defense to an action for injuries caused by the willful act or omission of a railway company, since the section has no refer-

ence whatever to willful misconduct by the railway company, but relates to misconduct of the party injured as a defense to negligence of the company in failing to give required signals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1089.]

9. SAME—INSTRUCTIONS.

In an action for death at a railway crossing, it is not error to instruct as to the duty of the employés in charge of railway trains to give proper signals at crossings, and to use ordinary care on approaching crossings, etc., even though no such issue was particularly raised by the pleadings, where the instruction is a mere statement of a general principle that might properly be charged in all cases arising under the statute requiring signals at highway crossings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1195.]

10. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action for death at a railway crossing, a charge that if any locomotive engineer on a railway train comes to a public highway crossing and fails to ring the bell within 500 yards of the crossing, etc., and keep it ringing until the engine passes the crossing or to blow the whistle, etc., and keep it blowing, etc., the law says they are negligent, was not prejudicial error, even though it held defendant to a stricter and different rule than that required by the statute, where defendant's testimony was to the effect that the engineer simply blew the signal for the crossing, and then commenced to ring the bell by an automatic ringer, and that the ringing continued until the train had proceeded beyond the crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

11. RAILROADS — ACCIDENTS AT CROSSINGS — FAILURE TO GIVE SIGNALS—CONTRIBUTORY NEGLIGENCE.

If a railway company fails to give statutory signals at a crossing, it is liable for killing a traveler thereon, unless the traveler, in addition to mere want of ordinary care, was guilty of gross or willful negligence, or an unlawful act, and such negligence or violation of law contributed to the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1072.]

12. TRIAL — INSTRUCTIONS — FAILURE TO CHARGE—ABSENCE OF REQUEST.

That proposition is distinct from the proposition that the law presumes that failure to give statutory signals is the cause of an injury only where it does not appear that the injury was caused in some other manner, and, where the former proposition was charged, failure to charge the latter was not error in the absence of a request.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

13. APPEAL — PRESENTATION OF QUESTION IN LOWER COURT — INSTRUCTIONS — PUNITIVE DAMAGES.

Where a complaint alleged willful conduct by defendant railway company causing a death at a crossing, and defendant did not demur thereto, even though the amendment of 1901 authorizing punitive damages in such a case had not gone into effect at the time of the accident, a charge authorizing punitive damages in case the injury was inflicted willfully or recklessly by the defendant was not reversible error, since it was responsive to the allegation of the complaint and correct as a general proposition, and there was no opportunity to rule on the question in the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1018.]

14. SAME.

If there are reasons why a correct proposition of law is not applicable to the case as an instruction, they should be brought to the attention of the presiding judge, in order that he may rule thereon, and, in the absence of a request or opportunity to rule on a question in the trial court, the Supreme Court will not consider it on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1018.]

Appeal from Common Pleas Circuit Court of Oconee County; R. C. Watts, Judge.

Action by James John Harbert, administrator, etc., against the Atlanta & Charlotte Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 53 S. E. 1001.

The exceptions were as follows:

"(1) Excepts because the presiding judge erred in allowing the plaintiff's attorney, over the defendant's objection, to ask the witness Fletcher Rice the following question: 'I want to repeat the question I asked one of the witnesses before, as to the pathway along by the side of the railroad to the north switch from Ft. Madison. Your honor can see it has now come in that there was a pathway, or traveled place, down the railroad. Mr. Carey has put it in issue, and we are not obliged to reply to it'—whereas, he should have ruled said testimony incompetent, for the reasons: (1) The complainant alleged that the deceased was killed while traveling along the public highway at a crossing, and his right to travel along a pathway by the side of the railroad was not an issue in the case. (2) The defendant had not brought out any testimony as to any path by the side of the railroad.

"(2) Excepts because the presiding judge erred in allowing the plaintiff's attorneys, over the defendant's objection, to ask the witness Fletcher Rice the question: 'Since you have been there, there has been a pathway running down by the side of the railroad, all along down by the north switch and over to the Jones Crossing, which was walked by people walking over that section of the country?' and in allowing the witness to answer said question, whereas, he should have ruled said testimony incompetent for the reasons: (1) (Same as 1 above.) (2) It was not in reply to any of the defendant's testimony.

"(3) Excepts because the presiding judge erred in allowing the plaintiff's attorney, over the defendant's objection, to ask the witness Keels Perry the question, 'Do you know of a little pathway being there on the side of the railroad?' and in allowing the witness to answer said question, whereas, he should have ruled said testimony incompetent for the reasons (1 and 2 above).

"(4) Excepts because the presiding judge erred in allowing the plaintiff's attorney, over the defendant's objection, to ask the witness John Harbert the question, 'Did Mr. Rice say on that occasion that he walked

directly from the north switch to Mr. Frick's house, and just as he went into the house 38 went by?' and in allowing the witness to answer said question, whereas, he should have ruled said testimony incompetent for the reasons: (1) There was no foundation laid for contradicting the witness Rice by advising him as to the time, place and person to whom such statement was made. (2) The witness Rice when on the stand was asked no such question.

"(5) Excepts because the presiding judge erred in not allowing the witness W. T. Tannery to answer the questions put to him by the defendant's attorney, 'Didn't he say [alluding to Mr. Jones], "I can't see the crossing and I am not the man you want?" How did he say it?' whereas, he should have ruled the testimony competent for the reasons: (1) It was a statement made in the presence of the plaintiff. (2) He was there for the plaintiff and with the plaintiff and as his agent to acquire information.

"(6) Excepts because the presiding judge erred in not allowing the witness W. T. Tannery to answer the question put to him by the defendant, 'While you all were talking about that same thing, didn't Mr. Jones say, "You can't see in 25 yards of the crossing?"' whereas, he should have ruled the testimony competent for the reasons (1 and 2 above).

"(7) Because his honor erred in charging the jury the plaintiff's second request to charge, in the following words: 'The burden of proof is, in the first instance, upon the plaintiff to show by the preponderance of the evidence the truth of the material allegations of the complaint, not admitted by the defendant, and, when the plaintiff has done this, he would be entitled to a verdict against the defendant, unless the defendant proves to your satisfaction, by a preponderance of the evidence, its defense of contributory negligence on the part of the deceased'—thereby instructing the jury that the plaintiff could recover without proving that the failure to give the signals contributed to the injury, and thereby limiting the defendant to the defense of contributory negligence, and excluding its other defenses that the injury was caused by the negligence of the deceased, and that he was guilty of gross negligence which contributed to the injury as a proximate cause.

"(8) Because his honor erred in charging the plaintiff's sixth request in the following words: 'If you should find that the deceased was negligent, yet if, notwithstanding such negligence on the part of the deceased, such negligence was not proximate cause of the injury to the deceased, but the proximate cause of the injury was the failure on the part of the defendant railway company or its agents or servants to give the statutory signals, or if you should find that the defendant railway company, its agents, or servants were negligent in not keeping a lookout for travelers at the crossing, or was negligent in not giving warning signals of danger, and such negligence on the part of the defendant railway company was the proximate cause of the injury to the deceased, then the plaintiff would be entitled to recover'—the error being (a) that he thereby gave the jury the law upon contributory negligence incorrectly, charging in effect that the defendant was liable if its negligence was the proximate cause of the injury, even if the deceased's negligence contributed as a proximate cause thereto; (b) that he thereby charged that the plaintiff was entitled to recover if the defendant was negligent in not keeping a lookout for travelers at the crossing, and such negligence was the proximate cause of the injury, when no such issue was in the case under the pleadings; (c) that he thereby charged that the plaintiff was entitled to recover if the defendant was negligent in not giving warning signals of danger and such negligence was the proximate cause of the injury; no such issue being raised by the pleadings.

"(9) Because his honor erred in charging the ninth request of the plaintiff in the following words: 'If the deceased was negligent, yet if the defendant railway company, its agents, or servants, after such negligence of the deceased, by the exercise of ordinary care, could have discovered and avoided inflicting the injury upon the deceased, and such negligence on the part of the defendant railway company, its agents or servants was the proximate cause of the injury to the deceased, or if, after the discovery of the danger of deceased, the defendant railway company, its agents, or servants could have avoided inflicting the injury upon the deceased by the exercise of ordinary care, if the failure to exercise such ordinary care on the part of the defendant railway company, its agents, and servants was the proximate cause of the injury to the deceased, and the negligence of the deceased, was not a proximate cause of the injury, then the plaintiff would be entitled to recover notwithstanding the negligence of the deceased'—the errors being (a) that he thereby charged the jury that the plaintiff could recover notwithstanding the negligence of the deceased, if after such negligence the defendant by the exercise of ordinary care could have discovered and avoided inflicting the injury, and such negligence was the proximate cause of the injury; (b) that he thereby charged the jury that the plaintiff would be entitled to recover notwithstanding the negligence of the deceased if after the discovery of the danger of the deceased the defendant by the exercise of ordinary care could have avoided inflicting the injury and such failure to exercise ordinary care was the proximate cause of the injury; (c) that, instead of charging this request, he should have charged that, if the deceased was negligent and negligence contributed as a proximate cause to the injury, the plaintiff could not recover unless the in-

jury was wantonly or willfully inflicted.

"(10) Because his honor erred in charging the jury the plaintiff's tenth request to charge, in the following words: 'If the injury to the deceased was caused by a willful act or willful omission of the defendant railway company, or its agents or servants, or by a conscious failure on the part of the defendant, its agents, or servants, to perform the duties required of it by law, then the defendant railway company would be liable whether the deceased was negligent or not. In such a case the contributory negligence of the deceased would not be a defense'—the error being (a) that he thereby confined the defendant to its defense of contributory negligence and deprived it of its other defenses; (b) that he thereby deprived the defendant of its defense that the injury was not the result of its carelessness, but the result of the carelessness of the deceased; (c) that he thereby deprived the defendant of its defense that the deceased was guilty of gross negligence, and that such gross negligence contributed as a proximate cause to the injury; (d) that he thereby deprived the defendant of the defense that the deceased was acting in violation of law, which contributed as a proximate cause to the injury; (e) that he thereby deprived the defendant of the defense that the failure to give the signals was not the cause of the injury, but other causes.

"(11) Because his honor erred in charging the jury the plaintiff's fourteenth request, in the following words: 'It is the duty of the employés in charge of railway trains to give the proper signals as required by statute, and to use ordinary care on approaching the crossing of the railroad and a public highway so as to prevent injury to those traveling on the highway'—the error being (a) that he thereby charged the jury that it was the duty of the defendant to use ordinary care on approaching the crossing, which let into the case acts of negligence not alleged in the complaint or made issues in the case; (b) that his honor should have excluded this issue from the jury, having held that the plaintiff's cause of action alleged in the complaint was under the crossing statute of this state, and that he could recover upon no other theory; (c) that under this charge the jury were at liberty to consider any negligence; (d) that said charge was inconsistent and outside of the issues raised by the pleadings; (e) that his honor, having held that the only negligence alleged in the complaint was the defendant's failure to give the statutory signals, should have refused as inapplicable to the case all requests not bearing upon that issue.

"(12) Because his honor erred in charging the jury as follows: 'I charge you as a matter of law that, if any locomotive engineer upon a railroad track comes to a public highway, where the public highway crosses the railroad, and if they fail, within 500 yards of the crossing, to ring the bell, and to keep ringing the bell until the engine gets over such highway, or to blow the whistle for five hundred yards before they reach the place where the highway crosses the railroad, and to keep blowing it until the engine crosses the public highway, and if they fail to do that, the law says that they are guilty of negligence'—thereby charging that the defendant was guilty of negligence if it failed to ring the bell within 500 yards of the crossing, and to keep ringing the bell until the engine passed over the highway, or if the defendant within said distance failed to blow the whistle, and to keep blowing it until the engine crosses, whereas, the statute requires the whistle to be blown or the bell to be rung within said distances, its terms being in the alternative, and the words of the charge held the defendant to a stricter and different rule than that fixed by the statute.

"(13) Because his honor erred in charging the jury that if they conclude that the defendant failed to give the signals required by the statute, as a matter of law the plaintiff would be entitled to recover such damages as they concluded he had sustained, unless they concluded from the testimony in the case that, in addition to a mere want of ordinary care, the deceased was guilty of gross or willful negligence or an unlawful act, and such gross or willful negligence or violation of law contributed to the injury, whereas, he should have charged the jury that the law presumed that the failure to give the signals was the cause of the injury only where it did not appear that the injury was caused in some other manner, and thereby charged that the defendant was liable even if the failure to give the signals did not contribute to the injury.

"(14) Because his honor erred in charging the jury as requested by the plaintiff in his twelfth request, as follows: 'But if you conclude that the plaintiff is entitled to recover damages of the defendant railway company, and that the injury to the deceased was inflicted willfully or recklessly by the defendant railway company, its agents, or servants, so as to cause the death of deceased, then in addition to the actual damages sustained by the parties in whose behalf this action is brought—in addition to such damages as will compensate them for the injury they have received by reason of the death of the deceased—you may go further and assess such additional amount, as punitive damages (as you think proportioned to the injury), as a vindication of a private right which has been invaded willfully or recklessly, and operate as a deterring punishment to a wrongdoer and as a warning to others'—the error consisting in charging the jury that the plaintiff could recover in this action punitive damages, whereas, he should have instructed the jury that they could not award punitive damages in this case as under the law as it stood at the time of the injury, the 24th day of February, 1901, no such damages could be recov-

ered, and this action was governed by the law as it then stood.

"(15) Because his honor erred in charging the jury that they could award the plaintiff vindictive, exemplary, or punitive damages if they concluded that the injury to the deceased was inflicted willfully or recklessly by the defendant in addition to actual damages, if they concluded that the defendant was liable, whereas, he should have instructed the jury that under the statute law of this state prior to the amendment of 1901 punitive damages could not be recovered in actions of this character, and, as the amendment of 1901 did not go into effect till 20 days from the 19th day of February, 1901, the date of its approval by the executive, this case was governed by the statute as it existed prior to the amendment, and punitive damages could not be awarded."

J. P. Carey, for appellant. Stribling & Herndon, for respondent.

POPE, C. J. This is an action for damages, alleged to have been sustained in consequence of the negligent and willful conduct of the defendant, which resulted in the killing of the plaintiff's intestate, while traveling the public highway at a crossing. The complaint alleges that the train of cars was being run at a high and rapid rate of speed, and that there was a failure to give the statutory signals. After denying the allegations of negligence and willful misconduct, the defendant alleged that, if the plaintiff's intestate was killed, his death was caused by his own negligence. The answer also contained the following: "As a further defense and for the purposes of this defense only, the defendant alleges that the deceased was guilty of negligence which contributed as a proximate cause to his death, along with the alleged negligence of the defendant, if any, in the matters complained of in the complaint, in the following particulars: That the said James A. Harbert was at the time he was killed walking upon the railroad track, where he had no legal right to be, in an intoxicated condition, and failed to exercise ordinary care in looking out for the approach of the train which is alleged to have struck him; that he was guilty of gross negligence in going upon the railroad track, in an intoxicated condition, and in not stopping, listening, and looking for an approaching train, and said contributory negligence is hereby pleaded as a bar to this action." The jury rendered a verdict in favor of the plaintiff for $10,000. A previous verdict for $8,000 was set aside on the ground that the train which killed the deceased was not operated by the defendant, but by the Southern Railway Company; his honor, the presiding judge, basing his order upon the case of Pennington v. Railway, 35 S. C. 439, 14 S. E. 852.

The exceptions will be set out in the report of the case and considered in their regular order.

First, second, and third exceptions: The testimony mentioned in these exceptions was merely explanatory of the locality where the injury was sustained, and the exceptions are therefore overruled.

Fourth exception: When Rice was on the stand, the following took place: "Q. Didn't you on that same occasion say, in the presence of Mr. John Harbert and myself, that you went straight on from the north switch to Mr. Frick's, and that you met no one, and just as you went in his house, 38 came along, or words to that effect? A. I guess I did. Q. Didn't you say that? A. Yes, sir; I guess I did." It will thus be seen that Rice was asked if he did not make substantially the same statement as that mentioned in the exception, and that he admitted such fact. There was therefore no error prejudicial to the appellant. State v. Sullivan, 43 S. C. 205, 21 S. E. 4.

Fifth and sixth exceptions: There are two reasons why these exceptions cannot be sustained. In the first place, the fact that the statement may have been made in the presence of the plaintiff did not dispense with the necessity of laying the foundation for contradicting the witness; and, in the second place, the appellant has failed to satisfy this court that the testimony was material.

Seventh exception: The charge set out in the request must be considered in connection with the other portions thereof, which show that the law as to the defenses not mentioned in the request was properly submitted to the jury; and, further, that his honor, the presiding judge, charged that "the plaintiff before he can recover must establish the allegations of his complaint by the preponderance of the testimony; and you must be satisfied that there was a failure on the part of the railroad company to give the signals as required by law before you can find for the plaintiff."

Eighth exception: We fail to find where the circuit judge charged the jury that the plaintiff could recover if the negligence of the deceased contributed to the injury as a proximate cause. Conceding that the pleadings did not specifically raise the question whether the defendant kept a proper lookout for travelers at the crossing, or gave due warning signals of danger, nevertheless the charge was responsive to the testimony.

Ninth exception: The charge was in substance that if the negligence of the defendant was the proximate cause of the injury, and the negligence of the deceased was not the proximate cause, then the plaintiff would be entitled to recover; and in this we see no error.

Tenth exception: The defense of contributory negligence upon which the appellant relied is based upon the provisions of section 2139 of the Code of Laws (Civ. Code 1902),

which is as follows: "If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law; and that such gross or willful negligence or unlawful act contributed to the injury." The law charged in the request was undoubtedly correct as a general proposition. La Fitte v. Railway, 73 S. C. 467, 53 S. E. 755. And we are unable to discover in section 2139, supra, any language indicating an intention to change the rule. That section makes no reference whatever to willful misconduct on the part of the railroad company, but provides that it shall be liable if it neglects to give the required signals, unless it is shown that the party injured was guilty of the conduct therein mentioned. The exception must therefore be overruled.

Eleventh exception: It will be observed that the appellant does not contend that the proposition of law mentioned in the exception was erroneous, except so far as it was inapplicable to the case under the pleadings. It has not, however, been made to appear that it was inapplicable, as it was the mere statement of a general principle that might properly be charged in all cases arising under the statute requiring signals at highway crossings.

Twelfth exception: Conceding the right for which the appellant contends, the error was not prejudicial to it, as the testimony does not show that the railroad company attempted to exercise such right. The testimony in behalf of the defendant was to the effect that the engineer simply blew the signal for the crossing, and then commenced to ring the bell by an automatic ringer, and that the ringing continued until the train had proceeded beyond the crossing. The principle for which the appellant contends is therefore inapplicable to the facts of this case.

Thirteenth exception: The proposition which the appellant contends should have been charged is distinct from that which was charged, and should have been presented in a separate request by the appellant. Moreover, the charge embodied a sound proposition of law.

Fourteenth and fifteenth exceptions: The defendant not having demurred to the complaint, as a general proposition the charge was correct, and was responsive to the allegations of the complaint. If there were reasons why punitive damages could not be recovered in this case, they should have been brought to the attention of the presiding judge, in order that he might have had the opportunity of ruling upon the question; and, as there has not been a ruling upon the question, it is not properly before this court for consideration. It would be unjust to the respondent, and likewise to the circuit judge, to reverse the judgment on a ground, not made an issue by the pleadings, and upon which he was not requested to rule. "A party ought not to be permitted to take the chances of a verdict in his favor, and wait until the verdict is rendered against him before making any objection. If, with the full knowledge of all the facts, he proceeds with the trial and takes the chances, he ought in justice and in fair dealing to submit to the consequences." Lee v. McLeod, 15 Nev. 163; State v. Norton, 69 S. C. 454, 48 S. E. 464. The identical question was presented in the case of Ragsdale v. Railway, 60 S. C. 381, 38 S. E. 609. In that case this court ruled that the charge was responsive to the issue made by the pleadings; and that, as the circuit judge was not requested to rule upon the question, the objection could not be interposed for the first time in the Supreme Court. The principle announced in that case was affirmed in Dent v. Railway, 61 S. C. 329, 39 S. E. 527, and Martin v. Railway, 70 S. C. 8, 48 S. E. 616.

It is the judgment of this court that the judgment of the circuit court be affirmed.

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(145 N. C. 476)

## WOOTTON v. SMITH.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. OFFICERS—OFFICE—PLACE OF TRUST.

Under Const. art. 14, § 7, providing that no person who shall hold any office or place of trust or profit under the United States or any department thereof or under the state, etc., shall hold or exercise any other office or place of trust or profit under the authority of the state, provided, etc., an office or place of trust is a public position, involving a delegation to the individual of some part of the sovereign functions of the government to be exercised for the public benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, §§ 1–4.]

2. SAME—INCOMPATIBILITY.

At common law there was no limit on the right of a citizen to hold two or more offices unless their duties were incompatible, but Const. art. 14, § 7, prohibits the holding of two or more offices or places of trust under the government of the United States, the state, county, etc., without reference to their incompatibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, §§ 37–43.]

3. SAME—PUBLIC ADMINISTRATOR—CITY RECORDER.

The position of public administrator is a mere administrative agency, and not an office or place of trust, within Const. art. 14, § 7, prohibiting a person from filling two or more offices or places of trust under the federal, state, or county government at the same time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, §§ 37–43.]

4. ADMINISTRATORS—PUBLIC ADMINISTRATOR—PERFORMANCE OF DUTIES AFTER TERM OR RESIGNATION.

Under the express provisions of Revisal 1905, § 21, a public administrator after the expiration of his term or upon resignation may continue the several estates committed to him until they are fully administered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22. Executors and Administrators, §§ 132–140, 189.]

5. QUO WARRANTO—SCOPE OF WRIT—PUBLIC AGENTS—REMOVAL.

The position of public administrator being an administrative agency, and not a public office, quo warranto will not lie either to remove the incumbent or to inquire by what authority he performs the duties or receives the emoluments of the position.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, §§ 10–16; vol. 38, Officers, §§ 98–102.]

Appeal from Superior Court, Mecklenburg County; Ferguson, Judge.

Action in the nature of quo warranto, on relation of J. J. Wootton, against W. M. Smith, to determine defendant's rights to hold the office of recorder of the city of Charlotte and at the same time to act as public administrator of the county of Mecklenburg. From a judgment dismissing the action, relator appeals. Affirmed.

Maxwell & Keerans, for appellee.

BROWN, J. As we were not favored with either brief or argument on the part of the relator, we are at a loss to comprehend exactly upon what grounds the contention is based that the public administrator of a county fills an office or place of trust within the meaning of article 14, § 7, of the Constitution of this state. We presume it is supposed that he fills a place of trust within the meaning of that article. The office or place of trust there indicated involves the delegation to the individual of some part of the sovereign functions of the government to be exercised for the benefit of the public. In Clark v. Stanley, 66 N. C. 59, 8 Am. Rep. 488, it is said: "A public office is an agency for the state, and the person whose duty it is to perform the agency is a public officer." At common law there was no limit on the right of a citizen to hold two or more offices, except the incompatibility of their duties. Now, it is a matter of Constitutional prohibition, and it is not necessary to determine whether there is any incompatibility, but only whether the places filled constitute offices or places of trust coming within that prohibition. An office or place of trust requiring a proceeding by quo warranto for the amotion of the incumbent is defined as follows: "A public position to which a portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being and which is exercised for the benefit of the public." High, Ex. Leg. Rem. § 620; Mechem, Pub. Off. § 1.

The most important characteristic which distinguishes an office from a public agency is that the conferring of the office carries with it a delegation to the individual of some of the sovereign functions of the government. In this respect the terms "office" and "place of trust" as used in our Constitution are synonymous. Doyle v. Raleigh, 89 N. C. 136, 45 Am. Rep. 677; Barnhill v. Thompson, 122 N. C. 495, 29 S. E. 720. As there used the word "office" is to be distinguished from those agencies or administrative places which are quasi public, only as the charge or office of an administrator or guardian. The place of public administrator partakes of some of the usual incidents of an office, but not of the essential one to bring it within the purport of the Constitution. A term is fixed and an oath is required, but so is an oath required of all administrators, executors, and guardians. The public administrator is not required to take an oath to support the Constitution, but simply to discharge the duties of his trust, similar in all respects to the oaths administered to all other administrators. At the expiration of his term, or upon resignation, the same individual may continue to manage the several estates committed to him until he shall have fully administered them. Revisal 1905, § 21. It is incompatible with our received ideas of a public office that the former incumbent may continue to discharge some of its duties and receive some of its emoluments for an indefinite period after vacating it. The public administrator exercises no governmental function whatever, and is the depositary of none of the state's sovereignty, and in that respect the place lacks the essential element necessary to constitute a public office. It is an administrative agency or public employment, and, as was said by Chief Justice Marshall, "although an office is an employment, it does not follow that every employment is an office." U. S. v. Maurice, 2 Brock. (U. S. C. C.) 96. Fed. Cas. No. 15,747. The duties performed by the public administrator are services performed under the public authority, as those of other administrators are performed, and for the public good, but they are not performed in the exercise of any standing laws considered as rules of action applicable to the public generally. The place does not carry with it the dignity or essential characteristics of a public office. It does not affect the public generally, but is confined entirely to the settlement of such estates as are necessarily committed to its charge. It is therefore evident that a writ of quo warranto will not lie either to remove the incumbent or to inquire by what authority he performs the duties or receives the emoluments of the place.

We are of opinion that his honor properly dismissed this proceeding, at the cost of the relator.

Affirmed.

(146 N. C. 206)

## BERNHARDT v. DUTTON.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. PLEADING—REPLY TO COUNTERCLAIM—MOTION FOR JUDGMENT—DISCRETION OF COURT.
In an action to recover lumber or the value thereof, it was not an abuse of discretion, on motion for judgment by defendant on his counterclaim on plaintiff's failure to reply thereto, for the court to permit him to do so, and overrule the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1049.]

2. APPEAL — REVIEW — PRESUMPTION — SUFFICIENCY OF EVIDENCE.
The presumption is that there was evidence to support the verdict where the evidence is not sent up.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3673.]

3. TRIAL—OFFER OF PROOF—NECESSITY.
Where evidence is excluded, the party who excepts to the ruling must show what he proposes to prove and its relevancy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 115.]

4. APPEAL—REVIEW — PRESUMPTION AGAINST ERROR.
The presumption is against error, and appellant must make it appear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3670.]

5. PRINCIPAL AND SURETY — LIABILITY OF SURETY—EXTENT.
A recovery on a bond, as against the surety, must be limited to the amount of the penalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 111.]

Appeal from Superior Court, Wilkes County; Councill, Judge.

Action by J. M. Bernhardt against J. M. Dutton. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

This is an action to recover 80,000 feet of lumber or $400, the value thereof, under a contract dated July 18, 1900, by which the defendant agreed to deliver to the plaintiff at Lenoir, within 12 months after date "the merchantable timber and lumber of oak, poplar and white pine from the land which is described in the contract, and containing 400 acres, at prices therein stated, the plaintiff to pay for the stumpage and sawing, as done, an amount which, with the stumpage and sawing, will make $6.50 per 1,000 feet as the lumber is put on sticks, all timber and logs for which it pays, to be the property of the plaintiff, payment to be made by it every two weeks for the timber as put on sticks, and the balance as the lumber is delivered at Lenoir." The testimony taken in the case is not sent up. The defendant, who testified in his own behalf, was asked by his counsel the following question: "In this contract I find this language: 'J. M. Dutton contracts to deliver all merchantable timber, such as oak, poplar and white pine from the lands of T. S. McNeil and W. T. Land, on the waters of Elk creek, Elk township, Wilkes county'; also 'F. L. Dula, G. W. McNeil, John Dula, Tom Dula, containing 400 acres, more or less, at $7.00, $10.00 and $19.00 for oak; $8.00, $11.00, $13.50 and $20.00 for poplar; $9.00, $15, $25.00 for white pine.' Tell his honor and the jury how much white pine and poplar you sawed and furnished the plaintiff in this case from the tracts mentioned in this paper." The court ruled out the evidence upon objection by the plaintiff, and the defendant excepted. There was a verdict and judgment for the plaintiff, and defendant appealed.

W. W. Barber and R. Z. Linney, for appellant. Edmund Jones, for appellee.

WALKER, J. (after stating the facts as above). The defendant moved for judgment upon his counterclaim, which was alleged to consist in the fact that the plaintiff, since the seizure of the lumber and before the defendant replevied, had disposed of or wasted about 15,000 feet of it, which is valued at $150. The plaintiff did not reply to this averment in the answer, but the court permitted him to do so and overruled the motion. It was within the sound discretion of the court to allow a reply to be filed at any time. "The law invests the court with ample powers, in all questions of practice and procedure, both as to amendments and continuances, to be exercised at the discretion of the judge presiding, who is presumed best to know what orders and what indulgence will promote the ends of justice in each particular case. With the exercise of this discretion we cannot interfere, and it is not the subject of appeal." Gilchrist v. Kitchen, 86 N. C. 23. In that case the plaintiff had moved for judgment, and the court allowed the defendant to file an amended answer, and then overruled the motion. See, also, Austin v. Clarke, 70 N. C. 458. There was certainly no abuse of judicial discretion in this case. The motion was properly overruled.

We have read the affidavit of the plaintiff in reply to one by the defendant for a continuance of the cause, which the defendant offered in evidence and which was excluded by the court. It is very long and it is not necessary to set it out. We have discovered nothing in it which is relevant to the controversy, and the defendant was not in the least prejudiced by the ruling of the court.

Nor do we see the exact bearing of the question put to the defendant as a witness in his own behalf and ruled out by the court. The evidence is not stated in the case. If it had been, the materiality of the fact proposed to be proved might more clearly appear. The real question was whether the defendant had complied with the condition of the contract, that he should pay for the lumber before the title should vest in him, and, particularly, whether he had paid for the 80,000 feet of lumber, for the recovery of which the suit was brought. As the verdict was in favor of the plaintiff, we must assume that there was evidence to support it, in the absence of any showing to the contrary by the

defendant. In this view, and without having the evidence before us, it does not appear that the quantity of pine and poplar sawed and shipped to the plaintiff could aid the jury in reaching a verdict. The questions were: How much had been cut and paid for? Had the plaintiff paid the price of the 80,000 feet? The brief of defendant's counsel states that the amount paid by the plaintiff was uncontroverted; but it does not so appear in the case. When the court excludes evidence, the party who excepts to the ruling must at least show what he proposes to prove and the relevancy of the evidence. He cannot very well be prejudiced by the exclusion of it, if it was not pertinent to the issue. The presumption in this court is against error, and the appellant, in order to succeed, must make it appear. The burden is upon him.

The plaintiff sued for $400 and recovered judgment against the defendant and his surety for $525.64, as the value of the property, and $157.69 as interest on the same. This was error. The recovery, as against the surety, should have been limited to the amount of the undertaking given by him. Machine Co. v. Seago, 128 N. C. 158, 38 S. E. 805. In this respect, the judgment is modified. Each party will pay his own costs in this court.

Modified and affirmed.

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(145 N. C. 492)

## STATE v. GUTHRIE.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. CRIMINAL LAW—TRIAL—RECEPTION OF EVIDENCE—DISCRETION OF COURT.

Though on a trial for murder death and facts tending to prove that it was brought about by some criminal agency should precede, as a general rule, proof connecting defendant with the murder, yet the order of proof is usually in the sound discretion of the court, and will not be reviewed unless some substantial injustice has been done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3063.]

2. SAME — HARMLESS ERROR — ADMISSION OF EVIDENCE OUT OF ORDER.

Error, if any, on a trial for murder, in the admission of a conversation with defendant implicating defendant before proof of the corpus delicti, was cured by the subsequent introduction of abundant independent evidence tending to prove death by criminal means and connecting defendant therewith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3140.]

3. HOMICIDE — SUFFICIENCY OF EVIDENCE — MURDER.

Evidence on a trial for murder in the first degree *held* to support a conviction thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 523–532.]

4. CRIMINAL LAW — TRIAL — MISTRIAL — DISCRETION OF COURT.

In all cases the court may in its discretion declare a mistrial, but in capital cases the facts must be fully found and placed on record, so that on plea of former jeopardy the action of the court may be reviewed.

5. SAME.

The refusal on a trial for murder to declare a mistrial, where a child of one of the jurors was killed in an accident, and he informed thereof before defendant's counsel had addressed the jury and the court's charge, was not an abuse of the court's discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2071.]

Appeal from Superior Court, Durham County; Councill, Judge.

Major Guthrie was convicted of murder in the first degree, and he appeals. Affirmed.

The prisoner was convicted of murder in first degree for the killing of his wife, Lizzie Guthrie, by means of choking or strangulation, under a bill of indictment in the proper statutory form. From the judgment of the court sentencing him to death, he appealed to this court.

Benjamin Lovenstein, for appellant. Assistant Attorney General Clement, for the State.

BROWN, J. We find three assignments of error relied upon in this court by the prisoner's counsel. (1) The admission of Louis Atkins' conversation with the prisoner before establishing the corpus delicti. (2) The refusal of the court to sustain prisoner's demurrer to the whole evidence. (3) That Juror Homer's child was killed by an automobile accident during the progress of the trial, and before defendant's counsel made his speech and before his honor's charge.

It is contended with much earnestness by prisoner's counsel that the court erred in receiving evidence tending to prove the guilt of the prisoner before requiring evidence to establish the corpus delicti, viz., the body of a crime, the body upon which a crime has been committed. The corpus delicti has two components—death as a result, and the criminal agency of another as the means. It is fundamental that no person may be convicted of the commission of a crime until a crime has been proven. It is therefore usual in trials for homicide to prove the fact of death and facts tending to prove that such death was brought about by some criminal agency, and then to offer proof connecting the accused with it. This order of proof is but just to the accused, and should be followed generally, although in this state the order of proof is usually in the sound discretion of the trial judge, and will not be reviewed by us unless it is made plain that some substantial injustice has been done. If any error was committed in receiving the declarations of Louis Atkins before proof of death, we think it was cured by the subsequent introduction of abundant independent evidence, tending to prove the fact of death by criminal means and connecting the prisoner therewith. Anthony v. State, 44 Fla. 1, 32 South. 818; Holland v. State, 39 Fla. 178, 22 South. 298. Mr. Wigmore writes with much sound sense on the subject: "To purport to preside over the

investigation of truth, and then, at an inordinate expense of time, labor, and money, to insist on reopening the entire investigation because a minor witness has been asked a minor question some one-half hour before he should have been asked, is to furnish a spectacle fit to make Olympus merry over the serious follies of mortals." Section 1867.

We think the court properly overruled the demurrer to the evidence. It is ample to go to the jury and fully justifies their verdict, if credited by them. There is evidence of a powerful motive, based upon intense jealousy; evidence of repeated threats to kill his wife, made up to the very night of the homicide; evidence tending to prove a violent altercation in the deceased's room, and that prisoner refused to let a witness enter; evidence of marks around the throat of the deceased, tending to prove that she was choked to death, together with a declaration of the prisoner tending to prove an admission that he had carried out his threat. The evidence in this case is stronger than that held to be sufficient in State v. Jones, 98 N. C. 651, 3 S. E. 507.

The third assignment of error is very imperfectly stated in the record, but we infer that during the argument, and before the prisoner's counsel had addressed the jury, a child of one of the jurors was killed by an accident, and that the prisoner's counsel moved for a discharge of the jury and for another trial before another jury. The record fails to disclose how the prisoner was unduly prejudiced and whether the trial was temporarily suspended or not. The trial judge has not the same unreviewable power to make a mistrial in capital felonies as in other cases. State v. Jefferson, 66 N. C. 309. The law is well stated in State v. Tyson, 138 N. C. 628, 50 S. E. 456: "It is well settled, and admits of no controversy, that in all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge, but in capital cases he is required to find the facts fully and place them upon record, so that upon a plea of former jeopardy, as in this case, the action of the court may be reviewed." It may be that inexorable necessity imposed a great hardship upon the afflicted juror, but we fail to see how the prisoner was unduly prejudiced, or any reason for reviewing the exercise of his honor's discretion. Upon a careful review of the record, we find no error.

No error.

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(146 N. C. 199)

## CALDWELL LAND & LUMBER CO. v. SMITH, Sheriff.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. TAXATION—COLLECTION—IMPLIED POWER.
The county commissioners have implied power, after making an assessment for taxes on unlisted property, to authorize collection by the sheriff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1023.]

2. SAME—ASSESSMENT—NOTICE.
Although the machinery act (Revisal 1905, § 5232), providing for the assessment of taxes on unlisted personal property, omits to provide that notice shall be given to the owner that he may have opportunity to be heard before the tribunal having power to make the assessment, the owner is entitled to such notice under Const. N. C. art. 1, § 17, prohibiting the taking of property without due process of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 604.]

3. SAME—ACTION—PARTIES.
In an action to enjoin collection of taxes on unlisted property, where an assessment is made and the list given to the sheriff for collection, the sheriff is the proper party defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1249.]

4. SAME.
In an action against the sheriff to enjoin collection of taxes assessed on unlisted property, the county commissioners may be joined as parties at their request.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1249.]

5. SAME—ENFORCEMENT—INJUNCTION.
The county commissioners placed on the tax list notes executed to plaintiff February 13, 1902, valued at $417,000, and assessed them for taxation at that sum as a solvent credit for the years 1902 and 1903, and added the penalty 25 per cent.; no notice being given to plaintiff of the proceedings. The commissioners placed the list in the hands of the sheriff, who advertised plaintiff's real estate for sale. *Held*, that plaintiff was entitled to an injunction against the sale pending a final hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1233.]

Appeal from Superior Court, Caldwell County; Ward, Judge.

Action by the Caldwell Land & Lumber Company against John M. Smith, sheriff, to enjoin collection of taxes. From an order continuing the injunction until the final hearing, defendant appeals. Affirmed.

This action is brought by plaintiff, the Caldwell Land & Lumber Company, against defendant, sheriff of Caldwell county, for the purpose of enjoining the collection of certain taxes assessed against its property. The facts disclosed by such allegations in the complaint as are not denied, or are admitted by the answer, are: The board of commissioners of Caldwell county at their meeting in May, 1907, placed upon the tax list, as a solvent credit, certain notes amounting to $417,000 executed by one Geo. O. Shakespeare, February 13, 1902, to plaintiff and secured by a deed in trust. These notes had not been listed for taxation. The commissioners valued the notes at the sum of $417,000, being their face value, and assessed them for taxation at said sum, as a solvent credit, for the years 1902 and 1903, adding to the tax the penalty of 25 per cent. aggregating the sum of $7,655.16. No notice was given plaintiff, either of listing, valuing, or assessing said notes. The commissioners immediately plac-

ed the said tax list in the hands of defendant sheriff for collection and he at once advertised for sale plaintiff's real estate consisting of some 42,982 acres of land. Plaintiff instituted this action June 12, 1907, asking for an injunction, etc. Judge Councill granted a restraining order returnable before Judge Ward, who, on the hearing July 9, 1907, "continued the injunction until the final hearing of the cause." He did not find any facts, simply referring to the pleadings. Defendant excepted and appealed.

Mark Squires, Lawrence Wakefield, and M. N. Harshaw, for appellant. W. C. Newland and Jones & Whisnant, for appellee.

CONNOR, J. (after stating the facts as above). The machinery act (Revisal 1905, § 5232), being the same as Acts 1901, p. 101, § 69, c. 7, and all other acts on the subject subsequent thereto, provides that "in all cases where any personal property, chose in action, or any property, except land, liable to taxation, shall have been omitted, or shall be omitted, in any future year from the tax list by the owner, or persons required by law to list the same, the board of commissioners shall enter the same on the duplicate of the next succeeding year and shall add to the taxes of the current year the simple taxes of such preceding year not exceeding five years, with twenty-five per centum added thereto, in which such personal property as aforesaid shall so have escaped taxation and the said board of commissioners shall value and assess the personal property aforesaid for those years and are empowered to examine witnesses and to call for papers to determine the value and to ascertain the persons liable for the tax upon said personal property." This is the only section in the statute concerning or regulating the listing and assessment of personal property omitted from the tax list by the owners. It omits to provide that notice shall be given the owner, or to give him any opportunity to be heard either before or after the property is listed, valued, and assessed. We have no doubt of the power of the Legislature to provide for the listing, assessment, and taxing personal property omitted to be listed as the law requires by the owner. Nor do we perceive any reason why it may not be taxed for five or more preceding years, if it has escaped taxation so long. These questions have been settled by several decisions of this court. Kyle v. Fayetteville, 75 N. C. 445; Railroad v. Com'rs, 82 N. C. 259; Wilmington v. Cronly, 122 N. C. 388, 30 S. E. 9. It is the settled policy, and so required by the Constitution, that all of the property, including solvent credits in the state, shall be assessed and taxed at its value in money. The method of enforcing this constitutional requirement is left with the Legislature, subject to other provisions of the Constitution securing to the citizen the right to be heard before his property is subjected to taxation. We are also of the opinion that an industrial corporation is liable to pay tax on its solvent credits, under such regulations as to the method of listing an assessment as may be provided by law. Of course, the special statutory provision prescribing the mode of assessing the property of banks and building and loan associations are exclusive of all others. A number of interesting questions are raised by the pleadings upon controverted allegations. In the absence of any finding of the facts, we are unable to discuss or decide them intelligently.

There are, however, several questions respecting the procedure in such cases which we think best to dispose of at this time. We would hesitate to give the construction to the statute for which defendant contends. It must be conceded that the provisions of the section in regard to listing, valuing, and assessing unlisted property are painfully indefinite and obscure. While no express power is conferred upon the commissioners, after making the assessment, to place the list so made in the hands of the sheriff, we think that by a fair construction, in the light of the power conferred, in other portions of the statute, respecting the regular tax list, such power is given. The courts have so held. "Assessments of escaped property are made nunc pro tunc; and it is immaterial that the regular periods for making and reviewing assessments, levying the taxes, or placing the rolls in the hands of the collection officers have elapsed, when they are made, unless the owner is thereby deprived of some constitutional right, or the statute limits the time." 27 Am. & Eng. Enc. 700. The qualifying language in this quotation presents the difficulty in this case. If the section stands alone and is to be construed without reference to other sections in the statute, or the universal principle that no property of the citizen may be taken or taxed without an opportunity to be heard before the board of assessors or tribunal having the power to list and assess such property, or before the courts of the state in some appropriate proceeding, we would find it difficult to reconcile it with section 17, art. 1, of the state Constitution. If, as contended by defendant, section 5233 empowers the board of commissioners, by simply examining the books of the register of deeds, to place upon the tax list any notes, or other choses in action, secured by mortgage which they may find thereon for five preceding years, and, without notice to the supposed owner, to place a value upon them, assess them for taxation, add the penalty, and summarily, enforce the payment of such tax and penalty by a sale of the property of the owner, the protective provisions of section 17, art. 1, of the Constitution would pro hac vice be annulled. The power to tax it, has been said, and the truth of the saying too frequently exemplified, is the power to destroy. While the power is essential to the life of the state, its enforcement, by constitutional methods and within constitutional limitations, is essential to the safety

of the property of the citizen. "Proceedings for the assessment of a tax being quasi judicial, it follows that, in order to give validity to the assessment, notice thereof should be given to the owner of the property to be assessed." 27 Am. & Eng. Enc. 704. The nature of tax proceedings is summary of necessity. "Every inhabitant of the state is liable, by means thereof, to have a demand established against him on the judgment of others regarding the sum which he should justly and equitably contribute to the public revenues. Every owner of property in the state, whether he be an inhabitant or not, is liable to have a lien in like manner established against his property. Moreover, the persons who make the assessment lighten the burden upon themselves in proportion as they increase it upon others. They must act, to a large extent, upon imperfect and unsatisfactory information, and the danger that, when most honest and fair minded, they will misjudge and thus do injustice, is always imminent. It is therefore a matter of the utmost importance to the person assessed that he should have some opportunity to be heard and to present his version of the facts before any demand is conclusively established against him; and it is only common justice that the law should make a reasonable provision to secure him, as far as may be practicable, against the oppression of unequal taxation by making the privilege of being heard a legal right." Cooley on Tax. 625. The learned author proceeds to say, and the importance of the subject, in the light of the loose and unsatisfactory provisions in our revenue laws, justifies the quotation, at some length: "In substance, the question will be whether the right to be heard in tax cases is a constitutional right and indefeasible. Upon this subject there is a general concurrence of authorities in the affirmative. It is a fundamental rule that in judicial or quasi judicial proceedings affecting the rights of the citizen he shall have notice, and be given an opportunity to be heard before any judgment, decree, order, or demand shall be given and established against him. Tax proceedings are not, in the strict sense, judicial, but they are quasi judicial, and, as they have the effect of a judgment the reasons which require notice of judicial proceedings are always present when the conclusive steps are to be taken. Provision for notice is therefore part of the 'due process of law,' which it has been customary to provide for these summary proceedings; and it is not to be lightly assumed that constitutional provisions, carefully framed for the protection of property rights, were intended, or could be construed, to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment." Cooley, 628. The text is illustrated and supported by an abundance of authority from both state and federal courts. No case is cited from this state because no attempt, so far as records show, has been made to disregard, in practice, a truth so manifest and fundamental. It is held that, if possible, statutes will be so construed as to require notice. Kansas Pac. R. R. Co. v. Russell, 8 Kan. 558; Baltimore v. Grand Lodge, 60 Md. 280; Gilson v. Munson, 114 Mich. 671, 72 N. W. 994. Section 5235 makes provision for the equalization of values after notice. This, however, refers to the regular tax list, and the time is fixed for making such equalization. Section 5236 provides for complaints by owners of property for improper valuation. This, of course, applies to property which has been listed by the owner. If he has no notice that claim is made, that he has omitted to list his property, and it is summarily listed, valued, and assessed, and the list, with the force and effect of a judgment and execution, given to the sheriff, how is he to make complaint, how is he to know until the "conclusive act is completed" either that his property is assessed or the value put upon it? We are clearly of the opinion that either the assessment is void and should be so declared, or that the plaintiff have an opportunity to contest all of the questions in the court which would have been open to it if notice had been given at the inception of the matter. In view of the many and more or less difficult questions raised upon the pleadings regarding the liability of the notes to taxation, by reason of the peculiar facts relating to their execution, etc., and the manner in which they should be assessed, if liable, the parties should be permitted to litigate them in this action. The necessity for giving notice to owners of choses in action before assessment is manifest.

It by no means follows that every note secured by mortgage is solvent to the extent of its face value, or that the full amount is due. Payments may have been made upon it. Again, "all bona fide indebtedness owing by any person may be deducted by the tax lister from the amount of said person's credits." Section 5227. If all of the notes, bonds, and other choses in action appearing upon the register's books for five preceding years are to be regarded as solvent credits, and listed at their face value, and if such listing and valuation is "conclusively correct," having the "force and effect of a judgment and execution," the question of securing revenue for the state and counties would be solved, but possibly the rights of the individual citizen would be sacrificed. For even so desirable a purpose the end would hardly justify the means. If the plaintiff corporation had during the years 1902 and 1903 a solvent credit for $417,000 subject to taxation which it omitted to list, it should, even at this late day, pay the taxes justly due upon it, but before the fact is conclusively established by a quasi judicial tribunal full and ample notice should be given and an opportunity to be heard afforded. We have no doubt that the plaintiff is entitled to injunctive relief pend-

ing the hearing. Purnell v. Page, 133 N. C. 125, 45 S. E. 534. By the same authority the sheriff is the proper party defendant. If, for any reason, the commissioners think that the rights of the county require, they may be made parties. We take the liberty of suggesting that the Legislature at its next session consider the propriety of amending section 5232, Revisal 1905, so that provision be made for notice before the personal property omitted from the tax list be listed, valued, and assessed.

The order of his honor continuing the injunction is affirmed.

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(145 N. C. 479)

## STATE v. LORD.

### Appeal of SMITH.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. CRIMINAL LAW—WARRANT—BEFORE WHOM RETURNABLE.

Revisal 1905, § 3162, providing that persons arrested under any warrant issued for any offense, "where no provision is otherwise made," shall be brought before the magistrate who issued the warrant, implies that the magistrate issuing the warrant may make it returnable before himself or some other officer having like jurisdiction to conduct the preliminary hearing.

2. SAME.

It being declared by the charter of a city, creating a recorder's court therefor and providing for election of a recorder, that he shall be an ex officio justice of the peace, and shall take the usual oath required to be taken by justices of the peace, besides one to honestly and faithfully perform the duties of his office, a justice of the peace issuing a warrant for arrest may make it returnable before the recorder as before any other justice of the peace.

3. JUSTICES OF THE PEACE—FEES—PRESUMPTION.

Where the recorder of a city recorder's court, who under the city charter was ex officio a justice of the peace, heard a warrant, made returnable before him by another justice, who issued it, and bound the accused over to the superior court, it will be presumed that he acted in his capacity of justice of the peace, and so was entitled to the fees of a justice of the peace therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 26.]

4. OFFICERS—HOLDING TWO OFFICES—JUSTICE OF THE PEACE.

Under Const. art. 14, § 7, excepting a justice of the peace from the inhibition against one holding two offices of trust or profit, one may be both a justice of the peace and the recorder of a city recorder's court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, § 41.]

Appeal from Superior Court, Mecklenburg County; Ferguson, Judge.

Charles Lord was arraigned in the superior court, charged with illegal sale of liquor, and pleaded guilty. The court refused to tax certain costs claimed by W. M. Smith, recorder and ex officio justice of the peace for the city of Charlotte, and said Smith excepted and appeals. Reversed and remanded, with directions.

John A. McRae, for appellant. Assistant Attorney General Clement, for the State. F. M. Shannonhouse, for appellee.

BROWN, J. The charter of the city of Charlotte creates a recorder's court for said city; defines its powers and jurisdiction, and provides for the election of a recorder. Section 53 provides "that said recorder shall be an ex officio justice of the peace, and before assuming the duties of his office shall take the usual oath required by law to be taken by the justices of the peace, and also an oath to honestly and faithfully perform the duties of his office." One Earnhardt, a duly qualified justice of the peace, who also acts as desk sergeant at police headquarters in said city, issued a warrant for defendant and made it returnable before W. M. Smith, the appellant, who is the recorder and ex officio justice of the peace. Upon the hearing, Smith bound the defendant over to the superior court. It is contended that the act of Earnhardt, J. P., was illegal, that the hearing before Smith was void, and that, therefore, the latter's costs cannot be taxed. His honor so held in which ruling we do not concur.

Section 3162 of the Revisal of 1905 provides that persons arrested under any warrant issued for any offense where no provision is otherwise made shall be brought before the magistrate who issued the warrant, etc. The clause, "where no provision is otherwise made," clearly implies that the magistrate who issued the warrant had the authority to make the warrant returnable before himself or before some officer having like jurisdiction to conduct the preliminary hearing. The court of the recorder exercises a jurisdiction limited to the city of Charlotte, and its criminal jurisdiction may be somewhat greater than that of a justice of the peace. If the Legislature had not also made the incumbent of the office of recorder a justice of the peace, we should have no hesitation in holding that a justice of the peace could not lawfully make a warrant returnable before that court any more than he could make it returnable before the superior court. Having been appointed a justice of the peace by the General Assembly and having duly qualified as such, the incumbent of the recorder's office is invested with the complete jurisdiction of a justice of the peace as defined by our Constitution, in addition to that which he exercises as recorder by virtue of the city charter. There is nothing in our fundamental law which forbids the appellant to hold the office of recorder and justice of the peace at one and the same time. Article 14, § 7, Const. We will, of course, presume that, when appellant heard the warrant made returnable before him, he acted in his capacity as a justice of the peace, and bound the defendant over to the superior court. We therefore think that the lawful fees prescribed by law for a

justice of the peace should have been taxed against the defendant.

There is nothing in State v. Joyner, 127 N. C. 542, 37 S. E. 201, which militates against our conclusion. In that case the mayor was not created a justice of the peace and required to qualify as a justice of the peace. He simply exercised the jurisdiction which a justice of the peace might concurrently exercise. That did not make him a justice of the peace. The appellant Smith is a justice of the peace, and as such he may lawfully exercise all the constitutional jurisdiction, in addition to his jurisdiction as recorder, which any other justice of the peace in his township may exercise. He is required to take the oaths prescribed by law for justices of the peace and the additional oath prescribed by the charter to honestly and faithfully perform the duties of his office as recorder.

The case is remanded, with directions to tax the fees allowed by law to the appellant as a justice of the peace. The costs of this court are to be taxed against appellee defendant Lord.

Error.

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(145 N. C. 481)

## STATE v. CARMON.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. ASSAULT AND BATTERY—IDENTITY OF ACCUSED — EVIDENCE — SUFFICIENCY — QUESTION FOR JURY.

Evidence on a trial for secret assault *held* sufficient to go to the jury on the issue of the identification of defendant.

2. SAME—MOTIVE.

In a prosecution for secret assault, it is not necessary to prove a motive for the crime; but it may be shown to ascertain the identity of the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 132.]

Appeal from Superior Court, Rowan County; Moore, Judge.

Fred Carmon was convicted of assault, and appeals. Affirmed.

The defendant was indicted for a secret assault, and was convicted of an assault and battery. The testimony was as follows:

George Kluttz testified: "The defendant is a negro. I live in East Spencer with my father, and he and I are engaged in running a store and meat market. On April 27, 1907, about 10:30 p. m., I was shot in the leg. At the time I was shot I was sitting on the counter in the store, about four or five feet from the door. It was a dark night, except a little light given by the moon. There were no lights in the street near or in front of the store where I was sitting. The store was lighted with three lights, and at the front door there was a shed the width of the store—over the sidewalk—about seven or eight feet high. There was a small lamp burning in the hallway of the Climax Hotel, which was diagonally across the street from the store. It was dark in the street. I did not see the defendant when he came up, and did not know he was in the street. I did not see him shoot a pistol and did not see his face, but after the shot was fired I got the glimpse of a person I took to be defendant. The pistol was fired from the street into the store, a distance of 15 or more feet from where I was sitting. The defendant had been in the store about 8 o'clock p. m. previous to the shooting, and had some words with my father about his account, and, when he went out, my father followed him, and beat him. When the pistol fired, I looked and saw some person running in the direction of the Climax Hotel. Defendant lives in a different direction from this hotel. I have known the defendant about two months. I have been laid up under the care of a doctor since I was shot, and the bullet is still in my leg, near my ankle. Not more than a second elapsed from the time of the shooting until I got the glimpse of some person leaving, who I thought was defendant."

J. R. Kluttz testified: "The shot was fired about 10:30 p. m., and hit my son, George Kluttz. It was dark in the street, and no lights were there or in front of the store, and the only light was from the store where we were sitting. I know it was almost impossible for us, being where the lights were shining, to see out into the dark and recognize a person 10 or 15 feet from where we were sitting, as the light naturally would blind a person looking from a lighted place into the darkness, but immediately after the shot was fired I threw my eyes around, and saw a person I took to be defendant and saw in his right hand something that looked like a pistol to me. The defendant ran in the direction of the Climax Hotel."

There was evidence on the part of the defendant tending to show an alibi, but it is not necessary to state it. Judgment was rendered on the verdict of guilty, and the defendant excepted and appealed.

R. Lee Wright and P. S. Carlton, for appellant. Assistant Attorney General Clement, for the State.

WALKER, J. (after stating the facts as above). The jury might well have acquitted the defendant upon the testimony in this case, but we are unable to declare that there is no evidence of his guilt. We admit that some of the testimony was not of a very satisfactory character, and might be denominated as slight; but the evidence, taken as a whole, was sufficient for the consideration of the jury, and we are not permitted to interfere and set aside the verdict in such a case. Indeed, we are expressly forbidden by a provision of the Constitution of many year's standing, and a most wise and wholesome one, from doing so. This is a court for the correction of errors in law. In this case

we would not disturb the verdict if we had the power, as the trial was presided over by an eminently fair and able judge, who, we are sure, was careful to safeguard the rights of the defendant. The judge below receives a better impression of the true merits of a case than we possibly can do, who do not see and hear the witnesses, and are not able to observe the other incidents of the trial. He is therefore the proper one to determine whether the verdict is against the weight of the evidence or not.

We cannot reverse the ruling of the court upon the sufficiency of the evidence, unless we overrule several cases decided by this court, which we are unwilling to do. The witness George Kluttz testified that he knew the defendant and had known him for two months; that, while it was dark when the assault was committed, he "got a glimpse" of him just after the pistol was fired, a second only intervening; and that he "thought" it was, and "took it to be," the defendant, the latter being only 15 feet from him at the time. His father stated that, while his vision was obscured by the fact that he was looking from a lighted room, his store, into the darkness without, and it was almost impossible for that reason to recognize a person, yet he "threw his eyes around" immediately after the firing of the pistol, and saw a person whom he "took to be" the defendant, and he also saw a pistol in his right hand or something that looked like one. He further stated that the defendant ran in the direction of the Climax Hotel, though it appeared that this was not in the direction of his home. It seems to us that this testimony is as strong as that which in State v. Lytle, 117 N. C. 803, 23 S. E. 476, was permitted to go to the jury, and upon which their verdict and the judgment were sustained by this court. Indeed, we are of the opinion that the testimony in this case is much stronger than the testimony of the witness John Dawkins was in State v. Lytle. He testified in that case as follows: "I recollect the night when the barn was burnt. I met a man whom I took to be Lytle. I was in seven steps of him, the man whom I took to be Lytle, in the road near my house. He was a low chunky man. It was too dark to see whether he was white or black. He had his back to me, had on a dark sack coat. I have known Lytle 10 years, have seen him often. Had I spoken to him, I would have called him Lytle. This was almost 7:30, on the Howard Gap road. This was the night the barn was burnt." The court held this evidence fully sufficient to uphold a conviction. Wherein is the difference between the two cases? If there is any, it is in favor of the sufficiency of the evidence in this case, because here we have, in addition to the impression made upon the minds of the two witnesses, the further fact that the defendant had been beaten by one of them less than two hours before the assault occurred, and therefore had the motive to shoot into the store. He may have missed his mark, it is true, but this does not destroy the force of the evidence as to the malicious motive. Besides, in Lytle's Case, there was but one witness to identify the defendant as the barn burner, while here we have the concurring testimony of two "eye-witnesses," upon whose minds the form and appearance of the fleeing criminal made identically the same impression. Then again, one of the witnesses, George Kluttz, stated that he knew the defendant well enough, of course, to recognize him—and that he not only "took" him to be, but he "thought" that he was, the defendant. We should not attach much importance to the particular form of the words used by the witnesses. When they said that they "took" the person who fired the pistol to be the defendant, or "thought" he was the defendant, it was evidently just another way, and their way, of saying that they recognized him. It was the simple language of men who plainly intended to convey that idea, but were not careful or accurate in expressing it. We might well refer to the fact, also, that the witness J. R. Kluttz, whose testimony was less positive and satisfactory than that of his son, stated that he saw a pistol in the hand of the person who was running in the direction of the hotel. It might reasonably have been argued that as he knew the defendant and had an altercation with him that night, if he could see so small an object in the dark as a pistol well enough to know what it was, he could just as well recognize the much larger object of a man whom he knew so well.

As to the motive being an important circumstance or link in the chain of evidence, it was not necessary, it is true, to show a motive for the shooting, but it became a most relevant fact, and one of much weight in ascertaining the identity of the defendant. State v. Adams, 138 N. C. 688, 50 S. E. 765. It was absent in the cases we cite in support of our ruling upon the evidence. With the other facts and circumstances showing a recognition of the defendant as the intended assassin, admitting that they were very slight and almost inconsequential, why might not the jury, with evidence of the motive so recently formed, inquire: Who else could have committed the crime? Who had any reason for making the assault? And then conclude, as we generally are influenced in our actions and conduct by our motives, malice, or desire for vengeance, that the evidence clearly pointed to the defendant as the culprit. Motive may sometimes be a most cogent and convincing fact in the determination of guilt, even though in other respects the evidence may be destitute of reasonable precision, or fail to afford just grounds for inferring the essential and ultimate fact of guilt. In State v. Costner, 127 N. C. 566, 37 S. E. 326, 80 Am. St. Rep. 809, the court said that the testimony, while

of the same general character, was weaker than it was in State v. Lytle, and yet there was more than a scintilla, and it was therefore sufficient to support the conviction. See, also, State v. Woodruff, 67 N. C. 89; State v. Telfair, 109 N. C. 878, 13 S. E. 726.

We conclude that the evidence in this case was not inconclusive as to the defendant's guilt, and was properly submitted to the jury.

No error.

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(146 N. C. 163)

## DAVIS v. DAVIS et al.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. ACKNOWLEDGMENT — MARRIED WOMEN — CERTIFICATE—BURDEN OF PROOF.

Under Revisal 1905, § 956, providing that no conveyance by husband and wife, where the private examination of the wife is certified, shall be invalid because procured by fraud, unless the grantee had notice thereof, the undue influence of the husband at the private examination of the wife joining in a conveyance of real estate, does not vitiate the certificate, regular on its face, unless the grantee has notice of it, and the burden of showing notice is on the wife.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 320–335.]

2. SAME—CONCLUSIVENESS OF CERTIFICATE.

Though the certificate of an officer taking the private examination of a wife joining with her husband in a conveyance is regular on its face, she may show that in fact no examination took place.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 290–315.]

3. SAME—SUFFICIENCY OF EVIDENCE.

A married woman seeking to show that no private examination was taken, notwithstanding the certificate of an officer to the contrary, has the burden of proving by clear and convincing proof the fact alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 320–335, 346.]

4. SAME.

Where a wife seeks to show that no private examination was taken of the execution of a conveyance by herself and husband, notwithstanding the certificate of an officer to the contrary, the court should explain that acts of a judicial officer can be set aside only on clear and convincing proof, and, unless the proof measures up to the standard, the trial court should not hesitate to set side a verdict against the validity of the certificate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 346, 347.]

Appeal from Superior Court, Watauga County; Peebles, Judge.

Action by Julia A. Davis against W. P. Davis and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Civil action brought to set aside the execution and privy examination of a deed dated May 13, 1904, purporting to have been made by plaintiff to her son, Eugene Davis. His honor, without objection, submitted the following issues: "(1) Was the privy examination of Julia A. Davis to the deed of May 13, 1904, taken separate and apart from her husband, M. M. Davis? Answer: No. (2) Was the plaintiff the owner in fee of the lands described in the pleadings when she signed the deed to her son on May 13, 1904? Answer: Yes."

R. Y. & F. A. Linney, for appellants. Edmund Jones, for appellee.

BROWN, J. The evidence tends to prove that the plaintiff, Julia A. Davis, inherited the land described in the complaint from her father. She is the widow of M. M. Davis. She and her husband had but one child, a son by name Eugene O. Davis. Early in life, when this son was about 17 or 18 years of age, he developed tuberculosis and died. While in this diseased condition and enfeebled by the ravages of his fatal malady, the plaintiff and her husband, M. M. Davis, joined in a deed purporting to convey plaintiff's land to said son, who within a few months thereafter died. The father, M. M. Davis, also died within two years of the death of his son. Treating the deed from his mother and father to the son as a conveyance of the fee, the land inherited by plaintiff from her father passed to the son absolutely, and upon the demise of the son became, by descent and under the statute, the land of his father. Upon the death of M. M. Davis, the land went, in the absence of direct heirs, to the collateral heirs of the said M. M. Davis, who are the defendants in this action, subject to the dower interest of the widow, who is the plaintiff. No valuable consideration whatever was ever paid by Eugene O. Davis, or by any one for him, or by any one at all, and the plaintiff never received anything for the land. In her complaint the plaintiff alleges, in substance, that the so-called execution of the deed by her was procured by the force and fear of her husband, with intent, as it is inferred, of becoming the absolute owner of his wife's land upon the expected death of the son. She alleges that she was never privily examined touching her voluntary consent to the execution of the deed, and that the deed is void, but that the deed is a cloud upon her better title, and asks relief that the court remove the same. There was evidence offered by plaintiff tending to prove that her husband and herself acknowledged the signing of the deed before a justice of the peace, that her husband was present during the entire ceremony, that the justice did not examine her at all as to her voluntary assent, and that in fact no privy examination whatever was taken either in her husband's presence or out of it.

Although the language of the first issue would seem to indicate that the case turned upon the mere presence of the husband at the ceremony of privy examination, yet such is not the fact. The charge of the court shows plainly that it turned upon the sole question as to whether any examination at all was taken. The defendants requested the court to charge: "(1) That there is no evidence in this case that Eugene Davis, the

grantee in the deed of May 13, 1904, offered in evidence, had at any time any knowledge or notice of the alleged defect in said deed to him. The plaintiff in no aspect of the case can recover. (2) That the certificate of the justice taking the private examination of a married woman is a judicial act, and ought to stand, unless the evidence offered to set it aside is full and convincing." The court refused to give the first instruction, but gave the second, to the effect that the proof should be clear, strong, and convincing. The court further charged the jury that they should be fully satisfied by strong, clear, and convincing proof that there was no private examination taken. The presence and undue influence of the husband at the ceremony of privy examination would not vitiate a certificate in all respects regular, unless the grantee had notice of it, and the burden would be upon plaintiff to show such notice. Revisal 1905, § 956. But that is not the theory upon which this case was tried. The charge of the court made the case turn upon the contention as to whether any such ceremony ever took place at all, and not what occurred at it. The testimony of the plaintiff herself is to the effect that she was never at that, or any other, time, examined as to her voluntary execution of said deed. The cases cited by the learned counsel for the defendant undoubtedly support their contention that the presence and undue influence of the husband will not avoid the legal effect of the certificate of privy examination made by one qualified to take it, unless the grantee is fixed with notice of it. Riggan v. Sledge, 116 N. C. 92, 20 S. E. 1016; Bank v. Ireland, 122 N. C. 575, 29 S. E. 835. But we have held at this term that while the certificate, if regular on its face, precludes all inquiry into the fraud or falsehood in the factum of the privy examination, unless the grantee is fixed with knowledge thereof, yet it is open to the feme covert to show, if she can, that in fact no examination whatever was taken. Lumber Co. v. Leonard (at this term) 59 S. E. 134. The theory upon which this case was tried, and the manner in which it was presented to the jury by the court, brings it within that ruling. His honor very properly placed the burden on plaintiff to establish her contention by clear, cogent, and convincing proof.

It may be that the jurors were unduly influenced by the evident wrong which had been perpetrated on plaintiff by her husband, but we cannot correct that. We repeat again what we said, in substance, in Lumber Co. v. Leonard, supra: The judges of the superior court should be extremely careful in cases of this kind to explain to the jury that the solemn acts of judicial officers are not to be lightly set aside, as titles to land depend upon the validity of their certificates, and never upon a mere preponderance of evidence, but only upon clear, strong, and convincing proof. Unless in their opinion the proof measures fully up to this high standard, we think the trial judge should not hesitate to set aside a verdict which destroys the legal effect of such an important judicial act.

No error.

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(146 N. C. 209)

## PHILLIPS v. SALEM IRON WORKS.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—SAFETY APPLIANCES—INSTRUCTIONS.

The evidence, in an action for injury to an employé, while testing a cylinder by steam, by the explosion of the cylinder, though conflicting, warranting a finding, not only that a safety valve was a safer mode of letting off excessive steam than the method used, but that it was the method known, approved, and in general use, plaintiff was entitled to an instruction that, if the latter fact was found, failure to use such a valve was negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1150.]

2. SAME—GENERAL USE OF SAFETY APPLIANCE—EVIDENCE—QUESTION FOR JURY.

Evidence, in an action for injury to an employé by explosion of a cylinder while being tested by steam, *held* sufficient to go to the jury on the question of a safety valve on such cylinders, being the method known, approved, and in general use for letting off excessive steam.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010–1029.]

Appeal from Superior Court, Forsyth County; Ferguson, Judge.

Action by W. L. Phillips against the Salem Iron Works. Judgment for defendant. Plaintiff appeals. Reversed, and new trial granted.

Action for damages alleged to have been sustained by plaintiff by reason of defendant's negligence. There was a verdict and judgment for defendant. Plaintiff noted exceptions to the charge and appealed. The facts pertinent to the exceptions and the decision of the appeal are: Defendant company, in connection with its other business, made "dry cans," which were used in woolen mills to dry yarn after it had been dyed. It was necessary that they should be steam tight, in order that they could be filled with steam, and heat the surface so that yarns would dry. They were cylindrical in shape, six or seven feet long, and from one foot to one and one-half feet across the ends, with iron heads and band shrunk around the head. The manner of testing the cans for leaks was as follows: The cans, after having the iron head strongly fastened on, by shrinking an iron band around them, were taken outdoors near the boiler house, and a pipe connected with the boiler that would carry steam into an opening at one end of the can; this opening being one-half inch in diameter. On the pipe taking the steam into the can, there was a steam cock to turn off the steam; the amount of steam passing through the pipe depending on how far this valve or cock was turned. There

was also on this pipe a steam gauge, to indicate the amount of steam pressure passing through the pipe into the can. In order to test the cans, it was necessary to hold the pressure at from ten to fifteen pounds; the cans being capable of standing a pressure of fifty pounds. After the steam had been let into the can, the can was struck with a hammer in the hands of the person whose business it was to see if there were any leaks; the stroke of the hammer being intended to indicate the leaks by the steam coming out. At the opposite end of the can into which the steam came, there was a pipe sticking out, with an outlet one inch in diameter, and at this end, to regulate the amount of steam pressure, the plaintiff was at work with a piece of scantling pressed against a stob in the ground, or the toe of his foot, as he chose. Upon the scantling there was nailed a piece of leather, and at the point where the leather was nailed the scantling was pressed against the outlet. It was his business to watch the steam gauge at the other end, which was some six or eight feet from him, and, by turning the scantling from side to side, reduce or increase the pressure. While at work, for some reason, the head blew out, and the scantling struck the plaintiff on the head.

Plaintiff alleged that defendant was negligent, in that it failed to provide a safety valve, which was in general use by those performing this class of work, so that the steam would automatically escape beyond the pressure desired. There was evidence tending to show that safety valves are in common use wherever any pressure is used in the form of steam or water; that they are used on everything that contains a pressure, in order to make them safe. It is very important to have a safety valve there when one would not know the condition of the steam gauge. It may be right, or it may be wrong. It is proper to use a safety valve on a machine when testing it. One could not guarantee it unless a safety valve was on it. It was not safe to test the cylinder with steam, without using a safety valve. It is dangerous for the simple reason that a steam gauge cannot be adjusted as quick as steam will adjust itself. Steam itself will find a way out of a boiler quicker than one can turn it out, if the proper spring is waiting for it at the point to take action. A steam gauge is no safety whatever on a boiler. It simply gives you time to get away before it blows up. A safety valve is simply to take care of you while around the boiler. It is not safe for a man to stand at this end of this cylinder here and adjust it with a stick, and tell by looking at that gauge what pressure of steam was in the cylinder, if he did that constantly.

A witness testified: "I understand the use of a safety valve. It is used to carry a certain amount of pressure in the boiler and give number of pounds to the square inch. It is set for the purpose required. It works automatically. When it gets to the given pounds of pressure it is set back and relieves the pressure itself. If it is set for 10-pounds pressure, and the pressure becomes more than 10 pounds, it blows off. Safety valves are in general use in steam machinery or vessels charged with steam. I do not remember ever seeing a boiler that did not have some kind of a safety valve on it. If a safety valve had been on the can set for 10 pounds, and more than 10 pounds came into the pipe leading to the can, it would have relieved itself. It is the general use to have safety valves on all vessels carrying steam." There was evidence that safety valves corrode and fail to operate. There was also evidence that the way provided for plaintiff to do the work assigned to him was safe; that the steam gauge indicated the amount of steam in the boiler. There was no evidence of any defect in the material of which the boiler was constructed. Defendant contended that plaintiff was guilty of contributory negligence. Both parties submitted a number of prayers for special instructions. Among other instructions given by his honor, he said to the jury that the duty of the employer was met if he furnished to his employé reasonably safe appliances for his work, etc. He further said: "If the gauge was a reasonably safe appliance, it does not make any difference that the defendant didn't furnish a safety valve; but, if it was not reasonably safe without a safety valve, then it would be negligence on the part of the defendant not to furnish a safety valve, provided that you should find that safety valves were in common use in work of this kind." Plaintiff excepted. "When you come to consider the allegations of negligence directed at the fact that the defendant did not furnish a safety valve, I charge you that you cannot find that the defendant was negligent in this respect from the fact alone that you may find that, if it had been adopted, it would have had a tendency to decrease the risk and make the work safer; but, in order to find the defendant guilty of negligence on account of this allegation, you must find from the evidence that a safety valve was so manifestly serviceable and necessary as to command the adoption thereof by reasonably prudent men in the same business so generally that it could not reasonably be ignored or disregarded." Plaintiff excepted.

Watson, Buxton & Watson and Lindsay Patterson, for appellant. Manly & Hendren, for appellee.

CONNOR, J. (after stating the facts as above). There can be no just criticism of his honor's charge, in so far as he defines the duty of the master to furnish to his servant a reasonably safe place to work, and reasonably safe appliances with which to perform the service. Plaintiff contends that he should

have gone further and told the jury that, when a safety appliance, in the operation of dangerous instrumentalities, is known, approved and in general use, the standard of duty, fixed by the law, requires the employer to furnish such appliances to his employé. That the use of such appliance became the standard of duty in respect to the safety of the employer; in other words, in contemplation of law the reasonably prudent man will furnish to his employé such appliances as are known, approved and in general use, rather than rely upon his own judgment of what is reasonably safe. In applying this principle, care must be taken to correctly define the terms "known, approved, and in general use" in respect to the extent and the time during which it is in such general use. The employer is not required to adopt every new appliance, or invention, which may be put upon the market. A sufficient number of persons, for a sufficient length of time, must be shown to have approved and used the appliance to test its value and efficiency—to make it generally approved and used within the meaning of the term. It must further appear that such appliance is reasonably within the reach of the employer. Applying the rule to the admitted facts, and to plaintiff's evidence, we have, for the purpose of passing upon the exception, this case: Defendant, for the purpose of testing the capacity, to resist the pressure of steam, for the purpose for which it was made, attached the cylinder by means of an iron pipe, one-half inch in diameter, to a boiler, and by turning the valve the steam from the boiler rushed into the cylinder. The cylinder had a capacity to resist a pressure of 50 pounds. The test could be made by putting in it 10 to 15 pounds. The boiler had a generating capacity of 60 to 80 pounds of steam. The evidence tended to show that the valve was turned one-fourth inch. On the pipe a gauge was set, and plaintiff was placed, for the purpose of discharging the duty imposed upon him, 8 or 10 feet from the gauge. At the end of the cylinder, and at the point at which plaintiff stood, was an appliance for turning off the steam if the gauge indicated too much pressure. This appliance was in charge of plaintiff. The cylinder exploded, as described by the witnesses, and injured plaintiff. Plaintiff insists, and introduced evidence tending to show, that the known, approved, and generally used method of preventing an explosion of such a cylinder, by reason of an excess of steam, was a safety valve. His evidence tended to show that a steam gauge was not reliable. One witness said: "A man cannot constantly look at a gauge without his eyes getting so that the figures run together. Looking at a gauge five minutes, a man cannot tell one figure from another. A man cannot look at a gauge constantly at ten and watch it stand at ten for five minutes and hold the pressure in, himself. It would not be safe to put any steam in there without having a safety valve." On the other hand, the defendant introduced several witnesses who said that the gauge and arrangement made for letting off the steam were safe and much better than a safety valve, giving reasons for their opinions. In this condition of the evidence, the rule laid down by his honor was clearly correct, and, in this aspect of the case, no just criticism can be made of the charge.

But the plaintiff insists that he has gone further and shown, not only that a safety valve was the safer mode of letting off excessive steam, but that it was the method known, approved, and in general use. The witnesses, upon this point, say that they have had experience in operating cylinders into which steam was put, and that it is usual to have a safety valve upon them; that this was the general custom. They explain, by saying that if, in any way, a greater quantity of steam went into the cylinder than the valve was "set for," it would automatically open, and the steam, in excess of the quantity provided for, would, as the witnesses say, "blow out." If the jury should find, as a fact, that the safety valve upon such cylinders, or similar vessels, into which steam is put, and which were subjected to pressure, was known, approved, and in general use, as a safety appliance, we are of the opinion that the defendant owed to plaintiff the duty of using it; that is, furnishing such appliance to plaintiff for his protection. In Empson Packing Co. v. Vaughn, 27 Colo. 66, 59 Pac. 749, it appeared that a cylindrical apparatus called a cooker, made of iron, in which the vegetables previously canned were placed for the purpose of subjecting them to a sufficient degree of heat to complete the process of canning, was used. This was done by closing the cooker perfectly tight and turning in steam, which was supplied from boilers through a pipe connecting the two. It was alleged, in that case, "that the explosion was due to the excessive pressure of steam confined in the cooker, which would have been avoided had it been provided with a safety valve so regulated as to allow the escape of the steam upon reaching a pressure within the limits of safety, or the pipe, connecting the cooker with the boiler, had been equipped with a pressure regulator, which would have automatically prevented the pressure, exerted by the steam, reaching beyond a fixed point." The court says: "In some establishments safety valves were used; in others only the thermometer and gauge used by appellant. * * * Which of these appliances was the one which the exercise of reasonable care and prudence would adopt? Steam has ever been acknowledged as a dangerous agency, the use of which results in accidents, even when the most approved safety appliances are utilized. The cooker was connected directly with the boilers, and was only capable of withstanding a much less degree of pressure than the steam generated in these receptacles usually exerted. It was designed to

be used with a safety valve. The thermometer and gauge, on the cooker, would not instantly indicate the pressure of the steam within it. The steam was only controlled by a globe valve on the pipe through which it was conducted to the cooker. Before any warning of danger-pressure would be indicated by the thermometer and guage, an explosion might occur." In that case there was no evidence that the safety valve was in general use. On the contrary, it appeared that both appliances were used. The court held that the failure to furnish the safety valve was evidence of negligence for the jury. A verdict for the plaintiff was sustained.

We do not hold, in this case, that the mere failure to furnish the safety valve, as a safety appliance, was, as a matter of law, negligence, but that if the jury find that it was known, approved, and in general use, the failure to do so would be negligence. The testimony upon this question is conflicting, and was properly submitted to the jury. The error consists in failing to direct the mind of the jury to the effect which they should give to the failure of defendant to have the safety valve, if they further found that it was known, approved, and in general use. The principle which this court has adopted, and which we think correct, is thus stated by Mr. Justice Hoke, in Bradley v. Railroad, 144 N. C. 555, 57 S. E. 223: "Where the employés are engaged in the operation of mills and other plants having machinery, more or less complicated, and usually driven by mechanical power, in such case an arbitrary standard of duty has been fixed, and the employer is required to provide methods placing implements, and appliances such as are known, approved, and in general use"—citing Hicks v. Manufacturing Co., 138 N. C. 319, 50 S. E. 503; Horne v. Power Co., 141 N. C. 50, 53 S. E. 658; Fearington v. Tobacco Co., 141 N. C. 80, 53 S. E. 662.

Defendant insists that no general use was shown. While it is true that the evidence does not show that others were engaged in the manufacture of cylinders or iron cans of the exact size, strength, and character as the one in controversy, it does appear that when cylinders of similar kind, construction, etc., are in use, the known, approved, and usual method of providing against danger from an explosion, caused by excessive steam, is to place upon them a safety valve, which, for the reasons given by the witnesses, would appear to be the most reliable safety appliance. It is impossible for courts to do more than apply the principles by which the duty of the employer is fixed to the cases as they arise. An examination of Labott's Work on Master and Servant and the elaborate notes, together with the Encyclopædias, shows the almost innumerable decisions applying the general principles to particular cases. While the courts are not disposed to unduly burden the industries of the country by imposing unreasonable or impracticable demands upon the employer, yet it is their duty to so declare and enforce the law that the lives and limbs of employés are rendered as safe as reasonable care can secure. It is in accordance with a humane and sound public policy that employers be required to exercise the degree of care known, approved, and in general use. To require this imposes no hardship upon them. We have so held, and the law in that respect has been crystallized into a statute that railroad companies must do so. Greenlee's Case, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734; Troxler's Case, 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580.

There was evidence tending to show that the method of testing the cylinder in use at the time of plaintiff's injury had been used for a long time without accident, and that it was not only reasonably safe, but to be preferred to the safety valve. It may be that the jury did not find that the safety valve was approved and in general use on such cylinders as the one by the explosion of which plaintiff was injured. If they had found otherwise, his honor's instruction did not permit them to give to such finding the effect of imposing the duty to furnish the safety valve. It is this omission of which plaintiff complains. Defendant insists that the evidence, if believed, did not show a general use of the safety valve on such cylinders, citing Mark's Case, 135 N. C. 287, 47 S. E. 432. We think that there was evidence fit to be submitted to the jury, upon the question. Of course, its weight and value was for the jury.

For the error in the instruction in this respect, there must be a new trial.

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(146 N. C. 178)

## JENKINS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. CARRIERS—CARRIAGE OF FREIGHT—DELAY IN TRANSPORTATION—ACTIONS—STATUTES.

Under Revisal 1905, § 2632, imposing a penalty on a railroad failing to transport freight within the ordinary time, one suing for a penalty makes a prima facie case by showing that the carrier neglected to transport freight within the ordinary time required.

2. SAME—BURDEN OF PROOF.

One suing a carrier for the penalty imposed by Revisal 1905, § 2632, has the burden of proving the issue of failure to transport within the ordinary time required.

3. SAME—QUESTIONS FOR COURT AND JURY.

In an action against a carrier for such penalty, the court must define the term, "ordinary time required," and the question whether the transportation was made within such time is for the jury.

4. SAME—"ORDINARY TIME."

The words "ordinary time," within Revisal 1905, § 2632, mean the regular customary time within which, by the facilities in general use for the performance of the duty of carrying goods, the carriage should be completed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 38.]

5. TRIAL—DELIBERATIONS OF JURY—PERSONAL KNOWLEDGE OF JURORS.

The general rule that facts in issue must be found by the jury on the evidence is subject to the exception that the jury may resort to facts of which men in general have common knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 739.]

6. CARRIERS—CARRIAGE OF GOODS—DELAY IN TRANSPORTATION.

Where, in an action against a carrier for the penalty imposed by Revisal 1905, § 2632, the evidence showed that the goods were delivered to it for transportation on December 7th, and were delivered to the consignee January 12th following, and that the distance was less than 200 miles, the jury were justified in finding that the time consumed was in excess of the ordinary time.

7. SAME—EXCUSE—EVIDENCE.

In such an action the carrier may show that extraordinary unforeseen conditions prevented the discharge of the duty within the ordinary time, and, where such conditions are shown, the question of reasonable time must then be measured by the unusual conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 38.]

8. SAME—STATUTES—CONSTRUCTION.

Revisal 1905, § 2632, imposing a penalty on a carrier for neglecting to transport within a reasonable time any goods received for shipment, and providing that it shall be deemed to have tranported the goods in a reasonable time, if it has done so within the ordinary time required for such transportation, and that a delay of 2 days at the initial point and 48 hours at one intermediate point for each 100 miles shall be prima facie reasonable, etc., makes a failure to transport within the ordinary time prima facie unreasonable, and, where the transportation is not within the ordinary time, the carrier is liable for the penalty imposed, less 2 days at the initial point and 48 hours at one intermediate point for each 100 miles, but the 2 days at the initial point and 48 hours at each intermediate point are not the standards by which reasonable time is measured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 38.]

Appeal from Superior Court, Cleveland County; Ferguson, Judge.

Action by J. F. Jenkins against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Action to recover penalty imposed by Revisal 1905, § 2632, for a failure to transport freight within a reasonable time. Judgment for plaintiff. Defendant noted exceptions and appealed.

W. B. Rodman and O. F. Mason, for appellant. Quinn & Hamrick, for appellee.

CONNOR, J. The following case is disclosed by the record: On December 7, 1906, Nissen & Co. delivered to defendant company at Winston-Salem, N. C., one wagon for transportation and delivery to plaintiff at Grover, N. C. The wagon was delivered to plaintiff January 12, 1907. The distance between the two stations is "more than 100, and less than 200, miles." There was no testimony tending to show the ordinary time required to transport freight from Winston-Salem to Grover. Defendant introduced no evidence. Motion for judgment of nonsuit denied. Defendant excepted. This ruling of the court presents the question whether, the distance between the two points and the time consumed in the transportation being shown, plaintiff is entitled to have his case submitted to the jury to find whether the freight has been transported within the ordinary time required, etc. We undertook, so far as necessary upon the record, to construe the statute in Stone v. Railroad, 144 N. C. 220, 56 S. E. 932. We there held that no other duty was imposed upon the carrier, in regard to the time within which the freight should be transported, than was imposed by the common law. The statute permits the plaintiff to go to the jury, as upon a prima facie case, by showing that the defendant omitted and neglected to transport the freight within the "ordinary time required," etc. The issue, therefore, in this case, is: Did the defendant transport, etc., within the "ordinary time required"? The burden of this issue is upon the plaintiff. What is "ordinary time" is a question of law. The court defines the term, fixes the standard. Whether the transportation is made within such time is a question of fact for the jury. In Stone's Case, supra, we found that "ordinary time" is the usual, regular, customary time within which, by the means and facilities in general use for the performance of the duty, the service should be completed. In other words, how long, over defendant's road by the use of the locomotive and cars in general use, by the usual schedules of its freight trains, used for that purpose, should the defendant have been required to transport this freight? The time, actually taken was 35 days. If the jury find that this was more than "ordinary time required," etc., the statute declares such time prima facie unreasonable, and imposes the penalty. If the plaintiff failed to introduce evidence tending to show facts from which the jury may find the fact in issue, the court should have granted the motion for judgment of nonsuit—he failed "to make out his case." Plaintiff insists that, having shown the distance and the time consumed, the jury may, as a matter of common knowledge, observation, and experience, find, as a conclusion of fact, that more than ordinary time elapsed between the shipment and delivery. The general rule is that facts in issue must be found by the jury upon testimony introduced in the orderly way prescribed in judicial procedure. To this rule there is a well-settled exception, the application of which is sometimes difficult. For the purpose of this discussion, it may be said that there are certain matters of which, by reason of common knowledge, observation, and experience, the courts take judicial notice. These "courts may and should notice without proof, and assume as known by others, whatever, as the phrase is, everybody knows." Thayer on Ev. 301. Greenleaf says: "In general, the jury may, in modern times, act only upon evidence

properly laid before them in the course of the trial. But, so far as the matter in question is one upon which men in general have a common fund of knowledge and experience, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this possession in making up their minds. * * * But the scope of this doctrine is narrow and is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and every-day life." 1 Evidence (16th Ed.) 17. Prof. Thayer, discussing the subject, says: "But, as the jury is bound to keep within the restrictions imposed upon courts by the principle of judicial notice, so also it has the liberty which that principle allows to courts. The circumstance that the jury is a subordinate tribunal does not change the nature of their office." Ev. 296; Wigmore, Ev. § 2565. In Com. v. Peckham, 2 Gray (Mass.) 514, cited by Prof. Thayer, the judge said: "Jurors are allowed to act upon matters within their general knowledge, without any testimony on those matters." Shaw, C. J., said: "The jury may properly exercise their own knowledge and experience in regard to the general subject of inquiry," being the value of certain goods. It becomes material, and of interest, to inquire how far the principle, or, speaking more accurately, the exception, has been applied in cases germane to this appeal. In Hipes v. Cochran, 13 Ind. 175, it was said: "We are of the opinion that the fact that the usual route and speed of travel from C., in Indiana, to R., in New York, is by railroad, is a public fact of which this court can as well take notice as the route and mode of passing from point to point." In Oppenheim v. Wolf, 3 Sandf. Ch. (N. Y.) 571, it was material to fix the date, as nearly as possible, of the death of one Joseph Wolf, lost in a voyage across the Atlantic. This fact was dependent upon the time ordinarily required to make the trip in vessels of the character of that in which he sailed. The vice chancellor said: "These are facts forming a part of the experience and common knowledge of the day, and, as such, are legitimate grounds for the judgment of the court." In Pearce v. Langfit, 101 Pa. 507, 47 Am. Rep. 737, it is said: "We apprehend that the ordinary speed of railway trains is a matter of judicial cognizance, and hence a very simple computation will demonstrate, with approximate certainty, the time within which mails may be transported between such cities as New York and Pittsburg." In Williams v. Brown, 53 App. Div. 486, 65 N. Y. Supp. 1049, Jenks, J., says: "That the time of railroad travel and transportation of the mails between two cities is less than two days" will be taken notice of by the court. In Bradford v. Steamship Co., 147 Mass. 55, 16 N. E. 719, Holmes, J., says that the jury would be justified in fixing the damage to the goods in controversy "as a matter of common experience." This court in Deans v. Railroad, 107 N. C. 686, 693, 12 S. E. 77, 80, 22 Am. St. Rep. 902, speaking through Mr. Justice Avery, says: "The jury were at liberty to exercise their common sense and to use the knowledge acquired by their observation and experience in every-day life in solving the question," in that case, of the distance within which the engineer could see a man on the track. "Courts and juries, acting within their respective provinces, must take notice of matters of general knowledge, and use their common sense when the evidence makes the issue of law or fact depend upon their exercise." While we are not disposed to extend the application of the doctrine further than we can clearly see is conducive to substantial justice, it is manifest in this case that the court may, as something known of all men, or, as said by Prof. Thayer, "everybody knows," have told the jury, as a matter of law, that a railroad freight train over defendant's track did not ordinarily require 35 days to travel 200 miles. To have nonsuited plaintiff upon the record would have been trifling with the administration of the law. While we are clearly of the opinion that in this case the jury were fully justified in finding the issue for the plaintiff, we do not commend the practices becoming too common, of submitting causes to juries upon slight evidence, especially when the party having the burden of the issue may so easily show the very truth of the matter. When the distance is greater and the time shorter, we would not be disposed to relax the safe rule that the plaintiff must make out his case by the introduction of evidence. If, as is contended, the matter is so well known that jurors are asked to act upon their common knowledge, it certainly cannot be an unreasonable burden upon the plaintiff to require him to introduce some evidence. The purpose of a trial by jury is to establish the truth, to the end that a righteous judgment be rendered. If the defendant be so advised, it may, of course, show that, notwithstanding the time consumed in the transportation is in excess of the ordinary time, extraordinary conditions unforeseen and unforeseeable causes intervened and prevented the discharge of the duty within the ordinary time. If such conditions as the law deems adequate are shown, the prima facie case is repelled, and the question of reasonable time is measured by the unusual and unexpected conditions. Whitehead v. Railroad, 87 N. C. 255. We are of the opinion that his honor properly denied the motion for judgment of nonsuit.

In Walker v. Railroad, 137 N. C. 163, 49 S. E. 84, there was no evidence as to the distance or delay. There was a total absence of any data upon which the jury could find an unreasonable delay. In Harper v. Express Co., 145 N. C. ——, 57 S. E. 458, Mr. Justice Hoke discusses the doctrine regarding the extent to which the court will take judicial notice of distances between cities and towns. His honor instructed the jury: "Reasonable time is the ordinary time according to the

means and opportunities which the shipping company had to deliver the goods. Our Legislature has said that it would allow 2 days at the receiving point, 48 hours', or 2 days', delay at some intermediate point in each 100 miles or fractional part of 100 miles; and, if the goods are delivered within that time, that is a reasonable time. But, if the goods are not delivered at the station to which they are consigned within that time, it is prima facie evidence that they are not delivered within a reasonable time, the ordinary time. And, if they are not delivered within the time mentioned by the statute, it devolves upon the defendant to show that it is not the length of time required for the ordinary delivery of the goods from the receiving station to which they are consigned." Defendant excepted. There can be no just criticism of his honor's definition of the term "reasonable time." He evidently experienced the same difficulty which confronted us in construing the statute by reason of the peculiar placing of the words, "and a failure to transport within such time shall be held prima facie unreasonable." As placed, they would seem to refer to the sentence immediately preceding, thus making the "lay days," or days "not charged," the standard of "reasonable time." This construction nullifies the language which makes "ordinary time" the standard. His honor told the jury that, if the goods were not delivered within 2 days from the day of receipt and 48 hours at intermediate points, there was prima facie an unreasonable delay. This view entirely eliminates the element of "ordinary time," making a "hard and fast" rule. Endeavoring to avoid this construction, which we thought inconsistent with the general provisions and purpose of the statute, we held in Stone's Case, supra, that the last sentence, in order of arrangement, should be referred to the former sentence making "ordinary time" the prima facie standard; thus making the act read, "A failure to transport within ordinary time is prima facie unreasonable." Thus construed, the jury find, first, whether the transportation was within the "ordinary time." This being found, the question arises, what time should be allowed defendant as "ordinary time" for transporting? For all in excess of this time it is liable for the statutory penalty less 2 days at the "initial point" and 48 hours at one intermediate point for each 100 miles of distance, etc., which shall not be charged against such carrier as unreasonable. Thus construed, the 2 days at the initial point and 48 hours at each intermediate point are not the standards by which "reasonable time" is measured, but are not to be charged "as unreasonable," or, as we said in Stone's Case, to this extent the standard of the common-law duty is lowered. We have defined the term "intermediate point" in Davis v. Railroad (at this term) 59 S. E. 53. Applying the principles announced in Stone's Case and herein, we have this result: Assuming that the time consumed in the transportation from December 7, 1906, to January 12, 1907, is more than the ordinary time, and therefore prima facie unreasonable, the question arises, what is reasonable time? Assuming, for the purpose of illustration, that 2 days for the transportation is such, we have a delay of 33 days. From this is to be deducted 2 days at the initial point, giving 31 days. If there be "intermediate points" coming within the definition given in the Davis Case, they are to be deducted; thus giving the number of days during which the transportation was unreasonably delayed for which the carrier is liable for the penalty. We have endeavored to give the statute a fair construction, having in view the language, from which we must ascertain the intention of the Legislature, and the evil intended to be remedied. We have been embarrassed in this and other cases by the very meager testimony set out in the record. While we do not wish to impose any unreasonable burden on the plaintiff, we cannot make out his case by an unwarranted extension of presumptions.

For the errors in the charge, the defendant is entitled to a new trial.

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(146 N. C. 135)

## HAMRICK BROS. & CO. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 27, 1907.)

CARRIERS — CARRIAGE OF GOODS — DELAY IN TRANSPORTATION — LIABILITIES.

In an action against a carrier for the penalty imposed by Revisal 1905, § 2632, on any railroad company neglecting to transport freight within a reasonable time, the court should submit the issues whether the freight was transported within a reasonable time and in what sum the carrier is indebted to plaintiff.

Appeal from Superior Court, Cleveland County; Ferguson, Judge.

Action by Hamrick Bros. & Co. against the Southern Railway Company for penalty imposed by section 2632, Revisal 1905, for failure to transport freight within reasonable time. At the conclusion of the entire evidence, defendant requested the court to instruct the jury that plaintiffs were not entitled to recover, and to the refusal to do so excepted. Defendant noted exceptions to instructions given the jury. Judgment for plaintiffs. Defendant appealed. Reversed and new trial ordered.

W. B. Rodman and O. F. Mason, for appellant.

CONNOR, J. The record shows that the freight was delivered to defendant company at Winston-Salem on January 25, 1907, to be transported and delivered to plaintiffs at Lattimore, N. C. There was evidence tending to show that the freight was delivered to plaintiffs at Lattimore on February 25, 1907. The distance between Winston-Salem and Lattimore is 154 miles. There was evidence

on the part of defendant showing the ordinary time required to transport freight between the two points. There was evidence, on the part of defendant, tending to show reasons for, and causes of, delay. In the view which we take of the appeal, it is not necessary to set out this testimony. For the reasons set forth in Jenkins v. Railroad (at this term) 59 S. E. 663, his honor properly declined to enter judgment of nonsuit or to direct a verdict for defendant. His honor instructed the jury "that a man who has goods consigned to him, after being received by defendant railroad company, may expect the goods within two days from the time they were delivered. Then add 2 more days for 100 miles and 2 more days for the next hundred miles, or fraction thereof—that, at that time, he may expect his goods to be delivered at the station to which they were consigned. The Legislature says that, being within a reasonable time, nothing else appearing, the jury will not count that time," etc. The instruction is based upon the same construction of the statute as in Jenkin's Case, supra. We endeavored to so construe the statute in that case as to give to every part of it force and effect. The instruction, given by his honor in this case, is open to the same objection as in that, and, for the reasons set out in the opinion there, we must grant a new trial. We would suggest that, in the trial of cases prosecuted under this statute, two issues be submitted: (1) Was the freight transported and delivered within a reasonable time? (2) In what sum is the defendant indebted to the plaintiff? In this way the attention of the parties, and the jury, is drawn to the real questions in issue.

There must be a new trial.

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(146 N. C. 167)

## MORRIS-SCARBORO-MOFFITT CO. v. SOUTHERN EXPRESS CO.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. CORPORATIONS—LEGISLATIVE REGULATION.
The state has the right to establish regulations for public service corporations, and to enforce the same by appropriate penalties, and in so doing the right of classification is largely referred to its discretion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1573.]

2. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW—CARRIERS—LOSS OF GOODS—FAILURE TO ADJUST CLAIM — PENALTY — STATUTORY REGULATION—CONSTITUTIONALITY.
Revisal 1905, § 2644, which provides a penalty for a carrier's failure to adjust a loss within a certain time after a claim therefor is filed, does not deny the carrier the equal protection of the law, since the penalty is moderate in amount and imposed only after opportunity for investigation, does not attach unless full recovery is had in accordance with the demand made, and is in reasonable and direct enforcement of the duties incumbent upon common carriers, and imposed alike on all members of a given class.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 703.]

3. COMMERCE—POWER TO REGULATE—POWERS REMAINING IN THE STATES.
In the absence of congressional inhibition, the state may establish laws and regulations on matters local in their nature which tend to enforce the proper performance of duties arising in the state, and which do not impede, but aid and facilitate, intercourse and traffic, though such action may incidentally affect interstate commerce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 7, 8.]

4. SAME—CARRIERS—LOSS OF GOODS—STATUTORY REGULATION.
Revisal 1905, § 2644, which provides a penalty for a carrier's failure to adjust a loss in a shipment of goods from without the state within 90 days after a claim for such loss is filed with it, is not in violation of Const. U. S. art. 1, § 8, conferring on Congress the right to regulate interstate commerce, since the penalty is in no sense a burden on interstate commerce, but is in aid of such traffic, and, in the absence of congressional legislation to the contrary, is a proper subject of state regulation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 81.]

Appeal from Superior Court, Randolph County; Moore, Judge.

Action by the Morris-Scarboro-Moffitt Company against the Southern Express Company for loss of goods and penalty for delay in settlement. From a judgment for plaintiff, defendant appeals. Affirmed.

There was evidence tending to show that defendant company, having undertaken, in the line of its duty as common carrier, to deliver certain goods to plaintiffs at Ashboro, N. C., the same having been shipped from Cincinnati, Ohio, in breach of its contract and agreement delivered only part of said goods, the package in which they were shipped having been broken open, while in defendant's custody, and part of goods taken; that after said package had arrived at Ashboro, and been delivered to plaintiffs in its damaged and defective condition, plaintiffs duly filed a claim for damage, pursuant to statute, and defendant wrongfully failed and refused to adjust the claim for more than 90 days, etc., the claim being in amount as follows:

Ashboro, N. C., Sept. 25, 1906.

Bought of Morris-Scarboro-Moffitt Co., Wholesale and Retail Dealers in Dry Goods, Notions, Groceries, and General Merchandise.

| | |
|---|---|
| To one (1) overcoat ..... | $20 00 |
| To one (1) overcoat, less 10 per cent.. | 18 00 |
| To one (1) coat and trousers..... | 21 75 |
| To part express ..... ..... | 21 |
| | $59 96 |

Issues were submitted and responded to by jury: "North Carolina, Randolph County. Superior Court, March Term, 1907. E. H. Morris, P. H. Morris, W. J. Scarboro, B. Moffitt, M. A. Moffitt, E. L. Moffitt, and E. Moffitt, Trading as Morris-Scarboro-Moffitt Co., v. Southern Express Company. (1) Is the defendant indebted to the plaintiffs on account of loss as alleged, if so, in what sum? Answer: Yes; $59.96, and interest from September 26, 1906. (2) Was the claim

of plaintiffs filed 90 days before the bringing of this suit? Answer: Yes."

There was judgment on the verdict for the amount of the loss and for the penalty of $50, imposed by the statute, and defendant excepted and appealed, and assigned for error that the statute imposing the penalty (section 2634, Revisal 1905) was invalid as to interstate shipments, because in contradiction of article 1, § 8, of the Constitution of the United States, conferring upon Congress the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

John A. Barringer and T. H. Calvert, for appellant. Elijah Moffitt, for appellee.

HOKE, J. (after stating the facts as above). The statute in question enacts: "That every claim for loss of or damage to property while in possession of a common carrier shall be adjusted and paid within sixty days in case of shipments wholly within this state, and within ninety days in case of shipments from without the state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment or the point of delivery to another common carrier: Provided, that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee aggrieved in any court of competent jurisdiction: Provided, that unless such consignee recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid. Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto and for the penalties herein provided for may be united in the same complaint." It is established that the defendant company had charge of the goods, having undertaken to transport and deliver same as common carriers; that, when delivered to plaintiffs by defendant, the package had been broken open and goods to the value of $59.75 had been taken out, which, with the proportional express charge of 21 cents, caused damage to plaintiff by reason of negligent default in the contract of carriage to the amount of $59.96; that formal demand for this exact amount had been made and filed with defendant's agent, and the company had failed and refused to pay the same for more than 90 days. According to the provisions of the statute, therefore, the penalty would attach as a conclusion of law from the verdict and facts admitted, and, if the statute is valid, the recovery by plaintiffs must be sustained. We have held at the present term, in the case of Efland v. Railroad, 59 S. E. 355, the defendant's appeal, that as a general rule the state or government, having control of the matter, had the right to establish certain regulations for these public service corporations, and to enforce the same by appropriate penalties, and that in the fixing of such penalties the right of classification was referred largely to the legislative discretion, citing case of Tullis v. Railway, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, and other authorities referred to and approved in that decision; the limitation on this right of classification being that established in the case of Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 151, 17 Sup. Ct. 255, 41 L. Ed. 666, as follows: "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and in all cases it must appear, not merely that a classification has been made, but also that it has been made on some reasonable ground, something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." The statute construed and upheld in Efland's Case, supra, was section 2642, Revisal 1905, imposing a penalty for wrongfully failing to return the amount of an overcharge, but the principle applies here, and shows that the statute now before us (section 2644) is not open to the objection sustained in Ellis' Case, supra, but is a penalty moderate in amount, imposed only after giving opportunity for investigation, does not attach unless full recovery is had in accordance with demand made, and, moreover, is in reasonable and direct enforcement of the duties incumbent upon common carriers, and imposed alike on all members of a given class. The statute, therefore, is not subject to the criticism that it denies to defendant the equal protection of the law, and we do not understand that the defendant insists on this objection.

It is strongly urged, however, that the law is in violation of article 1, § 8, of the federal Constitution, conferring on Congress the right to regulate commerce among the several states. The decisions of the Supreme Court of the United States have uniformly held that under this clause of the Constitution commerce between the states shall be free and untrammeled by any regulations which place a burden upon it, and these decisions also hold that, in the absence of inhibitive congressional legislation, a state may enact and establish laws and regulations on matters local in their nature, which tend to enforce the proper performance of duties arising within the state, and which do not impede, but aid and facilitate, intercourse and traffic, though such action may incidentally affect interstate commerce. Cal-

vert on Regulation of Commerce, pp. 76, 152, 159. A case in this court (Harrill v. Railroad, 144 N. C. 532, 57 S. E. 383) well illustrates the distinction between the two positions, and the decision in that case is an apt authority, we think, in support of the present judgment. In Harrill's Case the consignee demanded his goods held by the carrier at the point of destination, tendering the lawful charges due for the shipment defendant's agent wrongfully refused to deliver. A recovery by consignee of a penalty imposed by a state statute for such wrong was sustained, and it was held as follows: "A railroad company owes it as a common-law duty to deliver freight upon tender of lawful charges by the consignee, and, in the absence of a conflicting regulation by Congress, Revisal 1905, § 2633, imposing a penalty upon default of the railroad company therein, is constitutional and valid, and is an aid to, rather than a burden upon, interstate commerce." The same doctrine was announced and upheld in the case of Bagg v. Railroad, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569, as applied to a penalty imposed on the carrier for failure to start an interstate shipment within the time required by law. In that well-sustained opinion Mr. Justice Avery, for the court, said: "The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and under our system of government is vested in the Legislatures of the several states of the Union; the only limit to its exercise being that the statute shall not conflict with any provision of the state Constitution, or with the federal Constitution, or laws made under its delegated powers. Martin v. Hunter's Lessee, 1 Wheat. (U. S.) 326, 4 L. Ed. 97; State v. Moore, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696; State Tax on Railroad Cross-Receipts, 15 Wall. (U. S.) 284, 21 L. Ed. 164. So long as the state legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce and to expedite instead of hindering the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced either as supplementary to partial federal statutes relating to the same subject, or in lieu of such legislation, where Congress has not exercised its powers at all. Morgan S. S. Co. v. Louisiana, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237; Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; Railroad v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Railroad v. Fuller, 17 Wall. (U. S.) 560, 21 L. Ed. 710. The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. Cooley's Const. Lim. 595; County of Mobile v. Kimball, 102 U. S. 697, 26 L. Ed. 238; Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 234; Wilson v. B. B., etc., Co., 2 Pet. (U. S.) 245, 7 L. Ed. 412; Pound v. Turck, 95 U. S. 459, 24 L. Ed. 525; Turner v. Maryland, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370; Morgan S. S. Co. v. Louisiana, supra." A like decision has been made on a statute similar to the one we are now considering in our neighboring state of South Carolina—Porter v. Railway, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670—where it was held as follows: "The act (22 St. at Large, p. 443) providing a penalty on common carriers for failure to pay or to refuse to pay damages, etc., to freight within 60 days, does not conflict with those sections of the state and federal Constitutions providing for the equal protection of the laws to all, nor with the interstate commerce clause of the federal Constitution, or acts of Congress relating thereto." These opinions are in accordance with the principle established by numerous and well-considered decisions of the United States Supreme Court, which are alone authoritative on such questions. Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Smith v. Alabama, 124 U. S. 465–476, 8 Sup. Ct. 564, 31 L. Ed. 508; Telegraph Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; Railway v. Solan, 169 U. S. 133–137, 18 Sup. Ct. 289, 42 L. Ed. 688; Railway v. Florida, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175. In Smith v. Alabama, supra, Mr. Justice Mathews for the court said: "It is among these laws of the states, therefore, that we find provisions concerning the rights and duties of the common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the state for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the state in its courts; or, if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the

right to redress was void as being an unconstitutional regulation of commerce by the state. This, indeed, was the very point decided in Sherlock v. Alling, above cited." In Railway v. Solan, supra, Mr. Justice Gray, for the court, said: "A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

The case before us comes clearly within the principle of these decisions. The penalty is imposed, not directly upon interstate commerce itself, or during the transportation of the goods, but it arose by reason of default on the carrier's part after the transportation had terminated, and is in enforcement of the duty incumbent upon it by the law to adjust and pay for damages arising by reason of its negligent default. The penalty is in no sense a burden on intercourse and traffic between the states but it is in aid of such traffic, and, in the absence of congressional legislation to the contrary, is a proper subject of state regulation. We were referred by counsel to cases of Railway v. Murphey, 196 U. S. 195, 25 Sup. Ct. 218, 49 L. Ed. 444, Railway v. Mayes, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772, and McNeill v. Ry., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142, but we do not think that these decisions are in conflict with the views we have held to be controlling in the case before us. As we understand them, they all proceed upon the idea, not that the regulations in question were void because they affected in some way interstate commerce, but because they interfered directly with intercourse and traffic between the states, and were of a character that imposed an undoubted and distinct burden upon them. A careful perusal of either of these cases will show this to be the correct deduction from the decisions. Thus Mr. Justice Brown in Mayes Case, supra (page 328 of 201 U. S., page 492 of 26 Sup. Ct. [50 L. Ed. 772]), says: "The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. It can only be illustrated from the decided cases by applying the principles therein enunciated, determining from these whether in the particular case the rule be reasonable or otherwise. That states may not burden instruments of interstate commerce, whether railways or telegraphs, by taxation, by forbidding the introduction into the state of articles of commerce generally recognized as lawful, or by prohibiting their sale after introduction, has been so frequently settled that a citation of authority is unnecessary. Upon the other hand, the validity of local laws designed to protect passengers or employés or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized." And on page 329 of 201 U. S., page 493 of 26 Sup. Ct. (50 L. Ed. 772): "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of both freight and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce. It makes no exception in cases of sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather." And on page 330 of 201 U. S., page 493 of 26 Sup. Ct. (50 L. Ed. 772): "Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the state, and may have been intended merely to secure promptness on the part of the railroad companies in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional and accidental violations of its provisions, when no damage could actually have resulted to the shippers."

And, again, on page 331 of 201 U. S., page 494 of 26 Sup. Ct. (50 L. Ed. 772): "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance. Although it may be admitted that the statute is not far from the line of proper police regulations, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the Legislature." These citations we think give clear indication that we have correctly interpreted the opinion, and that the decision in no way conflicts with the disposition we have made of the present case.

We find no error in the record to the defendant's prejudice, and the judgment below is affirmed.

No error.

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(146 N. C. 153)

## ROLLINS v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. CARRIERS—CARRIAGE OF GOODS—DELAY IN TRANSPORTATION—PARTIES.

Revisal 1905, § 2632, provides that the party aggrieved may recover a penalty for a carrier's unreasonable delay in transporting goods. Plaintiff loaded and received a bill of lading for a car load of wood, shipped to the consignee to be sold by him for plaintiff's benefit. *Held*, that plaintiff, and not the consignee, was the party aggrieved by the delay.

2. SAME—EVIDENCE—QUESTION FOR JURY.

In an action under Revisal 1905, § 2632, where the delay arose and existed all at the point of shipment, the objection that there is no testimony as to the ordinary time required for a train between that point and the point of destination is not open to defendant.

3. SAME.

In such an action, where it is shown that the point of shipment is a regular station on the company's main line, leading directly to the point of destination, 25 miles away, though there is no testimony regarding the ordinary time required for a freight train between the two points, the jury may be permitted from their common observation and experience to consider and determine the question of ordinary time between the points, and, in the absence of explanation, fix the amount of the wrongful delay.

4. SAME—EVIDENCE.

In such an action, evidence that plaintiff told defendant's agent that plaintiff was shipping the goods to be sold on account, and that he could get no money until the goods were sold, is not relevant to the inquiry, since, when plaintiff establishes that he is the party aggrieved, it bears in no way upon his demand or defendant's obligation, whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time.

5. SAME—STATUTORY PROVISIONS—CONSTITUTIONALITY.

Revisal 1905, § 2632, which provides that the party aggrieved may recover a penalty for a carrier's unreasonable delay in transporting goods, is constitutional as a valid exercise of the police power.

Appeal from Superior Court, Chatham County; Webb, Judge.

Action by one Rollins against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action, tried on appeal from the court of a justice of the peace. This action was to recover a penalty for unreasonable delay in shipment of a car load of wood from Merry Oaks, N. C., to Raleigh, contrary to provisions of section 2632, Revisal 1905. There was evidence on the part of plaintiff tending to show that Merry Oaks was a regular station on the main line of the Seaboard Air Line, about 25 miles distant from Raleigh, N. C., and that there had been a wrongful delay of 12 days in the shipment of the wood after defendant company had received the wood and given bill of lading for same; that the delay occurred at the initial point, the car on which it was loaded having remained on the defendant's side track at Merry Oaks from the 6th of February, 1906, to February 20, 1906, and the wood was shipped on consignment to be sold for benefit of plaintiff and as plaintiff's wood. The testimony of plaintiff on that question was as follows: "I got Mimms to load car and get bill of lading for it. It was my load of wood. Bill of lading introduced in evidence dated February 6, 1906. Mr. Marks was agent of defendant company at that time. I told agent of defendant the first or second day after the bill of lading was issued that I insisted on the shipping of the wood; that I could not get my money for the wood until it was sold. I told him that I was shipping the wood to Mr. J. O. Morgan for him to sell for me, and that I could get no money for the wood until it was shipped. I had not sold or agreed to sell the wood at that time. I shipped it to be sold for me." There was evidence on the part of defendant in explanation of the delay as follows: "(1) That the side track on which the car was placed was torn up and had to be repaired, which prevented the car from being taken out on time; (2) that all north-bound local freights had their tonnage, and were unable to take the wood before it was done." Issues were submitted and responded to by the jury as follows: "(1) Did the plaintiff deliver to the defendant a car of wood on the 6th day of February, 1906, and did the defendant deliver a bill of lading therefor, as alleged? Answer. Yes. (2) Did defendant take an unreasonable time in transporting said car of wood from Merry Oaks to Raleigh under the circumstances in this case? Answer. Yes. (3) Did the defendant have notice, at the time the contract of carriage was made, that the plaintiff was the owner of the wood, and that he retained title to the same? Answer. No. (4) Did the defendant at any time before the said car was shipped have notice that the plaintiff had retained

title to the same? Answer. Yes. (5) What amount, if any, is the plaintiff entitled to recover? Answer. $80." There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

H. A. London & Son, for plaintiff. Day, Bell & Allen and Womack, Hayes & Bynum, for defendant.

HOKE, J. (after stating the facts as above). We find nothing in the record or case on appeal which gives the defendant just ground for complaint. It was chiefly urged for reversible error that the judge below should have instructed the jury that, if they believed the testimony, the plaintiff was not the "party aggrieved" under the principle established in the case of Stone v. Railroad, 144 N. C. 220, 56 S. E. 932. But the facts do not bring the present case within the principle of that decision. In that case the court properly held that "when goods are delivered to a common carrier for transportation, and bill of lading issued, the title, in the absence of any direction or agreement to the contrary, rests in the consignee, who is alone entitled to sue as the party aggrieved under the statute." And, applying the principle, the court was of opinion that there was no testimony which tended to withdraw the case from the general principle. In our case, however, the undisputed testimony was to the effect that at the time of the shipment plaintiff had made no sale of the wood, but the same was shipped to be sold for the benefit of the plaintiff, the consignor, and that he alone had the legal right to demand that the transportation be promptly made as required by law and the terms of the contract. This brings the present case clearly within the principle declared in opinion of Summers v. Railroad, 138 N. C. 295, 50 S. E. 714. In that decision the court said: "In giving the penalty to the party aggrieved, the statute simply designates the person who shall have a right to sue, and restricts it to him who, by contract, has acquired the right to demand that the service be rendered. The party aggrieved, in statutes of this character, is the one whose legal right is denied, and the penalty is enforceable independent of pecuniary injury. Switzler v. Rodman, 48 Mo. 197; Qualls v. Sayles, 18 Tex. Civ. App. 400, 45 S. W. 839; Grocery Co. v. Railway, 136 N. C. 396, 48 S. E. 801. Ordinarily, in case of a shipment of goods by a railway to a person who has ordered them, on delivery to the railroad, the company receives them as the agent of the vendee or consignee, and such person would be the aggrieved party by delay in forwarding. But in this case, by the terms of the agreement between the plaintiff and Ward & Son, the plaintiff was not to get credit for the returned goods till they were received by Ward & Son. It made no difference to this firm whether the goods were returned or not. They had their account against the plaintiff, and a fair interpretation of the agreement between the parties is that no credit was to be given till the goods came to hand. Until this occurred, the loss of the goods would have been the loss of the plaintiff, and he alone was interested in urging the shipment." This authority is controlling, and decides the point against defendant's position.

It was objected, further, that the court should have held that there was no testimony to be considered by the jury, that there had been unreasonable delay in the shipment, and this, for the reason that no witness had stated in express terms what was the ordinary time required for a freight train between Merry Oaks and Raleigh. The objection is hardly open to defendant on this record, for all the testimony was to the effect that the delay complained of arose and existed all at the point of shipment, Merry Oaks, but, considering that the exception is properly presented, we think that there was testimony sufficient to carry the case to the jury. The time of delay was shown, and it was also found that Merry Oaks, the point of shipment, was a regular station on the main line of the Seaboard Air Line, leading directly to Raleigh, the point of destination, and only 25 miles distant, and with facts and conditions so simple and circumscribed the jury might well be permitted, from their common observation and experience, to consider and determine the question of ordinary time between the two points, and, in the absence of explanation, fix the amount of wrongful delay on the principle established in Wright v. Railway, 127 N. C. 225, 37 S. E. 221, and Deans v. Railway, 107 N. C. 693, 12 S. E. 77, 22 Am. St. Rep. 902.

Exception was also made that the court permitted the plaintiff to testify that he told defendant's agent a few days after the bill of lading was given that he was shipping the wood to be sold on account, and that plaintiff could get no money till the wood was sold. The evidence was introduced on the third and fourth issues as to whether the defendant was notified that plaintiff was the "party aggrieved"; but we do not think that the issues themselves were material to the controversy, or that the testimony was in any way relevant to the inquiry. It should always be required, for a lawful recovery, on a statute having this wording, that plaintiff should establish that he is the party aggrieved; for, as said by Mr. Justice Connor in Stone's Case, supra: "It is manifest that the statute does not contemplate that two recoveries should be recovered for the same breach of duty." But, when this is done and defendant is thereby protected from responsibility except to the rightful claimant, it is of no importance and bears in no way on the justice of plaintiff's demand or of defendant's obligation whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time. The exception noted on the trial that the statute was unconstitutional in denying to defendant the

equal protection of the law was not insisted upon here. The court in several decisions has held that the statute is valid and the objection cannot be sustained. Walker v. Railway, 137 N. C. 163, 49 S. E. 84; Stone's Case, supra.

There is no error, and the judgment below is affirmed.

No error.

(146 N. C. 218)

## CARDWELL v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. CARRIERS—CARRIAGE OF GOODS—DELAY IN TRANSPORTATION—STATUTORY PROVISIONS—CONSTITUTIONALITY.

Revisal 1905, § 2632, which provides that the party aggrieved may recover a penalty for a carrier's unreasonable delay in transporting goods, is constitutional, as a valid exercise of the police power.

2. SAME—PARTIES—"PARTY AGGRIEVED."

Revisal 1905, § 2632, provides that the party aggrieved may recover a penalty for a carrier's unreasonable delay in transporting goods. Plaintiff sold goods to one at a distant point, delivered them to the carrier, and received a bill of lading therefor. Delivery at the buyer's home was a part of the contract of sale. *Held*, that plaintiff, and not the consignee, was the "party aggrieved" by the unreasonable delay, since the plaintiff is the one whose legal right is denied.

3. SAME—EVIDENCE.

In an action under Revisal 1905, § 2632, it is not relevant to the inquiry whether or not defendant knew the facts which gave plaintiff the right to sue.

Appeal from Superior Court, Alamance County; O. H. Allen, Judge.

Action by one Cardwell against the North Carolina Railroad Company for the value of goods and the penalty for delay in transportation. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action, tried on appeal from the court of a justice of the peace. There was evidence tending to show that plaintiff had sold to one M. J. Blue a package of harness worth $24.50, to be delivered at Efland, N. C., the stipulation as to delivery at Efland being a part of the contract of sale. The plaintiff had same shipped by defendant company from Burlington, N. C., to Efland, N. C., prepaying the freight charges, and taking a bill of lading therefor as shipped to M. J. Blue; that defendant failed to transport and deliver said harness within ordinary time in accordance with the contract, and plaintiff, having made good the loss to the purchaser, M. J. Blue, by supplying him with other harness, filed his claim, as required by the statute, and instituted this action to recover for the loss of the harness, and for the penalty for wrongfully failing to transport freight, allowed by section 2632, Revisal 1905. Under the charge of the court, there was verdict for plaintiff for the value of the goods and the penalty, judgment on the verdict, and defendant excepted and appealed.

Brooks & Thompson and W. H. Carroll, for plaintiff. King & Kimball and Parker & Parker, for defendant.

HOKE, J. (after stating the facts as above). The statute has been upheld as a constitutional enactment in Walker's Case, 137 N. C. 163, 49 S. E. 84, Stone's Case, 144 N. C. 220, 56 S. E. 932, and other decisions of like import, and the principle upon which it rests has been affirmed in Efland's Case (defendant's appeal, at the present term) 59 S. E. 355. It is chiefly urged for error by appellant that plaintiff is not the "party aggrieved" under the principle announced in Stone's Case, supra, in that it was held: "When goods are delivered to a common carrier for transportation and bill of lading issued, the title, in the absence of any direction or agreement to the contrary, vests in the consignee, who is alone entitled to sue as the 'party aggrieved' for the penalty given by section 1467, Revisal 1905." This is undoubtedly a correct decision, applying, as stated, where it appears that goods are shipped and bill of lading taken to a consignee without more. As indicated in the opinion, however, where the facts show, as in this case, that from the attendant circumstances or the terms of the agreement some person other than the consignee is the one whose legal right is denied and who is alone interested in having the transportation properly made, a different rule obtains, and the case comes within the principle of Summer's Case, 138 N. C. 295, 50 S. E. 714. In that opinion it was said: "In giving the penalty to the party aggrieved, the statute simply designates the person who shall have the right to sue, and restricts it to him who, by contract, has acquired the right to demand that the service be rendered. 'The party aggrieved is the one whose legal right is denied.'" Nor is it a valid objection to this recovery that defendant may not have been made aware of the facts which gave to plaintiff the right to sue as the "party aggrieved" under the statute. As shown in case of Rollins v. Railroad (at the present term) 59 S. E. 671, neither the issue as to defendant's actual knowledge, nor the evidence tending to support it, are, as a general rule, relevant to the inquiry. In the absence of any counterclaim or offset in favor of defendant against the person who as consignee appears to be the "party interested" under the contract, if the case is tried and determined in accordance with law, and in a way to protect defendant from a second recovery, it is not material whether the real party in interest was known to defendant or not.

We are of opinion that the authorities referred to are decisive against the defendant's position, and we find no error in the proceedings below that gives appellant any just ground of complaint.

No error.

(146 N. C. 246)

## MYERS v. CITY OF CHARLOTTE.

(Supreme Court of North Carolina. Dec. 4, 1907.)

1. EVIDENCE—COMPETENCY—VALUE OF REAL ESTATE—OPINION EVIDENCE.

In an action for damages to a meadow by a sewer, in which action defendant city asked for condemnation of a right of way, evidence by neighboring farmers who knew the meadow well as to the amount of hay the meadow would probably produce had the sewer not been built was competent, in confirmation of the owner's estimate of its market value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2273.]

2. SAME.

The greater or less acquaintance of witnesses with a meadow, testifying as to the amount of hay a meadow would probably produce, goes to the weight to be given their testimony, and not its competency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2217, 2273; vol. 50, Witnesses, § 80.]

3. SAME.

Evidence by witnesses, who were farmers and had examined the land, though they had no previous acquaintance therewith, as to what the land would produce after the sewer was constructed, was competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Evidence, §§ 2217, 2273.]

Appeal from Superior Court, Mecklenburg County; Ferguson, Judge.

Action by J. S. Myers against the city of Charlotte. Judgment for plaintiff, and defendant appeals. Affirmed.

Hugh W. Harris and John A McRae, for appellant. R. S. Hutchison and Burwell & Cansler, for appellee.

CLARK, C. J. This is an action for damages to plaintiff's meadow from a sewer built through it, partly above ground, inclosed within a concrete wall and partly under or through the soil. There was evidence that after heavy rains the culverts under the sewer did not always fully carry off the water, causing it to pond back on the meadow to its injury; besides, the defendant in his answer asked for the condemnation of a strip 40 feet wide for right of way and assessment of its value in this action. There are but two exceptions, both to the admission of evidence.

The plaintiff testified to the market value of the land, and, as a basis for his opinion, testified without objection what had been his income from it in the value of the hay produced before the sewer was built. The defendant excepted because two other witnesses were permitted to confirm plaintiff by giving their opinion, as farmers, as to the amount of hay the meadow would probably produce. Though they had no personal knowledge of what it had actually produced, they were experienced farmers, knew this meadow well, and owned land near by. Their evidence was competent, and was such as a jury would naturally desire to aid them in coming to a just conclusion. It was such information as an intending purchaser would always seek. It is true the measure of damages is the market value of so much of the land as was taken, and the deterioration of the rest by flooding. The estimate of its yield in hay, for raising which it had been used, was competent to confirm the plaintiff's estimate of its market value. The greater or less acquaintance of the witnesses with the land went to the weight to be given to their testimony, but did not render it incompetent.

The second exception is to the admission of the evidence of two witnesses, also neighboring farmers of experience, as to what the land would produce in its present condition, since the sewer was built; this being for the purpose of showing that it has now no productive capacity and hence no market value. As the land is used only for agriculture, we do not see how the defendant is hurt by the witnesses giving as the basis of their estimate of market value the amount of produce the land will yield in its present condition. The witnesses examined the land, but had no previous acquaintance with it. They were experienced farmers, and what weight should be given to their testimony that the land could not now produce crops by reason of ponding water was a matter for the jury. The value of land is largely one of opinion, derived from a variety of circumstances, and, when it is agricultural land, one of the most important is the yield of crops therefrom. That is a matter of which farmers, acquainted with the land, or who have examined it, can express an opinion upon, more or less accurately. This opinion is subject to the test of cross-examination, and the weight to be given to it is a matter for the jury. This matter has been recently fully discussed. Creighton v. Water Commissioners, 143 N. C. 171, 55 S. E. 511; Brown v. Power Company, 140 N. C. 341, 52 S. E. 954, 3 L. R. A. (N. S.) 912.

No error.

(146 N. C. 242)

## NEILL et al. v. WILSON et al.

(Supreme Court of North Carolina. Dec. 4, 1907.)

1. DEATH — NEGLIGENCE — RECOVERY — DISTRIBUTION.

The right of action conferred by Revisal 1905, § 59, making those causing negligent deaths liable to decedent's personal representatives, and providing that the recovery shall not be applied to the payment of debts or legacies, but that it shall be distributed as intestate property, is property as a part of intestate's estate, and, for the purpose of devolution and transfer, the rights of the claimants are to be determined as of the time when intestate died, and hence under section 4, providing that, when a married woman dies intestate, the surviving husband may administer upon her personalty and hold the same subject to the claims of her creditors and others having rightful demands against her, to his own use, etc., and providing that if the husband dies after his wife, but before administering, his personal representative or assignee shall receive the personalty of the wife as a part of the husband's estate, subject as aforesaid, where intestate's daughter died after his negli-

gent death and before recovery therefor, and her husband became insane after becoming administrator, her administrator de bonis non is entitled to her share of the recovery for the husband's benefit, subject to the claims of her creditors and others having rightful demands against her estate.

2. SAME—EXEMPTION FROM DEBTS.

Revisal 1905, § 59, providing that recovery for negligent death shall not be applied as assets in the payment of debts or legacies, but shall be distributed as intestate property, refers to decedent's creditors, and not the distributees'.

Appeal from Superior Court, Gaston County; Ward, Judge.

Controversy without action between Mrs. Minerva Neill and others and F. G. Wilson and others. From the judgment, Neill and others appeal. Affirmed.

Controversy without action, regularly submitted and determined. From the facts agreed upon it appears: That defendants' intestate, Robert Q. Wilson, died on September 10, 1904, leaving him surviving, as next of kin and distributees under the law, his mother and several brothers and sisters, among the last, Mrs. Elizabeth Quinn, wife of J. R. Quinn. That defendant F. G. Wilson was qualified as administrator of intestate on September 15, 1904. Mrs. Elizabeth Quinn died on September 30, 1904, and on October 24, 1904, her surviving husband, J. R. Quinn, was duly qualified as her administrator, and said J. R. Quinn having become non compos mentis, E. L. Wilson, one of the plaintiffs, became administrator de bonis non of Elizabeth Quinn, deceased, and also guardian of J. R. Quinn. That defendant, administrator, has on hand an amount of money arising from a recovery had by said defendant by reason of negligence of a railroad company causing the death of intestate. That action against the company for such wrongful act was begun November, 1904, judgment obtained in December, 1904, and amount was paid on 11th of January, 1905. And the question presented, on these and other facts stated, is whether E. L. Wilson, one of the plaintiffs, administrator de bonis non of Elizabeth Quinn and guardian of the husband of Elizabeth Quinn, who had been her qualified administrator, is entitled to her proportion of the fund as distributee. The judge below held and entered judgment as follows: "This cause coming on to be heard upon the statement of the facts in the case agreed, and after hearing arguments and duly considering the same, now, upon motion of O. F. Mason, attorney for E. L. Wilson, administrator d. b. n. of Mrs. Elizabeth Quinn, it is adjudged by the court that the said E. L. Wilson, administrator as aforesaid, is entitled to recover, and that he do recover of the defendant F. G. Wilson administrator of the estate of Robert Q. Wilson the sum of $628.34, the admitted balance in his hands, which sum, in the opinion of the court, belongs to the estate of the said Elizabeth Quinn under the facts agreed upon as aforesaid. It is further adjudged that Mrs. Minerva Neill, Mrs. Daisy Hutchison, Willis Wilson, Connie Wilson, Charles Wilson, Rebecca Wilson, and Shelton Wilson have received their full share of the estate of Robert Q. Wilson, as well as their share in the fund recovered from the Southern Railway Company by F. G. Wilson, administrator of Robert Q. Wilson, and the said parties are therefore excluded from participating in the funds in controversy. It is adjudged that the administrator F. G. Wilson pay the costs of this proceeding out of the said funds." From the judgment, the distributees, other than E. L. Wilson, administrator and guardian, appealed.

A. G. Mangum, for appellant. O. F. Mason, for appellees.

HOKE, J. (after stating the facts as above). Our statute addressed to this question (Revisal 1905, § 59) enacts as follows: "Whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amount in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy." It is said in Cooley on Constitutional Limitations (7th Ed.) p. 577, "that a vested right of action is property in the same sense that tangible things are property," and, quoting this authority with approval in Duckworth v. Mull, 143 N. C. 466, 55 S. E. 852, the court said: "While in ordinary transactions the term 'property' is not supposed to include a right of action, yet in constitutions and public statutes, where the words permit and the spirit and intent of the law require, a vested right of action is frequently considered and treated as property." It is not required, however, to resort to this rule of construction as on a statute of doubtful import, for we are of opinion that the statute quoted gives clear indication of the purpose of the Legislature to impress upon the right of action, the character of property as a part of the intestate's estate, and that for the purpose of devolution and transfer the right of the claimants should be fixed and determined as of the time when the intestate died. Even if the statutes were less explicit the inconvenience of adopting any other period for determining who should be the rightful claimants, and the uncertainty that would attend it, extending in many instances over a

long period of time, would almost of necessity compel such a construction.

This position finds some support in the case of Baker v. Railway, 91 N. C. 308, where the court sustained and made effective a release given by one of the beneficiaries prior to recovery. According to the interpretation we have given it, that the right of action conferred is property, and to be treated, for the purpose of distribution, as a part of the intestate's estate, the recognized principle applies, referring to the time of the intestate's death as the period when the distributees, as the rightful claimants of vested interests, shall be fixed and determined. Whit v. Ray, 26 N. C. 14; Rose v. Clark, 8 Paige (N. Y.) 574; 14 Cyc. pp. 107–109. It follows from this position that, under section 4, Revisal 1905, the administrator de bonis non of Mrs. Quinn is entitled to her share of the fund in question, to be held by him for the benefit of J. R. Quinn, the husband, subject to the claims of her creditors and others having rightful demands against her; for the protection of this fund against creditors provided for by the statute (section 59, supra) refers to the creditors of the intestate, and does not extend or apply to the creditors of the distributee.

There is no error in the judgment below, and the same is affirmed.

Affirmed.

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(146 N. C. 235)

## SHAW v. HIGHLAND PARK MFG. CO.

(Supreme Court of North Carolina. Dec. 4, 1907.)

1. MASTER AND SERVANT—LIABILITY OF MASTER—FAILURE TO FURNISH APPLIANCES.
Failure of a master to furnish sufficient help and suitable appliances on request therefor by plaintiff, an experienced workman, whereby plaintiff was injured, is negligence on the part of the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 176.]

2. SAME—AUTHORITY TO GIVE ORDERS.
A master intrusting authority to control others is responsible for the manner of its exercise, and is liable for any abuse of such authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 385.]

3. SAME—ACTION—QUESTIONS FOR JURY.
In an action for injury to servant, the question whether the negligent failure of the master to furnish suitable appliances was the proximate cause of the injury *held* to be for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1016.]

4. SAME—ADMISSIBILITY OF EVIDENCE.
In an action for injury to a servant, *held* proper to permit plaintiff to testify how he would have used certain appliances if he had been supplied with them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 920, 921.]

5. WITNESSES—COMPETENCY.
In an action for injury to a servant, plaintiff was a competent witness as to his bodily condition after the injury.

[Ed. Note.—For cases in point, see Cent. Dig. 50, Witnesses, § 217.]

6. DAMAGES—QUESTIONS FOR JURY.
Where, in an action for personal injury, plaintiff testified that immediately after the accident his vision became badly impaired, *held*, that the jury might well refer the impairment of his eyesight to the injury received, and were properly permitted to consider it as an element of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 533, 534.]

Appeal from Superior Court, Mecklenburg County; Ward, Judge.

Action by J. W. Shaw against the Highland Park Manufacturing Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This was a civil action, instituted by the plaintiff to recover damages for injuries sustained while in the employment of the defendant on the 18th day of May, 1905; plaintiff being engaged at the time in directing the work of tearing down a cloth press in defendant's mill, preparatory to moving to another part of the building. The court submitted these issues: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? A. Yes. 2. Did the plaintiff by his own negligence contribute to his own injuries? A. No. 3. What damages is the plaintiff entitled to recover? A. $5,000." From the judgment rendered defendant appealed.

Tillett & Guthrie, for appellant. McNinch & Kirkpatrick, R. S. Hutchison, and Burwell & Cansler, for appellee.

BROWN, J. The matter involved in this appeal was before this court at a former term, and constitutes the second cause of action, reported in 143 N. C. 134, 55 S. E. 433. That opinion is referred for a general statement of the case. The jury having found the issue of contributory negligence against the defendant, and there being no error committed by the court upon the trial of that issue pointed out to us, that question may be considered settled.

The learned counsel for defendant contends now that the plaintiff is not entitled to recover in any aspect of the case (a) because there is no evidence that the defendant was guilty of negligence in failing to furnish two chain blocks and tackle or other proper appliances; (b) there is no evidence that the failure to furnish sufficient hands caused the injury; (c) the defendant's negligence was in no sense the proximate cause of the plaintiff's injury. We will not consider in detail the numerous exceptions for failure to give defendant's prayers for instruction on the issue of negligence, as, in the view we take of the case, it is needless to do so.

His honor might well have instructed the jury that, if they believed the evidence in the case, the defendant was guilty of negligence in failing to furnish the plaintiff with sufficient and proper tools and appliances reasonably necessary for the accomplishment of the work the plaintiff was commanded to do,

and also for failure to furnish sufficient assistants reasonably necessary to help in performing it. The entire evidence upon this issue is embraced by the testimony of the plaintiff himself, and that tends to prove that plaintiff was ordered by Superintendent Constable to move the bed plate and plunger, weighing some 5,000 pounds, to another part of the mill, and that Constable was present, overlooking the manner in which the work was done. Plaintiff told Constable that he needed a two-ton chain block, but Constable said he could not afford to hire it, as it would cost him $1 a day, and it would take two weeks to finish the job, and that the mill was not making any money, and the plaintiff would have to make out with the two small chain blocks. The plaintiff protested, stating that the small chain blocks were too little, but was told by Constable to go ahead and use them anyway. Plaintiff again told Constable that he thought they were too small, and he wanted a heavier one, but was again instructed by Constable to go ahead and use them, as they were all right. When plaintiff went to use these chain blocks, he found that one of them was defective, or out of repair, so that he could not use it. Both Constable and Johnson, the general manager of the mill, knew at the time that this chain block was out of repair, and that plaintiff could, therefore, only use one of the two chain blocks in tearing down the press. The evidence tends to prove that plaintiff had large experience in moving heavy machinery, and knew what was necessary; that he had been working for defendant some 10 years, and had used a two-ton chain block frequently in unloading heavy machinery, and that such chain block is nearly double the size of the chain block used on this occasion. The evidence shows that insufficient help was furnished (one man and three inexperienced colored boys), and, upon plaintiff's protesting that such help was insufficient, Constable said he knew the three boys were not "worth a damn," but that they were all he had, and he directed plaintiff to go ahead, and promised to furnish more help, which he failed to do. Upon this uncontradicted evidence, his honor would have been justified in charging the jury that, if believed to be true, it proved that the defendant's superintendent had been undeniably negligent in his duty to plaintiff. The defendant failed to furnish appliances proper and necessary for such work. It furnished defective appliances, and such as were insufficient in size and number. It failed to furnish sufficient assistants, although repeatedly demanded by plaintiff, and three of those furnished were inexperienced and unsuitable for that kind of work. The uncontradicted declarations of the superintendent himself proves that the appliances and help demanded by plaintiff were necessary for the safe performance of the work, and that those furnished were utterly insufficient. It is immaterial that the superintendent was a competent one. Those intrusting authority to control others are held responsible for the manner of its exercise. If it is abused, those conferring it are held responsible for its abuse. Tanner v. Lumber Co., 140 N. C. 475, 53 S. E. 287; Mason v. Machine Works (C. C.) 28 Fed. 228. We scarcely deem it necessary to cite authority to sustain our view that the defendant fell far short of its legal duty to plaintiff, but the controlling principles are to be found in Phillips v. Iron Co., at this term, where some of the precedents in our own reports are cited. 2 Labatt, §§ 572, 573; Lamb v. Littman, 128 N. C. 361, 38 S. E. 911; Means v. Railroad, 124 N. C. 574, 32 S. E. 960, 45 L. R. A. 164; Flike v. Railroad, 53 N. Y. 549, 13 Am. Rep. 545; Mason v. Machine Co., supra; Railroad Co. v. Fort, 17 Wall. 553, 21 L. Ed. 739; Railway Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787. With due deference for the learned counsel for defendant, we think Stewart v. Carper Co., 138 N. C. 60, 50 S. E. 562, relied on by them, has but little bearing on this controversy. In that case the negligence charged was not that the master had altogether failed to furnish an elevator, or that the one furnished was our of repair, but that the elevator which he had furnished was lacking in certain safety appliances in general use. Hence the court held that, in order to convict the defendant of the negligence charged, the plaintiff must offer evidence tending to show that the elevators in general use were equipped with the safety appliances which this particular one lacked.

No complaint is made of the design and construction of the chain blocks furnished the plaintiff, but the charge is that those furnished were insufficient for the work in hand, because one was broken and the other too small. As was tersely said by the learned counsel for the plaintiff, Mr. Cansler, "the master is just as culpable in furnishing appliances sufficient in quality, but deficient in quantity, as he is for furnishing those sufficient in quantity, but deficient in quality." It is contended again that the failure to furnish proper chain blocks and assistants was not the proximate cause of the injury, and therefore the negligence is not actionable. The Covington Case, 138 N. C. 374, 50 S. E. 761, relied upon by defendant, differs materially from this. There the case was made to turn upon the contributory negligence of the defendant. Here that defense is eliminated by the finding of the jury. We think his honor properly submitted the question to the jury as to whether the negligent failure to furnish sufficient appliances and help was the cause of plaintiff's injury. This is a deduction to be drawn by the jury from the facts in evidence, and the evidence abundantly supports the conclusion they reached.

His honor properly permitted plaintiff to testify what he would have done with the

two-ton chain blocks, and how he would have suspended the bed plate by means of it, and whether under such conditions it was possible for the bed plate to have fallen on him. These statements of the witness were competent to explain the connection between the alleged negligence and the injury. Before the jury could safely draw any inference from the lack of such machinery, they should understand its operation. Certainly the plaintiff demonstrated that he was fully competent to explain it.

The defendant excepted to the charge of the court permitting the jury to consider injury to plaintiff's eyesight as an element of damage, upon the ground that there is no evidence to support such claim. Upon this subject the plaintiff testified: "The muscles and tendons were torn loose in my side, and my arm was affected—paralyzed to certain extent. It is still dead and numb. It also affected my eyes. My eyes are crossed. I see two objects. I could see perfectly good before I sustained the injury. Immediately after the injury, and from that time up to the present, I cannot see at all hardly." It may be that plaintiff is not an expert on diseases of the eye, but he is a competent witness to testify to a fact. If the jury believed that his eyesight was perfectly normal before the injury, and that immediately after the injury he could not see "at all hardly," they might well refer this misfortune to the injury received, and find a causal connection between the two; there being no other apparent cause. The injury to the sight following almost instantly upon the bodily injury differentiates this case from those cited by defendant, where the disease was not developed until months afterwards. The case of Proulx v. Bay City, 143 Mich. 550, 107 N. W. 273, is very much in point. The plaintiff fell upon the sidewalk and sustained physical injuries, consisting of a bruise to the knee and the running of a sliver into her left hand. Some days after this accident, paralysis in the left side, pains in the back, difficulty of articulation, and trouble with the vision appeared. In holding that the question whether the injuries were the direct cause of the subsequent ailments was for the jury, the Michigan Supreme Court said: "We think it was so clearly a question of fact for the jury as to whether the physical injury was the direct cause of the paralysis and other symptoms as not to require discussion." In that case there was no expert or opinion evidence introduced. The matter was left to the jury to say from the facts testified to, as to whether there was any causal connection between the injury received and the subsequent paralysis. See, also, Hirte v. Railway, 127 Wis. 230, 106 N. W. 1068; Adcock v. Nav. Co., 45 Or. 173, 77 Pac. 78; Lindemann v. Railroad Co., 69 App. Div. 442, 74 N. Y. Supp. 988; Sellman v. Wheeler, 95 Md. 751, 54 Atl. 512; Wright v. City, 60 Wis. 119, 18 N. W. 750, 50 Am. Rep. 350.

Upon a review of the whole record, we find no error.

No error.

WALKER, J., did not sit.

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(146 N. C. 230)

## J. F. WHITE CO. v. CARROLL.

(Supreme Court of North Carolina. Dec. 4, 1907.)

1. CHATTEL MORTGAGES — ACTION TO FORECLOSE — PLEADING — CONSTRUCTION — PROPERTY MORTGAGED — AFTER-ACQUIRED GOODS.

In an action to foreclose a mortgage on a stock of goods, the answer alleged that the goods described in the mortgage had been sold. Plaintiff replied that defendant had agreed that goods subsequently purchased by him from plaintiff, and all other goods in defendant's store, should be subject to the lien of the mortgage, "and mortgaged to plaintiff as security for the credits so extended, all of the goods in said store at the time of the bringing of this action." *Held*, that under Revisal 1905, § 495, providing that pleadings be liberally construed with a view to substantial justice between the parties, the reply should be construed as alleging a parol mortgage on the after-acquired goods, or an agreement that defendant might sell the original stock in the course of trade, and that new goods bought and substituted for those should be subject to the lien.

2. SAME—PAROL MORTGAGE.

A parol mortgage upon after-acquired goods is good, at least between the parties, provided, if reduced to writing, it would have been valid, and is not objectionable on the ground that it embraces future acquisitions of goods not then in esse, or not belonging to the mortgagor at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 61.]

3. SAME—FORM.

No particular form of words is necessary to create a lien or to constitute a mortgage; it being sufficient that the parties intended their agreement to operate as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 83.]

4. PLEADING — REPLY — MATTER TO BE PLEADED.

In an action to foreclose a mortgage on a stock of goods, the answer alleged that the goods described in the mortgage had been sold. *Held*, that a reply stating that it was agreed that the mortgage should include the stock as it changed from time to time was not improper, though Revisal 1905, § 503, provides that new matter in an answer is to be deemed controverted by plaintiff as upon a direct denial, since defendant was not prejudiced by being informed of the particular grounds of plaintiff's claim.

5. SAME—LEAVE OF COURT TO REPLY—MOTION TO STRIKE OUT.

A reply should not be stricken out because it had not been filed by order of court and was not marked "Filed," after it had remained unfiled several terms without objection from defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1394.]

6. SAME—CONSISTENCY.

In an action to foreclose a mortgage on a stock of goods, the complaint, alleging plaintiff's title and right of possession, and the reply, alleging that the mortgage covered the stock as it changed from time to time, are not inconsistent, since the plaintiff in his reply merely amplifies the statement of his title, and does not set up a new cause of action.

Appeal from Superior Court, Granville County; Justice, Judge.

Action by the J. F. White Company against C. A. Carroll to recover a stock of goods. From a judgment of nonsuit, plaintiff appeals. Reversed, and new trial ordered.

This action was brought to recover a stock of goods. It appears that the defendant had given to the plaintiff on March 16, 1900, a mortgage on the stock of goods then in his store to secure the price of goods bought by him. The plaintiff alleged that he was entitled, under this mortgage, to the property. The defendant answered on August 1, 1906, and denied the execution of the mortgage, and averred that it was without consideration, and that it does not embrace any goods seized by the sheriff in this action or any goods now in the defendant's store; the stock of goods described in the mortgage having long since been sold or disposed of. He then avers that the mortgage, together with two others made at the same time, each for $300, was executed by agreement of the parties to defraud the defendant's creditors. The plaintiff replied on November 10, 1906, as of August term, 1906, as follows: "That subsequent to the execution and assignment of said bond and mortgage defendant bought other goods from the plaintiff, which he expressly agreed should be included in and held subject to the lien of said mortgage, and from time to time, and until shortly before the bringing of this action, continued to buy other goods from the plaintiff, under an agreement that the goods so purchased, and all other goods in the defendant's store, should be subject to the lien of said mortgage, and mortgaged to plaintiff as security for the credits so extended, all of the goods in said store at the time of the bringing of this action." It also denied the fraud alleged in the answer. The reply remained on file for two terms of the court before the trial of the case. At April term, 1907, on motion of the defendant, the judge struck out the reply, because it had not been filed by order of the court, and was not marked "Filed," and, further, because the answer did not call for a reply. At the trial the plaintiff offered to introduce evidence tending to show "that the defendant told the plaintiff a day or two after the date of the mortgage that he had given the mortgage to secure that debt, and such as might be contracted thereafter; that he had given Brown a paper that would protect the plaintiff as to the goods he already had and as to such as he might purchase thereafter, and from time to time continued to buy other goods from the plaintiff under an agreement that the goods so purchased and all other goods in the defendant's store should be subject to the provisions of the plaintiff's mortgage." The court excluded the evidence, and the plaintiff excepted. The court having inspected the mortgage and held that the plaintiff had no lien on the goods, except those in the store at the date of the mortgage, the plaintiff excepted to the ruling, submitted to a nonsuit, and appealed.

Graham & Devin, for appellant. Winston & Bryant, for appellee.

WALKER, J. (after stating the facts as above). If it was the intention of the pleader to allege in the third section of the reply that there was a mutual mistake in drawing the mortgage, and that the real contract between the parties was that the instrument should embrace, not only the goods then in the store, but all thereafter purchased to renew or replenish the stock, he should have so plainly stated and asked for a correction of the mortgage in that respect; but, while it would seem from the proof tendered that he intended so to allege in part, we think that both the reply and the proof which were rejected by the court must be given a broader scope and extend, not only to a mistake in the mortgage, but also include a separate and independent agreement to give the plaintiff a parol mortgage upon the original stock and all subsequent additions to it, or all goods thereafter purchased, to secure the entire indebtedness due to him. The expression in the reply, "and [the defendant] mortgaged to plaintiff, as security for the credits so extended, all of the goods in said store at the time of the bringing of this action," would seem to bear this construction if we give it a liberal interpretation, which we are required to do in order to administer substantial justice between the parties. Revisal 1905, § 495. The pleading is not very explicit, we admit, but is sufficient, by the indulgence of the law, to embrace the idea of a parol lien or mortgage upon after-acquired goods. Such a mortgage is as good, at least between the parties, as if it had been in writing, provided, if reduced to writing, it would have been valid. Cobbey on Chattel Mortgages, § 14; McCoy v. Lassiter, 95 N. C. 88; Moore v. Brady, 125 N. C. 35, 34 S. E. 72. There can be no objection to the validity of the parol mortgage upon the ground that it embraces future acquisitions of goods not then in esse, or not belonging to the mortgagor at the time. Perry v. White, 111 N. C. 197, 16 S. E. 172; Brown v. Dail, 117 N. C. 41, 23 S. E. 45; Jones, in his work on Chattel Mortgages (4th Ed.) § 154, says that a mortgage upon a stock of goods, and any new goods acquired by way of renewal or substitution for them, is valid, at least between the parties to it. See, also, section 172, and Cobbey on Chattel Mortgages, §§ 355, 370. The reply is susceptible of the construction that the plaintiff and defendant agreed that the former might sell the original stock in the ordinary course of trade, and that all new goods bought and substituted for those sold should be subject to the lien. This agreement would seem to

come within the principle stated and applied in Sharpe v. Pearce, 74 N. C. 600 (Jones on Mortgages [4th Ed.] § 71); and would, perhaps, be valid as between the parties to the mortgage. We have held that no particular form of words is necessary to create a lien or to constitute a mortgage; it being sufficient that the parties intended their agreement to operate as such. McCoy v. Lassiter, supra. The law seeks after the common intention of the parties and enforces it, as between them, when it is ascertained. The ruling of the court by which the reply was stricken out we think was erroneous.

If it was necessary for the defendant to aver that the mortgage given to the plaintiff did not embrace the property in dispute, instead of simply denying the plaintiff's title and right of possession thereto, this new matter is deemed to be controverted by the plaintiff as upon a direct denial or avoidance, as the case may require. Revisal 1905, § 503; Fitzgerald v. Shelton, 95 N. C. 519; Buffkin v. Eason, 110 N. C. 264, 14 S. E. 749; Clark's Code (3d Ed.) § 268, and cases cited at pages 288 and 289. And, this being so, why should it be held improper for the plaintiff to file a written reply in order to state distinctly his defense to the new matter, whether a counterclaim or not, instead of relying upon the statutory reply. Such a written reply was made in Bean v. Railroad, 107 N. C. 731, 12 S. E. 600, and expressly approved by the court. Whether he would be bound by such a pleading, and forbidden, at the trial, to prove other matter by way of avoidance, we need not decide, for the question is not before us. How was the defendant prejudiced by being informed of the particular grounds upon which the plaintiff claimed the right to recover the property? We are inclined to the opinion that, as the plaintiff merely alleged his title and right to possession, a general denial by the defendant would have sufficiently presented the real issue between the parties, unless the plaintiff sought to reform the mortgage. There is a marked difference between such an equity to reform the instrument and an agreement merely to substitute other property for that described in the mortgage. We think the court erred, also, in striking out the reply after it had remained on file several terms without any objection from the defendant. Dempsey v. Rhodes, 93 N. C. 120; Kerchner v. Reilley, 72 N. C. 171; McMillan v. Baker, 92 N. C. 110; Corn v. Stepp, 84 N. C. 599.

We do not find any inconsistency between the complaint and the reply. In the complaint the plaintiff alleges simply his title and right of possession and in the reply he shows how he acquired them. Where is the conflict? Houston v. Sledge, 98 N. C. 414, 4 S. E. 197; Hardin v. Ray, 94 N. C. 456. There is no departure in pleading here, as we understand the several allegations of the complaint and the reply. The plaintiff merely amplifies, in the latter, the statement of his title, and the case is in principle therefore exactly like Simpson v. Lumber Co., 133 N. C. 95, 45 S. E. 469. There is no new cause of action set up.

It is not necessary that we should consider the other matters discussed in the learned and well-prepared briefs of counsel. We are of the opinion that the court erred in its rulings upon the pleadings and the evidence, and a new trial is ordered.

New trial.

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(146 N. C. 258)

## SPRINKLE et al. v. HOLTON et al.

(Supreme Court of North Carolina. Dec. 4, 1907.)

1. EXECUTORS — RIGHTS AND LIABILITIES OF LEGATEES—CONTRIBUTION.

A legatee who has received no more than his legal share of the estate is not liable to account to another legatee, who, by reason of the devastavit of the executor, fails to receive his full share, but the remedy is against the executor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1267–1269.]

2. SAME.

Where, by mistake as to the condition of the estate, the executor pays to a legatee more than his share, or if by some unforeseen cause, for which the executor is not responsible and which clearly could not reasonably have been anticipated, it turns out on a final settlement that he has overpaid some of the legatees, the executor, after making good to the other legatees their share, may have relief in equity against the overpaid legatees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 1265, 1319–1327.]

3. TRUSTS—ENFORCEMENT—LACHES.

An executor having a power of sale under the will sold real property to the testator's widow, and later took judgment for the price. Having already paid the older children in confederate money an amount greater than the judgment, by arrangement with the widow and younger children, the younger children paid off the judgment and the property was conveyed to the widow for life, with remainder to the younger children. Later all the children joined in a petition for the sale of other property of the estate, and divided the proceeds equally. More than 30 years after the conveyance, during which time it had not been questioned and the property had been improved, the older children sued to enforce a trust in their favor in the land. *Held* that, if the deed was a breach of trust by the executor, the right of action accrued at once, and the laches of the plaintiffs was a bar to the suit.

Appeal from Superior Court, Mecklenburg County; Ward, Judge.

Action by William Sprinkle and others, against Charles S. Holton and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

The plaintiffs' evidence, the material parts of which are of record, discloses this case.

Thos. J. Holton died December 27, 1860, having first made and published his last will and testament, in which he made the following disposition of his estate:

"Item 1. I will, devise and bequeath my whole estate, real and personal, including my choses in action, to my friend, Ebenezer Hutchison in trust primarily for the payment of all my debts, and secondly for the equal use and benefit of all my children, subject nevertheless to the reservation on the part of my beloved wife Rachael, of the same rights in my estate to which she would have been entitled under the law of North Carolina in case I had died intestate, hereby investing said Hutchison with full power and authority to make such disposition by sale of all or any portion of my estate, either publicly or privately, as he may deem most judicious for the promotion of the interest of my creditors, and that of my children by the way of distribution.

"Item 2. I hereby nominate and appoint my said friend E. Nye Hutchison sole executor of this my last will and testament."

The will was duly admitted to probate and the executor qualified according to law. The testator left surviving his widow, Rachael Holton, who dissented and dower was duly allotted to her, Mary, who married plaintiff Wm. Sprinkle, and died leaving the plaintiffs Walter Sprinkle, Thos. H. Sprinkle, and Mary S. Bentheim, her heirs at law, plaintiff Sarah, who intermarried with J. L. Deaton, defendants Chas. S. Holton, Harriet Holton, Rachael, who intermarried with Crisp, Edwin Holton, Harrison Holton, and Virginia, who died intestate and without issue. Thos. J. Holton, at the time of his death, was the owner of several lots of real estate, all of which, except that allotted to the widow as dower, were sold by his executor, pursuant to the power conferred by the will. He also sold the personal property. After paying the debts, he paid to the children Mary, Sarah, and Harrison, in confederate money, the sum remaining in his hands, less a small amount. The testator owned two lots in the city of Charlotte which the executor sold at public auction, October 13, 1863, to the widow Rachael Holton for the sum of $3,592.65. To secure the purchase money she executed her note, with personal security, the executor retaining the title until the note was paid. The lot brought a fair price. At October term, 1869, of the superior court of Mecklenburg county, the executor obtained a judgment on the note against said Rachael and her security. On July 3, 1872, he filed an account in the superior court of Mecklenburg county, showing the manner in which he had administered the estate. It appears from said account that, after paying the debts, he had paid over to the plaintiffs, Mary and Sarah, and to defendant Harrison, in confederate money, and by sale of property, amounts aggregating more than the judgment against Rachael Holton. It also appeared that he had not paid to the other, or younger, children, any amount whatever. On the 1st of October, 1872, the executor executed a deed, the material parts whereof are as follows:

"This indenture made and executed this 1 day of October, in the year of our Lord eighteen hundred and seventy-two, by and between E. Nye Hutchison, executor of the last will and testament of T. J. Holton, deceased, of the city of Charlotte, county of Mecklenburg, state of North Carolina, of the first part, Rachael R. Holton, of said city, county and state, of the second part, and Charles S. Holton, Edwin J. Holton, Hattie C. Holton, and Rachael Holton, herein all of said county and state, of the third part. Whereas, at a sale of the real estate of the said T. J. Holton pursuant to Will of said testator by the party of the first part, the said Rachael R. Holton, became the purchaser of two lots, viz., one situated in the city of Charlotte aforesaid on the northeast corner of Trade and College streets, fronting 99 feet on each of said streets with the alternate lines parallel to the same and of the same length, and one other in said city on the northwest corner of Trade and B streets, lying between B street and the dower lines of said Rachael R. Holton and on which she resides, fronting 76 feet on Trade street and on B street 198 feet with alternate lines parallel to the same and of corresponding lengths with those on said streets, and gave her a note therefor, the title being retained until the said note should be paid. And whereas the parties of the third part have this day paid to the party of the first part the sum of $3,592.05 each paying one-fourth of said sum in discharge of a judgment rendered and now docketed in the superior court of Mecklenburg county on the note given as aforesaid for the purchase of said two lots. And whereas the said payment has been made by an arrangement and agreement between the parties of second and third parts and this deed conveyance and all its provisions, limitations and conditions are made in conformity with said arrangements and agreement as settled and determined by and between themselves. Therefore, this indenture witnesseth: That the party of the first part for and in consideration of the said sum of $3,592.05 paid as aforesaid by the parties of the third part, and with the consent and agreement of the party of the second part and for the further consideration of the sum of five dollars in hand paid by the party of the second part," etc. He proceeds to convey to the said Rachael in fee the second lot described in the preamble, and the first lot (being the lot described in the complaint) to the said Rachael for life, remainder to the defendants herein, with certain contingent limitations, etc., not necessary to be set out here. This deed was duly proven and recorded in the office of the register of deeds of said county January 2, 1873. The said Rachael and the defendants took possession of said property, and remained therein until her death November 22, 1905. The defendants continued to hold the possession. The plaintiffs introduced the deposition of Dr. E. Nye Hutchison, the executor, who, upon cross-

examination, said that the deed was executed pursuant to, and in execution of, a settlement made between Rachael Holton, the younger children represented by Mr. H. W. Guion, and himself, represented by Mr. Jos. H. Wilson, members of the bar; that upon examination it was found that the older children had received a sum from their father's estate larger than the interest of the younger children in the judgment against Rachael Holton; that, when he made the deed, he considered it a final settlement of the estate. There was no suggestion of any fraud in the transaction. The defendants have put valuable improvements on the lot conveyed to them, and have executed deeds in trust to secure indebtedness to defendants, trustees of the Union Theological Seminary, W. S. Alexander, trustee, and the Southern Real Estate Loan & Trust Company. Their interests are not, however, affected by this litigation. The plaintiffs demand judgment that the deed of October 1, 1872, be declared invalid; that the plaintiffs and defendants be adjudged to own the property, as tenants in common, and for other relief. Defendants, among other defenses, plead the several statutes of limitations.

His honor being of the opinion that plaintiffs were not entitled to recover, rendered judgment of nonsuit. Plaintiffs excepted and appealed.

W. J. Montgomery, Chase Brenizer, and Maxwell & Keerans, for appellants. Clarkson & Duls, R. S. Hutchison, and Burwell & Cansler, for appellees.

CONNOR, J. (after stating the facts as above). There can be no doubt that, under the terms of the will of Thos. J. Holton, the executor was empowered to sell all the real estate. Hence the sale of the lot in controversy to Rachael Holton was valid, and constituted, upon the execution of the note, a binding contract whereby she acquired an interest in the property entitling her to call upon the executor for a deed by paying the note. It is equally clear that the note, in the hands of the executor, constituted an asset, or fund, to be distributed in accordance with the will of Holton. The interest of the plaintiffs and defendants, devisees and legatees of Holton, in the lot was merged into the note. Only by a cancellation of the contract and of the note could their interest in the property be reinstated. This could only be accomplished with the consent of all parties in interest. The executor was in the line of his duty when he obtained judgment on the note. His next step in the settlement of the estate was to subject the lot to sale for the purpose of paying the judgment. If he had done so, it is manifest, from the state of his account, that it would have been his duty to pay the proceeds to the younger children, the defendants herein, who had received no part of their share of the estate. Any surplus from the sale of the lot would have belonged to Mrs. Rachael Holton.

In this condition of the estate, the executor, the widow, and the four younger children, acting under the advice of counsel, made the arrangement pursuant to which the deed was executed. We do not see how the plaintiffs can justly complain of the terms upon which this deed was executed, or the settlement made, or how any wrong was done them, entitling them to have the deed invalidated. If the executor had received from Rachael Holton the money and immediately paid it to defendants, and she had conveyed to them an estate in fee, reserving a life estate, there can be no doubt that their title would have been perfect. We do not perceive any substantial difference in the two transactions. It is conceded that the executor is solvent, and if, by the arrangement made, he paid to defendants a larger amount than they were entitled to, he, and not the defendants, is liable to plaintiffs. It appears from the record, not only that the executor is solvent, but that at the time the deed of October 1, 1872, was made, there was other property of the estate from which the plaintiffs could have received any sum to which they might show themselves entitled by reason of the payment to defendants of the amount of the judgment against Rachael Holton. It also appears that after the death of Mrs. Holton the reversion in the dower was sold upon petition of plaintiffs and defendants for $14,000, and by consent of all parties divided equally.

While, in the view which we take of the case, all of this is immaterial, it is manifest that, if it be conceded that by the execution of the deed the defendants received more than their fair share of the estate, the plaintiffs have no equitable ground upon which to cancel the deed. They suggest that the sums paid them in confederate money should be "scaled," and they be charged with the amount which it was worth in gold. While no case is cited in which this court has held that such is the principle upon which the estate should be settled, if it be conceded that the plaintiffs' view is correct, and if it be further conceded that the plaintiffs have any cause of action against defendants, it certainly could not extend to the cancellation of the deed of October 1, 1872. The only possible liability to which they could be subjected would be to pay to plaintiffs an amount which, together with what they have received otherwise, would make an equal distribution. It is well settled that a legatee who has received no more than his legal share of the estate is not liable to account to another legatee, who, by reason of a devastavit of the executor, fails to receive his full share. His remedy is against the executor. The one who receives but what belonged to him has done the other no wrong. There are a line of cases which hold that if, by mistake as to the condition of the estate, the

executor pay to one legatee more than his share, or if, by some unforeseen cause for which the executor is not responsible and could not have reasonably been anticipated, it turns out upon a final settlement that he has over-paid some of the legatees, he, after making good to the other legatees their share, may have relief, in equity, against the overpaid legatee. But the court will grant such relief only when it clearly appears that the executor was unable to foresee the "peculiar circumstances" by reason of which the mistake occurred. Alexander v. Fox, 55 N. C. 106, 62 Am. Dec. 211; Lambert v. Hobson, 56 N. C. 424.

It may be that, if the executor is insolvent and the legatee who has suffered loss under circumstances which would have entitled the executor to relief in equity, such legatee would be subrogated to the rights of the executor. No such condition is shown here, for the reason that there were ample resources of the estate from which equality could have been secured, and that with the concurrence of the plaintiffs they have been distributed. While not technically an estoppel, the conduct of the plaintiff in this respect is very cogent evidence of acquiescence in the settlement made by the executor with the defendants and a recognition of the fact that, as understood by him, the execution of the deed was a final settlement. The deed setting forth the terms of the settlement was recorded January 3, 1873. Thirty-three years elapsed during which no action was taken by plaintiffs. During this time the widow and the defendants were in possession of the property making valuable improvements upon it, executing mortgages and in all respects treating as their property in a manner consistent with the terms of the deed and inconsistent with any trust relation. The fact that the widow had a life estate did not, in any manner, affect plaintiffs' right to sue. If the deed was invalid, she had no better right under it than the defendants. The authorities cited by counsel fully sustain their position that the defendants took and held with notice of the provisions of the will, but they took and held in accordance with the will. If executing the deed was a breach of trust by Dr. Hutchison, the cause of action therefor accrued to plaintiffs at once. They had full notice of what he had done and for 33 years acquiesced in it. To permit them now, after the property has been improved by defendants and increased in value, to attach a trust to the legal title and set aside the settlement, would be doing violence to an unbroken current of decided cases and sound equitable principles. We have no doubt, after a careful inspection of the record, that Dr. Hutchison, under the advice of gentlemen eminent at the bar for learning and of high personal and professional position, has dicharged his duty and executed the trust reposed in him with fidelity. The settlement was made without the slightest suggestion of a breach of trust and put upon the public records. The plaintiffs, with full knowledge of it, by their silence for a third of a century, recognized its justice. The security of property rights, the peace of families, and the public welfare demand that there must be an end of litigation. Courts of equity have always wisely refused to entertain "stale claims." Harrison v. Hargrove, 109 N. C. 346, 13 S. E. 939.

The judgment of nonsuit must be affirmed.

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(146 N. C. 221)

## LEMLY v. ELLIS.

(Supreme Court of North Carolina. Dec. 4, 1907.)

1. COVENANTS — WARRANTY — BREACH — DAMAGES.

The measure of damages for breach of warranty of title to land is the proportion that the value of the land to which title failed bears to the whole consideration paid, or the amount paid to acquire title, not exceeding the purchase money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 245–253.]

2. INSANE PERSONS — PROPERTY — LIABILITY FOR SUPPORT.

The property of an insane person, especially when in custody of the court, will not be applied to the payment of his general indebtedness, as distinguished from claims for his present maintenance, until a sufficient fund is set aside for the support of the lunatic and his family.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Insane Persons, § 107.]

Appeal from Superior Court, Forsyth County; Ferguson, Judge.

Action by W. A. Lemly against W. B. Ellis. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Manly & Hendren, for appellant. Lindsay Patterson, for appellee.

HOKE, J. This case was before us on a former appeal, and was sent back for a new trial of the issue as to damages. See Lemly v. Ellis, 143 N. C. 200, 55 S. E. 629. The action was for breach of warranty in the sale and conveyance of realty on the part of defendant to plaintiff, and it appears that defendant sold and conveyed to plaintiff eight tracts of land, for an entire consideration of $37,000, a part of which was in money and another part in bonds. The title to one of the tracts proving to be defective, the present action was instituted, and, defendant being a nonresident, an attachment was issued and levied on $16,000 of bonds as the property of defendant, and which were at the time in possession and control of plaintiff. The consideration being entire, and the title to one of the tracts having proved defective, the correct rule for estimating the plaintiff's damages is the proportion that the value of the land, covered by title paramount, bears to the whole, estimated on the basis of the consideration paid, the real consideration; or, if a good title has been procured by the vendee, the basis for the correct apportionment would

be the amount reasonably paid to buy in the outstanding title, provided such amount did not exceed the purchase money. Price v. Deal, 90 N. C. 295; Woods Mayne on Damages, 1 Amer. Ed. pp. 285, 286. Under the charge of his honor, by fair intendment, the jury were directed to make the apportionment on the basis of the actual value of the land, and in this there was error to defendant's prejudice, for there was some evidence tending to show that the actual value exceeded the amount of the consideration.

Defendant further excepts to the refusal of the court below to set aside a portion of the attached property for the support of defendant and his family; it having been made to appear that defendant is now insane and has a wife and infant child resident in the state, and there being evidence tending to show that defendant is insolvent. It is an established principle with us that the property of an insane person, certainly where same is in custody of the court, will not be applied to the payment of his general indebtedness, as distinguished from claims for his present maintenance, until a sufficient fund is set aside for the support of the lunatic and his family, including his wife and infant children who are a part of his household. In re Latham, 39 N. C. 231; Adams v. Thomas, 81 N. C. 296; Adams v. Thomas, 83 N. C. 521. In Latham's Case, the doctrine and the reason upon which it rests is stated by Daniel, J., as follows: "But the better opinion is that the said statute was not introductive of any new right, but was only declaratory of the common law. Beverly's Case, 4 Steph. 126, 127; 2 Ves. Jr. 71; Bac. Abr. title 'Idiots and Lunatics,' C; Shelford, 12. And we take it that the king, as parens patriæ, by the common law, had the protection of all his subjects, and that, in a more particular manner, he is to take care of all those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves. Bac. Abr. 'Idiots and Lun.' C. All the lunatic's estate has been converted into money, and only the sum of $942.14 is now within the reach of this court. We think that this fund must be retained by the committee, not to pay his balance or the debts of any of the creditors, but for the purpose of maintaining the lunatic and his wife and infant children. That the court must reserve a sufficient maintenance for the lunatic, before making an order for payment of debts, or allowing to the committee sums already applied by him to that purpose, is clear from the nature of the jurisdiction in lunacy, as well as from the decisions. In Ex parte Hastings, 14 Ves. 182, Lord Eldon said he could not pay a lunatic's debts and leave him destitute, but must reserve a sufficient maintenance for him; and in Tally v. Tally, 2 D. & B. Eq. 385, that is cited with approbation by this court. With respect to the maintenance of the wife, and such of the children as, from tenderness of age or other causes, are dependent upon the parent, this court, in Brooks v. Brooks, 2 D. & B. Eq. 389, gave the opinion, that, though it was not mentioned in our statute, it was a proper charge upon the lunatic's estate—it not preventing the maintenance of the lunatic himself—upon the ground that the lunatic himself was chargeable with it; and, among the demands on his estate, to be provided for by order of the court, none can be more meritorious certainly, and no disposition of the lunatic's estate is so likely to promote the comfort and due care of the lunatic himself." Both the decisions and the legislation on the subject, of like import, give clear indications that the duty is enjoined in the proper care of unfortunates who are citizens or resident within the jurisdiction. And a further consideration of the question will require that the doctrine be modified or be further applied and expressed to the effect that the just and lawful demands of creditors should not be stayed or denied them, when it is made to appear that the care and support of the lunatic and his family are otherwise provided for, such provision belonging to them as of right, and not arising from the private bounty or charity of others.

On the first trial of this case the judge below was correctly advertent to the modification suggested, and rendered judgment directing an application of the property attached and its proceeds to the judgment, after hearing evidence and finding that the defendant himself was a resident of the state of New York and being cared for in a hospital there for the insane, and that his wife is a resident in Winston, N. C., with an infant child aged about 13 years, had property conveyed to her by defendant to the value of at least $10,000, and affording an annual income of about $1,200. It may be well to note that the time when the facts and circumstances pertinent to this question should be ascertained and declared is when the judgment is finally entered appropriating the funds, and it may be that a new inquiry should be had. But, if these or substantially similar conditions exist when the judgment is rendered, we think that the plaintiff should be allowed to have judgment appropriating the property attached to the amount he may recover.

For the error in the charge, there will be a new trial on the issue as to damages; and it is so ordered.

New trial.

(146 N. C. 191)

## CASHMAR-KING SUPPLY CO. v. DOWD & KING.

(Supreme Court of North Carolina. Nov. 27, 1907.)

1. PARTNERSHIP—PARTNERSHIP IN DIFFERENT FIRMS.

D. and K. were partners and debtors of plaintiff firm, of which K. was a member and general manager. D. paid to K. a sum of money as being in full for his share of the debt owing to plaintiff from the firm D. & K., and it was so accepted. *Held*, that plaintiff could not accept the money on the debt, and also deny K.'s authority to act as agent and bind the firm because he was interested as D.'s partner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 200.]

2. LIMITATION OF ACTIONS—PART PAYMENT.

A payment made and intended to be in discharge of the whole indebtedness is ineffectual as part payment to defeat operation of the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 642.]

3. SAME.

Part payment of a debt will not stop the statute of limitations unless the debtor intended it as an acknowledgment of the balance of the debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 644.]

4. SAME—MUTUAL ACCOUNT.

Where a creditor collects an amount for a debtor and applies it on his account without authority, it is not an item of a mutual account sufficient to stop the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 637.]

Appeal from Superior Court, Mecklenburg County; Ferguson, Judge.

Action by the Cashmar-King Supply Company against Dowd & King. Judgment for plaintiff, and defendants appeal. New trial granted.

This action was brought to recover the sum of $1,274.02, being the balance of an account alleged to be due by Dowd & King, of which firm the defendant is a member, to the plaintiff, for money advanced and goods sold and delivered. The original amount was $7,589.18, but on February 28, 1903, Dowd & King paid thereon $3,162.01, leaving a balance as of that date of $4,393.17. The debt of Dowd & King was contracted with the Dowd & King Supply Company, whose interest therein has passed to the plaintiff corporation, which is entitled to recover the balance of the account, if any is due. The firm of Dowd & King ceased to do business after the organization of the Dowd & King Supply Company and went into liquidation. On March 16, 1904, the defendant, W. F. Dowd, agreed with S. F. King, his former partner, who was at the time the treasurer and general manager of the plaintiff company, that he would pay to the plaintiff the sum of $3,119.15 in full satisfaction and discharge of his part of the liability as a member of the firm of Dowd & King to the plaintiff for the said balance of $4,393.17; it being two-thirds thereof, which was W. F. Dowd's just proportion of the liability as between him and S. F. King, the said Dowd having an interest of two-thirds and King the remaining interest of one-third in the partnership of Dowd & King. In pursuance of this agreement, he paid the sum of $3,119.15 to S. F. King, as treasurer and general manager of the plaintiff company, in discharge of his said liability to it, and the money, or its equivalent, was received by King for that purpose and credited on the books of the plaintiff to Dowd & King by S. F. King. It appears that on April 6, 1903, the Dowd & King Supply Company sold to Dowd & King merchandise to the amount of $6.25, and they are charged with that sum on the books of the supply company as of that date and are credited with $34 collected by the supply company for Dowd & King as of February 20, 1903. These amounts are included in the general balance of $7,589.18. The defendant W. F. Dowd, among other defenses, pleaded the statute of limitations. One of his defenses was that there had been a full accord and satisfaction of his liability to the plaintiff by virtue of the transactions between him and S. F. King, its treasurer and general manager. W. F. Dowd had been an officer of the Dowd & King Supply Company, and was an officer of the plaintiff company, before and after the transaction with S. F. King, but had no official connection with the latter company at the time of the said transaction. Evidence was taken upon the controverted matters between the parties, but it is not necessary to be stated, as it has no practical bearing upon the case, as decided by the court. The court submitted three issues to the jury which, with the answers thereto, are as follows: "(1) Is the defendant W. F. Dowd indebted to the plaintiff; and, if so, in what amount? Answer. $1,274.02, with interest from March 16, 1904. (2) Was the payment of $3,119.15 in full accord and satisfaction, as alleged in the answer? Answer. No. (3) Is the plaintiff's claim barred by the statute of limitations, as alleged in the answer? Answer. No." At the close of the testimony the judge charged the jury "that, if they found the facts to be in accordance with the testimony introduced in the cause, they would answer the first issue '$1,274.02, with interest from March 16, 1904'; the second issue, 'No'; and the third issue, 'No.'" Upon the verdict judgment was entered for the plaintiff, and the defendant appealed, having duly reserved exceptions to all errors in the rulings and charge of the court.

Stewart & McRae, for plaintiff. Pharr & Bell and T. C. Guthrie, for defendant.

WALKER, J. (after stating the facts as above). We need not stop to inquire whether S. F. King had sufficient authority to enter into the agreement with W. F. Dowd by which the latter was discharged from all liability upon the debt due to the plaintiff by Dowd & King, as we decide the case upon

another ground, though we are inclined to the opinion that there was no evidence of authorization or of ratification by the plaintiff.

The plaintiff's cause of action is barred by the statute of limitations, in any view of the evidence. It was not denied that W. F. Dowd paid the money to the plaintiff through its general manager, S. F. King, in full satisfaction and discharge of his liability to the plaintiff. It was only contended that King had no express authority to make the settlement with Dowd, and that there was no ratification of his act by the plaintiff, and specially that King was interested in the transaction, and could not therefore represent his principal so as to bind it. Whether the agent must derive some personal benefit from the transaction, in order to disqualify him to act for his principal, and so as to produce a conflict between his own interest and that of his principal, is another question which was ably argued before us, but the discussion of which we may well pretermit. If W. F. Dowd paid the money to King as general manager, in satisfaction of his liability, it is not within the power of the plaintiff to repudiate his act, as being one not authorized, and apply the money as a payment on the debt. The money must be accepted according to the intention of the parties to the transaction and applied accordingly; that is, to the full discharge of Dowd's liability, or rejected for the want of authority, in which case the parties would be restored to their original rights. Sound morality and fair dealing imperatively require the law to apply this rule to our business affairs. The plaintiff is not permitted "to blow hot and cold," or to accept and reject, at the same time. As the two rights are conflicting, the law gives to it an election to ratify the act of its agent, when it was discovered, and thereby discharge Dowd, or to reject the unauthorized act and stand upon its rights, unaffected by it. This principle is such a just and salutary one that it would surprise us if we should find that the law had not adopted it. But the law has, and by the decisions of this very court it has been fully recognized and applied to cases very much like the one at bar. What stronger statement of the doctrine do we need than the language of the court in Hewlett v. Schenck, 82 N. C. 234, as follows: "A partial payment, though the evidence need not be in writing, being an act and not a mere declaration, revives the liability because it is deemed a recognition of it, and an assumption anew of the balance due. But if, at the time such payment is made, the presumption arising from the unexplained fact is disproved by the attending circumstances, or other sufficient evidence of a contrary intent, the payment will not have such effect. Here not only can no inference of such intention be inferred, but there was an express agreement that Hart was not to be held responsible for the residue of his principal's defalcation, and the payment is made upon that understanding. While the chairman had no authority to enter into such an engagement, and, if he had, it would be inoperative for want of a consideration, as is held in McKenzie v. Culbreth, 66 N. C. 534, Bryan v. Foy, 69 N. C. 45, and Mitchell v. Sawyer, 71 N. C. 70, the evidence is competent and sufficient to repel the presumption of intention to assume the entire debt. Smith v. Leeper, 32 N. C. 86; Angell, Lim. 211, et seq., note, and numerous other cases cited for the defendants from reports in other states." The law as to the legal effect of a partial payment in discharging the entire debt, where there is an agreement of that kind, has been changed by Acts 1874–75, p. 208, c. 178; Revisal 1905, § 859. But that change does not in the least impair the force of the case we have cited as a conclusive authority against the plaintiff upon the facts in the record before us. Revisal 1905, § 371, declares as follows: "No acknowledgment or promise shall be received as evidence of a new or continuing contract, from which the statute of limitations shall run, unless the same be contained in some writing signed by the party to be charged thereby, but this section shall not alter the effect of any payment of principal or interest." It will be seen that there is no express provision that a partial payment shall prevent the operation of the statute, except from the time it was made. The statute merely leaves its effect to be determined by the law as it was before the enactment of the section as to a new promise. There was no reference in the statute of 21 Jas. 1, c. 26, to a payment as operating to stop the running of the statute and as fixing a new terminus a quo, as in the case of a promise to pay. A payment was allowed this effect by the courts, and for the reason that it raised an implied promise to pay the residue of the debt. But the rule is limited, in its application, to the reason upon which it is based, and the payment consequently must have been made under such circumstances as will warrant the clear inference that the debtor recognized the debt as then existing and his willingness, or, at least, his obligation, to pay the balance. Battle v. Battle, 116 N. C. 161, 21 S. E. 177; Pickett v. King, 34 Barb. (N. Y.) 193; Richardson v. Thomas, 13 Gray (Mass.) 381, 74 Am. Dec. 636; 1 Wood on Limitations, § 99; Bank v. Harris, 96 N. C. 121, 1 S. E. 459; Riggs v. Roberts, 85 N. C. 151, 39 Am. Rep. 692. The payment should be of such a nature and made in such a way as to imply in law that the debtor acknowledges the debt as still existing and promises distinctly and unequivocally to pay the same, just as Lord Ellenborough, in Fleming v. Hayne, 1 Starkie. 370, said should be the character of the promise when it is express. In 25 Cyc. p. 1373, we find it said: "A payment of part in full satisfaction of the whole, or accompanied by

acts or declarations showing that the debtor does not intend to pay the balance, will not suspend the statute or revive the balance of a barred debt." Linsell v. Bonsor, 29 E. C. L. 319, 9 Bing. N. C. 241; Jones v. Langhorne, 19 Colo. 206, 34 Pac. 997; Brisbin v. Farmer, 16 Minn. 215 (Gil. 187); Compton v. Bowns, 5 Misc. Rep. 213, 25 N. Y. Supp. 465; Bowker v. Harris, 30 Vt. 424; U. S. v. Wilder, 13 Wall. (U. S.) 254, 20 L. Ed. 681; Crow v. Gleason, 141 N. Y. 489, 36 N. E. 497; Aldrich v. Morse, 28 Vt. 642; Hale v. Morse, 49 Conn. 481; Jewett v. Petit, 4 Mich. 508; Cronshore v. Knox (Pa.) 10 Atl. 25. In Compton v. Bowns, 5 Misc. Rep. 214, 25 N. Y. Supp. 466, the court says: "It is elementary law that the effect of part payment, in defeating the operation of the statute of limitations, depends upon the promise it implies to pay the residue, but, if the payment be intended, not as a discharge pro tanto, but as a complete liquidation of the entire demand, how can an engagement to pay more be inferred? The implication of an acknowledgment of the continuance of the debt from an act supposed and designed to extinguish it, and of a promise of further payment from a payment made and intended as final and complete, is a palpable absurdity"—citing Weston v. Hodgkins, 136 Mass. 326, and other authorities. Compton v. Bowns seems to be directly in point as to all the questions considered by us in this case. The general principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment. U. S. v. Wilder, supra. The intention of W. F. Dowd to pay only in full settlement and discharge of his liability is too plain in this case to admit of the slightest doubt. He expressly stipulated for exemption from payment of the balance of the debt.

The law will not permit the amount collected by the Dowd & King Supply Company from Dowd & King, to wit, $34, and credited on their account without any authority from them, and the amount collected, $6.25, to be considered as constituting a mutual account between the parties so as to put the statute in motion only from the last item. In Hussey v. Burgwyn, 51 N. C. 385, it was said that the sending of a draft to the creditor, without any reference to the debt, was not sufficient to stop the running of the statute. It was also held that, in order to make an account a continuing one from its commencement to its close, there must be mutual accounts between the parties, or an account of mutual dealings kept by one only, with the knowledge and concurrence of the other, for otherwise an item within time cannot have the effect of preventing the application of the statute. As said in that case: "Here there was no mutual accounts kept by the parties, and there was no proof that the defendant intrusted the plaintiff to keep such a one." The $6.25 for merchandise was a distinct item disconnected from the prior account, Dowd & King having gone out of business and being then in liquidation, and the credit of $34 for collections was applied to the old account without authority. There was no semblance of a mutuality of accounts. The cause of action accrued not later than February 28, 1903, and was barred on March 1, 1906, when the action was brought.

The charge of the court was therefore erroneous. It should have been the very reverse of what it was as to the third issue.

New trial.

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(146 N. C. 254)

## In re BEAUCHAMP'S WILL.

(Supreme Court of North Carolina. Dec. 4, 1907.)

1. WILLS—PROBATE—COMMON FORM—VALIDITY.

Under the express terms of Revisal 1905, § 3128, the probate of a will in common form is valid until set aside.

2. SAME—PROBATE IN SOLEMN FORM—LOSS OF RIGHT TO.

While testator's next of kin and heirs at law may require probate in solemn form, the right may be forfeited by either acquiescence or unreasonable delay, after notice of probate, and such right was forfeited where petitioner knew for more than 40 years of the probate in common form and of the qualification of the executors, and knew of their removal from the state, of the appointment of an administrator with the will annexed, and of his proceeding for final account and settlement to which she was a party.

3. SAME—PETITION FOR PROBATE IN SOLEMN FORM—ISSUES DETERMINABLE.

Issues as to the execution of a will and the testator's capacity may only be determined after probate in solemn form is allowed, and will not be considered on a preliminary question whether the right to caveat has been forfeited by unreasonable delay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 523.]

4. HUSBAND AND WIFE — SUIT BY WIFE — RIGHT TO BRING.

Under Revisal 1905, § 408, subd. 1, providing that a husband need not be joined in a suit by his wife concerning her separate property, one may sue for the probate of her father's will in solemn form, without joining her husband, if he is opposed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 774.]

5. WILLS—PROBATE—LIMITATION—CAVEAT TO WILL—EFFECT OF STATUTE.

Laws 1907, p. 1263, c. 862, fixing seven years after probate of a will in common form as the time within which a caveat for probate in solemn form may be filed, and permitting seven years after ratification of the act as to wills theretofore proven, did not revive a right to file a caveat which had been lost by 40 years' acquiescence.

6. HUSBAND AND WIFE—RIGHT TO SUE—LIMITATIONS.

Failure from 1863 for over 40 years to file a caveat for the probate of a will in solemn form may not be excused by a married woman on the ground that until the Laws 1899, p. 209,

c. 78, repealing as to married women Code 1883, §§ 148, 163, suspending the running of limitations, limitations did not run against her, since there was no statute of limitations as to the time in which a caveat should be filed until 1907.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 801.]

Appeal from Superior Court, Davie County; Ward, Judge.

Caveat to James Beauchamp's will, filed by Sarah Jane Sparks and another. From the judgment, the caveators appeal. Affirmed.

A. H. Eller and E. E. Raper, for appellant. E. L. Gaither and T. B. Bailey, for appellee.

CLARK, C. J. This is a caveat to the will of James Beauchamp, who died August 10, 1863, filed by his daughter November 17, 1903, asking for probate in solemn form. She was a married woman at the time the will was probated, September, 1863, and is still. The respondents are her younger brother and sister, who were infants of tender years in September, 1863. The probate of the will in common form in 1863 is valid till set aside. Armstrong v. Baker, 31 N. C. 114; Revisal of 1905, § 3128. While the next of kin and heirs at law have the right to require probate in solemn form, this right may be forfeited either by acquiescence or unreasonable delay after notice of the probate. Etheridge v. Corprew, 48 N. C. 18. In that case Pearson, J., says (page 21 of 48 N. C.) that the court in passing upon the preliminary question whether or not the right to caveat has been forfeited by unreasonable delay "cannot be expected" to try "allegations as to the execution of the will and the capacity of the testator." Those matters are for consideration only after the probate in solemn form is allowed. On this preliminary question, the court will only consider whether the lapse of time, under the attendant circumstances, was an unreasonable delay. Armstrong v. Baker, 31 N. C. 109, 112. Here the petitioner had knowledge of the probate of the will and qualification of the executors more than 40 years ago, of their removal from the State many years thereafter in 1878, of the appointment of an administrator c. t. a., and of his proceeding for final account and settlement to which she was a party. The court properly dismissed the action. Randolph v. Hughes, 89 N. C. 428; Osborne v. Leak, Id. 437. It is true the petitioner has all the time been a feme covert, but she could have brought suit, without joining her husband, if he were opposed (and there is no reasonable ground to apprehend he would be). Revisal 1905, § 408 (1). It is true, also, that till chapter 862, p. 1263, Laws 1907, there was no statute of limitations as to the time in which a caveat must be filed. But it was well-settled law (see cases, supra) that the right would be forfeited by unreasonable delay. The above act of 1907 now fixes seven years after probate in common form as a limitation, and permits seven years after ratification of the act as to wills theretofore proven. But this last must be taken to apply to cases where a caveat was not already barred by the lapse of unreasonable time, for it has been held that, while the Legislature can suspend the running of the statute of limitations or extend the time, it will not be taken to apply to revive a cause of action already barred. Whitehurst v. Dey, 90 N. C. 542; Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365. We do not think the act of 1907 can be reasonably construed as intending to revive a right to file a caveat which had been lost by 40 years' acquiescence. Indeed, the act shows a contrary intent by restricting to seven years' absolute bar that which formerly was unlimited, save by the court's conception of what would be unreasonable delay under all the circumstances of the particular case.

The petitioner also insists that chapter 78, p. 209, Laws 1899, repealing as to married women the sections (Code 1883, §§ 148, 163) suspending the running of the statute of limitations, was made prospective only, and that time up to its passage was not to be counted against married women. But that statute has no application for the very sufficient reason that there was no statute of limitations as to the caveat of a will, and neither its suspension nor the repeal thereof could apply. Said sections 148 and 163 provided that as to actions therein named (which do not include filing a caveat) the following persons would not be barred by the time prescribed: (1) Infants; (2) insane; (3) convicts; (4) married women. Gov. Fowle, in his message to the Legislature of 1889, recommended that married women be taken out of that category. This was done by the act of 1899, which was introduced and urged by Judge W. B. Councill, then a member of the General Assembly. But it will be seen at once that this act can have no bearing at all upon a case like this, to which there was then no statute of limitations applicable.

Affirmed.

(146 N. C. 242)

## LOFTIS v. DUCKWORTH.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. MORTGAGES — TRUST DEED—COMPENSATION OF TRUSTEE — ACCEPTANCE OF TRUST — EFFECT.

Where the trustee in a deed of trust to secure a debt accepts the trust, he is bound by the terms of the deed as to his compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1133.]

2. SAME—CONSTRUCTION.

A deed of trust securing the payment of a debt provided: "When the advertisement [for sale of the property] * * * is begun the commissions of the trustee on the amount herein secured shall be deemed due and payable and may be collected by him in the same manner as other moneys secured by this trust and he shall convey said land to the purchaser, etc., and apply the proceeds of said sale to the discharge of said debt and interest * * * and to the expenses of this trust including five per cent. commissions to the trustee," etc. *Held*, that the trustee was entitled to commissions on the amount of the debt only, and not on the amount for which the land was sold.

3. SAME — RATE OF COMMISSIONS — REASONABLENESS.

A commission of 5 per cent. to a trustee under a trust deed securing payment of a debt of $568 was reasonable.

Appeal from Superior Court, Transylvania County; Guion, Judge.

Controversy without action between T. T. Loftis, receiver, and W. B. Duckworth. Judgment for Loftis, and Duckworth appeals. Affirmed.

This is a controversy submitted without action. As stated in the brief of appellant's counsel, the only point in the case is whether the trustee who sold under the power given to him in the deed of trust from W. J. Wilson is entitled to commissions on the full amount realized at the sale, or only on the amount of the debt secured by the deed of trust and the actual expenses of the sale. The deed provides as follows: "When the advertisement herein provided for is begun, the commissions of the trustee on the amount herein secured shall be deemed to be due and payable, and may be collected by him in the same way and manner as other moneys secured by this trust and he shall convey said land to the purchaser and heirs in fee simple, and apply the proceeds of said sale to the discharge of said debt and interest on the same and to payment of the expenses of this trust, including 5 per cent. commissions to the trustee, and of any other moneys then owing from the said parties of the first part to the said party of the third part, and secured by this deed in trust, any surplus to be paid to the said parties of the first part." The court held that the trustee was entitled to receive commissions only on the amount of the debt secured ($568), the commissions thereon being $28.40, and directed him to retain the latter amount and the amount of the debt, and to pay the balance to the plaintiffs, who owned the land described in the deed of trust. The defendant excepted and appealed.

Welch Galloway, for appellant. Geo. A. Shuford, for appellee.

WALKER, J. (after stating the facts as above). The ruling of the court was clearly right. It is not necessary that we should review the cases decided by this court in regard to the question of commissions allowable to a trustee acting under a power of sale. Those cases were cited to us, but they involved questions different from the one presented in this record. They are collated and discussed by Clark, J., for the court, in Turner v. Boger, 126 N. C. 300, 35 S. E. 592, 48 L. R. A. 590. The trustee accepted the trust, and is therefore bound by the terms of the deed. Although the expression, "the commission of the trustee on the amount herein secured shall be deemed to be due and payable," is found in that part of the deed which relates to an advertised sale which is not made, it was evidently the intention of the parties to fix thereby the amount of the commissions in any event, whether the sale should be made or not. The subsequent expression, when providing for the distribution of the purchase money, namely, "And apply the proceeds of sale to the discharge of said debt and interest on the same, and to the payment of the expenses of this trust, including five per cent commissions to the trustee," necessarily refers to the clause immediately preceding it and which we have already quoted. We must construe the deed as a whole, not omitting any one of its provisions, and with a view of ascertaining the true meaning of the parties. So considering it, we are convinced that there was no error in the judgment of the court. There was no point made as to the defendant's right to retain the actual expenses of the sale, though no provision is made for their retention in the judgment. If necessary, the latter may be modified to include them in the amount to be retained by the defendant. We think the rate of commissions was reasonable.

Affirmed.

(146 N. C. 283)

## McNEILL v. ALLEN et al.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—STATUTORY PROVISIONS—UNREGISTERED DEED.

Laws 1885, p. 233, c. 147, § 1, now Revisal 1905, § 980, provides that no "conveyance of land or contract to convey or lease of land" for more than three years shall be valid as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, but from the registration thereof, provided no purchase from any such donor, bargainor, or lessor shall avail to pass title as against any unregistered deed executed prior to December 1, 1885, when the person holding or claiming under such unregistered deed shall be in actual possession and enjoyment of the land. *Held*, that the words "unregistered deed," as used in the proviso, is used in its broad generic sense, and has the same scope as the quoted words, "conveyance

of land," etc., used in the first part of the section.

2. SAME—NOTICE—POSSESSION.

Laws 1885, p. 233, c. 147, § 1, now Revisal 1905, § 980, makes conveyances invalid to pass title against purchasers for value until registration, but excepts unregistered deeds executed prior to December 1, 1885, when the person holding thereunder is in actual possession. Defendants and their ancestor were in possession of land since 1873 under a bond for title from P., executed at that time, which bond was registered in 1899. P. having died, a commissioner appointed by the court sold the parcel in question in 1898 as a part of the estate, and a deed therefor was executed to plaintiff and registered the same year. *Held*, that the rights of the parties should be determined by the law as it stood prior to the enactment of Laws 1885, p. 233, c. 147.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 549.]

3. EJECTMENT—QUESTIONS FOR JURY.

In ejectment, in which defendants claimed to be in possession under a prior bond for title from plaintiff's grantor on which the purchase price had been paid, whether payment had been so made, and, if only a part, how much, was for the jury.

Appeal from Superior Court, Wilkes County; Ward, Judge.

Ejectment by George T. McNeill against Edmund Allen and others. From a judgment for plaintiff, defendants appeal. Reversed.

Finley & Hendren, for appellants. Manly & Hendren, W. W. Barber and R. N. Hackett, for appellee.

CLARK, C. J. Ejectment. On January 11, 1873, Phineas Horton delivered to the father of defendants a bond to make title, under which he entered into possession, which he and they have held continuously ever since. Phineas Horton died in 1886. A commissioner, appointed by the court, made sale of his lands in 1898. At this sale the plaintiff became purchaser of this tract, and the commissioner executed to him August 26, 1898, a deed therefor, which was registered September 8, 1898. On October 18, 1899, the bond to make title, executed to defendants' father in 1873, was registered. The defendants' evidence tended to prove that the amount named in the bond for title had been paid in full. This was controverted by the evidence for the plaintiff. The court charged the jury that if they believed the evidence to answer the issue, "Yes"; that is, that the plaintiff was the owner of the land. The defendants excepted, and this is the only exception relied on.

In giving this charge the court held that bonds for title were not in the purview of the second proviso of section 1, c. 147, p. 233, Laws 1885 (now Revisal 1905, § 980). This proviso excludes from the operation of the act any "unregistered deed" executed prior to December 1, 1885, when the person holding or claiming thereunder shall be in the actual possession and enjoyment of the land at the time of the execution of the second deed. The defendants contended that, while the proviso mentions only "unregistered deed," this refers to and is as broad as the words in the first part of the section, "Conveyance, contract to convey or lease of land," and is broad enough to include any kind of sealed instrument, sufficient in form and terms to transfer from one person to another, either the legal or equitable title to land. 2 Blackstone's Com. 295, defines a deed as "a writing sealed and delivered by the parties." Anderson's Law Dictionary adopts the above definition, and says: "This comprehensive meaning includes any writing under seal, as a bond, lease, mortgage, agreement to convey realty," etc. Coke, Litt. 35b, 171b, cited 4 Kent, Com. 450, 452, defines a deed as a "writing sealed and delivered by the parties." The point raised is now presented for the first time; but, considering the evil to be remedied and the evident intent that there should be exempted from the provisions of the new act titles based on instruments executed prior to December 1, 1885, we think that the words "unregistered deed" in the second proviso to Revisal 1905, § 980, is used in its broad generic sense, and has reference to, and has the same scope as, the words "conveyance of land, or contract to convey, or lease of land," used in the first part of the section. The instruction of his honor was therefore erroneous. Revisal 1905, § 980, does not apply where the sealed instrument was executed prior to December 1, 1885. The rights of the parties will be determined by the law as it stood prior to the enactment of chapter 147, p. 233, Laws 1885. Whether the purchase money secured by the bond for title has been paid in whole or in part, and, if in part, what part, is a matter for determination by the jury.

Error.

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(145 N. C. 563)

## STATE v. McDOWELL.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. HOMICIDE — PREMEDITATION — SUFFICIENCY OF EVIDENCE.

Evidence examined, and *held* sufficient to warrant a finding that a homicide was the result of preparation and premeditation on the part of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 480.]

2. SAME — EXPRESS MALICE — NECESSITY FOR PROVING.

It is not necessary to a conviction for murder that the state prove express malice or motive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homicide, § 17.]

3. SAME—INSTRUCTIONS.

In a prosecution for homicide, an instruction that if defendant on the impulses of the moment, or without having fully determined so to do beforehand, suddenly shot at deceased because of the treatment defendant's companion was receiving or about to receive, it would be murder in the second degree, was properly refused, the latter part of the instruction being

susceptible of the construction that, if defendant shot in revenge for the treatment his companion had received, it would be murder in the second degree only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 592.]

4. CRIMINAL LAW — INSTRUCTIONS—INSTRUCTION ERRONEOUS IN PART.

The refusal in a criminal case of an instruction erroneous in part is not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2012.]

Appeal from Superior Court, McDowell County; Webb, Judge.

Robert McDowell was convicted of murder, and appeals. No error.

Pless & Winborne, for defendant. Asst. Atty. Gen. Clement, for the State.

BROWN, J. The prisoner introduced no testimony, and that admitted in behalf of the state tends to prove the following facts: The prisoner, with one Long and some others, were on the train, going, via Vein Mountain, to Marion. A difficulty occurred on the train between a party of negroes in the second-class coach. Millen, the flagman, went in and tried to quiet them. Long came up to Millen and asked what authority he had to interfere with the fight. Millen replied that it was none of Long's business and that it was his business to quell disturbances. Long thereupon cursed Millen, and Millen hit Long with his fist. Millen made Long sit down and be quiet. Millen then went back in the smoker, and the prisoner got up, walked up the aisle to the baggage car, and changed his pistol from one pocket to another, came back, and said he did not allow any son of a bitch to run over him, and sat down in the seat with Long. Long all this time was cursing Millen, and saying that he was not going to be run over and was not going to take that of anybody. When the train stopped at Vein Mountain, prisoner got out and walked up and down the track, looking back at the train, with his pistol in his hand. Millen was not outside at that time, but in the smoker. When the train left Vein Mountain, some one told the conductor that there was disorderly conduct in the second-class car. He walked up through the second-class car to where the prisoner and Long were sitting. The conductor testified that the prisoner was sitting in the seat in front of Long, but the other evidence seems to contradict this, and it seems that the prisoner was sitting in the same seat with Long; the prisoner being nearest the aisle. Long was still cursing Millen when the conductor came up, and said, "You be quiet, or I will have to put you off." Long replied, "I don't allow any man to curse me like he did"; and said he was not going to "take it." Millen came in and heard the remarks of Long, and walked up to about two seats behind Long and prisoner, and asked Long if that was Long cursing him. Long said "Yes," and Millen hit Long with his fists. Long jumped up and opened a knife, and Millen hit Long and knocked him down. Millen then stepped back about four steps from where they were sitting, making him about four seats away, and stood there, looking at the conductor attempting to hold Long in his seat. While Long was struggling with the conductor, the prisoner jumped up, and, turning around, faced the conductor, jerked his pistol out, threw his arm so his pistol extended over the conductor's right shoulder, snapped it once or twice, then fired it twice, hitting Millen in the left temple, killing him instantly. The conductor and one of the witnesses threw prisoner down, and tied him. When prisoner shot deceased, the deceased was standing with his head turned to the right, looking at the conductor and Long, and was shot in the left temple. The few exceptions to testimony appearing in the record we find upon examination to be without merit, and not of sufficient novelty or importance to warrant discussion.

The prisoner excepts to the refusal of the court to instruct that there is no evidence of premeditation and deliberation, and therefore the jury could not convict of murder in the first degree. We think the jury were warranted in finding from all the circumstances surrounding the homicide that it was the result of preparation and premeditation upon the part of the prisoner. He and Long appeared to be intimately associated. When Long provoked the difficulty with the deceased, the prisoner evidently sympathized with his companion, and prepared to take his part. He pulled out his pistol, shifted it from one pocket to another so as to have it "more handy," went out on the platform at the station when the train stopped, looking at the cars, and brandishing his pistol. When he fired the fatal shot, prisoner reached his arm over the conductor's shoulder or around his neck, and snapped his pistol several times before it would fire. There is no pretense of self-defense, and nothing in the evidence tending to prove any personal injury to prisoner sufficient to arouse such violent passion. From these circumstances the jury might well conclude that the prisoner slew the deceased on a principle of revenge for the fancied wrong to himself or his companion, which was trivial in its nature so far as prisoner was concerned, and that he had determined to slay deceased before he fired the fatal shot. State v. Johnson, 47 N. C. 247, 64 Am. Dec. 582; State v. McCormac, 116 N. C. 1034, 21 S. E. 693; State v. Lipscombe, 134 N. C. 694, 47 S. E. 44. The evidence of preparation, deliberation, and premeditation submitted to the jury in this case appears to be equally as strong as, if not stronger than, that held to be sufficient in State v. Daniel, 139 N. C. 549, 51 S. E. 858; State v. Hunt, 134 N. C. 684, 47 S. E. 49; State v. Teachey, 138 N. C. 587, 50 S. E. 232. The conduct of prisoner throughout indicates thought, contrivance, and design in the man-

ner of securing and handling his pistol prior to firing the fatal shot, and to such a degree as manifests an exercise of judgment and deliberation rather than unpremeditated and ungovernable passion. State v. Daniel, supra. It is not necessary to conviction that the state should prove express malice or motive. The malice is implied from the manner of the slaying, and the motive, although unnecessary to be proven, is perfectly apparent from all the evidence. State v. Adams, 136 N. C. 617, 48 S. E. 589; State v. Wilcox, 132 N. C. 1143, 44 S. E. 625; State v. Turner, 143 N. C. 642, 57 S. E. 158.

The prisoner excepts because the court refused to give the following instruction: "If defendant, upon the impulse of the moment, or without having fully determined so to do before, suddenly began shooting, or shot at the flagman because of the treatment which his companion was receiving or about to receive, it would be murder in the second degree." The first score of words embody a correct proposition of law. The remaining part of the instruction is susceptible to the construction that, if the prisoner fired the fatal shot in revenge for the treatment his companion had received or was receiving, it would be only murder in the second degree. This is erroneous. Revenge implies malignity, retaliation, not impulsive passion.

"May my hands
Never brandish more revengeful steel."

It indicates a deliberate and premeditated purpose. State v. Daniel, supra. A portion of the prayer being erroneous, the court did not err in rejecting the whole.

We have examined the record with that careful scrutiny which cases of this gravity demand, and we find no error.

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(146 N. C. 225)

## PRENDERGAST v. PRENDERGAST.

(Supreme Court of North Carolina. Dec. 4, 1907.)

DIVORCE—GROUNDS—STATUTORY PROVISIONS—SINGLE OFFENSE.

Code 1883, § 1285, enumerated as the first two grounds of absolute divorce: "(1) If either party shall separate from the other and live in adultery; (2) if the wife shall commit adultery." Laws 1905, p. 501, c. 499, struck out the first ground, and substituted therefor: "If a husband shall commit fornication and adultery." *Held*, that in view of the uniform construction put upon Revisal 1905, § 3350, defining the crime of "fornication and adultery," to the effect that to constitute such offense the misconduct must be habitual, and the fact that the Legislature probably had that construction in mind, proof of one act of adultery by a husband would not entitle the wife to an absolute divorce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 52–60.]

Appeal from Superior Court, Alamance County; Councill, Judge.

Action by Rosa Prendergast against J. S. Prendergast for divorce. Plaintiff alleged and offered evidence tending to prove one act of illicit intercourse on the part of the husband, defendant. Without evidence ultra thereupon, the trial judge intimated that he would charge the jury that in no aspect of the evidence was the plaintiff entitled to the relief prayed for, in that the laws of North Carolina did not allow a dissolution of the bonds of matrimony for one act of adultery on the part of the husband. Thereupon, plaintiff, having excepted, submitted to a nonsuit and appealed. Affirmed.

Parker & Parker, for appellant.

HOKE, J. Under Code 1883, § 1285, and for years prior thereto, the causes for absolute divorce in this state were as follows: (1) If either party shall separate from the other and live in adultery. (2) If the wife shall commit adultery. (3) If either party at the time of the marriage was and still is naturally impotent. (4) If the wife at the time of the marriage be pregnant, and the husband be ignorant of the fact of such pregnancy, and be not the father of the child with which the wife was pregnant at the time of the marriage. By chapter 499, p. 501, Laws 1905, the first clause of foregoing section was stricken out, and there were substituted the words, "If the husband shall commit fornication and adultery," making that part of the law, in effect, as follows: That an absolute divorce shall be granted (a) if the husband shall commit fornication and adultery; and (b) if the wife shall commit adultery. To adopt the position contended for by the plaintiff would require that these terms should have one and the same meaning, whereas the marked difference in the two clauses, standing as they do in such close juxtaposition, gives clear indication that the Legislature intended to make a distinction between the man and the woman in this feature of our laws of divorce, and we are of opinion that in allowing a divorce when the man shall "commit fornication and adultery" it was intended to give those terms the distinctive meaning acquired by the words when associated together and as contained in section 3350 of the Revisal of 1905, defining the crime of "fornication and adultery." The uniform construction put upon this statute has established that to constitute fornication and adultery the misconduct must be habitual, and the General Assembly was no doubt advertent to this construction in making the amendment referred to. There are grave reasons for the distinction made by this legislation which the General Assembly evidently regarded as controlling, but, being matters more properly for legislative consideration, they are not specified or dwelt upon here, and only referred to in a general way in support of the construction we have given the statute. It is argued that this interpretation would leave the amendment without any force or effect on the law as it formerly stood, but a reference to the statute will readily indicate the change

that was made and intended. Formerly, in order to a divorce for such misconduct on the part of the husband, it was required that he should withdraw from his household and live in adultery, or force the wife to leave him, while this is now no longer required.

We think his honor correctly interpreted the amendment, and there is no error in his decision.

Affirmed.

BROWN, J. (concurring in result). I concur in the opinion of the court construing the act of 1905. It is evident that, when the General Assembly of 1905 enacted the divorce law of that session, it had in mind the indictable offense of fornication and adultery, and intended that the offense of the husband must amount to that in frequency before the wife could secure a divorce, but that one act of adultery is sufficient to justify the husband in putting away the wife. But with entire deference I cannot concur in the suggestion of the court that there are "grave and weighty reasons for the distinction made by this legislation." On the contrary, I feel that such legislative discrimination against the wife and in favor of the husband is inherently and morally wrong, and unjust to the wives and mothers of our state. The result, as the law now stands, is that, if the husband be endowed with the powers which Gibbon ascribes to Mahomet, he may with impunity have intercourse with 30 different prostitutes in one night, and the unfortunate wife must hang her helpless head in shame, and bear her humiliation as best she can; while, if the husband should confine his attentions to one "soiled dove" for a few times only, the law will avenge the wrong done the outraged wife by divorcing her from her unfaithful spouse. On the contrary, let the wife step aside but once from the path of virtue, the strong arm of the law will turn her out of her husband's house to starve, and free him forever from her degrading company if he so wills. "Grave and weighty reasons" for such a discrimination against the pure women of this state do not readily suggest themselves to me. On the contrary, it appears to me that every consideration of justice and right demands that the husband should be held to as strict a moral accountability as the wife. Reasons for such discrimination do not seem to have suggested themselves to legislators in other states. One act of adultery on the part of either party to the marriage is ground for absolute divorce in every state of this Union except North Carolina, Kentucky, and Texas (9 Am. & Eng. Enc. p. 746), and no injurious results have followed in those states which have repudiated the fallacy that public policy requires such a discrimination between husband and wife. Our law is more unjust than the ancient common law of our English ancestors in its treatment of women in this respect. In those days if either party committed adultery it was ground for divorce from bed and board, but not a vinculo matrimonii, for the reason that, if absolute divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent. 1 Blackstone, p. 441. Under our law the wife is not even justified in leaving the husband for one act of infidelity, and, if her outraged feelings force her to do so, the husband need not support her. The fear that the husband will commit one act of adultery in order to enable his wife to procure a divorce is absolutely groundless, as is shown by the experience of those states which have done equal and exact justice in this matter, and where divorces are no more frequent than in this state and her two sister commonwealths. The truth is that a husband who will openly commit one act of adultery to make evidence against himself will commit as many such acts as is necessary to accomplish his purpose. In the ancient days of feudalism, the adulterous wife frequently suffered death, not so much because of any moral delinquency on her part, as because the blood of the heir might become tainted. We have no primogeniture now, and the husband can devise his lands away from his "tainted heir" if he so wills. This reason if ever valid is now worthless, since we are considering only the rights of the wife against the husband, and not of the husband against the wife. The law should not be relaxed in favor of the wife, but made stricter in regard to the husband so as to hold both to the same standard of conjugal loyalty to each other, and require both to obey the commandment of God.

It is to be hoped that some future General Assembly will abolish this unjust discrimination, and follow the example of the 43 states of this Union in dealing impartially between those who plight their mutual faith at the altar.

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(146 N. C. 248)

## HAUSER v. MORRISON.

(Supreme Court of North Carolina. Dec. 4, 1907.)

1. JUSTICES OF THE PEACE—RECOVERY OF POSSESSION OF LAND—SUMMARY PROCEEDINGS—JURISDICTION.

The remedy by summary proceedings in a justice's court given by the landlord and tenant act (Revisal 1905, § 2001 et seq.) is restricted to cases where the relation between the parties is that of landlord and tenant, and where the relation existing is that of mortgagor and mortgagee, giving the right to an account, or vendor and purchaser, requiring an adjustment of equities, the court has no jurisdiction, and the proceeding should be dismissed.

2. VENDOR AND PURCHASER — RECOVERY OF LAND BY VENDOR—FORM OF REMEDY.

A purchaser of land who gave notes to the vendor for the price, secured by mortgage, failed to comply with the contract and reconveyed to the vendor, who leased the same to the purchaser and gave him an option to purchase. The purchaser held possession and paid part of the price, the receipts for which recognized the

notes originally given and the mortgage as subsisting. *Held* that, though the parties could only assert rights under the lease and the option, the vendor could not maintain summary proceedings under the landlord and tenant act (Revisal 1905, § 2001 et seq.).

Appeal from Superior Court, Wilkes County; Ward, Judge.

Summary proceedings in ejectment by G. A. Hauser against W. S. Morrison. Judgment for plaintiff on appeal from a justice, and defendant appeals. Reversed.

F. D. Hackett, for appellant. Finley & Hendren and O. C. Dancy, for appellee.

HOKE, J. The authorities of this state have established the principle that the remedy by summary proceedings in ejectment given by the landlord and tenant act (Revisal 1905, § 2001 et seq.) is not coextensive with the doctrine of estoppel arising where one enters and holds land under another, but is restricted to the cases expressly specified in the act; and, where the relation between the parties is simply that of landlord and tenant, and when on the trial of such a proceeding, it is made to appear that the relation existing is that of mortgagor and mortgagee, given the right to an account, or vendor and vendee, requiring an adjustment of equities, a justice's court has no jurisdiction of such questions, and the proceeding should be dismissed. Parker v. Allen, 84 N. C. 466; Hughes v. Mason, 84 N. C. 473. In this last case, Dillard, J., for the court, said: "The landlord and tenant act in Battle's Revisal, c. 64, § 19, by its terms, and the construction put upon it by the court, gives the remedy of summary ejectment before a justice of the peace only in the case when the simple relation of lessor and lessee has existed, and there is a holding over after the term has expired either by efflux of time, or by reason of some act done or omitted contrary to the stipulations of the lease. Credle v. Gibbs, 65 N. C. 192; McCombs v. Wallace, 66 N. C. 481; Forsyth v. Bullock, 74 N. C. 135. And it is equally well settled that the jurisdiction does not extend to the relation of mortgagor and mortgagee and vendor and vendee, in which, although the mortgagor and vendee may technically be tenants at law, they are viewed in equity as the owners of the estate, and are allowed, in order to avoid the circuity of letting judgment go and then going into equity, to enjoin the execution, to set upon one action under our present system their equitable title in defense to any action which may be brought to recover the possession. Heyer v. Beatty, 76 N. C. 28; Abbott v. Cromartie, 72 N. C. 292, 21 Am. Rep. 457; Calloway v. Hamby, 65 N. C. 631; Turner v. Lowe, 66 N. C. 413; Forsyth v. Bullock, supra." We are of the opinion that a proper application of the doctrine requires that the present action should be dismissed for want of jurisdiction in the justice's court. From the evidence offered on the trial, it appears: That in February, 1904, plaintiff sold and conveyed to defendant a house and lot in Wilkesboro for the sum of $2,800, and took notes and mortgage or deed of trust to secure the purchase price, one note being for $1,000 and the second for $1,800, etc. That defendant made some payments, but failed to comply with the contract, and on September 15, 1905, defendant reconveyed the property to plaintiff, and on September 16th plaintiff leased the property to defendant at the price of $4 per week, with a provision that, on default of any of these payments, defendant could be evicted without notice. And on same day September 16, 1905, plaintiff gave defendant a written option for 60 days to purchase the property at $2,800 less payments already made. Defendant continued to hold the property and has remained in possession until the present time, having the interest conferred by these contracts and the conduct of the parties under and in reference to them. There was admission made that defendant had paid $800 or $900 on the purchase price to September, 1905, and evidence tending to show that since that date defendant had at different times paid as much as $189.50 in money and other articles of value, and had further deposited in some bank a note of one Crouch, to the amount of $1,000, the proceeds of which, when collected, were to be applied on the purchase price. The testimony does not clearly disclose the exact nature of the arrangement between the parties as to the Crouch note, but it tends to show that plaintiff has asserted some interest and control over this note and its proceeds, as applicable to his claim under the contract. There is grave doubt, on the face of these contracts and the evidence, as it now appears, if the relationship of vendor and vendee, as it was established by the original contract between the parties in February, 1904, has ever been changed or materially affected by these subsequent agreements on the principle established by the decisions of Dawkins v. Patterson, 87 N. C. 387, and McLeod v. Bullard, 84 N. C. 515, affirmed on rehearing, 86 N. C. 210, to the effect that a mortgagee who purchases the equity of redemption direct from the mortgagor, in order to uphold his purchase, has the burden of showing that his purchase was entirely fair and without undue oppression. And it will be noted, in this connection, that both the so-called option, and many of the receipts, recognized the first mortgage and the purchase notes originally given as still subsisting. But, assuming that the parties are in a position to assert in strictness their rights, as they appear under the lease, and the option of date September 16, 1905, and that, under them, the defendant was given an option to purchase the property, we think it clear, from the facts shown forth in evidence, and the manner in which the payments have been made and received, that

defendant has exercised the privilege conferred, and has taken, and now holds, the position of purchaser under these contracts, and that plaintiff has accepted and recognized this position and taken the money as if the contract relationship between them was that of vendor or vendee, and that as such an account and adjustment is required of their dealings in reference to this property.

There are decisions here and elsewhere to the effect that a mortgagor of property, after default, and a vendor, under an executory contract, may at times rent the property to the mortgagor or vendee in possession, as in Crinkley v. Edgerton, 113 N. C. 444, 18 S. E. 669, and that such a lease will, under certain circumstances, be upheld so far as to give the lessor the benefit of a landlord's lien as against a claim by outsiders. But these cases, and the principle upon which they rest, do not go to the extent of depriving the mortgagor or vendee, occupying the property, of their right to account and adjustment, or of conferring on a landlord, under such a contract, the right of summary proceedings in ejectment, which, as stated, applies only when the simple relation of landlord and tenant exists between the parties. Thus, in Crinkley v. Edgerton, in upholding a landlord's lien, as stated, in preference to the claim of an outsider, the court said: "It is true that in Puffer v. Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682, the court held that, as between the parties, if the lessor attempted, after sundry payments made, to declare them forfeited and to retake possession of the property, the court would, in equity in such case, hold the contract a mortgage and direct an accounting and sale as on a foreclosure. And so it is here as to this land should the landlord attempt to resume possession of it." The case of Hamilton v. Highlands, 144 N. C. 279, 56 S. E. 929, bears a strong analogy to this, and the general principles applied in that case are in accord with those we hold to be controlling here.

There was error in refusing to dismiss the action for want of jurisdiction in the justice, and the judgment is reversed.

Reversed.

CLARK, C. J. (concurring in result). The amounts which would be involved in stating an account in this case would necessarily place the cause beyond the jurisdiction of a justice of the peace. It is also true that there are many cases which hold that a justice of the peace is ousted of jurisdiction, however small the amount, if an equity has to be administered. It is, perhaps, as well to call attention in this case, as in any other, to the fact that these rulings were first made by the courts under the influence of decisions rendered under the former Constitution and procedure, and are not warranted under the present Constitution and procedure. They have been reiterated only because not called in question. The present Constitution (article 4, §§ 1, 2, 27) is quite explicit. Section 1 provides: "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished." They are abolished absolutely, not only as to the Superior Courts, but for the courts of justice of the peace, and clerks, and all other courts for the next section (2) enumerates the courts, to all of which of course section 1 applies. There is no exception of any court from the provisions of section 1. Section 27 confers on justices of the peace jurisdiction of all civil actions founded on contract, where the amount does not exceed $200, and wherein title to land is not involved, and authorizes the Legislature to give jurisdiction of all other civil actions where the property in controversy does not exceed $50, and this the General Assembly has done. Revisal 1905, § 1420. The Constitution withdraws cases involving title to land, but neither the Constitution nor any statute withdraws any case, within the amount prescribed for a justice, from his jurisdiction because an equity or an equitable element arises or must be administered, and, indeed, this could not be done, for the distinction between actions at law and suits in equity are abolished. The statute could not revive it for the court of the justice of the peace nor of the clerk. That the courts have attempted to revive it, as to the justice of the peace and clerks, not always logically or without difficulty, is a curious instance of the persistence of the ideas prevalent under a former procedure, after that procedure and everything pertaining to it has been abolished. In the nature of things there is no reason why a justice of the peace or a clerk, within their jurisdictional limits, should not administer rights involving equitable elements as much as an action for the same amount in a case formerly not cognizable in a court of equity. A justice of the peace or clerk of the court cannot issue injunctions or appoint receivers, not because an equitable element arises, but because the statute does not name them as officers authorized to issue those writs. They are authorized to issue process in the ancillary remedies of arrest and bail, attachment and claim and delivery.

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(146 N. C. 597)

## STATE v. SAUNDERS.

(Supreme Court of North Carolina. Dec. 4, 1907.)

COSTS — CRIMINAL PROSECUTIONS — LIABILITY OF COUNTY.

Revisal 1905, § 1283, provides that if a person is convicted in a criminal action, for certain offenses and is unable to pay the costs, the county shall pay the witness and certain court officers, the solicitor alone being omitted, one-half their fees. Section 2768 provides that, where the convicted person is insolvent, the solicitor shall receive one-half his usual fee.

Section 1355 makes it the judge's duty, where a county has provided for working convicts on the roads, to sentence them to work thereon, and, where a convict is imprisoned for nonpayment of costs, he is to be detained only until he has repaid the county the "half fees charged up against it." *Held* that, where a person who is unable to pay the costs is convicted of a criminal offense not within the exceptions to section 1283, and sentenced to work on the public roads, the county is liable only for one-half the fees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 1119.]

Appeal from Superior Court, McDowell County; Lyon, Judge.

Monroe Saunders was convicted of crime and sentenced by the court to confinement in the county jail for a term of three years, "to be worked on the public roads of Marion township, McDowell county. The court further adjudged that the county pay the cost of said prosecution in full." From so much of the judgment as directed that the county pay full cost, the county commissioners appealed. Modified.

J. L. C. Bird, for appellants. Assistant Attorney General Clement, for the State.

CONNOR, J. The appeal brings into controversy the alleged power of the judge upon conviction of a defendant, and sentence to imprisonment in the county jail, with direction that he be worked on the county road, to adjudge full costs against the county. It is conceded that the power to impose cost, either upon the county or the defendant, is of statutory origin and regulation. State v. Massey, 104 N. C. 877, 10 S. E. 608. The liability of the county for costs in criminal cases is now regulated by section 1283 of the Revisal of 1905, wherein the several statutes in force prior to July 1, 1905, the date at which the Revisal became the statute law of the state, are codified. As applicable to this case, the county is made liable. "If * * * the defendant * * * be convicted and unable to pay the costs * * * the county shall pay the clerks, sheriffs, constables, justices and witnesses, one-half their lawful fees only." In capital felonies, and other cases named in the section, full fees are to be paid. It will be noted that in the enumeration of the officers, whose fees are provided for, the solicitor is omitted. By reference to section 2768, Revisal 1905, it will be seen that, where the party convicted is insolvent, the solicitor shall receive one-half his usual fee. Section 1283 does not seem to provide for the payment of half fees by the county in any case where the defendant serves out a sentence on the public roads except in New Hanover county. It would seem, therefore, that other counties are liable in case of conviction only "when the defendant is unable to pay the cost." The fact is not found by the court in this case, but, as no point is made in respect thereto, we will assume that the judgment is based upon that fact. It will be observed by reference to section 1355 that, when any county had made provision for working convicts upon the public roads, it is made the duty of the judge, holding court in such counties, to sentence to imprisonment at hard labor on the public roads for such terms as are prescribed by law for their imprisonment in the county jail. No provision is made, in this section, for cost, except where persons are imprisoned for nonpayment of cost and in these they are to be detained only until they repay the county to the extent of the "half fees charged up against it"; thus showing that the Legislature recognized the liability of the county in such cases only for half fees. We find nothing in the statutes authorizing judgment against that county in criminal cases, except those specially named, for more than half fees. The judgment of his honor must be modified in that respect. The county will pay half fees unless the commissioners shall wish to raise the question of defendant's insolvency, which they may do when motion is made to modify the judgment in the superior court.

Modified.

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(146 N. C. 324)

## AIKEN v. RHODHISS MFG. CO.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—EVIDENCE.
Evidence that a master provided a platform, 6 feet wide, 14 feet long, and 18 feet above the ground, without railing of any character, for plaintiff and other employés to use in the course of their employment, and plaintiff fell from the platform because it was wet and slippery, justifies a finding by the jury that the master was negligent.

2. SAME — ASSUMED RISK — INSTRUCTIONS — YOUTH AND INEXPERIENCE OF SERVANT.
Where, in an action for injuries to a servant by falling from an unrailed platform, there was evidence that plaintiff, at the time he was injured, was only 16 years old, that he had worked for defendant a week before the injury, was then absent a week, and was hurt on the first day he returned to work, an instruction that it was the jury's duty, in passing on the question whether plaintiff voluntarily assumed the risk, to consider any evidence of plaintiff's youth and inexperience, was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1168–1173.]

3. SAME — EVIDENCE — RELEVANCY — PRECAUTIONS AGAINST RECURRENCE OF ACCIDENT.
In an action for injuries to a servant by falling from an unrailed platform, evidence of changes made in the platform after the injury was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 918.]

4. MASTER AND SERVANT—INJURIES TO SERVANT—PLEADING.
A complaint for injuries to a servant by falling from an unrailed platform, alleging that the platform was "constructed," etc., and that defendant had negligently and carelessly left it without banisters, etc., did not authorize an inference that the platform was uncompleted at the time of the injury.

Appeal from Superior Court, Burke County; Guion, Judge.

Action by Pearl Aiken against the Rhodhiss Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

See 53 S. E. 866.

Action for damages for personal injury sustained by plaintiff while in the employment of defendant corporation. Plaintiff, about 16 years of age, while in the discharge of his duties as employé of defendant company, fell from a platform 6 feet wide, 14 feet long, and about 18 feet from the ground. The platform extended from a door in cloth room leading to a side track of the railroad at a point opposite a short platform of similar width extending from the cloth or store room by skids or pieces of plank or lumber laid across from one to the other and then taken up, so as to leave the side track clear. The alleged negligence consisted in the failure of defendant to furnish a safe way to plaintiff, in that, there was no railing, or banister, on the side of the platform to protect employés and prevent them from falling. Plaintiff testified that he was in the employment of defendant a week before the injury; that he was away from the mill a week and returned to work. The door was made by cutting down a window and building a platform, or gangway, therefrom. This was done while plaintiff was at home. He was hurt the first day he returned to work. When he returned to the mill the morning he was injured, he passed over the gangway and went into the door. It was then dry. It rained after he got to the mill. He thus describes the manner in which he was injured: "Mr. Christopher Rhodes was in charge. He called me out to lay some skids back. It had rained after I had gone into the room. He called me to move skids. The platform was wet. He went to end towards warehouse and told us to move skids, so we picked up one and Rhodes the other. We moved it back towards the mill. My back was towards the mill. I was walking backwards towards the mill about midway of gangway. My feet slipped and I fell off. Nothing to make my feet slip only it was wet; planks were wet. When my feet slipped, I went off gangway 15 or 20 feet to the ground. I was unconscious for a few minutes." The remainder of his testimony related to the manner and extent of injury. Doc. Aikens, a witness for plaintiff, testified that he helped to build the platform. "It was not built right. I built it the way they told me. It was too narrow for the height and had no banisters. * * * They haul cloth over it, not cotton." He was asked by plaintiff whether or not a railing had been built around the platform since the accident. The court admitted the question and answer over defendant's objection. Exception. Witness said there was a railing around the platform, which he described. The same question was asked another witness and admitted over defendant's objection. He said: "There has been a change; a railing put around each side." Defendant excepted. Defendant introduced evidence tending to show that the injury was caused by plaintiff's own negligence. It also pleaded assumption of risk. The court submitted the following issues: "(1) Was plaintiff, Pearl Aiken, injured by the negligence of defendant as alleged? (2) Did plaintiff, by his own negligence, contribute to the injury? (3) Was there an assumption of risk on the part of plaintiff? (4) What damage has plaintiff sustained?" At the close of the entire evidence, defendant moved for judgment of nonsuit. Motion denied, and defendant excepted. Defendant requested the court to instruct the jury that there was no evidence showing actionable negligence. The court refused, and defendant excepted. The court, at plaintiff's request, instructed the jury: "It was the duty of the defendant company to furnish a safe place or platform for Pearl Aiken where it required him to work, and if the defendant required him to move plank or skids along an uncovered platform it was its duty to so construct it as to render it reasonably safe for said Pearl Aiken to perform any labor which it or its vice principal commanded and required him to perform on said platform." Defendant excepted. The court, at the request of the plaintiff, instructed the jury: "The plaintiff, Pearl Aiken, will not be deemed to have assumed the risk growing out of the failure of the defendant to provide such railing and safeguards as described above along the margin of said platform, unless the danger arising from such defect was obvious and so imminent that no man of ordinary prudence and acting with such prudence would have incurred the risk of assisting Chris. Rhodes to remove the skids or planks along said platform, and the burden is upon the defendant to show that Pearl Aiken voluntarily assumed the risk incident to the conditions surrounding him, and it is not enough to make good this defense to show merely that he worked on, knowing the danger, but it is necessary for such purpose for the defendant to show that the construction of said platform was so grossly and clearly defective that the employé Pearl Aiken must have known of the extra risk and have voluntarily and knowingly assumed it. [And it is the duty of the jury, in passing upon the question whether Pearl Aiken voluntarily and knowingly incurred an imminent risk of injury growing out of the condition of the platform when he he was working upon it, to consider any evidence tending to show that he was a youth and inexperienced, and the jury would find accordingly in passing upon the issue submitted, and would respond to the third issue: 'No.']" To so much of the foregoing instructions as is embraced in brackets the defendant excepted. There were several instructions in regard to the alleged contributory negli-

gence of plaintiff. They are noted in the opinion. There was a verdict for plaintiff. Judgment and appeal.

Avery v. Ervin, for appellant. Avery & Avery and Self & Whitener, for appellee.

CONNOR, J. (after stating the facts as above). We concur in his honor's ruling on the motion for judgment of nonsuit. There was ample evidence of negligence on the part of defendant in failing to provide a reasonably safe way for plaintiff to perform the service required of him. The failure to provide the platform, or gangway, with a railing, approaches very closely to negligence per se. It clearly justified the jury in finding that it was dangerous. We also concur with the instruction given in regard to the alleged assumption of risk. If the plaintiff had, for any appreciable length of time, used the platform without the railing, the danger was so obvious that we would be compelled to hold that he was barred of recovery. In view of the peculiar circumstances under which the injury was sustained, the age and inexperience of plaintiff, we are of the opinion that his honor correctly instructed the jury in that respect. We are constrained, however, in view of the decisions of this court and the almost uniform opinion of text-writers based upon decisions of other courts, to order a new trial, by reason of the error committed in admitting the evidence of the change made in the platform after the injury was sustained by plaintiff. In Lowe v. Elliott, 109 N. C. 581, 14 S. E. 51, it is plainly held that such evidence is incompetent and the reasons therefor stated by Shepherd, J. This case was cited and approved in Myers v. Lumber Co., 129 N. C. 252, 39 S. E. 960. While it is said in Lowe v. Elliott, supra, that there may be peculiar cases in which such testimony is admissible, we find nothing in this record taking the case out of the general rule. It was suggested that the testimony was competent to show that the platform was unfinished at the time of the injury, thereby making the negligence of defendant consist in directing the plaintiff to work on it in an incomplete, unfinished condition. A careful examination of the pleadings and the evidence fails to sustain the suggestion. The complaint alleges that the platform "was constructed," etc., and that defendant had negligently and carelessly left the said gangway without banisters. The plaintiff's witness, Doc. Aiken, built the platform and testified in regard to its construction. He makes no suggestion that it was unfinished.

It is impossible for us to conjecture how much weight the jury attached to the fact that the railing was placed on the sides after plaintiff was injured, and, in this condition of the case, we have no other course open to us than to direct a new trial.

(146 N. C. 268)

## In re ENTRY NO. 49 OF WILLIAMS.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. PUBLIC LANDS—PROCEEDINGS UNDER ENTRY LAWS—NATURE.

A proceeding under the entry laws (Revisal 1905, §§ 1707–1709), authorizing a claimant of land to produce to the entry taker a description of the land, and providing that any person claiming an interest in the land shall file his protest against the issue of a warrant after which a notice shall be issued to the claimant demanding him to appear before the Supreme Court and show cause why his entry shall not be declared void, is not a civil action in which the protestants occupy the attitude of plaintiffs, and they cannot terminate the proceedings or avoid the effect of a judgment by submitting to a nonsuit.

2. SAME.

A protestant in a proceeding under the entry laws (Revisal 1905, § 1707 et seq.), relating to entries on vacant lands, may withdraw his protest as a defendant in a civil action, may withdraw his answer, and, though he does so, he remains a party to the proceeding and may except to the form of and appeal from the judgment rendered; he being bound by the judgment to the extent that the court had power to render it.

3. SAME.

A proceeding under the entry laws (Revisal 1905, § 1707 et seq.), relating to entries on vacant lands, is statutory, and the judgment must follow the statute and be within its terms.

4. SAME.

Where, in proceedings under the entry laws, the protestant withdraws his protest, the court may, under Revisal 1905, § 1713, sustain the right of claimant to make the entry, and the judgment entered should declare that the right of the claimant is sustained, and that the entry taker deliver to the claimant a copy of the entry with its proper number and a warrant to the survey, etc.

5. SAME.

Where, in proceedings under the entry laws, the protestant withdraws his protest, the court cannot tax the protestant with the cost of the survey of the entry made after the withdrawal but all the costs, including the costs of any survey made by direction of the court, should be taxed against him.

Walker and Hoke, JJ., dissenting.

Appeal from Superior Court, Burke County; Guion, Judge.

Proceedings under the entry laws by R. Williams, enterer, in which A. G. Olmstead and others appeared as protestants. From a judgment for the enterer, protestants appeal. Modified and affirmed.

Jno. T. Perkins, S. J. Ervin, and Avery & Ervin, for appellants. Avery & Avery and J. F. Spainhour, for appellee.

BROWN, J. The appellee, Williams, on January 1, 1906, laid an entry in the county of Burke as follows: "No. 49. R. Williams enters and locates 2,000 acres of land lying in Burke county and state of North Carolina in Upper and Lower South Fork township and on the waters of Upper and Lower South Fork river, adjoining the lands known as the Queen and Gaither lands, P. A. Carswell's

grant and the Erwin and Greenlee speculation land, and the F. S. Drury grant on the west, beginning on a stake, the corner of P. A. Carswell's grant, No. 16,518, and in the line of said Queen and Gaither lands; and runs south 170 poles with said P. A. Carswell's line east to a white oak, Margaret Chapman's N. W. corner; thence south with her line in part and with F. S. Drury line, 300 poles, to a stake in the red line of the southern line run by Montgomery, known as the Erwin and Greenlee grant; thence west with said line to a stake in said line and corner of F. S. Drury grant; thence northwardly with said line as it meanders and around with older deeded land to the Queen and Gaither line and various courses and distances so as to include all or any vacant lands. This January 1, 1906. R. Williams. Enterer." On January 24, 1906, the appellants filed the following protest: "To J. F. Battle, Register of Deeds of Burke County: You will take notice that A. G. Olmstead, Marlin E. Olmstead, and F. L. Bartlett claim title to the land sought to be entered by R. Williams on January 1, 1906, No. 49, and hereby file their protest and caveat to the issuing of a warrant on said entry, protesting that said land is not vacant, and pray that you certify copy of the entry and protest to the clerk of the Superior Court as provided by law. This January 24, 1906. A. G. Olmstead. Marlin E. Olmstead. F. L. Bartlett. By J. T. Perkins, Attorney." The proceeding was transferred to the superior court for trial and heard at June term, 1907. At that term the protestants moved the court to be allowed to enter a nonsuit. This motion was denied and protestants excepted. "Protestants come into court and through their counsel move to be allowed to withdraw their protest, to which R. Williams objects. Motion allowed. Judgment against protestants for the cost." The court then, after reciting in its judgment the various steps taken in the proceeding, decreed as follows: "It is now, on motion of Avery & Avery, attorneys for said R. Williams, enterer, ordered, adjudged, decreed, and declared that the said R. Williams has the right to a warrant of survey upon the entry described in the protest, and that the land covered by said entry is vacant, and that the protestants A. G. Olmstead, Marlin E. Olmstead, and F. L. Bartlett are not the owners of any part of the land covered by said entry, and that as against the protest and claim of the said A. G. Olmstead, Marlin E. Olmstead, and F. L. Bartlett the said enterer, R. Williams, has the lawful right to call upon the state of North Carolina to issue a grant after a survey upon said warrant for the land covered by such survey." The protestants excepted to the form of this judgment, and appealed.

1. We are of the opinion that his honor did not err in refusing protestants' motion to be allowed to enter a nonsuit. As we have held, this proceeding is not a civil action. Bowser v. Wescott (at this term) 58 S. E. 748. The protestants do not occupy the attitude of plaintiffs in such action. This is a peculiar proceeding, devised by the General Assembly, for the purpose of testing the right of an enterer to enter lands under our entry laws, claiming that they are vacant and unappropriated. It is not an action of ejectment or trespass. The proceeding is sui generis, but is more analogous to the caveat to a will than anything else. When the protest or caveat is filed, and the proceeding transferred to the Superior Court for trial in accordance with the statute, the protestant cannot terminate the proceeding or avoid the effect of a judgment by submitting to a nonsuit.

2. While the protestant cannot take a nonsuit, he can withdraw his protest, just as a defendant in a civil action may withdraw his answer, or the caveators to a will may withdraw their caveat. The protestant does not thereby part company with the proceeding. He still remains a party to it, as a defendant in a civil action does, although withdrawing his answer, and he may except to the form of and appeal from the judgment rendered, as he is unquestionably bound by that judgment to the extent the court had power to render it.

This brings us to the consideration of the exception of appellants to the judgment rendered. As the proceeding is purely statutory, the judgment must follow the statute and be within its terms. The withdrawal of the protest gave the court power to enter the same judgment against protestants which it should have rendered had the matter been tried before the jury and the right of a claimant to make the entry been sustained. Revisal 1905, § 1713. The judgment should declare, after reciting the various steps in the proceeding, as has been done by his honor, that the right of the enterer or claimant R. Williams to make the entry No. 49, as set out in the record, be sustained, and that the entry taker deliver to the said enterer a copy of the entry with its proper number and a warrant to the survey, or to survey the same in accordance with the statute in such cases made and provided, to the end that said enterer or claimant may apply for the issuance of a grant according to law. Revisal 1905, § 1713.

Let the cause be remanded, with instructions to enter judgment in accordance with this opinion. We see no reason why the protestants should be taxed with the cost of surveying the entry which necessarily is subsequent to the withdrawal of the protest, and would have been incurred by the claimant had there been no protest. All the costs of the superior court should be taxed against the protestants, including the costs of any survey made by direction of the court. Let the costs of this court be equally divided be-

tween appellants and appellee; each paying one-half.

Modified and affirmed.

WALKER and HOKE, JJ., dissenting.

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(146 N. C. 281)

## DAVIS et al. v. MARTIN et al.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. SPECIFIC PERFORMANCE — CONTRACT — OPTION.

A contract to convey certain described land to plaintiffs for $2 per acre provided the sum was paid within three years from the date thereof, and reciting payment in cash of $25, "by way of earnest," was not a mere option, but a contract of sale which could be specifically enforced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 196.]

2. VENDOR AND PURCHASER—CONTRACT—TIME OF ESSENCE.

Time is not of the essence of an absolute contract for the sale of land wherein one of the parties agrees to sell and the other to buy; the sale to be completed within an agreed time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 121, 122.]

3. FRAUDS, STATUTE OF—SALE OF LAND—CONTRACT—SIGNING.

The vendors were the parties to be charged by a contract for the sale of land within the statute of frauds, so that such contract signed by the vendors was enforceable though not signed by the purchasers.

Appeal from Superior Court, Rutherford County; Peebles, Judge.

Suit for specific performance by George Davis and others against John Martin and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

D. F. Morrow, for appellants. Gallert & Carson and McBrayer & McBrayer, for appellees.

BROWN, J. On April 16, 1903, Amos Owens and wife executed to plaintiffs a paper writing duly recorded on April 18, 1903, wherein said Owens and wife contracted to convey certain lands duly described to plaintiffs for $2 per acre, provided said sum be paid within three years from the date thereof. Twenty-five dollars was paid in cash "by way of earnest" at the time the contract was executed. Amos Owens and wife executed a deed to defendant John Martin for said land dated April 7, 1905, which was probated April 7, 1905, and recorded January 4, 1906. The answer admits knowledge of the contract made by Owens with plaintiffs, and that defendants agreed to perform same, but defendants aver said contract is not a bond for title, but an option only which has expired without being closed by plaintiffs. This is the only question presented by the appeal.

We think that his honor did not err in adjudging the paper to be a valid contract for the sale of the land based upon consideration and in the usual form of a bond to make title. The paper has all the essential elements of bond to make title. It is in no sense a mere option. It is not a continuing offer to sell, but a complete agreement to sell, accompanied by payment of a part of the purchase money. There is a decided distinction between an option to purchase, which may be exercised or not by the prospective purchaser, and an absolute contract of sale, wherein one of the parties agrees to sell, and the other to buy, certain property; the sale to be completed within an agreed time. In the latter case, the mere lapse of time with a contract unperformed does not entitle either party to refuse to complete it, and therefore time is not of the essence of the contract; but where the contract is merely an option generally, without consideration, of course, time is of the essence. The true character of the paper is manifest by its recital of the receipt of $25 as "earnest" money, evidently used in the sense of purchase money. This signifies, not a payment for the privilege of exercising a future option to buy or not, but a payment of part of the contract price for the sale of the land. "Earnest" means a part payment of the purchase price of property. It is a term taken from the civil law, and was more generally used in connection with sales of personalty to "bind the bargain." Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306; 2 Blk. 447; Walker v. Nussey, 16 M. & W. 302.

The fact that the plaintiffs did not sign the contract will not avail defendants. It was duly executed, delivered, and registered, and is binding on the party to be charged. The plaintiffs are not the parties to be charged within the meaning of the statute of frauds. They stand by their contract to pay and seek to charge the defendants with its performance.

Affirmed.

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(146 N. C. 273)

## In re ABEE'S WILL.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. WITNESSES — RECALL — DISCRETION OF COURT.

The recall of witnesses for further examination is in the discretion of the trial judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 899.]

2. APPEAL—REVIEW—DISCRETION.

Exercise of the trial court's discretion to permit a witness to be recalled for further examination is not open to review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3853–3855.]

3. SAME.

Where the trial court held that on the facts stated the right to recall a witness did not exist as a matter of law, and declined to permit such recall, the ruling constituted an exercise of discretion, and was not on the ground that the court was without power to permit such recall.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3853–3855.]

4. WILLS—UNDUE INFLUENCE.

Undue influence sufficient to destroy a will must be such as to constitute a fraudulent influence controlling testator's mind so as to induce him to make a will which he would not otherwise have made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 375.

For other definitions, see Words and Phrases, vol. 8, pp. 7166–7172, 7823–7824.]

Appeal from Superior Court, Burke County; Guion, Judge.

Proceedings for the contest of the will of Andrew Abee. From a judgment admitting the will to probate, J. P. Abee appeals. Affirmed.

Self & Whitener, J. F. Spainhour, and W. C. Newland, for appellant. J. T. Perkins, Avery & Avery, and S. P. Ervin, for appellee.

HOKE, J. The court below refused to allow the caveators to recall for further examination the witness W. B. Reece, as to a conversation had between the witness and the testator, in reference to which, as stated in the case on appeal, "he had testified, and, having been recalled, had again testified." Our decisions are to the effect that this matter of recalling witnesses for further examination is in the discretion of the judge presiding at the trial, and his action in this respect is not open to review. Sutton v. Walters, 118 N. C. 495, 24 S. E. 357; Olive v. Olive, 95 N. C. 485.

It is contended by appellant that the judge below did not make this ruling in the exercise of his discretion, but on the ground that he had no power to allow appellant to recall the witness; but we do not so interpret the order made. The court held that on the facts stated the right to recall a witness did not exist as a matter of law, and in the exercise of its discretion declined to permit that this should be done. The authorities cited therefore are decisive against appellant's position.

It was further urged for error that his honor held that there was no evidence tending to show undue influence. It is established with us that, in order to avoid a will on this ground, the influence complained of must be controlling and partake to some extent of the nature of fraud. Marshall v. Flinn, 49 N. C. 199; Wright v. Howe, 52 N. C. 412; Paine v. Roberts, 82 N. C. 451. As held in Wright v. Howe, supra: "The influence which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not otherwise have made."

It would serve no good purpose to go into any extended or detailed statement of the testimony. We have carefully read and considered it as given in the case on appeal, and we fully concur with the trial judge that there is no evidence tending to show undue influence, and are of opinion that the judgment establishing the validity of the will should be affirmed.

No error.

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(146 N. C. 336)

## AUSTIN v. CITY OF CHARLOTTE.

(Supreme Court of North Carolina. Dec. 11, 1907.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREET—CONTRIBUTORY NEGLIGENCE.

In an action against a municipal corporation for injuries sustained by falling into an unguarded street excavation, it was shown that plaintiff left the street and started across some vacant lots to his destination. He encountered a hedge and moved along the hedge toward the street, which he knew to be excavated. The night was dark, and he was feeling his way with his feet. In working around the hedge and onto the sidewalk, which he thought was there, he fell into the excavation and was hurt. *Held*, that plaintiff was guilty of contributory negligence precluding recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1679.]

Appeal from Superior Court, Mecklenburg County; Ferguson, Judge.

Action by James A. Austin against the city of Charlotte. From a judgment granting a nonsuit, plaintiff appeals. Affirmed.

The plaintiff is a physician, and on the night he was injured he had started to the house of his patient at No. 1006 North Brevard street, in the city of Charlotte. Brevard street had been excavated, and the houses on the east side, including the house of his patient, were left standing from 10 to 12 feet above the level of Brevard street. The doctor got off the street car at the intersection of Brevard and Thirteenth streets, there left Brevard street, and ascended some steps cut out of the bank, crossed Thirteenth street, and started to his patient's house across the intervening yards. After crossing Thirteenth street and passing into Yandle's yard, which was the first yard after leaving Thirteenth street, he struck a hedge of evergreen about midway between the house and the street. It was a dark night, and the plaintiff could not see. He knew that Brevard street in front of Yandle's yard had been excavated, and he knew that the bank on the east was very steep, if not perpendicular. When he struck the hedge, he moved along the hedge, not towards the house, where there could have been no danger, but towards the street, which he knew had been excavated. When he fell he was sliding his feet along so as to feel his way and not fall into the excavation, and at the same time he was holding onto the hedge as a protection and trying to pull himself around the hedge and get onto the sidewalk, which he thought was there. At this point the ground gave way under the plaintiff, and he fell into Brevard street. At the close of plaintiff's evidence, the court granted the defendant's motion for nonsuit, and plaintiff appealed.

Tillett & Guthrie and R. E. Austin, for appellant. Pharr & Bell and Hugh W. Harris, for appellee.

CLARK, C. J. The plaintiff was not injured by traveling along the street or sidewalk, nor by any defect in the street, or so near the street as to make it dangerous for travel. In fact, the plaintiff was not traveling the street at all. The trouble was not that Brevard street was dangerous to travel, but that Yandle's lot was. The city was not responsible for injury sustained by one not traveling its streets. It was not required to see that it was safe for plaintiff to traverse a private lot. In Scranton v. Hill, 102 Pa. 378, 48 Am. Rep. 211, the plaintiff was passing over a bridge along a public highway, and, supposing that he was clear of the bridge (it being in the nighttime), turned aside to enter a path, which left the highway, and unfortunately he turned from the highway before he had reached the path and fell over the edge of the bridge. The court in that case decided that the following instructions should have been given: "It being the undisputed testimony in this case that the plaintiff elected to leave the traveled street for the purpose of passing over an adjacent lot, without the limit of the highway, that though the right to pass over such adjacent lot may exist so far as to protect the plaintiff from trespass, yet the safety of the way in which he passed to such adjacent lot is at his own peril, that the defendant is not under any legal obligation to keep such passage to an adjacent lot in safe condition, and therefore the plaintiff cannot recover." In Bunch v. Edenton, 90 N. C. 431, cited by plaintiff, the person was traveling along the sidewalk and fell into an adjacent pit. Here plaintiff was traveling through a private lot and fell into the street. Besides, the plaintiff was injured by his own negligence. He says that he knew that Brevard street had been excavated; that he had passed there a short time before, and the work was then going on; that on this night he inquired of a street car conductor if there were steps up the bank at Starnes' house; that when he got off the cars he went up the bank 12 or 15 feet high, out of Brevard street at the railroad; that when he struck the hedge in Yandle's lot he turned toward the street and went along the hedge, feeling his way with his feet. Evidently at that moment he was aware of the presence of the danger. Thus the plaintiff, on a dark night, without a light, was feeling his way toward the point of danger, and taking his chances on being able to get around the dangerous point without harm. Even though the sidewalk had been there, and as to this he said he did not know, but supposed it was there, yet even then he knew he was taking chances with danger, because even with the sidewalk he was dangerously near the excavation, and he was aware of this because he said he was sliding his foot along the ground, and says that he hoped to pull himself around the hedge by holding onto the hedge, and this statement is borne out by the natural fact that he pulled down a part of the hedge with him when he fell. It was a case of the plaintiff's knowing of the danger and taking his chances to escape. It would hardly be contended that if this had occurred in the daytime the plaintiff would not have been guilty of negligence. Much more was it negligence for him to take such chances in the nighttime, when he could not see.

In Walker v. Reidsville, 96 N. C. 382, 2 S. E. 74, the town of Reidsville had made an excavation within about 15 feet of the grounds around the market house, which grounds were used as a public thoroughfare. There were no lights or barriers around this pit or excavation. The plaintiff started to his home in the night, and, the grounds around the market place being crowded with people, he started across the lot where the pit was, and fell in and was injured. He stated that, while he knew the pit was there, he was thinking of something else at the time, and forgot about the pit. The court said: "In that case the party injured, in his own wrong, helped to bring the injury upon himself. In a just sense, he injured himself." The court said further: "It seems to us that there can be no reasonable question that the plaintiff himself negligently contributed to the severe injury of which he complains, and that his negligence was the direct, helping cause of it. He well knew of the pit, its dangerous character, where it was, and of the passway, 15 feet broad, between it and the market house, out of which he passed. He did not need to go near it at all. He went out of his usual way in doing so. He did not by mere accident fall into it as he passed along by it. He unnecessarily and carelessly walked into it. Although he no doubt suffered greatly, he is not excusable for forgetting it. A reasonably prudent and careful man would not forget the presence of such danger in his immediate neighborhood—one that he had seen and observed every day for more than a fortnight, and but a few hours before he received the hurt. He was bound to act upon his information and use ordinary care and prudence in shielding and protecting himself from what he knew to be a menacing danger to every one who passed near it. He forgot, and failed to be careful at his peril, and in his own wrong. Parker v. Railroad, 86 N. C. 221; Railroad v. Houston, 95 U. S. 697, 24 L. Ed. 542; Dillon, Mun. Corp. § 789; Beach, Cont. Neg. 40." In this case the plaintiff knew of the condition of the street, but by a mistake went towards it, instead of towards the house. He trusted to finding his way at night over a private lot.

The judgment of nonsuit is affirmed.

Affirmed.

(146 N. C. 311)

ASHEVILLE LAND CO. et al. v. LANG et al.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. BOUNDARIES—WATER COURSES—ACCRETION.
The doctrine that where a stream is a boundary, imperceptible accretions to the bank from the shifting of the stream belong to the proprietor on the gaining side, and the stream remains the boundary, does not apply where the stream is not the boundary, but is only mentioned as one of the means to locate the beginning point of the survey of a lot whose boundaries where actually marked on the ground, and a change in the stream will not shift the beginning point of the survey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 99.]

2. SAME.
Where the beginning corner of a survey is on the bank of a stream, the measurement in running the lines of the survey must be made from the place where the beginning corner stood at the date of the deed, though the doctrine of accretion applies, for otherwise the whole tract would move with the bank of the stream.

3. SAME—EVIDENCE—ADMISSIBILITY.
Where a witness testified as to the finding of a stake resembling a surveyor's stake at the point where the evidence tended to locate the beginning corner of a survey, the map made by the witness at the time was competent to corroborate his testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 166, 173.]

4. SAME.
Where the jury may find that a subsequent call in a survey was identified, the courses and distances may be reversed and run backward to find the lost corner or point of beginning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 52.]

Appeal from Superior Court, Buncombe County; Cooke, Judge.

Ejectment by the Asheville Land Company and another against J. H. Lang and others. From a judgment for defendants, plaintiffs appeal. Reversed.

Action of ejectment over the boundary of a town lot. Both parties claimed under the same source of title. The controversy turned upon the true location of the beginning corner called for in the Hallyburton deed as follows: "Beginning at a stake on the south bank of Town Branch in the eastern edge of Depot street, said stake being 209 feet east of the Western N. C. R. R. bridge over said Town Branch." There was evidence offered by plaintiff to show that at the date of said Hallyburton deed the said stake was placed at the edge of the south bank of Town Branch, and that by actual measurement at that time this stake was 170 feet from the angle in Depot street, the end of the first call in said deed. Also, that Town Branch had changed its bed 18 feet since the date of the Hallyburton deed by reason of freshets and the filling in of the lot with stone and dirt by the adjacent proprietor and by the city government. The defendant offered evidence that the location of said Branch had not been perceptibly changed. A witness for plaintiff testified that he made the sale to Hallyburton, and saw the survey made for the boundaries set out in said deed; that the beginning stake was set 170 feet from the angle in Depot street. The plaintiff also offered evidence that, when Depot street was paved in 1893, in digging down in the made earth 170 feet from said angle, a stake was found at that point which had the appearance of being a surveyor's stake, and the fact was then and there noted down by the city engineer, who made a map, identified by said surveyor at this trial, on which, at the time, he marked the location of said stake. This map was offered to corroborate the surveyor, but was rejected on objection by the defendant, and plaintiff excepted. The evidence was uncontradicted that, after the date of the Hallyburton deed, the lot at the beginning point was filled in several feet deep with stone and dirt. Verdict and judgment for defendant. Appeal by plaintiffs.

Frank Carter, H. C. Chidister, and Davidson, Bourne & Parker, for appellants. Merrimon & Merrimon, for appellees.

CLARK, C. J. The plaintiffs excepted for the refusal of the following prayer for instruction: "That in no aspect of the case can you consider the run or thread of the stream as it existed in 1889 (at the date of the Hallyburton deed), or as it now exists at its intersection with the eastern margin of Depot street, as defining the beginning corner." It not having been found or admitted that the stream had changed its location, this prayer could not have been given, though it is true that the doctrine of accretion has no application here. That applies where a stream is a boundary. In such cases the slow, gradual, imperceptible accretion to the bank from the shifting of the stream belongs to the proprietor on the gaining side, and the stream remains the boundary. But here the stream is not the boundary. It is mentioned as one of the means to locate the beginning point of the survey of a town lot, whose boundaries were actually run out and marked on the ground; said beginning being further measured at the time as being 170 feet from a certain angle in the road. The change in said road, or location of said angle, would not shift the location of the beginning point in the survey of said lot. No more would the shifting of the bed of the stream change the location and boundaries of the lot. But, as there was evidence tending to show that the bed of the stream had not changed, in that event (should the jury so find) its location would be a factor, and the prayer that "in no aspect of the case" should the run of the stream as it existed at date of the deed, or as it exists now, be considered, was properly refused. Even where the doctrine of accretion applies, if the beginning corner is on the bank of a stream, in running the other lines measurement must be made from X, where the beginning corner stood at date of deed, else

the whole tract would move with the bank of the stream. But the court erred in excluding the map made by the city surveyor in 1893, whereon, at the time, he entered the finding of the stake resembling a surveyor's stake, at the point where the evidence of the plaintiff tended to locate the beginning corner or stake. This evidence was offered to corroborate the testimony of the city engineer, and was competent for that purpose.

"After the jury had retired, and had been out several hours considering the issues in this case, they came back, and at about 11 o'clock at night asked for further instructions. In reply to their interrogatory as to whether or not they could locate the beginning corner by commencing on the alley and by running back the first two lines according to their courses and distances, the courses reversed, the court replied that they could not." The plaintiff excepted. This instruction, taken in connection with the circumstances under which it was given, must have misled the jury into the belief that they could not, under any circumstances, nor for any purpose, reverse the two first courses of the Hallyburton deed; whereas, in certain aspects of the case, it was entirely proper for them to have done so. The rule laid down in our authorities is that the survey, where practicable, must be run out in the same order in which the surveyor, at the time of the deed, made it. But when there is, as here, the search for a lost corner or line, if corners or lines further on are located, the courses and distances may be reversed and run backward to find the lost corner or beginning. In Harry v. Graham, 18 N. C. 77, 27 Am. Dec. 226, Ruffin, C. J., says: "For example, if this deed had said that the line from the corner chestnut and red oak ran to a black oak near the patentee's other line, and gave neither course nor distance, or only one, and thence N. 45° E., 220 poles, to a post oak, his own and Beard's corner, the line might be reversed from the post oak to ascertain the corner of that and the next preceding line, because that affords the only evidence (the black oak not being found, or its locality otherwise identified) of the point at which the one line terminated and the other began." In Dobson v. Finley, 53 N. C. 498, Pearson, C. J., says: "Supposing the pine to be established as the second corner, could the first, a beginning corner, be located by reversing the course and measuring the distance called for from the pine back, that is on the reversed course? His honor ruled that the beginning corner could be fixed in this way. We agree with him. If the second corner is fixed, it is clear, to a mathematical certainty, that by reversing the course and measuring the distance you reach the first corner." Both these cases are cited, approved, and followed in Lindsay v. Austin, 139 N. C. 467, 468, 51 S. E. 990, in which case the authorities are reviewed and the principles applicable are clearly stated by Mr. Justice Brown, who also points out that "there is nothing in Norwood v. Crawford, 114 N. C. 518, 19 S. E. 349, which militates against the position that this is a proper method of determining the beginning corner." The same principle that reversing the line may be resorted to when a lost corner or line cannot be located by proceeding in the regular course is laid down in Duncan v. Hall, 117 N. C. 446, 23 S. E. 362. Here one, at least, of the subsequent calls, the alleyway, was identified, or the jury could so find, and, if they did, the courses and distances could be reversed to locate the beginning.

It is not necessary to consider the other exceptions, as there must be a new trial, since in the above particulars there is found reversible error.

Error.

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(78 S. C. 562)

## COOPER v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. June 4, 1907. Rehearing Denied Dec. 14, 1907.)

1. APPEAL — DECISIONS REVIEWABLE — ORDER ON MOTION TO STRIKE OUT PLEADING.

Under Code Civ. Proc. 1902, § 11, subd. 2, allowing an appeal from an order striking out a pleading or any part thereof, there is no appeal from an order refusing to strike.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 704.]

2. PLEADING—MATTERS OF FACT OR EVIDENCE —CERTAINTY AND DEFINITENESS.

In an action against a railroad by a person injured in leaving a moving train, a complaint, alleging that the conductor encouraged and invited plaintiff to get off the train while in motion, is sufficiently certain and definite without setting out the words, conduct, and surrounding circumstances from which the encouragement and invitation are drawn, since facts and not evidence should be pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 31, 39.]

3. CARRIERS — DUTY TO PERSONS ASSISTING PASSENGERS—PERSONAL INJURIES.

A person who accompanies a passenger onto a train to render her assistance, in conformity with a custom acquiesced in by the carrier, is not a trespasser, and, if the carrier has notice of his intention to disembark, it must hold the train a reasonable time to allow him to leave it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1242.]

4. SAME—ACTIONS—EVIDENCE—QUESTION FOR JURY.

In an action against a carrier by one entering a train to assist a passenger, for injuries sustained in leaving the moving train, evidence *held* sufficient to take to the jury the question whether the carrier had notice of plaintiff's intention to disembark.

5. SAME—NEGLIGENCE OF PLAINTIFF.

Whether plaintiff was negligent in jumping from a moving train *held*, under the evidence, to be for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1391–1393.]

6. APPEAL—REVIEW—EVIDENCE.

Whether or not a verdict is capricious or contrary to the weight of the evidence cannot be determined on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928–3934.]

Appeal from Common Pleas Circuit Court of Sumter County; R. O. Purdy, Judge.

Action by J. Witherspoon Cooper against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willcox & Willcox and Mark Reynolds, for appellant. Lee & Moise, for respondent.

POPE, C. J. This action was commenced by the plaintiff in April, 1903, to recover damages for personal injuries sustained in alighting from defendant's train, caused, as alleged, by the negligence of defendant company in the following particulars: (1) In that the train did not stop long enough to enable plaintiff to accompany his daughter on board and alight therefrom with safety; (2) that the statutory requirement that the company shall cause all of its trains for passengers entirely to stop for a sufficient time to receive and let off passengers was not observed; and (3) that the conductor in charge of defendant's train encouraged and invited the plaintiff to alight. On a former appeal this court overruled the judgment of the circuit court sustaining a demurrer by defendant. 69 S. C. 479, 48 S. E. 458. The facts are as follows: On December 28,. 1902, plaintiff's daughter, a young girl, wishing to go from Mayesville, her home, to Sumter, S. C., plaintiff bought for her a ticket entitling her to passage. The train was due at Mayesville at 9 o'clock p. m. but on the night in question was about an hour late. On its arrival, in order to help his daughter with her baggage and to see her safely on the train, plaintiff got on board, and, according to his testimony, passed through the smoker to the door leading into the main body of the passenger coach, where he bade his daughter good-bye and at once proceeded to disembark. Before he reached the platform, however, the train had started, and, in his endeavor to get off while it was in motion, he fell or was thrown to the ground, thereby sustaining the injuries complained of. The plaintiff testified the conductor was on the platform and encouraged him to jump. The conductor admitted his position on the platform, but denied that he noticed the plaintiff or in any way encouraged the act. Prior to the trial of the case, defendant gave notice to the plaintiff that a motion would be made before Judge R. O. Purdy to strike out as irrelevant and redundant, or failing in that to make more definite and certain, the following statements from paragraphs 5 and 6, respectively, of the complaint: "But on the contrary, then and there encouraged the plaintiff to get off said train whilst in motion, whereby the plaintiff received serious personal injuries, as aforesaid." "That he was encouraged and invited by the agents and servants of the defendant to get off of train in the manner aforesaid." The ground for the motion was that these clauses stated a legal conclusion, and the issue formed by its denial could have no connection with it or effect upon the cause of action. The motion was overruled in both particulars, and the defendant gave notice of appeal to this court. The case on its merits was heard at the April, 1906, term of court of common pleas for Sumter county, and resulted in a verdict of $500 for the plaintiff. Judge Gary, the presiding judge, having refused a motion for a new trial, the defendant appeals.

The first question that arises is whether or not this court can consider the appeal from the order of Judge Purdy refusing to strike out the above-quoted sections of the complaint as irrelevant and redundant. By reference to section 11, subd. 2, of the Code of Civil Procedure of 1902, it will be seen that, while appeal is allowed where the order strikes out any pleading or part thereof, no provision is made for appeal in case of refusal to strike out. In speaking on this subject in the case of Harbert v. Railway, 74 S. C. 16, 53 S. E. 1002, the court says: "The omission to provide for appeal from an order refusing to strike out is significant, and there is good reason for it. If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleadings, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings. On the other hand, if the circuit court errs in refusing to strike out any pleading or portion of pleading as irrelevant, the error of submitting an irrelevant issue to the jury may be corrected on appeal from the charge actually made or from refusal of requests to charge. This view of the matter impairs no substantial right, and prevents multiplicity of useless appeals and the delay and inconvenience which would be incident thereto." By omitting to allow appeal from refusal to strike out, it was not intended to give the circuit judge arbitrary power in the matter. The purpose was to save inconvenience and delay. While it was probable that at times judges would err in refusing to strike out irrelevant and redundant matter, yet, after the whole case had gone to the jury, if the moving party felt himself hurt thereby, as in the case of a wrong charge or wrong refusal to charge, he could on his general appeal to this court have it reviewed. In this case, however, the appellant seems not to urge the alleged error in refusing to strike out, but relies on the ground that the complaint should have been made more definite and certain. The complaint alleged that the conductor "invited and encouraged" plaintiff to jump from the train. We are unable to see where the conclusion of law comes in, or where the allegation is indefinite and uncertain. In a pleading the facts which are but the logical conclusion from

other facts must be stated; and the facts from which they are inferred are but evidence, not to be pleaded. This is the essence of proper pleading. Here the invitation is a fact drawn from words, conduct, etc. Had the plaintiff undertaken to put into his complaint all of the evidentiary facts, such, for instance, as the words and gestures used, the surroundings, the position, and bearing of the conductor, he must have gone far beyond the usual and proper mode of pleading. These facts were the evidence to be brought out on the trial of the cause. The invitation was the ultimate, material fact to be proved. The motion of the defendant therefore was properly overruled. Bliss on Code Pleading, § 210; Pomeroy's Remedies, § 526; Shaver v. Grendel Mills, 74 S. C. 430, 54 S. E. 610; Lynch v. Spartan Mills, 66 S. C. 17, 44 S. E. 93.

We proceed now to consider whether or not the circuit judge erred in refusing to grant a new trial. While there are a number of alleged errors in the refusal, we think they raise only three questions: (1) Was there any evidence of negligence on the part of the defendant? (2) Did the evidence conclusively show the plaintiff guilty of contributory negligence? (3) Was the verdict capricious and contrary to the weight of the evidence.

A consideration of the first question leads to the inquiry: What was the duty of the defendant to the plaintiff as one assisting a passenger? Clearly he was not a trespasser. Yet it is as true that the same duty was not owed him as if he had been a regular passenger. As was said by the court in the case of Railway v. Lawton, 55 Ark. 528, 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 54: "It is a matter of common knowledge that, in the usual conduct of the passenger business, it often becomes necessary for those not passengers to go upon the cars to assist incoming as well as outgoing passengers, and that a practice has grown up in response to this necessity. While it perhaps arose out of a consideration for the security and convenience of the traveler, it has proved beneficial to carriers, and now prevails in this state and extensively elsewhere, and is treated as an incident to the business in the conduct of the public and the acquiescence of carriers. * * * We conclude that such attendant performs a service in the common interest of the carrier and passenger, and that his entry upon a car is upon an implied invitation which entitles him to demand ordinary care of the carrier." In a note to this same case, Mr. Freeman has the following: "The weight of authority undoubtedly sustains the proposition that a person who resorts to the station or railroad cars of a railroad company for the purpose of assisting an incoming or an outgoing passenger is there under the implied invitation of the company, and is not a trespasser. But unless the company or its employés have notice of his purpose to assist a passenger to a seat only, or of his intention to merely assist a passenger to alight from the train, it is not under the same obligation, as to protection, that it owes to the passenger, and it is only bound to exercise ordinary care not to injure him while he is attempting to alight from the train." Hutchinson, in his work on Carriers (section 991), lays down the same rule, and quotes many authorities in support of it. He says: "So one who goes upon a train to render necessary assistance to a passenger in conformity with a practice approved or acquiesced in by the carrier has a right to render the needed assistance and leave the train; and the carrier, in permitting him to enter with knowledge of his purpose, is presumed to agree that he may execute it and is bound to hold the train a reasonable time therefor. * * * Where the carrier's servants have no knowledge, or there are no circumstances tending to put them on notice, that a person who has boarded a train to assist another intends to alight before the train starts, they are not bound to hold the train until he has had time to disembark, nor to notify him before the train is started." Again, in the case of Johnson v. Railway, 53 S. C. 306, 31 S. E. 213, 69 Am. St. Rep. 849, the court uses this language: "There can be no doubt that a female holding a ticket entitling her to transportation as a passenger on a railroad train, if feeble or incumbered with heavy baggage or other impediments, is entitled to have assistance in boarding the train, and, if the same is not afforded by the railroad officials or servants, her husband or other escort may render the necessary assistance, and for this purpose is entitled to enter the train, and is entitled to a reasonable time to leave the train before it is put in motion. Both reason and authority unite in sustaining this proposition, * * * providing the defendant or its agents have notice of the purpose for which such person enters the train." From the foregoing authorities, it seems clear that the defendant, if it in any way had notice of the intention with which plaintiff entered its train, owed him the duty of giving him sufficient time to disembark. Of course, if it could not possibly have had such knowledge, it would be unreasonable to hold that such a duty existed. All that the statute requires is that sufficient time be allowed for the passengers to get on and off at the station, and if this is allowed no one has a right to complain. In this case, every witness who boarded the train testified that it came to a standstill, and that he was seated before it moved off. The question then is: Was there any evidence that defendant had notice? Plaintiff's testimony is that as he returned to the platform he found the conductor there, and was urged by him to get off. The conductor himself testified that he was on the platform. This, together with evidence of the surrounding circumstances, was sufficient to go to the jury on the issue

of negligence on the part of the defendant.

The second alleged error in refusing to grant a new trial was that the testimony showed conclusively that plaintiff's injuries were due to his own negligent act in jumping from the moving train. In the case of Cooper v. Railway, 69 S. C. 479, 48 S. E. 458, the rule is laid down that it is not negligence, as a matter of law, for a passenger to alight from a moving train on invitation of the carrier's agents, unless the circumstances are such as to make the danger of alighting obvious to a person of ordinary prudence and senses. Were the circumstances such in this case? It is true it was in the night, but would not a reasonable and prudent man here have reached the conclusion that the train was moving very slowly, having just started? Would not he have a right to believe that, being at a regular station, his landing would be safe and smooth? Under such circumstances, we cannot conclude as a matter of law that the plaintiff was negligent in jumping from the train. This contention therefore must be overruled.

The whole question of negligence and contributory negligence was properly submitted to the jury, and, a verdict having been reached, this court cannot consider whether it is capricious and contrary to the weight of the evidence. Blowers v. Railroad, 74 S. C. 222, 54 S. E. 368.

It is the judgment of this court that the judgment of the circuit court be affirmed.

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(79 S. C. 570)

## PARLER et al. v. FOGLE et al.

(Supreme Court of South Carolina. Dec. 14, 1907.)

1. COUNTIES—CREATION OF NEW COUNTIES—BOUNDARIES.

Neither the Constitution nor statutes of the state require the lines of new counties to conform to township or precinct boundaries.

2. SAME—PETITION—SUFFICIENCY.

The question whether the boundaries of a proposed new county were laid down in the petition for the creation thereof with sufficient definiteness was for the Governor to determine.

3. SAME—AMENDMENT TO PETITION.

It was within the discretion of the Governor to refuse or allow an amendment to a petition for the creation of a new county, setting forth with more definiteness the boundaries thereof.

4. INJUNCTION — SUBJECTS OF RELIEF — RESTRAINING HOLDING OF ELECTION—RIGHT TO VOTE.

The right to vote at an election being a mere political right, the general rule is that it is not within equitable cognizance.

5. SAME—ADEQUATE REMEDY AT LAW—IRREMEDIABLE INJURY.

The power to interfere by injunction to prevent an election, if it exists, should be exercised only where there is no adequate legal remedy, and it is made clear that an irremediable wrong will result from holding the election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 14.]

6. SAME—ADEQUATE REMEDY BY CERTIORARI.

Since under Civ. Code 1902, § 577, the decision of the State Board of Canvassers, on appeal, is not conclusive on questions of law, parties opposing the holding of an election to determine whether or not a new county should be created had an adequate remedy by writ of certiorari to test the validity of the election and their right under the Constitution to vote thereat.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 15.]

7. SAME—FAILURE TO COMPLY WITH REGISTRATION LAWS.

The fact that the election officers or the people have not taken the proper steps to have qualified voters ready to cast their ballots is not ground for the Supreme Court to enjoin an election which the Constitution requires the Governor to order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 145.]

Petition by A. R. Parler and others for a writ of injunction against W. Brooks Fogle and others. Petition denied.

W. C. Wolfe, B. H. Moss, and D. O. Herbert, for petitioners. Bellinger & Welch, for respondents.

WOODS, J. On October 28, 1907, his excellency, Gov. Ansel, ordered an election to be held on Tuesday, December 17, 1907, upon the question of creating a new county out of portions of Orangeburg and Lexington counties. The plaintiffs, alleging themselves to be qualified electors residing within the area of the proposed new county, have filed their complaint in this court, praying that the election be enjoined on several grounds which will be separately considered. The answer does not deny any material allegation of fact, and it was agreed at the argument that it was to be treated as a demurrer to the complaint. The question therefore is whether, taking all the statements of fact in the complaint as true, the court should enjoin the commissioners and managers from holding the election.

The petition to the Governor and all the proceedings thereunder are alleged to be void "because the boundaries and lines of the proposed new county are not stated and described with sufficient definiteness and clearness so as to be understood and followed by the surveyors, and said boundaries and lines are not surveyed and 'plainly marked,' as required by a statute, with sufficient definiteness and clearness, so as to enable those interested to know certainly where the lines of the proposed new county are located, and who, among those residing near the proposed new lines, are within, and who are without, the proposed new county; and also because the said proposed lines have been run in utter disregard of the lines of the townships and polling precincts established by law in the said county of Orangeburg, and in many cases the townships and polling precincts are cut up and divided so as to include the greater part of the township or polling precinct within the proposed new county, and exclude the polling or voting place, and such is the case with Orange, Goodbye, and Poplar

townships and other townships in said county of Orangeburg." The complainants further allege the Governor, without warrant of law, allowed the petition presented to him to be amended so as to enlarge the area of the proposed new county. There is nothing in the Constitution or statutes of the state requiring the lines of new counties to conform to township or precinct boundaries. The question whether the boundaries of the proposed new county were laid down in the petition with sufficient definiteness was for the governor to determine. Lamar v. Croft, 73 S. C. 407, 53 S. E. 540; Reese v. Ansel, Governor, 58 S. E. 933. So also it was within the discretion of the Governor to refuse or allow the amendment to the petition before him setting forth with more definiteness the boundaries. The Constitution proceeds on the theory that the Governor, with respect to all proceedings before him, will see that its provisions are carried out with justice to all parties concerned; and to this end by implication he was empowered to pass upon all questions of detail, such as proposed amendments, reasonably necessary to the determination of the main question whether the election should be ordered.

The plaintiffs next insist the election should be enjoined because they are qualified electors residing within the area of the proposed new county, who will be prevented from voting at the election. On this important question the allegations of the complaint are as follows: "That section 1 of article 7 of the Constitution of South Carolina provides that, upon due proceedings had as provided by law in such case, the Governor shall order an election upon the question of forming and creating a proposed new county, and that at such election all the qualified electors residing within the territory constituting the proposed new county shall have the right to vote in such election for or against the formation and creation of such new county. That section 576 of volume 1 of the Code of Laws of 1902 of South Carolina provides that for the purpose of such election the commissioners of election for each old county proposed to be cut shall appoint managers for each voting place in the area of the old county proposed to be cut off, and shall deliver to them the books of registration for those voting places, limiting and restricting the voting to such voting places as are located within the new territory, and there is no provision of law for holding such election at precincts outside of the new territory. That pursuant to the last-mentioned statute, the defendants have only ordered such election to be held within the territory constituting the proposed new county, and have instructed the managers of such election to allow only those electors registered at the polling precincts within the territory constituting the proposed new county to vote in such election, whether residing in such territory or not. That four of the plaintiffs, to wit, A. R. Parler, A. C. Smith, E. F. Irick, and George W. Smith, reside within the lines of the proposed new county, and are all duly qualified, registered electors in all particulars, and reside within the townships of Goodbye and Poplar, in said county and state, and are duly registered to vote in all the voting places within said townships, to wit, at Dantzler's Mill and Eiloree, but that, while the greater portion of said townships and polling precincts are included within the proposed new county, the only voting places in said townships are left outside of the proposed new county, and there can be no other voting places within said townships unless created by the General Assembly, and that the defendants have not appointed managers or authorized the opening of these voting places for the election upon the question of forming and creating the proposed new county aforesaid, and that said plaintiffs will be entirely deprived of exercising their constitutional right of voting upon the said question; and there are numerous other qualified electors residing within the territory constituting the proposed new county aforesaid situated and circumstanced precisely as the said plaintiffs, who will all be disfranchised in so far as this election is concerned. That all statutes or parts of statutes of South Carolina contravening the aforesaid provisions of the Constitution of this state, as hereinbefore stated, and depriving the qualified electors of their constitutional right to vote, are null and void and unconstitutional; that the action or proposed action aforesaid of the defendants in holding or attempting to hold the said election is null and void and without the sanction or authority of law."

Section 576 of the Civil Code of 1902, referred to in the petition, relating to new county elections, contains this enactment: "Such elections shall be conducted in the same manner as general elections in this state, and all persons entitled to vote under the Constitutions and laws of this state, at general elections shall be entitled to vote at such election." Article 2, § 9, of the Constitution, provides: "The General Assembly shall provide for the establishment of polling precincts in the several counties of the state, and those now existing shall so continue until abolished or changed. Each elector shall be required to vote at his own precinct, but provision shall be made for his transfer to another precinct upon his change of residence." Article 7, § 1, requires that, after the filing of the proper petition, "the Governor shall order an election * * * by the qualified electors within the proposed area." The argument for injunction on this point may be thus summarized: The plaintiffs and many others are qualified electors within the area of the proposed new county, but registered at precincts not situated within such area. The Constitution does not allow them to vote except at their own precincts. The statute does not provide for an election at the precinct at which they

are registered without the area of the proposed new county, and the commissioners of election, acting under the statute, will not open the polls at such precincts, but only at those within the area of the proposed new county. The plaintiffs are not able to change their registration to the precincts within the proposed new county, because their residence has not been changed. If it be admitted that the Constitution confers on the plaintiffs and other electors in like situation the right to vote on the new county issue, the conclusion cannot be avoided that the General Assembly has provided for an election and denied the right of suffrage conferred by the Constitution by failing to authorize the opening of any poll at which the right could be exercised.

The question made by the plaintiff is obviously a serious one, but its decision in this proceeding would be premature. The right to vote at an election being a mere political right, the general rule is that it is not within equitable cognizance. Darst v. People, 62 Ill. 306; Guebelle v. Epley, 1 Colo. App. 199, 28 Pac. 89; Harris v. Schryock, 82 Ill. 119; Roudanez v. City, 29 La. Ann. 271; Hardesty v. Taft, 23 Md. 512, 87 Am. Dec. 584; Shoemaker v. City, 129 Iowa, 244, 105 N. W. 520, 3 L. R. A. (N. S.) 382, and note; McCrary on Elections, § 386; High on Injunctions, 1316. In some cases the courts have enjoined popular elections on issues similar to this, where there was no constitutional or statutory authority whatever for holding them. This doctrine has been applied principally where it was proposed under an unconstitutional statute to hold an election, the result of which would affect property rights. Mayor v. Hughes, 110 Ga. 795, 36 S. E. 247; Murfreesboro Ry. v. County Commissioners, 108 N. C. 56, 12 S. E. 952; State v. Eggleston, 34 Kan. 714, 10 Pac. 3. But the power to interfere by injunction to prevent the expression of the popular will by an election, if it exists, should be exercised with the greatest caution; and only where, under the well-recognized rule of equity, there is no other adequate legal remedy, and it is made clear that an irremediable wrong will result from holding the election. In Paine on Elections, § 940, it is said: "The jurisdiction of any court, or of the whole judicial department of the government, to enjoin the expression of the popular will at a time in the manner provided by statute, may well be doubted. If the election, when held, is not according to statute, or if the statute was enacted without any constitutional authority, the courts might very well hold the election invalid. But that is quite another thing from enjoining the people from peacably assembling for casting their votes for, or against, any proposition submitted to them under the color of law." So far as our investigation extends, an injunction against the holding of an election by the people has never been issued in this state. It will rarely happen that a court can say in advance irremediable wrong will result to individual electors from the result of an illegal election. Assuming a threatened denial of the right of electors to cast their ballots, this might turn out to be damnum absque injuria, for the election might result in favor of the side on which the complaining electors would have voted, or the result might be so overwhelmingly against that side that the votes of all whose rights were threatened in advance would have no practical effect. The plaintiffs have a plain and adequate remedy at law by a writ of certiorari to test the validity of the election and their right to vote under the Constitution, if it should turn out a denial of their alleged right affected the result. Segars v. Parrott, 54 S. C. 1, 31 S. E. 677, 865. For even under section 577 of the Civil Code of 1902 the decision of the State Board of Canvassers, on appeal, is not conclusive on questions of law.

The last allegation is that the registration laws of the state have not been complied with, and that therefore there are no qualified electors within the proposed new county. It is no ground for this court, to enjoin an election which the Constitution requires the Governor to order, that the election officers or the people have not taken the proper steps to have qualified voters ready to cast their ballots. If there are no voters, then there can be no election. It is not to be presumed election officers will allow persons to vote who are not entitled to suffrage, and there is no need to enjoin an election which the plaintiffs allege will entirely fail for lack of qualified voters. If illegal votes are permitted, attack may be made on the election after it is held in the manner provided by law.

The petition for injunction is denied, and the complaint dismissed.

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(129 Ga. 635)

## WILEY v. JONES et al.

(Supreme Court of Georgia. Nov. 12, 1907. Rehearing Denied Dec. 21, 1907.)

INFANTS—ACTIONS—WRIT OF ERROR—BILL OF EXCEPTIONS—SERVICE.

The ordinary, suing for the use of one of the heirs at law of a decedent, brought suit on the bond of the administrator against the heirs at law of the surety, alleging that the estate of the surety had been finally settled and distributed among such heirs, with a prayer for a judgment against each heir for the pro rata amount necessary to discharge the liability of the principal to the usee of the plaintiff. One of the defendants was a minor, for whom a guardian ad litem was appointed, who accepted the trust and united in certain demurrers filed by the defendants. The court sustained the demurrers. A bill of exceptions was sued out, assigning error upon the judgment sustaining the demurrers. There is an acknowledgment of service upon the bill of exceptions, by attorneys describing themselves as being "attorneys for defendants in error," following which are the names of all the defendant heirs at law, including the minor. The acknowledgment of service does not contain the name of the guardian ad litem, nor was a copy of the bill of exceptions served upon him. *Held*: (1) The guardian ad litem was a necessary

party to the bill of exceptions. (2) The acknowledgment of service in the name of the minor does not bind the guardian. (3) The writ of error must be dismissed for a failure to serve such guardian ad litem. See, in this connection, Vickers v. Hawkins, 128 Ga. 794, 58 S. E. 44; Grorce v. Field, 13 Ga. 24; 10 Enc. Pl. & Pr. 668, 669, and note; Strayer v. Long, 83 Va. 715, 3 S. E. 372; Boyer v. Boyer, 89 Ill. 447; Clarke v. Gilmanton, 12 N. H. 515; 22 Cyc. 678; Freeman v. Carnock, 2 Dickens' Rep. 439; Taylor v. Atwood, 2 Peere Williams' Rep. 643.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by C. M. Wiley, ordinary, for the use, etc., against B. L. Jones and others. Judgment for defendants, and plaintiff brings error. Writ of error dismissed.

R. L. Anderson, for plaintiff in error. T. J. Cochran and Jno. P. Ross, for defendants in error.

ATKINSON, J. Writ of error dismissed. All the Justices concur, except HOLDEN, J., who did not preside.

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(3 Ga. App. 232)

## CHARLESTON & W. C. RY. CO. v. CAMP.

(No. 701.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. RAILROADS—ACCIDENT AT CROSSING—EVIDENCE.

Negligent conduct of the defendant, if a part of the res gestæ of the transaction in which the plaintiff is injured, though not the proximate cause thereof, may be alleged and proved in connection with the negligent acts of the defendant through which the injury did directly occur.

2. SAME—FAILURE TO SIGNAL.

If a railway train approaches a public crossing without giving signals and without checking its speed in accordance with the statute, the company may be held liable for an injury to a mule, which, while being led across the track at the crossing, becomes frightened at the train, balks, jerks loose, and is run over a few feet below the crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1476–1482.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

It not appearing that the plaintiff's attempt to take the mule across the track ahead of the train was, under the circumstances, as a matter of law, so negligent as to amount to a failure to exercise ordinary care, the court did not err in overruling the demurrer to the petition.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by C. H. Camp against the Charleston & Western Carolina Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

W. K. Miller, for plaintiff in error. F. W. Capers and T. S. Lyons, for defendant in error.

POWELL, J. The plaintiff alleged that he arrived with his team at a public crossing on the defendant's railroad. He found the crossing blocked by a freight train. After waiting about 15 minutes, he went to the front of the train, seeking the cause, and found the train crew asleep on the engine. He awakened them, and after some time they made an opening in the train. After being thus delayed for an hour, the plaintiff started to drive on and across the tracks, when another freight train approached the crossing at a high speed and without checking in obedience to the crossing law. The plaintiff had a mule tied behind his wagon. The rapid approach of the train caused this mule to balk on the crossing, break loose, and start down the track, where, about 30 feet below the crossing, he was overtaken by the engine and killed. The defendant filed a demurrer, which the court overruled, and it brings error.

1. The first point insisted on is that, since the negligence in blocking the crossing was not the proximate cause of the injury, the allegations in regard thereto should have been stricken. These acts were so closely connected with the injury as to be relevant as part of the res gestæ, just as a violation of the blowpost law is admissible, although the injury does not occur at a crossing, but so near thereto as to make such violation an evidentiary circumstance. Bullard v. Southern Ry. Co., 116 Ga. 644, 649, 43 S. E. 39; Atlanta & Charlotte Air Line Ry. Co. v. Gravitt, 93 Ga. 409, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145.

2. The further point is that there is no allegation that the noise made by the train was unusual and unnecessary. While the rule is often stated in general terms that railway companies are not responsible for the fright of animals on account of noises usual and necessary in running the train, yet this does not mean that, because it is usual for them to violate the crossing law and necessary for them to make the attendant noise to maintain the rate of speed at which they may be unlawfully accustomed to run at such places, a recovery cannot be had in cases such as here alleged. In approaching the crossing, those in charge of the train were under the absolute duty to have it so checked and under such control that it could be stopped if any person or animal happened to be upon the crossing. If they had had the train under this degree of control, the plaintiff's mule would not have been injured, though it became frightened at the normal noise of the train. In this view the unlawful speed, and not the noise, would be the proximate cause of the injury. A., K. & N. Ry. Co. v. Durham, 108 Ga. 547, 34 S. E. 332 (2); Bowen v. G., J. & S. R. Co., 95 Ga. 688, 22 S. E. 695.

3. It is also contended that the plaintiff's contributory negligence prevents a recovery. The cases of Thomas v. Central Ry. Co., 121 Ga. 38, 48 S. E. 683, and Harris v. Southern Ry. Co., 129 Ga. ——, 58 S. E. 873, are cited. In those cases the plaintiff, misjudging the speed of the train, in gross imprudence stepped immediately in front of the engine, and a

recovery was properly denied. The circumstances here are different. So far as the record shows, the plaintiff had time enough to cross. Indeed, we presume he did cross in safety, as there was no allegation of injury to himself, to the team he was driving, or to the vehicle. The balking of the mule, through fright at the approach of the train, is, so far as the record shows, all that kept it from going across before the train arrived. Under these circumstances we cannot adjudge, as a matter of law, that the plaintiff was guilty of such contributory negligence as to preclude a recovery. If the jury find that the plaintiff, in the exercise of ordinary care, should have anticipated the balking of the mule, or that he was in any wise negligent, but in a less degree, in attempting to take it across the track at that time, the defendant would be entitled to a verdict in the one case and to a diminution of the damages in the other. Civ. Code 1895, §§ 2322, 3830; G., C. & N. Ry. Co. v. Mathews, 116 Ga. 424, 42 S. E. 771; Comer v. Barfield, 102 Ga. 485, 489, 31 S. E. 89. See, also, M. & W. R. Co. v. Winn, 26 Ga. 250, 253, 255.

Judgment affirmed.

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(3 Ga. App. 223)

## BRINSON v. BRINSON. (No. 673.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. WRIT OF ERROR—REVIEW.
The evidence was legally sufficient to support the verdict.

2. SAME—ASSIGNMENTS OF ERROR.
The assignments of error as to the admission of testimony are fatally defective, in that they do not state what objection was made thereto when it was offered. Blackburn v. Woodward, 128 Ga. 226, 57 S. E. 318; McFarland v. Darien R. Co., 127 Ga. 97, 56 S. E. 74 (2); Howard Supply Co. v. Bunn, 127 Ga. 664, 56 S. E. 757 (5). See, also, Lewis v. Hutchinson, 127 Ga. 790, 56 S. E. 998 (3).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3010.]

3. SAME.
None of the other exceptions are meritorious.

(Syllabus by the Court.)

Error from City Court of Waynesboro; P. P. Johnston, Judge.

Action between M. E. Brinson against W. W. Brinson. From the judgment, M. E. Brinson brings error. Affirmed.

Lawson & Scales, for plaintiff in error. H. J. Fullbright, for defendant in error.

POWELL, J. Judgment affirmed.

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(3 Ga. App. 247)

## MIMS v. BROOK & CO. (No. 720.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. PARTNERSHIP—ESTOPPEL—PLEADING.
Where the plaintiff seeks to hold a defendant liable as a partner on a contract made in the name of a partnership, on the theory that, even if such defendant were not in fact a member of the firm, his conduct has estopped him from denying such relation, it is not necessary that the facts by which the plaintiff intends to show the estoppel should be set forth in the petition. A direct allegation that the defendant is a member of the partnership is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 408.]

2. SAME—HOLDING OUT.
Before one not in fact a partner will be estopped from denying his connection with the firm, it must appear not only that he, by admissions, conduct, or otherwise, held himself out as partner, but also that the opposite party was misled by the putative status and acted thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 52.]

3. TRIAL—INSTRUCTIONS—ADMISSIONS.
In a case where the admissions of a defendant who has filed a plea of no partnership are offered in evidence against him, it is error for the court to refuse a timely written request to charge the jury that admissions should be scanned with care.

4. PARTNERSHIP—EVIDENCE—BILL HEADS.
Where, as against a defendant filing a plea of no partnership, the fact of the partnership is otherwise prima facie established, bill heads of the firm, used in the business and containing his name as a partner, are admissible in evidence against him; and especially is this true where the proof makes it probable that he knew his name was being so used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 66, 72.]

5. SAME—DISSOLUTION—NOTICE.
Upon the question of the character of notice necessary to be given upon the dissolution of a partnership, in order to relieve the retiring partner, and of the burden of proof in such cases, the decision in the case of Bush v. McCarty Co., 127 Ga. 308, 56 S. E. 430, is explicit and controlling.

6. PRINCIPAL AND AGENT—AUTHORITY—NOTICE TO AGENT.
Evidence tending to establish knowledge on the part of the plaintiff's bookkeeper of the dissolution of a partnership with whom the plaintiff has been doing business is, in the absence of any proof that the bookkeeper's authority to receive notice is greater than that usually possessed by those in that employment, inadmissible to show notice to the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 670–684.]

7. PARTNERSHIP—DEBTS—EXTENSION OF TIME—NONCONSENTING PARTNER—DISCHARGE.
If a creditor of a partnership, after a dissolution thereof, with notice of such dissolution, takes from one partner, without the direction or consent of the other, a promissory note in renewal and extension of a pre-existing debt of the partnership, the partner not so consenting is discharged from liability on the debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 645–647.]

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Suit by Brook & Co. against the College Park Milling Company, an alleged partnership. From a judgment for plaintiffs, S. G. Mims brings error. Reversed.

J. F. Golightly and T. O. Hathcock, for plaintiff in error. Payne, Jones & Jones, for defendants in error.

POWELL, J. Suit was brought by Brook & Co. against the College Park Milling Company on a note signed in the firm name, and

it is alleged that the milling company is a partnership composed of Mims and Hathcock. Mims filed a plea alleging that he was not a partner. It appears that in 1903 Mims and Hathcock did business as partners under the name College Park Milling Company. In 1904 Mims sold out his interest in the mill to Hathcock, and the partnership was dissolved; Hathcock continuing the business under the name of College Park Milling Company. No publication of the dissolution was made. The evidence was doubtful as to whether the plaintiffs were creditors of the partnership, within the purview of the rule requiring actual notice, and was in sharp conflict as to whether they had actual notice of the dissolution. In 1904 and 1905 they sold corn to the milling company, and took a note executed by Hathcock in the name of the milling company in settlement of the account, and this note was from time to time in like manner renewed. It was the contention of the plaintiffs that Mims, after the dissolution and at the time they were making the sales, told them that he was a partner, and afterwards expressly directed them to take the renewal notes as they did; and this he as emphatically denied. Effort was made by the defendant to show that while publication of the dissolution was not made, it was a matter of common notoriety among the business men of both College Park and Atlanta. The plaintiffs introduced in evidence a number of bill heads of the College Park Milling Company, dated in 1904 and 1905, containing the name of Mims as a partner. Mims denied knowledge of their existence, and objected to their introduction in evidence. The jury found against Mims' plea of no partnership, and to the overruling of his motion for a new trial he brings error. Upon an examination of the record, we find that a new trial must be granted upon some of the grounds; but, instead of taking up the assignments of error seriatim, we shall lay down a few rules of law which we think will cover the case. As tested by what we are about to say, some of the exceptions are meritorious; others, not.

1. Where the plaintiff sues a number of defendants as partners, he may recover by showing either an actual partnership undissolved, or, as against one filing a plea of no partnership, an estoppel on his part to deny liability as a partner, either by reason of admissions acted on, by the prior existence of a partnership of the dissolution of which proper notice was not given, or by any other sufficient state of facts to create such an estoppel. Proof of a state of facts which will estop the defendant from denying that he was a partner is as effective, in support of a petition alleging a partnership, as proof that the partnership did actually exist. It is not required that the plaintiff should show, by the allegations of his petition, that he expects to hold the defendant as a partner by reason of an estoppel. Actually the ostensible or putative partner may not be a member of the partnership; but, when he places himself in such a position that the law estops him from denying his connection with the firm, he is, in juridical contemplation, just as irrefragably a partner as if he were actually so. Carmichael v. Greer, 55 Ga. 116; Sankey v. Columbus Iron Works, 44 Ga. 228; Slade v. Paschal, 67 Ga. 541; Carlton v. Grissom, 98 Ga. 118, 26 S. E. 77. The cases of Smith v. Ferrario, 113 Ga. 872, 39 S. E. 428, and Tuells v. Torras, 113 Ga. 691, 39 S. E. 455, cited by counsel as being to the contrary, are in fact not so.

2. An estoppel to deny partnership does not necessarily arise, however, from the fact that one has held himself out as a partner by admissions or otherwise. It must appear that the opposite party acted upon the putative status and was misled thereby. Thornton v. McDonald, 108 Ga. 4, 33 S. E. 680; Stewart v Brown, 102 Ga. 836, 30 S. E. 264.

3. The court should have charged the jury, upon the defendant's timely written request therefor, that "admissions should be scanned with care." This principle was applicable to the case. Civ. Code 1895, § 5479; Ocean Steamship Co. v. McAlpin, 69 Ga. 438 (4).

4. There was no error in admitting the bill heads showing the name of Mims as a partner. Tumlin v. Goldsmith, 40 Ga. 221.

5. "The dissolution of a partnership by the retiring of an ostensible partner must be made known to creditors and to the world. The word 'creditors,' as thus employed in the statute (Civ. Code 1895, § 2634), is not limited to persons who were creditors at the time of the dissolution. A person who had previously sold goods and given credit to the firm during its continuance was within its meaning. Actual notice must be given to creditors. As to the notice which must be given to the world, no inflexible rule can be laid down. Fair and reasonable publication in a public gazette circulated in the locality in which the business of the partnership has been conducted is generally sufficient; and any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard, are proper to be considered on the question of such notice. General reputation of the dissolution, in a community where a person sought to be charged with notice resides, or in the business community to which the parties belong, is admissible as tending to show notice. Such general reputation or notoriety is not itself notice, but is admissible for the consideration of the jury in determining whether there was notice. A witness cannot state his mere conclusion that others than himself knew a fact." Bush v. McCarty Co., 127 Ga. 308, 56 S. E. 430. As stated in the opinion in the case just cited, the burden of showing that the notice was received by the plaintiff is upon the defendant. See, also, Askew v. Silman, 95 Ga. 678, 22 S. E. 573.

6. The fact that the plaintiffs' bookkeeper knew that the partnership had been dis-

solved is prima facie inadmissible for the purpose of charging the plaintiffs with such knowledge.

7. If the plaintiffs, with notice of a dissolution of the partnership, took the note sued on from Hathcock, although it was merely a renewal of a previous note on which Mims was bound, Mims would be discharged from liability, unless he directed the plaintiffs to take the renewal note, or otherwise affirmatively consented thereto, in which latter event he would be bound. Civ. Code 1895, § 2659; First National Bank v. Cody, 93 Ga. 128, 19 S. E. 831 (6); First National Bank v. Ellis, 68 Ga. 192.

Judgment reversed.

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(3 Ga. App. 212)

## FITZGERALD COTTON OIL CO. v. FARMERS' SUPPLY CO. (No. 634.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. PRINCIPAL AND AGENT—AGENCY—DENIAL—ESTOPPEL.

A person who has held out another, throughout a course of dealing, as his agent, and has thus induced third parties to deal with him as his agent, is estopped, as to such third parties, from denying the agency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 42–44.]

2. SALES—WRITTEN CONTRACT—TERMS—DELIVERY—TIME—QUESTION FOR JURY—EVIDENCE.

Under a written contract for the sale of cotton seed meal and hulls, "to be hauled out as early as convenient," it is a question for the jury, to be decided in the light of all the surrounding circumstances and the exigencies of the contracting parties, as to when delivery was to take place.

(a) It is not error to admit in evidence a letter, from the buyer to the seller, demanding delivery of the remainder of the goods at a time which, under the evidence, the jury were authorized to find was reasonable for such delivery, or even at a later time, when the evidence was such as to indicate that there had been a mutual temporary disregard of the terms prescribing an earlier delivery.

3. WRIT OF ERROR—REVIEW—INSTRUCTIONS—PREJUDICE.

A party cannot complain of a charge which was more favorable to him than it ought to have been.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3562, 4052–4062.]

4. EVIDENCE—PAROL—SIGNING CONTRACT—CAPACITY.

Where a contract is signed by a person individually, parol evidence is admissible for the purpose of showing that he was acting as agent for another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1906–1910.]

5. TRIAL—INSTRUCTIONS—REQUESTS—GENERAL CHARGE.

Where a matter is covered correctly and sufficiently in the general charge, it is not reversible error that the judge refused to charge it in the identical language of a written request.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651–659.]

6. SALES—BREACH OF CONTRACT—PETITION—DEMURRER.

The demurrer was properly overruled. No reversible error appears in any of the grounds of certiorari.

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Suit by the Farmers' Supply Company against the Fitzgerald Cotton Oil Company. From a judgment in favor of plaintiff, affirmed on certiorari to the superior court, defendant brings error. Affirmed.

The Farmers' Supply Company brought suit in the city court of Fitzgerald against the Fitzgerald Cotton Oil Company for a breach of the following contract, which they alleged they made through their agent Harris: "Fitzgerald, Ga., Dec. 9th, 1905. Mr. J. H. Harris, City—Dear Sir: We offer you one thousand sacks of Upland meal at $22.-00 per ton, one thousand sacks of hulls at $8.-00 per ton, same to be hauled out as early as convenient. Yours truly, Fitzgerald Cotton Oil Company, by L. W. Meakin, Secretary and Treasurer."

"Fitzgerald Cotton Oil Company, City—Gentlemen: I accept the above offer. Enclosed find check for $100.00 on above. Yours truly, J. H. Harris."

The breach alleged was the failure to deliver on demand 831 sacks of meal. There was no dispute about the making of the contract in the terms set out above. During the month of December, the defendant delivered some meal and hulls as called for by the plaintiff. On the 30th of the month, the defendant wrote the following letter to the plaintiff: "The price of Prime Upland C/S meal has advanced to $24.00 per ton f. o. b. mill. This price subject to withdrawal without notice. We will have to cancel our trade with you and return unused portion of funds left with us unless you immediately haul out the meal sold. It is beyond all oil mill terms and agreements for cash sales to be left on storage without special agreement to that effect and without funds to cover the amount of purchase. We will consider the sale null and void unless full amount is placed in our hands to cover purchase unless the goods are hauled out at once." The plaintiff received this letter late in the afternoon on the day it was written, which was Saturday. On the following Monday morning, the 1st of January, the plaintiff's manager went to the office of the defendant with a blank check in his hand to pay for the rest of the meal and hulls and to haul the same out. One Huggins was in charge of the office. Plaintiff's manager told Huggins that he had come for the balance of the meal and hulls and asked him for 500 sacks. Huggins refused to let him have this amount, and finally sent him away with 10 sacks, or 1,000 pounds. When Huggins refused to let him have more than 10 sacks, plaintiff's manager did not offer to pay for the remainder of the meal and hulls. During the months of January and February, hulls were delivered by defendant and paid for by plaintiff at the contract price, although plaintiff could have purchased the hulls in the open market at a slightly lower figure.

The defendant also delivered and accepted payment for meal during these months at the contract price of $22, although the market price had advanced from $24 to $28 per ton. On March 10, 1906, the plaintiff wrote to the defendant as follows: "We now make final demand on you for the balance of the cotton seed meal due us on this contract to be delivered at once, not later than the 15th inst." It also appears from the evidence in the record that plaintiff had made several previous demands for meal which had been refused by the defendant. Upon the failure and refusal of the defendant to comply with the demand contained in the letter of March 10th, the plaintiff went into the open market and bought the meal for $28 per ton, and then brought suit for the difference between the market price of $28 per ton at that time and the contract price of $22 per ton. At the trial in the city court, the jury returned a verdict for the plaintiff, and the defendant sued out certiorari to the superior court. The error assigned in this court is the order of the judge of the superior court overruling the certiorari.

Haygood & Cutts, for plaintiff in error. E. W. Ryman and E. Wall, for defendant in error.

POWELL, J. (after stating the facts as above). 1. The first assignment of error is that the manager of the plaintiff company was allowed to testify that Huggins, on January 1, 1906, "refused to let me have more than a thousand pounds of meal." The objection which the defendant urges to this testimony is that it does not appear that Huggins was an agent of the company who was authorized to act, and therefore any refusal on his part would not be binding on the defendant. From the evidence in the record it appears that Huggins was referred to by the manager of the defendant company as his bookkeeper; that, when plaintiff's manager called at the office on January 1st, Huggins was in charge of the business; that he had authority to sign orders for the delivery of meal; that he was authorized to collect all money unless directed not to do so; that, both before and after the day named, the plaintiff's drayman called at the office of the defendant company, and Huggins ordered meal and hulls delivered to him; that, when the manager Meakin was absent, Huggins was in charge of the office, because Meakin himself testified: "When I was away from there, I left Mr. Huggins there. His instructions and duties were to issue tickets from the office, make all charges, and keep a correct record of everthing that transpired in and out of the office in the way of business." In determining the extent of an agent's authority, it is more important to look to the nature of the duties he is accustomed to perform than to the name by which he is called. If his duties are those of a manager or an assistant manager, it is immaterial that he is referred to by his principal as a bookkeeper. By a course of dealing Huggins had been held out as having authority to deliver and to refuse to deliver meal and to receive payment therefor. He was thereby clothed with apparent authority to that extent. In Huffcut on Agency (2d Ed.) 129, it is said: "The sole inquiry in such a case is whether there has been a holding out of the agent as one having authority, and whether the third person, acting with average prudence and good faith, was justified in believing that the agent possessed the necessary authority. If so, the principal must bear the risk, because he has held out the agent as possessing the authority which he seems to possess, and is not in a position to maintain that third parties should know that what appears to be true is not true." As was said by the Supreme Court of New Jersey, speaking through Depue, J.: "A principal is bound by the acts of his agent, within the authority he has actually given him, which includes not only the precise act expressly authorized to be done, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that he is liable for the acts of the agent, within the appearance of the authority he knowingly permits the agent to assume, or holds the agent out to the public as having." Law v. Stokes, 32 N. J. Law, 249 (2), 90 Am. Dec. 655. The defendant had held out Huggins in such a manner as to lead the plaintiff, who had been dealing with him, to believe that he had authority to deliver and to receive payment for the goods which it sold, and therefore the defendant cannot now assert his lack of actual authority, because "the authority of an agent need not necessarily be proved by an express contract, but may be proved by the habit and course of business of the principal. If a man holds out another as his agent, and thus induces persons to deal with him as agent, the principal is estopped, as to such third parties, from denying the agency." Brooks v. Jameson, 55 Mo. 505. See, also, Story on Agency (8th Ed.) §§ 87, 95; Mechem on Agency, § 84; Johnson v. Waxelbaum Co., 1 Ga. App. 51, 58 S. E. 56 (3); Luckie v. Johnston, 89 Ga. 321, 15 S. E. 459.

2. The defendant contends that the court erred in admitting in evidence the letter dated March 10, 1906, from the plaintiff to the defendant, on the ground that under the evidence of both parties the contract was broken, if at all, on January 1, 1906, and the rights of the parties became fixed as of that date; that, if Huggins was authorized to act, his refusal to deliver the meal demanded was a breach by the defendant; and that, if Huggins was not authorized to act, the plaintiff was guilty of a breach in not making a legal demand and tender within the time prescribed by the contract. This contention is not sound, for the following reasons: In the first place, there was no specific date mentioned in the contract for delivery

and payment. The only thing appearing on this point was that the goods were "to be hauled out as early as convenient." We cannot say as a matter of law that the expression used meant not later than January 1, 1906. What the parties meant by this expression was a question of fact, to be determined by the jury in the light of all the surrounding circumstances. Under the evidence, the jury were authorized to find that the parties meant a later date than January 1, 1906, and under such a finding the letter referred to was relevant and important for the purpose of showing that the plaintiff had demanded performance, and that the defendant had refused such demand. Furthermore, the evidence showed that during both January and February hulls were delivered by the defendant and paid for by the plaintiff at the contract price, though the plaintiff could have purchased the hulls cheaper in the open market; also, that the defendant delivered meal and accepted payment therefor at the contract price of $22 per ton, whereas the market price at the time was from $24 to $28 per ton. The witnesses of the plaintiff testified that these deliveries and payments were made in pursuance of the terms of the contract; and, while the witness of the defendant denied this, the jury were authorized to find in accordance with the evidence on the part of the plaintiff. Therefore, even if the defendant was right in its contention that the date prescribed by the contract for delivery and payment was not later than January 1st, the subsequent conduct of the parties tended to show a mutual temporary disregard of strict compliance with this term of the contract, and the letter objected to was admissible under section 3642 of the Civil Code of 1895, which is as follows: "Where parties, in the course of the execution of a contract, depart from its terms and pay and receive money under such departure, before either can recover for failure to pursue the letter of the agreement, reasonable notice must be given the other of intention to rely on the exact terms of the agreement. Until such notice, the departure is a quasi new agreement."

3, 4. The defendant sets forth several excerpts from the charge of the court and complains that they embody expression of opinion on the facts. When these excerpts are read in connection with the context and with the charge as a whole, they are not open to objection on the ground stated. Indiana Fruit Company v. Sandlin, 125 Ga. 223, 54 S. E. 65 (6). The defendant does, however, assign error on one portion of the charge which seems to contain an intimation by the judge that the evidence tends to establish a certain fact. This fragment of the charge is contained in the thirty-seventh paragraph of the petition for certiorari, and is as follows: "Now I charge you, gentlemen of the jury, that a contract in writing, such as this one, with the name of an individual signed thereto, can be shown to be the contract of his principal, whether that principal be another individual or a corporation. In other words, it is possible to show that that contract was in fact the contract of the Farmers' Supply Company. Now evidence has been put before you tending to show, and for the purpose of showing, that was really the case." At the trial the defendant introduced only one witness. As to the fact on which the opinion of the court was intimated, he testified as follows: "Mr. Harris came down to my office and told me he wanted to buy some meal and hulls, and as I understood it he wanted to buy them for the Farmers' Supply Company. * * * When I made this contract I was dealing with J. H. Harris, and the goods were supposed to be for Farmers' Supply Company. I knew that at the time. * * * I know that he bought these goods from me with the understanding that Farmers' Supply Company were to receive the goods." Harris was introduced as a witness by the plaintiff, and he testified that in making the contract he was acting as agent for the Farmers' Supply Company. Since therefore there was no dispute in the evidence as to this matter, the judge could have properly charged the jury that, although the contract was signed by Harris, yet the evidence showed that he was acting as agent for the Farmers' Supply Company, and that the contract was really one between the plaintiff and the defendant. In other words, instead of merely intimating that the fact had been proved, he could have charged them positively and unequivocally that it had been proved. Shields v. Ga. Ry. & Elec. Co., 1 Ga. App. 172, 57 S. E. 980. This being so, the defendant cannot complain that the judge only intimated an opinion adverse to its contention, when he could have charged that there was no evidence in support of such contention, for the defendant cannot complain of a charge which is more favorable to it than the evidence justifies. Moss Mfg. Co. v. Carolina Portland Cement Company, 1 Ga. App. 232, 57 S. E. 914. It was competent to show by parol evidence that the contract nominally that of the agent was in fact that of the principal. Civ. Code 1895, §§ 3022, 3039; Watertown Engine Co. v. Palmer, 84 Ga. 368, 10 S. E. 969, 20 Am. St. Rep. 368, and citations; Tiffany on Agency, 233.

5. Several assignments of error go to the refusal of the judge to charge in accordance with certain requests submitted in writing by the defendant's counsel. One of these requests was as follows: "Under the law persons dealing with one who purports to act in behalf of a corporation do so at their own risk as to whether such person is in fact the agent of the corporation and authorized to act for it or not." The court gave this charge, but qualified it as follows: "With this proviso: That they are protected if the agent is held out by the com-

pany or other person as being the agent empowered to transact such business." It is insisted that the qualification added by the judge was error. Instead of this qualification being error, it kept the charge from being error, because, under the evidence, Huggins had the apparent authority which he assumed to have, and one of the very acts which clothed him with this apparent authority was the holding of him out by the defendant in such a manner as to lead the plaintiff to believe that he had such authority. The request embodied a correct statement in the abstract of a general principle of law, but it would have been error to give in charge this abstract principle without the qualification added by the judge. The proviso qualified the abstract principle so as to make it applicable to the evidence in the case.

The defendant further complains of the refusal of the judge to charge in accordance with a written request, as to certain admissions which had been made in the original answer, but which were subsequently withdrawn by an amendment. The request was substantially a correct statement of the law, but the language used would probably have misled the jury. The judge refused to make the charge requested, but in his general charge he covered the law relating to the matter referred to, as follows: "Now, with reference to admissions, I charge you this: If a party make an admission against his own interest, then, if it is made in the form and manner prescribed by law, it is allowed in evidence. If the party make an admission in a plea, either by himself or his attorney, and subsequently amend that pleading and strike it, it can be introduced in evidence as an admission on his part, made either by himself or his attorney. In case it is stricken, and then introduced in evidence, it has the same effect as an admission made in a statement; that is to say, it goes before the jury, and they can give it such weight and credit in determining the facts and circumstances as they deem it wise to attach to it. Now, under the law, a man has the right, at different stages of the procedure of a suit, to amend his petition by striking out certain things which he has before put in his petition, if the court allows it. If it is stricken out, and the court allows it to be stricken out, he is not then bound by it, but it can be introduced as an admission, to go before the jury, to be given such weight and credit as a fact and circumstance as they deem wise." This charge correctly states the law as to admissions made by pleadings. Alabama Midland Ry. Co. v. Guilford, 114 Ga. 627, 40 S. E. 794; 2 Wigmore on Evidence, 1250. Where a matter is covered substantially and sufficiently by the general charge, a refusal to charge in the exact language of a written request is not error. Hawkins v. Kermode, 85 Ga. 116, 11 S. E. 560 (2).

6. The demurrer to the petition was properly overruled. No reversible error appears in any of the grounds of certiorari.

Judgment affirmed.

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(3 Ga. App. 196)

## ATLANTIC COAST LINE R. CO. v. YESBIK. (No. 498.)

(Court of Appeals of Georgia. Dec. 9, 1907. On Rehearing, Dec. 20, 1907.).

WRIT OF ERROR—ASSIGNMENTS OF ERROR—SUFFICIENCY.

This court has no jurisdiction of a bill of exceptions which, though assigning error upon rulings made pendente lite, does not in any manner except to a final judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 1572–1574.]

(Syllabus by the Court.)

Error from City Court of Albany; D. F. Crosland, Judge.

Action by Joe Yesbik against the Atlantic Coast Line Railroad Company. Judgment for plaintiff and defendant brings error. Dismissed.

Bennet & Conyers and Pope & Bennet, for plaintiff in error. Jesse W. Walters & Son, for defendant in error.

RUSSELL, J. At the trial in September, the judge overruled demurrers to the declaration and refused a nonsuit, to which rulings exceptions pendente lite were duly preserved by the defendant. The jury returned a verdict for the plaintiff. The defendant made a motion for a new trial, which was heard and overruled in April following the trial. The bill of exceptions neither excepts to nor assigns error upon the order overruling the motion for a new trial. The failure to assign error upon the final judgment is not fatal, but the failure to except thereto is. Lyndon v. Ga. Ry. & Elec. Co., 129 Ga. ——, 58 S. E. 1047.

The writ of error, therefore, not being such as to confer jurisdiction upon this court, must be dismissed.

### On Motion for Rehearing.

The motion for a rehearing is denied. Before passing upon the question of dismissal (there being no motion to dismiss), we had already determined, after a full consideration of the merits of the case and of the exceptions contained in the record, to enter a judgment of affirmance. Thereafter discovering that there was no exception or assignment of error upon a final judgment, the court was of the opinion that a consideration or a discussion of the assignments of error, even if properly presented, was useless. "A rehearing will not be granted merely to change the judgment from that of dismissal to one of affirmance; the result in both cases being identical." Carreker v. Thornton, 1 Ga. App. 508, 511, 57 S. E. 988.

(3 Ga. App. 204)

## YOUNG v. MURRAY. (No. 592.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. BILLS AND NOTES—EXECUTION—REAL PARTY IN INTEREST—RIGHT TO SUE.

A promissory note payable to the order of an agent of a corporation, both being specified by name in the note, is in legal effect payable to the corporation; but either the principal or the agent can maintain an action on it. Civ. Code 1895, § 3037, par. 2; Martin v. Lamb, 77 Ga. 252, 3 S. E. 10.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 267.]

2. AGRICULTURE — FERTILIZERS — TAGS — BURDEN OF PROOF.

Where the defense to a note given for fertilizers is that the packages of fertilizers did not have tags attached as required by law, the burden is on the defendant to prove the fact. Civ. Code 1895, § 5160; Avera v. Tool, 74 Ga. 398; Lorentz v. Conner, 69 Ga. 761; Holt v. Navassa Guano Co., 114 Ga. 668, 40 S. E. 735.

3. SAME—FERTILIZERS—TAGS.

Where some of the packages containing the fertilizers, when received by the purchaser, had tags attached, and the others had wire on them, indicating that they had been tagged, the jury was authorized to believe that the law had been fully complied with by the manufacturer as to all of the packages.

4. BILLS AND NOTES—EVIDENCE.

No material error of law was committed, and there was evidence to support the verdict.

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action by W. A. Murray against G. F. Young. From a judgment for plaintiff, defendant brings error. Affirmed.

L. D. Passmore and Mark Tison, for plaintiff in error. T. R. Perry, for defendant in error.

HILL, C. J. Judgment affirmed.

(3 Ga. App. 241)

## GEORGIA, F. & A. RY. CO. v. SHEPPARD. (No. 715.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

JUSTICES OF THE PEACE—JUDGMENT BY DEFAULT.

A justice of the peace has no power to render judgment by default without testimony against the defendant in an action for damages, although the cause of action stated in the summons is verified by the plaintiff's affidavit, and although the defendant, after due service, does not appear or plead.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 386.]

(Syllabus by the Court.)

Error from Superior Court, Calhoun County; W. N. Spence, Judge.

Action by E. S. Sheppard against the Georgia, Florida & Alabama Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

L. M. Rambo, for plaintiff in error. Smith & Miller, for defendant in error.

POWELL, J. Sheppard sued the railway company in a justice's court for damages on account of the killing of two of his hogs in the running of its train. He verified his cause of action by an affidavit. The defendant was duly served, but failed to appear at the call of the case at the first term. The magistrate thereupon entered a judgment by default in favor of the plaintiff for the amount claimed in the summons. The railway company brought the case to the superior court by certiorari, on the ground that the judgment was rendered without any evidence. At the hearing the judge of the superior court overruled the certiorari, and the railway company brings error.

In certain cases in justices' courts, judgment by default may be rendered upon the pleadings, without further proof. If the suit be an action upon an open account, duly verified by affidavit, the court shall give the plaintiff judgment, unless the defendant files a plea, likewise verified by written affidavit. Civ. Code 1895, § 4130. So, also, though suit on an unverified account may properly be defended by an unverified plea, yet in such actions, if the defendant does not appear or plead at all, the magistrate may give judgment by default. Peeples v. Sethness Co., 119 Ga. 777, 47 S. E. 170; Parris v. Hightower, 76 Ga. 631 (2b). A plaintiff cannot, however, avail himself of the privileges of the rule above stated by setting out, in the form of an account, a cause of action which in fact is not a liability on account, but of some other nature. Caudell v. Southern Ry. Co., 119 Ga. 21, 45 S. E. 712; Lowe Co. v. Central R. Co., 123 Ga. 712, 51 S. E. 653. In suits upon unconditional contracts in writing, where the defendant does not appear or plead at the first term, the magistrate should render judgment for the plaintiff, without further proof than the writing itself. In other cases, the plaintiff must introduce enough testimony to show a prima facie right to recover before he is entitled to a judgment, although the defendant does not appear or plead. Maddox v. Central Ry. Co., 1 Ga. App. 46 (4), 57 S. E. 1062. The court, therefore, erred in not sustaining the certiorari.

Judgment reversed.

(3 Ga. App. 237)

## NATIONAL LOAN & TRUST CO. v. LOVETT. (No. 712.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

WRIT OF ERROR—PERMISSION TO WITHDRAW—AFFIRMANCE—DAMAGES.

Upon the call of the case in this court the plaintiff in error entered no appearance, but requested permission to withdraw the writ of error. The defendant in error, under rule 22 (57 S. E. xii), moved to open the record and prayed an award of damages for delay. The motion is granted, the judgment is affirmed, and damages in the sum of 10 per cent. upon the amount of the judgment in the lower court are awarded against the plaintiff in error.

(Syllabus by the Court.)

Error from City Court of Tifton; R. Eve, Judge.

Action between the National Loan & Trust Company and G. D. Lovett. From the judgment, the company brings error. Affirmed.

W. J. Wallace, for plaintiff in error. Fulwood & Murray, for defendant in error.

HILL, C. J. Judgment affirmed, with damages.

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(3 Ga. App. 206)

## McLENDON v. DUNLAP HARDWARE CO.

(No. 617.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. EXECUTION—CLAIM OF PROPERTY—OWNERSHIP—ADMISSIONS—TAX DIGEST—RETURNS.
In a claim case, the tax digest, showing the returns of the defendant in execution before the pendency of litigation, is admissible in evidence as an admission of the defendant. It is competent also to show that the claimant did not make any return of property for taxation during the year in which the judgment was rendered.

2. SAME—EFFECT—PRESUMPTION OF TITLE.
It is error to instruct the jury in a claim case that property returned in the name of a taxpayer is presumptively his property. The return is a circumstance of more or less probative value to be considered by the jury within the limitation above indicated, but the declaration of the party making the returns raises no presumption of title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 573.]

3. SAME—INSTRUCTION.
The court gave the following charge requested by the plaintiff in fi. fa.: "If the jury believe from the evidence that the 25 acres of cotton, ½ acre of potatoes, field peas, and ground peas, 30 acres of hay, 1,800 pounds of seed cotton, gathered, belonged to J. S. McLendon and other parties jointly, then he could not sustain his claim, and it would be your duty to find that much of said property subject to the plaintiff's fi. fa." *Held*, that this instruction was erroneous: (1) It did not state a correct principle of law; (2) it deprived the claimant of the benefit of his contention that he and his cropper made the agricultural products, and that they were undivided at the date of the levy.

4. SAME—VERDICT—EVIDENCE.
The verdict is not supported by any evidence, and is set aside as contrary to law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 573.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Execution levy by Dunlap Hardware Company against J. A. McLendon, in which J. S. McLendon intervened and filed claim to the property levied on. From a judgment finding the property subject, claimant brings error. Reversed.

Mark Tison and J. H. Tipton, for plaintiff in error. Perry & Williamson and Hardeman & Jones, for defendant in error.

HILL, C. J. An execution, issued from the city court of Sylvester dated March 30, 1906, in favor of the Dunlap Hardware Company against J. A. McLendon, was levied on the 21st day of September, 1906, upon the following described property as the property of the defendant in fi. fa., to wit: "Twenty-five acres of corn in the field not gathered; 25 acres of cotton in the field not gathered; ½ acre of potatoes and field peas and ground peas in the field not gathered; 30 acres more or less in hay with peas; one black horse-mule eight years old name Sam; one black mare-mule ten years old name Cedar; 1,800 pounds seed cotton more or less gathered in the house." On the 24th day of September, 1906, J. S. McLendon filed a claim to all of the property levied upon as above described. On the trial of the claim case, the plaintiff introduced the execution in his favor, and proved by the sheriff that when he made the levy he found both the defendant in fi. fa. and the claimant in the house located on the land where the property was, but that he could not say which one was in possession of the property or was in charge of the place upon which it was located, and that apparently the one was no more in possession of the place and the property than the other. The claimant thereupon, without contesting the sufficiency of this evidence to shift the burden, assumed the burden, and in his own behalf testified substantially as follows: That the defendant in fi. fa. J. A. McLendon, was his brother, and that he had rented the land from him for the year in which the levy was made, and that the crops which were levied upon were made by him and his cropper for that year; that his brother had no interest in the crops as landlord; that his cropper who planted and cultivated the crop, and who was not his brother, did have an interest in the crop, and there had been no division between him and his cropper as to the crops that were ungathered in the field, and this applied also to the portion of the crops that was in the house; that both of the mules levied upon were his individual property, in which the defendant in fi. fa. had no interest; that he lived on the place where these crops were made, and his brother had been with him for about two months before the levy, but before that time he had been living in Oakfield; that he (the claimant) had been living on this farm for two years prior to the levy; that during the year 1905 he worked for his brother for wages at $50 per month; that he "overseered the farm," but that for the year 1906 he rented the land from his brother and was his tenant; that he bought both of the mules levied upon himself, one from the Cedar Company, and the other from his brother the first week in January, 1906, paying for him the sum of $100; that the mules in question were paid for by him with his own money; that his brother owed him a large amount of money which he loaned him in 1905; that the crops under levy were made entirely by him and his cropper, and his brother had no interest in them whatever; that his taxes were given in by his brother for 1906 at his request, as his brother was staying at Oakfield, while he was living down on the farm and did not know when the tax receiver or assessor would be at Oakfield. The tax digest for the year

1906 was introduced by the plaintiff in fi. fa. over the objection of the claimant, and it showed that for the year 1906 J. A. McLendon, the defendant in fi. fa., paid taxes on merchandise, $5,000; on horses and mules, $200; and on carriages, etc., $25. The name of the claimant, J. S. McLendon, did not appear upon the tax digest for that year.

The jury found that the property was subject to the execution, and the claimant filed a motion for a new trial on the general grounds and on the following special grounds: (1) Because the court erred in admitting the tax digest and in reading to the jury in connection with his ruling admitting the digest the oath prescribed by Pol. Code 1895, § 834, to be made by the taxpayer; the claimant insisting that the tax digest was not admissible for the purpose of showing title in the party making returns, and that reading the oath of the taxpayer had the effect to emphasize the force of the evidence and unduly impress the jury with the probative value of tax returns. (2) Because the court erred in charging the jury as follows: "In regard to the tax books, all the evidence introduced to you from the tax books of this county is prima facie evidence that the property appearing opposite the party's name belongs to that party, but this presumption may be rebutted by proof. You look to see if this property described in these tax books is the property under levy. You look to all of the testimony in the case, and see if the property is the property of J. S. McLendon or J. A. McLendon, and determine that under the same rules that I have given you in charge." It is alleged that this was error because there was no evidence to support or authorize this charge, and because the tax digest was introduced to show the return of property by J. A. McLendon; that this return could not include any of the property in controversy unless it was the mules, and there was no evidence to show that the mules returned were the same as those under levy, and this charge had the effect to cause a finding for the plaintiff, when the verdict was demanded for the claimant. (3) Because the court charged the jury as follows: "I am requested to charge you, and I give you in charge, that if the jury believe from the evidence that the 25 acres of cotton, ½ acre of potatoes, field peas, and ground peas, 30 acres of hay, 1,800 pounds of seed cotton, gathered, belonged to J. S. McLendon and other parties jointly, then he could not sustain his claim, and it would be your duty to find that much of said property subject to the plaintiff's fi. fa." It is insisted that this charge was contrary to law; that exactly the contrary was true under the facts as stated; and that this charge deprived the claimant of the benefit of his contention that all of the crops belonged to him as landlord subject to his cropper's rights therein, as the crops had not been divided between them, and also of his contention that his brother, J. A. McLendon, had no interest in the crops whatever; and that this charge was therefore material error and operated against the claimant. (4) The other grounds in the amended motion simply particularize the general ground that the verdict was without any evidence to support it, and was therefore contrary to law. We will first take up such of the special exceptions as we consider material.

1. The tax digest was admissible in evidence for two purposes: First, as an admission of the defendant in fi. fa. before the pendency of litigation (Civ. Code 1895, § 5189; Tolleson v. Posey, 82 Ga. 372; Smith v. Haire, 58 Ga. 446; Ivey v. Colquitt, 63 Ga. 509; Ivey v. Cowart, 124 Ga. 159, 52 S. E. 436, 110 Am. St. Rep. 160); also, for the purpose of showing that the claimant failed to make any return of taxable property for the year in which he claimed to be the owner of the personal property in controversy (McCrory v. Manes, 47 Ga. 90; Lynch v. Lively, 32 Ga. 575; 10 Enc. Ev. p. 728, note 55). In this case, however, this evidence had little, if any, probative value. The returns did not show that they included any of the personal property levied upon, except probably the mules; and, as to agricultural products, the court will judicially know that tax returns are usually made in the spring or summer and before such products are in a physical condition to be treated as property, and the evidence in this case shows that all of these agricultural products were still undivided between the claimant and his cropper at the time of the levy, which was subsequent to the tax returns, and the positive and undisputed testimony of the claimant showed that he had requested the defendant in fi. fa., who was his brother, and living in town, to make his tax returns, and that he (the claimant) had paid the tax execution issued against the defendant in fi. fa. for the taxes of 1906. In admitting the tax returns as evidence, we do not think it was error for the court to read or cause to be read to the jury the oath prescribed for the taxpayer by section 834, of the Political Code of 1895. This oath was a part of the returns and was necessary to make the returns complete or of any probative value.

2. The charge of the court objected to as contained in the second special ground of the motion for a new trial, we think, is error. Tax returns in certain cases are a circumstance of more or less probative value, but the declaration in them as to title raises no presumption that what is therein stated is the truth.

3. The charge of the court objected to in the third special ground of the motion for a new trial which was requested by the plaintiff in fi. fa., we think was erroneous for several reasons. If the jury believed from the evidence that, at the time of the judgment upon which the execution was issued, the property levied upon belonged to the claimant and any other persons jointly, neither of

the other persons being the defendant in fi. fa., the property would not be subject to the fi. fa., and it would have been the duty of the jury to find a verdict in behalf of the claimant; and if the jury believed that the property, or at least a large part of it, belonged to the claimant and his cropper who had made it, but that it had not at the time of the levy been divided between them, it would not have been subject to the execution. According to the evidence of the claimant, this was the truth, but under this charge of the court the claimant was deprived of the benefit of this contention. In short, the property levied upon was not subject to the execution if at the time of the judgment it did not belong to the defendant or some one holding under him since the date of the judgment; and if, under the evidence, which was not disputed, the property belonged to the claimant and his cropper at the date of the judgment, it was not subject to the execution.

4. Probably it was unnecessary to pass upon any of the special exceptions of error, as we are clear from an analytical examination of the testimony that the verdict for the plaintiff finding the property subject was wholly unsupported by the evidence. Even possession in the defendant in fi. fa. at the time of the levy which gives rise to the presumption of ownership was not sufficiently shown. The sheriff testified that he did not know whether the claimant or the defendant was in possession of the property when he made the levy, and the undisputed evidence of the claimant is that he and his cropper had made the crop levied upon for that year on the place which he had rented from his brother, that this crop was not divided at the time of the levy between him and his cropper, that the defendant in fi. fa. had no interest whatever in any part of the crop, and that the other property levied upon had been bought by him and paid for, and all of the property was in his exclusive possession at the time of the levy, and the defendant in fi. fa. had been staying with him for only two months, but lived at Oakfield. The inference which may have arisen from the tax returns, as before stated, was of no probative value: First, because it was fully met and overcome by direct and undisputed testimony; and, secondly, because the property levied upon, except the two mules, was certainly not included in the returns at all, and it is doubtful if the two mules were included. While at all times reluctant to interfere with the verdict of the jury, we feel constrained to do so where we are clearly of the opinion that so far as the record shows the verdict finds no support whatever in the facts. We are less reluctant to set aside the verdict in this case because, under the undisputed evidence, the greater portion of the property levied upon was the product of the brawn and muscle of the claimant and his cropper, earned in the sweat of their brows.

Judgment reversed.

(3 Ga. App. 242)

## BENTLEY v. SMITH et al. (No. 719.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. MASTER AND SERVANT—EMPLOYMENT CONTRACT—REQUISITES.

Under the evidence in this case, the plaintiff could not recover on the contract, because the testimony did not show that such a contract had been made for the employment of the plaintiff as would authorize a recovery thereupon. It appeared from the plaintiff's own testimony that no definite price was fixed for his services, and that there was no agreement between the parties as to the value of his services, coupled with a mutual understanding, or an obligation (either by acquiescence or otherwise) on the part of the defendants, that such price should be paid by them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Appeal and Error, § 2.]

2. FRAUDS, STATUTE OF—EMPLOYMENT CONTRACT.

It is not error to grant a nonsuit, where it appears from the evidence, without contradiction, that the contract of employment on which the plaintiff's right of action depended is for a period exceeding one year, and is not in writing, and there is no evidence which brings the case within the exception provided by Civ. Code 1895, § 2694.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 66.]

3. SAME—PART PERFORMANCE.

The part performance which will take a contract out of the operation of the statute of frauds is such as is, within the terms of the agreement, an essential part of the contract, and as such is essential to the performance of the contract. The fact that the person who has contracted to serve another one year, to commence at a future day, enters upon the performance of his contract, does not take the case out of the statute. The servant may quit at any time and recover the value of his services on a quantum meruit, and the master may discharge the servant at any time without incurring liability therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 288.]

4. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—CONTINUANCE—TERMINATION.

A contract for permanent employment continues indefinitely, and is terminable by either of the parties at any time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 8.]

(Syllabus by the Court.)

Error from City Court of Washington; S. H. Hardeman, Judge.

Action by Frank Bentley against O. H. Smith and others. From a judgment for defendants, plaintiff brings error. Affirmed.

J. M. Pitner and F. H. Colley, for plaintiff in error. Wm. Wynne and W. A. Slaton, for defendants in error.

RUSSELL, J. Plaintiff in error brought a suit on a contract in the city court of Washington, alleging that on the 23d of November, 1906, the defendants in error employed him to work as a clerk in their store during the balance of 1906 and the year 1907 at $50 per month. The suit was for the unpaid balance claimed for the month of January, 1907. At the conclusion of the plaintiff's evidence the court granted a nonsuit

and dismissed the case, and exception is taken to this judgment. According to the plaintiff's evidence he received a telegram from the defendants on the 16th of November, and in response to the telegram went to Washington, and on the 23d of November entered into an agreement to clerk for them. The telegram was as follows: "Frank Bentley, Woodville, Ga. Dry goods position open. $50 per month until January. Permanent position. Can you except at once? O. & H. Smith." According to plaintiff's own testimony, all that was agreed between the parties was that the defendants would give $50 per month until January 1, 1907, and that they would then increase his wages. He testified that the defendants did not say how much his wages would be increased, nor did he ask. According to the plaintiff's testimony he left it with the defendant Ollie Smith as to any raise in his salary. In addition to this, the plaintiff testified that the defendant Ollie Smith said that he wished to employ the plaintiff in a permanent job, that he replied that he could not move his family to Washington for anything less than a year and would not do so, that he moved from Woodville to Washington, and that it cost him $40 to move. The plaintiff did not testify that it was essential in any way to the contract that his family should be moved to Washington, nor that the defendants so understood it. He did testify that he moved from Woodville to Washington to comply with his trade with the defendants. The plaintiff was discharged on January 5, 1907, at which time the defendants paid him at the rate of $50 per month. The judgment of nonsuit was clearly right, for two reasons.

1. The plaintiff alleged in his petition that he had a definite contract for $50 per month. His evidence did not confirm or support that allegation. It failed to show that there had been any definite agreement as to the sum to be paid him after January 1st, and the suit was brought for the remainder of that month. The proof, so far from sustaining the allegations, failed to establish any contract at all for any stipulated sum per month. The amount to be paid, far from being actually agreed upon, was to be determined thereafter by Ollie Smith, one of the partners. The only testimony in the case (that of the plaintiff himself) clearly established that no price was fixed for his services after January 1st, and that there was no agreement, either expressed or tacit, on the part of the defendants, that he should be paid that sum. The court could well have sustained the motion to nonsuit upon this ground. The plaintiff failed to prove his case as laid.

2. But, even if the evidence for the plaintiff, in spite of the telegram which he introduced, can be construed as speaking a definite contract of employment, it was not error to grant the nonsuit, because the evidence showed that the contract of employment upon which the plaintiff's right of action depended was not to be performed within one year from the making thereof, and no evidence was adduced which would take it out of the statute of frauds. Civ. Code 1895, § 2693.

3. It is insisted, however, by counsel for the plaintiff in error, that there was such part performance as will except it from the operation of the statute of frauds. What is the part performance relied upon? It is found in the testimony of the plaintiff that he moved his family from Woodville to Washington in order to carry out his contract. We do not think that there was such part performance of the contract as would take the case out of the statute of frauds—such part performance as would render it a fraud on the part of the party refusing to comply. In Wood, on Master & Servant, p. 373, it is said, that "the fact that a person that has contracted to serve another one year, to commence at a future date, enters upon the performance of his contract, does not take the case out of the statute, and the servant may quit at any time during the term and recover the value of his services rendered upon a quantum meruit, without deduction for the loss to the employer, and the master may discharge the servant at any time without any liability therefor. There is no validity to such a contract, and it cannot be enforced in any respect. If the wages are payable monthly, no action upon the contract can be maintained therefor, and the statute would be a complete defense thereto." So that the fact that he entered upon employment and served six weeks would not avail as part performance. Nor can the fact that the plaintiff in error moved his family to Washington at an expense to himself suffice to take the case out of the statute. It was, at best, a mere preliminary act (if connected with the contract in any way)—a mere getting ready to perform. Acts which are merely preparatory or preliminary to the performance of the contract in question are not sufficient as part performance. 26 Am. & Eng. Enc. of Law (2d Ed.) 60. The part performance referred to in the statute is something substantial, and is generally essential to the performance of the contract. Thus in Petty v. Kennon, 49 Ga. 468, the part performance of the tenant consisted in his not merely having paid the rent agreed upon for the time he had occupied the premises, but in his having expended money and labor, under the contract, in repairs upon the place, which paid for a longer use thereof. In Barnett Steamers v. Blackmar, 53 Ga. 98, it was held that the part performance that will take a case out of the statute must be the doing of something required by the terms of the contract. See, also, Graham v. Theis, 47 Ga. 479; Simonton v. Liverpool, etc., Ins. Co., 51 Ga. 82; Brunswick Co. v. Lamar, 116 Ga. 1, 42 S. E. 366.

Counsel for the plaintiff in error cited the

cases of McLeod v. Hendry, 126 Ga. 169, 54 S. E. 949, Fontaine v. Baxley, 90 Ga. 416, 17 S. E. 1015, and Barnett Steamers v. Blackmar, 53 Ga. 98, to sustain their contention that there was such part performance of the contract as would take the case out of the statute of frauds. In accord with our holding that the part performance must be such an act as is essential to the contract, it appears in the McLeod Case, supra, that the terms of the oral agreement required McLeod to surrender his rights under his bond for title. He had parted with something of value upon the faith of Hendry's parol agreement. The evidence in the present case is not analogous to that in the McLeod Case. The plaintiff was paid all that he contracted for during the time for which he was employed; and, while it may have been expensive to him to move his family, their removal furnished no element of value to the defendants in error. In the Fontaine Case, supra, it was one of the express stipulations of the contract that Fontaine should go to New York and there secure contracts for the furnishing of ties to be supplied by the plaintiffs. The very terms of the contract required him to go to New York and incur expense for the benefit of the plaintiffs. In the Blackmar Case, 53 Ga. 98, it was mutually agreed between the parties that a clerk was necessary, and the amount of his salary was agreed upon as essential to the execution of the contract between the parties, and upon this ground it was held that the employment and payment of the clerk amounted to such part performance as would prevent the defendant from setting up the statute of frauds. The first two cases are suits for damages for the breach of alleged contracts, but in both of them the part performance was something originally contemplated and agreed to as a part of the oral contract, and was essential to its existence and completeness. So we conclude that neither the service of the plaintiff in error until January 5th nor the expense of the removal of his family is such part performance of the contract as would take it out of the statute of frauds.

We somewhat sympathize personally with the argument of counsel for the plaintiff in error, who follows his argument with this question: "Can it be said that under all the facts of this case, upon the facts showing bad faith and fraud, upon the part performance of the contract, upon the fact that the defendants used the services of petitioner for seven days of the month for the salary of which this suit is brought, that all these facts and circumstances count for naught, and that, despite the justice of our cause, the law turns away her face?" And he concludes with the exclamation: "If so, then from our Code should come the statement that for every wrong there is a remedy; for in this case there is none." We have no power over the practical operation of the statute of frauds. "Ita lex scripta est." And we can only administer it. It can, perhaps, however, be said that if in this case, as contended by plaintiff in error, "it is a fraud upon Bentley's rights, and yet the defendants summon, to protect them in this fraud, the very law that was formed to prevent it," nevertheless the statute has perhaps prevented even more frauds than it has caused.

4. The telegram introduced in the case confirms our opinion of the correctness of the ruling of the trial judge. When it is considered, in connection with the plaintiff's testimony, that there was no definite agreement as to the value of his services after January 1st, it appears that the defendants in error had the right to discharge the plaintiff, as they did. The language used in the telegram was "permanent employment," and a contract for permanent employment has been held to be a contract to continue indefinitely, and terminable at any time by either of the parties. 20 Am. & Eng. Enc. of Law (2d Ed.) 16.

Judgment affirmed.

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(3 Ga. App. 190)

CROOKER v. HAMILTON et al. (No. 473.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. WRIT OF ERROR—DISPOSITION OF CAUSE—REVERSAL IN PART.

The evidence authorized the verdict as to all of the defendants, but a verdict in favor of one of them was not demanded by the evidence. Error being specially assigned on the fact that the court directed the finding of the jury, the judgment refusing a new trial as to that defendant must be reversed. There was no error in refusing a new trial as to the other defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4562–4572.]

2. BILLS AND NOTES—COVENANT NOT TO SUE—NECESSITY OF WRITING.

The agreement never to sue another upon his written obligation must be in writing in order to be a covenant equivalent to a release, within the meaning of Civ. Code 1895, § 3714, unless made subsequently to the original undertaking and upon a new and independent consideration.

3. EVIDENCE — PAROL EVIDENCE — VARYING NOTE.

Parol evidence is inadmissible to vary the terms of payment or the date of the maturity of a promissory note, or to ingraft upon the note a provision for an extension of time.

4. SAME—FRAUD—CONSIDERATION.

Parol evidence is admissible, not only when a promissory note is obtained by fraud, but when the note is not the entire contract between the parties, and when the contract is partly in parol and partly in writing. Where the sole consideration of a promissory note is an agency to sell a patent right and articles patented thereunder, parol evidence is admissible, not only to show the real value or worthlessness of the power of sale evidenced by such contract, but also, when it is pleaded that the note was obtained by fraud, to present to the jury all such facts and circumstances as tend to establish that defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2005–2020.]

(Syllabus by the Court.)

Error from City Court of Baxley; J. H. Thomas, Judge.

Action by E. R. Crooker against John Hamilton and others. From a judgment for defendants, plaintiff brings error. Reversed in part.

V. E. Padgett, for plaintiff in error. W. W. Bennett and Parker & Moore, for defendants in error.

RUSSELL, J. Crooker brought suit upon a promissory note against John Hamilton and Willie Hamilton. The note sued upon was given for a patent right, and it so appears on the face of the note. The defendants filed pleas of fraud in the procurement of the note and of failure of consideration; the plea averring that the consideration of the note was a patent right for a certain clothes washer, and that the thing patented, and therefore the patent right, was absolutely worthless. The plea alleged other grounds of failure of consideration. The defendants further alleged in their plea a contemporaneous verbal agreement that the note would never be sued on. The original petition of the plaintiff made no reference to the consideration of the note, but by amendment the plaintiff set up as a consideration the contract by which there was conveyed to the defendants the privilege of selling family rights and minor standard special and patentee's agency of the "Swift 1904 Clothes Washer." The privilege was not confined to any territorial limits less extensive than the face of the earth (unless some like purchaser had previously pre-empted a county, by occupancy), and in addition the purchasers were granted the right of appointing two subagents. The plaintiff also, by amendment, attached as an exhibit to his petition a statement of W. J. Hamilton, admitting that he had received full and complete instructions as to the operation of the washer and that all the other requirements of the contract had been fully complied with. The note, which was the basis of the suit, was dated September 9, 1905, and the contract of sale was of the same date. The statement of Willie Hamilton bore date of October 4, 1905. At the conclusion of the testimony the court directed a verdict for the defendants, and exception is taken to the order of the court refusing a new trial.

1. We think that the judgment of the trial judge, as a matter of law, is partly right and partly wrong. The only material error is presented in the eleventh ground of the motion for new trial, which excepts to the direction of the verdict by the judge. If the plaintiff in error had not assigned error especially upon the fact that the verdict was directed, instead of having been found by the jury, we should affirm the judgment as a whole, under the ruling in Dickenson v. Stults, 120 Ga. 632, 48 S. E. 173, and Shipley v. Eiswald, 54 Ga. 520. The pleas of the defendant John Hamilton were fully supported by evidence which was uncontradicted. No verdict could legally have been found in favor of the plaintiff against him, and hence there was no error in directing the verdict in his favor. While the suit was brought against Moody as an indorser, and his name appears as such upon the copy note attached to the declaration, and while the defendants Hamilton admitted the execution of the note, the defendant Moody did not admit indorsing it. On the contrary he testified emphatically that Crooker, the plaintiff, was present when the note was executed and it was delivered to him, that he was only an agent of Crooker in taking the note for the purpose of turning it over to him, and that he never had any interest whatever in it. He further unequivocally denied that he ever indorsed the note, or authorized any one to indorse it for him, or ever agreed to pay it. The admissions of the Hamiltons as to the note could not affect Moody, and in view of the fact that the evidence in support of his plea was uncontradicted, and that the original note, if it shows to the contrary, was not introduced, a verdict in his favor was demanded. The evidence in behalf of Willie Hamilton would have authorized a finding in his favor; but it was contradicted by his admission in writing, subsequently to the note and the contract of purchase, that he had received full consideration. In certain events he might be estopped from setting up failure of consideration against the plaintiff. Greenhood on Pub. Policy, rule 10. His testimony as to the circumstances under which the admission was made raised an issue of fact, and the judge erred in himself deciding this issue, instead of submitting it to the jury. As the case must, for this reason, be returned for another trial as to the defendant Willie Hamilton, and although such errors as are assigned in the remaining grounds are not sufficiently grave to warrant a new trial, we will proceed to deal with the other grounds of the amended motion for new trial.

2. The plaintiff's objection to certain parol evidence as contained in the first and sixth grounds of the amendment to the motion for new trial was well taken though the verdict could be sustained without reference to this testimony. The testimony objected to is that the plaintiff had agreed never to sue upon the note or contract. This testimony should have been excluded. It sought to ingraft upon the note a condition contradictory to its terms. The admission of this evidence was violative of section 5201, Civ. Code 1895. Counsel for the defendants in error insist that the contemporaneous verbal agreement, made by the plaintiff at the time of the execution of the note sued on, that if the defendants would execute the note, he would never sue on it, was binding on the plaintiff and acts as a release of the defendants from liability on the note, and that it is not necessary that the contemporaneous agreement not to sue should be in writing. We agree with

counsel to this extent: That "a covenant never to sue is equivalent to a release; so, also, a bond to indemnify the debtor against his own debt." Civ. Code 1895, § 3714. But we are compelled to hold, under all the prior adjudications upon this subject in this state, that an agreement or "covenant" made anterior to or contemporaneously with the contract must be in writing to be equivalent to a release. Perhaps this has not been expressly held in terms but in all the cases where the question has been raised it plainly appears that the agreement was in writing, except in Manley v. Ayers, 68 Ga. 508; and even in that case a bond was entered into by Dorrough, with Manley and others as securities, which appears to have been the basis for the ruling. In Marietta Savings Bank v. Janes, 66 Ga. 286, the covenant was in the form of a letter written by the payee to the maker previous to the execution of the note. It was held that the agreement (in writing) was in effect a covenant never to sue. In Martin v. Monroe, 107 Ga. 332, 33 S. E. 62, there was a written agreement between the parties, which was held to amount to a release because the two papers were executed contemporaneously and the obligation never to sue was utterly inconsistent with an obligation to pay.

8. The evidence objected to in the third ground of the motion was objectionable for the same reason as that of which complaint is made in the first. The testimony that the plaintiff told one of the makers that, if they could not pay the note when it became due, he would extend it, tended to alter the terms of the note. The verdict, however, did not depend upon release of the defendants or failure of the plaintiff to comply with a promise to extend the note. The plea of failure of consideration was fully supported by the evidence, uncontradicted as to John Hamilton, and Moody's plea was undisputed; so that these errors were really immaterial.

4. The second, fourth, fifth, sixth, seventh, eighth, ninth, and tenth grounds of the motion for new trial are each assignments of error upon rulings of the court in admitting, or in refusing to exclude, upon motion, testimony in support of the defendants' plea of failure of consideration. In our opinion there is no merit in any of these grounds. The theory of the counsel for the plaintiff in the court below and defendant in error here appears to be that parol evidence as to the consideration of the note was inadmissible because the contract for the sale of the property in question was in writing, and, further, that parol evidence in reference to the written admission of Willie Hamilton was inadmissible, because that admission was in writing. It must be borne in mind that the note is the basis of the suit, and not the contract or the written admission. There is no evidence of debt in the contract introduced by the plaintiff. The plaintiff's rights depended upon the note, because the contract in express terms admitted that all of the rights conveyed by it had been fully paid for by Hamilton. Nothing could be recovered by virtue of the contract, unless for a breach of some of its provisions with reference to the agency. The contract and the agreement, though both in writing, were at last nothing but evidence upon the subject of the consideration of the note. So far as the contract is concerned, it was merely evidence as to what was the consideration of the note. When the defendants pleaded that the note was without consideration, the plaintiff, by amendment, replied: "There was consideration, and here it is: I sold you certain valuable rights mentioned in this contract." None of the parol evidence offered by the defendants and admitted by the court tended in any wise to vary the terms of the note. It was all of it addressed solely to the consideration, and the contract could subserve no purpose in the suit on the note, except to support the plaintiff's contention that there was consideration. The written admission of Willie Hamilton was not in any sense a contract, or such an instrument as is referred to in section 5201, Civ. Code 1895. It was nothing more or less than an admission by one of the defendants (which it was perfectly proper for the plaintiff in introduce) that he had received consideration for the note in question. It was not an admission in judicio. The character and effect of this evidence was not altered because the admission was in writing, instead of resting in parol. Unless denied or explained to the satisfaction of the jury, it might estop the defendant who made such admissions from setting up failure of consideration or impeach him as a witness before the jury. But it was competent for him either to deny its execution or explain the circumstances under which the admission was made. It cannot be denied that, if Crooker had purposely gotten Hamilton drunk to induce his signature, the admission would be worthless as evidence. The case is not altered if the fraud be otherwise perpetrated.

There were two issues properly raised in the case—fraud in the procurement of the note and of the contract for which the note was given, and failure of consideration; and, as affecting the consideration of the note sued on, parol evidence was admissible as to both these issues. If the note was without consideration, the defendants had the right to show it by parol. This is as well settled as anything can be. If, on the other hand, the note was fraudulently procured and is not the entire contract, or if the contract of agency to sell a clothes washer (which is the only consideration for the note that appears in the record) was partly written and partly oral, parol testimony can be resorted to, to completely present the contract to the jury. See Epps v. Waring, 93 Ga. 765, 20 S. E. 645. It is not disputed that John Hamilton is illiterate and unable to read or write, and

that the contract was not read to him by any one. In addition, the evidence of total failure of consideration as to him was also uncontradicted. The contract for the clothes washer was only evidence of what he got for his note, and the defendants had the right to show that that something was worthless, and as one of the means of proving that the agency and right to sell was worthless they could show, in the manner allowed by the court, that the article to be sold was itself worthless. If part of the consideration of the note they had given was a promise to furnish certain things besides those put in writing, so that the contract was partly in writing and partly in parol, they could show that. See Byrd v. Campbell Co., 94 Ga. 48, 20 S. E. 253. There was no error in directing the verdict as to John Hamilton and Moody; and the judgment refusing a new trial, in so far as they are concerned, is affirmed. The issue raised between the testimony in behalf of the defendants on the subject of failure of consideration and the admission of Willie Hamilton, a month after the note was given, that he had received full consideration, should have been submitted to the jury; and, for the reason that exception is specially taken to the fact that the verdict was directed, the judgment refusing a new trial as to him must be reversed.

Judgment as to John Hamilton and M. F. Moody affirmed; as to Willie Hamilton reversed.

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(3 Ga. App. 200)

## SHEFFIELD v. BAINBRIDGE OIL CO.
(No. 569.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. EVIDENCE — BEST EVIDENCE — CHATTEL MORTGAGES — ATTORNEY'S FEES — NOTICE — NOTICE TO PRODUCE.

The written notice of claim for attorney's fees, required by the proviso to the Act of 1900 (Laws 1900, p. 53), is itself the best evidence of its contents. In the absence of other proof of the service of such notice upon the defendant, the proper foundation for the introduction of secondary evidence must be laid before parol evidence as to the service, nature, or contents of such notice is admissible. It is error to allow parol evidence as to the contents of such notice, or to refuse, upon proper motion, to exclude such parol evidence, where the defendant has not been served with a notice to produce, nor any other attempt been made to show the loss or destruction of the original notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 600, 642.]

2. CHATTEL MORTGAGES—ATTORNEY'S FEES—FORECLOSURE PROCEEDINGS—RETURN DAY.

An obligation to pay attorney's fees embodied in a mortgage is collectible in the same manner as if it were contained in a note or other evidence of indebtedness. The return day prior to which the debt must be paid is the return day of the court to which the foreclosure of the mortgage is returnable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 579.]

3. SAME—VERDICT—EVIDENCE.

The verdict was contrary to evidence, and the court erred in refusing a new trial.

(Syllabus by the Court.)

Error from City Court of Miller County; C. C. Bush, Judge.

Action by the Bainbridge Oil Company against B. A. Sheffield. Defendant's motion for a new trial after verdict for plaintiff was overruled, and he brings error. Reversed.

Pottle & Glessner, for plaintiff in error. E. S. Longley and Bush & Stapleton, for defendant in error.

RUSSELL, J. The Bainbridge Oil Company foreclosed a chattel mortgage against B. A. Sheffield, and the mortgage fi. fa. was levied on Jim and Dave, two young horse mules. The defendant gave a forthcoming bond and filed an affidavit of illegality, which was amended by setting up a debt due to him by the plaintiff in the mortgage fi. fa. in excess of his indebtedness evidenced thereby. The mortgage fi. fa. included $19.30 as attorney's fee, and the total amount of this fi. fa., including the attorney's fee, was $212.37. The amount of the set-off claimed by the defendant for commissions and sacks was $345.50. The jury returned a verdict in favor of the plaintiff. Sheffield moved for a new trial, and excepts to the order overruling his motion. Besides the general grounds of the motion for new trial, the plaintiff in error presents three questions by his bill of exceptions. (1) It is insisted that the court erred in submitting to the jury the question whether the defendant was liable for attorney's fees, and erred in charging the jury upon that subject. The reason for the first assignment of error, as urged by counsel for plaintiff in error, is that a proceeding to foreclose a chattel mortgage is not such a suit as would authorize a recovery of attorney's fees; and the ground of the second exception is that there was no legal evidence to authorize an instruction by the judge upon this subject. (2) The second point raised by the motion for new trial is that the court erred in refusing to rule out the testimony of a witness to the effect that he had sent the defendant written notice for attorney's fees, and the further testimony of this witness as to the contents of the written notice. (3) Because the verdict is contrary to the evidence, and the evidence demanded a verdict in favor of the defendant.

1. We shall consider the second question first. The motion to rule out the evidence of the witness as to the sending of the notice and as to the contents of the notice, should have been sustained. The written notice was the best evidence of its contents, and the proper foundation had not been laid for the introduction of secondary evidence. No notice to produce had been served on the defendant, and no attempt was made to show the loss or destruction of the original notice. See Western Union Tel. Co. v. Bates, 93 Ga. 352, 20 S. E. 639; Holcombe v. State, 28 Ga. 66; McAfee v. State, 85 Ga. 438, 11 S. E. 810; Jackson v. Jackson, 47 Ga. 100; Kerr v.

State, 105 Ga. 655, 31 S. E. 739; Western Union Tel. Co. v. Hines, 94 Ga. 430, 20 S. E. 349; Tilley v. Cox, 119 Ga. 867, 47 S. E. 219. Parol evidence of the original notice cannot properly be received until at least the instrumentalities of ordinary diligence have been employed to produce the paper itself, so that the court can judge whether this lackey of the law is what he claims to be and all he ought to be, and decide that he can be trusted to take money from the defendant and carry it to the plaintiff.

2. We cannot concur in the proposition that, because the obligation to pay attorney's fees is embodied in a chattel mortgage, it presents any exception to the general rule as to such obligations. It is insisted by counsel for plaintiff in error that the act of 1900 (Laws 1900, p. 53) should be strictly construed. It is true that the original Twitty bill (embodied in section 3667, Civ. Code 1895) made all obligations to pay attorney's fees void, unless the defendant filed a plea and failed to sustain it. The act of 1900, amending section 3667, introduced into that section an exception and is limited by a proviso. It is only when the exception has arisen, and after the mandate of the proviso has been complied with, that any liability for attorney's fees arises. In Mt. Vernon Bank v Gibbs, 1 Ga. App. 862, 58 S. E. 269, we have referred to the fact that the allowance of attorney's fees upon evidence of indebtedness is not specially favored by our Code. It is only under the provision of an exception to the general rule (that the obligation to pay attorney's fees is void) that a promise to pay attorney's fees, contained in a note or other evidence of indebtedness, can be enforced. However much we may doubt the propriety of the law, which apparently discriminates against promises to pay attorney's fees, nevertheless, as this is the apparent policy of the state, those rights dependent upon the exception will be strictly construed. But there is no reason why the obligation to pay attorney's fees should be more strictly construed because it is contained in a mortgage. The act itself says, "upon any note or other evidence of indebtedness." The real difficulty arises from the fact that the debtor can be relieved from attorney's fees if he pays the debt before return day, and in many cases of mortgage foreclosures there is, strictly speaking, no return day. In the Case of the Mt. Vernon Bank, supra, we gave the meaning of the term "return day" as heretofore defined in this state, and as applicable to ordinary suits. If no issue is made to a mortgage foreclosure, it differs, of course, from an ordinary suit; but if an issue is made there is no material difference. We hold that, if the notice be given 10 days prior to the affidavit of foreclosure and the mortgage be not paid, the mortgagor would become liable for attorney's fees according to his obligation. If the mortgagor has been so notified, and fails to pay the debt prior to the date upon which, by the terms of the fi. fa., the sheriff is required to have the money before the court, this would furnish the return day contemplated by the statute.

The question before us is whether the mortgagor is liable for attorney's fees in this and other like cases, where a defense is filed and where the day and term to which the issue shall be returned is established by law and in each case is well known. In such a case we have no hesitation in holding that as the mortgage fi. fa., which heretofore was final process, has, by the act of the defendant himself, been transmuted into the beginning of or primal step in a suit, the defendant has himself provided a definite return day prior to which the notice can be given as in any other case. There would seem to be more real justice in this rule than in taxing one with attorney's fees on an ordinary note, who, though he is notified, has no disposition to contest the justness of the plaintiff's claim or put him to any unnecessary expense, and who does not comply with the notice and pay his obligation simply because it is impossible to procure the money with which to discharge it. In the case of a mortgagor who files an illegality to the levy of the mortgage fi. fa., the plaintiff is necessarily subjected to the expense of attorney's fees. The mortgagor raises an issue which must be settled in the courts, and there is no reason why he should be relieved from his obligation. If the judge had been right in his ruling on the evidence which the defendant's counsel moved to exclude, he would have been authorized to give the charge upon the subject of attorney's fees which is complained of. The charge was a correct statement of law. But inasmuch as the judge had erred in not excluding the evidence upon this subject, for the reasons we have heretofore stated, the evidence was not legally before the jury. For this reason the charge of the judge was, in the present case, erroneous. The presentation of the subject of attorney's fees was a repetition and continuation of his former error in not excluding the evidence upon the subject from the jury.

3. Without deciding whether the rulings excluding the testimony in behalf of the plaintiff were correct or not, the verdict in its behalf was not supported as to the interest (there being several admitted credits whose dates were not fixed by evidence), nor as to attorney's fees. But, as the case must be remanded upon the grounds already discussed and for the reasons therein announced, it is unnecessary that we should pass upon this ground of exception and more proper that we submit the evidence (which may be different upon the next trial) to the jury without comment.

Judgment reversed.

(3 Ga. App. 238)

COLLINS & TOOLE v. CREWS. (No. 714.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

Agency to sell does not necessarily carry with it agency and authority to collect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 301.]

2. SAME—SCOPE—PROOF.

Proof of agency, which depends upon evidence of the relative position and relationship of the parties, extends no further than to the authority necessary to do the acts shown. Authority to do an act as an agent will not be implied from the doing by such agent of a totally distinct and different act in behalf of his principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 254.]

3. BANKRUPTCY — COMPOSITION — SCHEDULES —CREDITORS NOT NAMED—NOTICE.

Where a judgment confirming a composition in bankruptcy is relied upon to discharge an admitted indebtedness, and it appears that the name of the creditor is not in the schedule of the bankrupt, the burden is upon the debtor affirmatively to prove that the creditor had notice or actual knowledge of the proceedings in bankruptcy prior to the judgment of discharge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 611.]

4. SAME—NOTICE TO SELLING AGENT.

Notice to an agent is insufficient unless it be made to appear that the scope of his authority and duty was such as necessarily included such act, and therefore bound the principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 680.]

(Syllabus by the Court.)

Error from Superior Court, Calhoun County; W. N. Spence, Judge.

Action by T. A. Crews against Collins & Toole. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

L. M. Rambo, for plaintiffs in error. H. M. Calhoun, and L. L. Lyon, for defendant in error.

RUSSELL, J. The judge directed a verdict, and exception is taken thereto. As we held in Davis v. Kirkland, 1 Ga. App. 10, 58 S. E. 209, the power conveyed by Civ. Code 1895, § 5331, is merely permissive and granted for the purpose of preventing a useless waste of time. The trial judge therefore directs a verdict at his peril. But there is no error if no other verdict could have been found than that directed. There was no error in directing a verdict in this case.

Crews sued Collins & Toole on open account. The defendants admitted a prima facie case and assumed the burden of proof. This gave the plaintiff a right to a verdict, unless the defendants proved their defense in all respects. The plea of the defendants was twice amended (with the consent of the court and the plaintiff) during the course of the trial: First, by striking and then by reinserting the third paragraph of the answer. The third paragraph of the answer averred that the plaintiff had actual notice of the proceedings in bankruptcy. It was necessary for the defendants to prove this in this case, regardless of the plea, if they hoped to defeat recovery. We think they failed to prove it. The plaintiff, who resides at Walkertown, N. C., sold the defendants a bill of tobacco; but, before the payment of this bill, the defendants were adjudged bankrupts in the United States District Court for the Southern District of Georgia. The defendants offered terms of composition, and these were confirmed by his honor, Judge Emory Speer, judge of the Southern district of Georgia, on December 23, 1903. The name of the plaintiff did not appear in the schedule of unsecured creditors, filed by Collins & Toole, and Crews testified that he never at any time received any notice from the referee in bankruptcy, or from any other source, that the defendants were adjudged bankrupts, nor notice of any meeting of the defendants' creditors called for any purpose, nor of any offer of composition; that he knew absolutely nothing of the bankruptcy of the defendants, until he was advised by his attorneys after he sent his claim to them for collection, in 1905. Up to that time he had had absolutely no notice of any kind or from any source that the affairs of the defendants were being administered in bankruptcy.

The evidence up to this point rendered a verdict for the plaintiff inevitable, for while a discharge in bankruptcy releases a bankrupt from debt, and while an order of confirmation of the composition becomes, in effect, a discharge, and may be pleaded in bar with like effect, and while the debt of a creditor not scheduled in time for proof and allowance may be thus discharged or avoided, it is indispensable either that such creditor have notice, or that actual knowledge of the proceedings in bankruptcy be brought home to him before such proceedings will operate so as to discharge the debtor from liability for the debt. The defendants having assumed the burden, the issue in the case turned on whether they could disprove the testimony of Crews and show that Crews had knowledge of the proceedings in bankruptcy. The defendants attempted to do this by proving that the person who represented himself as the agent of Crews for the sale of the goods in question was told by the defendants that they had been adjudged bankrupts and had offered a composition to their creditors. In other words, the proof for the defendants went to the point that they told the agent who sold them the goods of the proceedings in bankruptcy. This fell far short of proving that Crews, the plaintiff, had actual knowledge. It raised no issue of fact with Crews' testimony that he had neither notice nor knowledge of the proceedings in bankruptcy. Where one attempts to bind a principal with notice through an agent, proof of the agency is indispensable. Proof of agency and authority to sell goods does not carry with it agency and authority to collect; and Collins

& Toole, not having scheduled Crews as a creditor, and relying on notice or actual knowledge to defeat the collection of this debt, were required to show that the agent was acting within his agency and within the scope of his authority and duty as such agent.

In other words, the burden was upon Collins & Toole to show that the salesman (whose name seems to have been unknown to them, and whose only connection with the plaintiff was established by the fact that he made two efforts in his behalf to sell the defendants goods, one of which resulted in the sale of the goods, the purchase price of which is the basis of this suit and that at the time of the second offer he told him of the bankruptcy proceedings) had authority not only to collect debts due the plaintiff, but that it was within the scope of his authority, and one of the duties of his agency, to convey the information he received to Crews. Otherwise, the proof that he sold the goods amounted to nothing, and, as this was all that the defendants proved, they totally failed to show that the plaintiff had either notice or knowledge of the proceedings in bankruptcy. If the defendants had shown that in a long course of dealings with the plaintiff this unknown salesman, or another salesman, had been accustomed to collect for the plaintiff, and payments to such salesman had been recognized and ratified by the plaintiff, there might have been reason for inferring that the agent had power to collect. The salesman in this case, however, so far as appears from the evidence, did not even offer to collect, or request payments, in behalf of the plaintiff, and does not appear to have known that Collins & Toole's account was not paid, until so informed by them. The defendants having relied, for proof of agency, upon evidence of the relative situation of the parties, the rule that such agency is established no further than is necessary for the discharge of the duties ordinarily belonging to it will control. All that they proved in regard to the salesman was that he was an agent to sell. This, as held by the Supreme Court in Walton Guano Co. v McCall, 111 Ga. 114, 36 S. E. 469, did not carry with it authority to collect, and certainly raised no such inference as could reasonably satisfy a jury that it was one of the duties of such agent to notify the plaintiff of the proceedings in bankruptcy, pending against the defendants. Under the rule laid down in Wikle v. L. & N. R. Co., 116 Ga. 309, 42 S. E. 525, the scope of the agency was limited strictly to what was proven. At best, this was only agency to sell. And this is a sound rule. Any other would be extremely hazardous. The verdict directed is in accord with well-settled rules of law and evidence. Certainly these rules should not be strained or extended to enable a debtor, who omitted this creditor's name from the list of his creditors in his schedule, and whose only notice to him was expected to be conveyed by a salesman (who might never have come, but happened by haphazard to drop in), to defeat the collection of a debt confessedly just.

Judgment affirmed.

POWELL, J., disqualified.

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(3 Ga. App. 178)

DROUGHT et al. v. POAGE. (No. 300.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. GARNISHMENT—DISSOLVING BOND—RIGHTS OF USEE.

Where garnishment has been issued, and the defendant, for the purpose of dissolving the garnishment, executes a bond under section 4718 of the Civil Code of 1895 for the use of a named usee, such recital does not make the usee a party claimant of the property in the hands of the garnishee, and entitled as such to have an issue tendered and disposed of as to the title to the property before final judgment can be entered against the garnishee and on the dissolution bond.

2. JUDGMENT — CONCLUSIVENESS — PARTIES —RIGHT TO OPEN.

Where a defendant executes a bond to dissolve a garnishment, not for himself individually, but for the use of a named usee, the interest of the defendant and that of the usee are identical, and a final judgment against the defendant is conclusive against the usee, and, after judgments have been entered against the garnishee and on the dissolution bond, the judgments should not be opened at the instance of the usee in order to allow him to make a claim to the property in the hands of the garnishee which has been appropriated as the property of the defendant to the payment of the judgment in favor of the plaintiff.

3. GARNISHMENT — PARTIES — CLAIMANT — PLEADING—BOND.

Before a claimant becomes a party to a garnishment suit, he must file a claim to the property apparently belonging to the defendant, in the hands of the garnishee, or he must give a bond to dissolve the garnishment under the provisions of section 4720 of the Civil Code of 1895.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by E. B. Drought and others against Anna C. Woodbridge, in which the garnishment summons was served on J. F. Brooks, guardian and ex officio administrator of the estate of Florence A. Bryan, deceased, pending which defendant Woodbridge filed a statutory bond to release the garnishment. A judgment in favor of plaintiff holding the property subject having been affirmed, plaintiff entered judgment against the garnishee and the sureties on the dissolving bond, and later against defendant. Thereafter C. A. Poage, claiming to be a party to the dissolving bond, moved to open said judgments which motion was allowed, after which plaintiff and defendant B., the surety on the garnishment bond, moved for a new trial, which Poage moved to dismiss. From an order dismissing such motion, movants bring error. Reversed.

Garrard & Meldrim and Twiggs & Oliver, for plaintiffs in error. Geo. W. Owens, for defendant in error.

HILL, C. J. Drought caused an attachment to be issued against Anna C. Woodbridge, returnable to the May term, 1899, of the city court of Savannah. This attachment was levied by serving a summons of garnishment on J. F. Brooks, guardian and ex officio administrator of the estate of Florence A. Bryan, on the 16th of March, 1899. On the 5th day of June, 1899, the garnishee filed his answer in the attachment suit. This answer, among other things, set out that the garnishee had in his hands as the net distributive share of Anna C. Woodbridge in the estate of Florence A. Bryan $4,779.68, which he held under an order of the superior court of Chatham county to await the result of litigation pending in that court of John M. Bryan and Others v. Jordan F. Brooks, Guardian and Ex Officio Administrator of Florence A. Bryan, Deceased. On said 5th day of June, 1899, the garnishment was dissolved by the defendant Anna C. Woodbridge, who gave a statutory bond as prescribed by section 4718 of the Civil Code of 1895; the bond being as follows: "State of Georgia, Chatham County. Know all men by these presents that, whereas, A. E. Drought, for the use of E. B. Drought, has issued out process of garnishment against Mrs. A. C. Woodbridge, of the county of Orange, state of Florida, returnable to the city court of Savannah, for the sum of $3,759.50; and, whereas, the said A. C. Woodbridge, for the use of C. A. Poage, desires to dissolve the said garnishment by giving bond according to the statute in such cases made and provided: Now, we, the said A. C. Woodbridge, for the use of C. A. Poage, as principal, and the Fidelity & Deposit Company of Maryland, a corporation, as security, acknowledge ourselves jointly and severally bound to A. E. Drought, for the use of E. B. Drought, to pay the judgment that shall be rendered on said garnishment; upon condition, nevertheless, that should the said A. C. Woodbridge, for the use of C. A. Poage, make unto the said A. E. Drought, for the use of E. B. Drought, full payment of the judgment that shall be rendered on said garnishment, or should the said Fidelity & Deposit Company do so for them, then this bond to be void"—signed, etc. On the trial of the attachment suit, a verdict was rendered in favor of the plaintiff Drought against the defendant Woodbridge. The case was taken to the Supreme Court, and the judgment in favor of the plaintiff was affirmed. 118 Ga. 671, 672, 45 S. E. 266. On September 4, 1903, after the judgment of the Supreme Court had been made the judgment of the city court, the plaintiff entered up judgment against the garnishee, and also entered up judgment against the defendant A. C. Woodbridge, and against the surety on her bond to dissolve the garnishment, viz., the Fidelity & Deposit Company of Maryland, and on September 11, 1903, a final judgment was entered up against her on said dissolution bond, and also against the garnishee and against the surety on the bond. By direction of the superior court, through an interlocutory decree in the case pending there touching the Bryan estate, the garnishee in this case, Jordan F. Brooks, as administrator, had previously paid over all the money in his hands to W. R. Leaken as the attorney of record for Anna C. Woodbridge and C. A. Poage. Under these judgments of the city court, the Fidelity & Deposit Company of Maryland, surety on the dissolution bond, made payment to the attorneys of record of the plaintiff Drought, Messrs. Twiggs & Oliver.

On October 23, 1903, C. A. Poage, through his attorney, George W. Owens, Esq., filed a motion in the city court of Savannah to open the judgment in that court against the garnishee, entered on the 4th day of September, 1903, and the judgment on the bond dissolving the garnishment, entered on the same, and the final judgment rendered on the 11th day of September, 1903. In this motion, claiming that he was a party to the bond dissolving the garnishment, and that he as such claimant had dissolved the garnishment, he assigns the following reasons why the judgments should be opened: "(1) That no issue was ever tendered on said claim as required by law, and no traverse filed to the answer of said garnishee as required by law. (2) That said claim was never assigned for trial as required by law. (3) That no hearing was ever had on said claim, as required by law. (4) That said judgments were rendered in the absence of the movant and his counsel, and without the assent of the movant or of his counsel or any notice given to the movant or to his counsel of the proposed judgments to be taken, said counsel being absent by leave of court, had and obtained in due form of law on the 5th day of August, 1903, and said leave being granted to said counsel for providential causes." For these reasons the movant "prays that the said judgments, having been improvidently rendered, may be opened and set aside in terms of law." This motion was duly served upon the plaintiff Drought and the defendants, Brooks, guardian and ex officio administrator of the estate of Florence A. Bryan, and the Fidelity & Deposit Company of Maryland, surety on the garnishment bond.

Drought, the plaintiff, filed a general demurrer to the motion to reopen and set aside these judgments, and subject to his demurrer he filed an answer to said motion on the following grounds: "(1) That said C. A. Poage is not a party to said case as claimant or otherwise, and has no right to move the court to open said judgments. (2) That no claim has ever been interposed by the said Poage. and therefore no issue could be tendered and no hearing could be had on a claim not tendered. (3) That the absence of movant or of his counsel at the time said judgments were entered should not and cannot affect the va-

lidity and binding force of said judgments, as the said movant was not a party to said case and had no rights in said case which the court was legally and equitably bound to consider. (4) That notwithstanding the fact that said Poage is not a party of record in said case, he was fully apprised of all proceedings before they were taken, and had full opportunity to be present himself or to be represented by an attorney before and at the time all of said judgments were taken, and whatever rights movant may have had in this case connected with those of Mrs. Anna C. Woodbridge, or growing out of contractual relations with Mrs. Anna C. Woodbridge, apparent from the record in said case, were fully considered and passed upon by an attorney of this court, who acted for Mr. George W. Owens, both in the Supreme Court of Georgia and in this court, and after a full and thorough examination of the entire matter, the said attorney who appeared for Mr. Owens gave his full consent that the final judgment of September 11, 1903, should be entered."

The other defendants, Brooks, garnishee and ex officio administrator, etc., and the Fidelity & Deposit Company of Maryland, both answered said motion to open and set aside the judgments on the same grounds as set out by the plaintiff Drought, and set out the following additional reasons why the motion should not be granted: "That the said Poage was a party to the case of J. M. Bryan et al. v. Florence A. Bryan, deceased, et al., in the superior court, brought to the March term, 1899, the same being an equitable proceeding; and before verdict and decree was taken in said cause, said Poage was made a party to the same by order of the court, on May 2, 1899, claiming to be an assignee, for valuable consideration, of the interest of Anna C. Woodbridge in the estate of Florence A. Bryan. That said cause went to final decree after said Poage was made a party, * * * by the terms of which decree, among other things, it was provided that the portion of said estate coming to said Anna C. Woodbridge should be held up in the hands of said Brooks, guardian and ex officio administrator, subject to the future decree of said court, in view of the claim made by the said assignee, C. A. Poage, and of the garnishment which had been served upon said guardian and ex officio administrator. That in said cause, by decretal order taken on June 5, 1899, after the money in the hands of said guardian and ex officio administrator, except the part awarded to Anna C. Woodbridge, * * * had been deposited by said Brooks, as such guardian and administrator, in the Chatham Bank subject to the joint check of himself and the judge of the superior court, it was decreed that there was no issue between Anna C. Woodbridge and C. A. Poage, and that it appeared to the court that Anna C. Woodbridge, for the use of said Poage, has dissolved the garnishment of A. E. Drought, for the use of E. B. Drought, which had been served upon the said Brooks, guardian and ex officio administrator, * * * and it was ordered, in and by the terms of said decree, that Brooks, guardian and ex officio administrator, should pay to the order of W. R. Leaken, counsel of record for said Anna C. Woodbridge and for said C. A. Poage, her assignee, all the moneys in his hands as the share of said Anna C. Woodbridge in the estate of said Florence A. Bryan, * * * which order was taken by W. R. Leaken, as attorney for said Anna C. Woodbridge and for said C. A. Poage, and at their instance. Further, that upon the same day (June 5, 1899) the bond dissolving said garnishment made by Anna C. Woodbridge is dated, she signed herself for the use of C. A. Poage, with the Fidelity & Deposit Company of Maryland as surety, which bond was strictly in accordance with the Code of Georgia for the dissolution of a garnishment by the defendant, and not by the claimant, and upon the execution of said bond the money in the hands of Brooks, guardian, etc., was payable to W. R. Leaken, as attorney under said decretal order of the court, for the said Anna C. Woodbridge and said C. A. Poage; their interests being identical, and there being no issue between them, but after said bond was taken, dissolving said garnishment, by agreement between said W. R. Leaken, as attorney for said parties, and the said Jordan F. Brooks, the said money in his hands, or the greater portion thereof, was left on deposit with the said Jordan F. Brooks as agent of said company, to protect the said company in the premises. That therefore the said C. A. Poage was privy to all that had been done in this case, and linked his fortunes in said cause with those of Anna C. Woodbridge, and has no right to move to open said judgment of this court or to set the same aside, having never seen fit to make a distinct claim to said money or property in the hands of said garnishee, and said Poage has no rights in the premises on the merits. Respondent denied that said Poage ever has been a claimant in said garnishment proceedings, or that he has ever dissolved the same, but, on the contrary, avers that whatever rights he may claim to have as so-called assignee of said Anna C. Woodbridge, he has staked upon the issue between said Drought and the said A. C. Woodbridge in the litigation just ended, and in which the remittitur of the Supreme Court has been filed and made the judgment of this court, and under which judgment of this court this garnishee and the said surety company have been compelled to pay said money to said E. B. Drought."

On July 30, 1904, the motion to open the judgments came on to be heard before Judge Norwood in the city court of Savannah, and testimony was introduced for both parties (a brief of the evidence duly appearing in the record), and the court, on the same day, rendered a decision opening said judgments

of September 4 and 11, 1903. To this judgment opening the said judgments, E. B. Drought and Jordan F. Brooks, guardian, etc., and the Fidelity & Deposit Company of Maryland, surety, excepted pendente lite, and the exceptions pendente lite were duly certified by the court and ordered to be placed on the record in open court August 27, 1904. Subsequently, on the 27th of August, 1904, and at the same term of court, a motion for a new trial was made by the above-named parties, and said motion was amended on July 16, 1906. Said motion was heard on July 16, 1906, and said C. A. Poage, through his attorney, moved the court orally to dismiss the motion for a new trial on the ground that a direct bill of exceptions was the only remedy for correcting any errors the court may have made in opening the judgments rendered in said case September 4, 1903, and September 11, 1903, which motion the court sustained, and dismissed the motion for a new trial, and the movants all except. The foregoing is a substantial statement of the material questions made in the record.

The judgment of the lower court dismissing the motion for a new trial is strongly challenged by the plaintiffs in error. In view of the fact that the plaintiffs in error made timely exceptions pendente lite to the judgment in favor of the movant, on the motion to open and set aside the judgments, which exceptions were duly allowed and certified by the court and preserved as part of the record, and the further fact that in the bill of exceptions to this court, and in the brief, error is assigned on these exceptions pendente lite, it becomes immaterial and unnecessary for this court to pass upon the alleged error in dismissing the motion for a new trial. Especially is this true where the same questions are made in the exceptions pendente lite as are made in the motion for a new trial. Generally, a direct bill of exceptions is the appropriate remedy to bring up alleged errors in the progress of a civil action at law, where such errors are predicated upon the decision of the judge on motions and the like, and where the judgment complained of is a conclusion of law upon the facts of the case as they appear of record—for instance, a judgment on demurrer, a motion in arrest, or a motion to set aside a judgment, or a nonsuit, and the like. Fannin v. Durden, 54 Ga. 476. In the instant case, a motion was made in writing to open certain judgments which were regular on their face, but which were alleged to have been improvidently rendered because of facts both of record and dehors the record. It is not a technical motion to set aside the judgments, for such motions can only be based upon some defect which appears on the face of the record. Dugan v. McGlann, 60 Ga. 353; Pulliam v. Dillard, 71 Ga. 598; Artope v. Barker, 74 Ga. 462; Regopoulas v. State, 116 Ga. 596, 42 S. E. 1014. The proceeding is more appropriately a petition in a court of law to open and set aside a judgment for reasons both of law and fact, and is analogous to an equitable petition to set aside a judgment of a court of competent jurisdiction for fraud, accident, or mistake, etc. This petition was duly served on all the necessary parties and they appeared and defended. On the issues made by the pleadings, evidence both oral and documentary was introduced and considered, and the judge, without the intervention of a jury, rendered a final judgment. We think this judgment could have been properly excepted to directly by bill of exceptions, or a motion for a new trial could have been made. In this case practically both remedies were adopted, and the decision of the court opening the judgments in question was attacked with both weapons. Pretermitting, however, any ruling on the judgment dismissing the motion for a new trial, except as above indicated, we prefer to end the litigation by deciding the meritorious questions clearly and timely made by the exceptions pendente lite and preserved in the record.

The movant (now defendant in error) bases his right to have the judgments of September 4 and 11, 1903, opened and set aside on the ground that he was a party to the suit of Drought against Woodbridge when the bond was filed to dissolve the garnishment; that the giving of the dissolution bond by defendant Woodbridge, "for the use of C. A. Poage," was tantamount to filing a claim by him as usee; and he contends that the judgments entered in this case without any issue on the claim or traverse of the garnishee's answer were illegal. Unquestionably, where a claimant has filed a bond to dissolve a garnishment, he becomes a party to the suit. In this case Poage did not file a claim, nor did he make a claimant's bond. The bond as given by the defendant Woodbridge, "for the use of C. A. Poage," was a statutory bond by a defendant for the purpose of dissolving the garnishment as provided for in section 4718 of the Civil Code of 1895. Its condition was "to pay the judgment that shall be rendered on the garnishment." The condition in a claimant's bond to dissolve a garnishment is entirely different. Section 4720, Civ. Code 1895. If the defendant in error had given a bond according to the provisions of section 4720, based on a claim to the property in the hands of the garnishee, he would have been a party to the suit, and it would have been irregular to have entered judgment against the garnishee finding the property in his hands subject to the plaintiff's judgment against the defendant without first disposing of the issue on the claim. The Supreme Court, when the attachment suit of Drought against Woodbridge was before it, expressly ruled that the bond in this case dissolving the garnishment was a bond by the defendant. 118 Ga. 671, 45 S. E. 266. The fact that it was recited in the bond that

the defendant made it "for the use of C. A. Poage" did not convert it into a claimant's bond. These words, "for the use of," in this case simply indicated that the interests of the defendant and the party she designated as "usee" were identical. Indeed, the record shows that in the suit pending in the superior court of Chatham county of Bryan et al. v. Brooks, guardian and ex officio administrator of the estate of Florence A. Bryan, et al., C. A. Poage, claiming to be an assignee for a valuable consideration of the interests of Mrs. A. C. Woodbridge in said estate, before said suit went to final decree, was made a party, and the court held that there was no issue between said assignee and Anna C. Woodbridge. The interests of Anna C. Woodbridge and C. A. Poage as to the funds in the hands of the garnishee being therefore identical, when she made the bond for the use of C. A. Poage, and the money was thereupon paid over to W. R. Leaken, the attorney of record for Mrs. Anna C. Woodbridge and C. A. Poage, it became a matter entirely between them and their attorney.

It is clear that Poage was in no sense a party claimant in the garnishment proceedings based on the attachment suit of Drought v. Woodbridge. If he was a party at all, it was as a defendant with Woodbridge, and when Woodbridge's rights were concluded by the judgment of the Supreme Court, so were his in the then state of the pleadings. After the Supreme Court had decided against the defendant Woodbridge, the plaintiff, when the remittitur was filed in the court below, had the right to enter up judgment against the defendant, against the garnishee on his answer, and also against the principal and surety on the dissolution bond. Before the final judgment was so entered, Poage might have claimed the fund in the hands of the garnishee, belonging to the defendant Woodbridge, as an assignee for a valuable consideration. In other words, he could have made himself a party claimant. This he did not do. It is too late for him, after a judgment has been properly rendered, and after the surety on the dissolution bond has paid the judgment and received the money of the principal in the bond, which he claimed as assignee in the suit pending in the superior court, and received it from his attorney of record, to come into court and ask that these judgments be opened and he be allowed to make a claim to the fund already legally and equitably applied to the payment of the judgment against his surety. Not being a party to the suit when the judgments were rendered, the absence of his attorney furnished no reason why they should have been opened. The Supreme Court, in Moore v. Kelly & Jones Co., 109 Ga. 798, 35 S. E. 168, declares that: "While a motion to set aside a judgment is addressed to the sound discretion of the judge, it should not, although made during the term at which the judgment was rendered, be granted, unless some meritorious reason be given therefor." The absence of Mr. Owens, who, according to the record, was the attorney for the defendant Woodbridge, whose rights had been fully determined by the Supreme Court, constituted no legal or meritorious reason why the court should have opened judgments properly and regularly entered, at the instance of one who was not a party and who apparently had no interest in the matter between the parties litigant. We think the judgment of the city court, on the motion of Poage, that the judgments against the garnishee and on the bond dissolving the garnishment be opened, was erroneous, and should be set aside.

Judgment reversed.

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(62 W. Va. 654)

## CAVENDER v. CITY OF CHARLESTON.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907.)

1. BRIDGES—DUTY OF CITY TO REPAIR.
Where, by the extension of the corporate limits of a city, a public bridge, owned and controlled by a county, comes to be within such city, it becomes the duty of the city to keep the bridge in repair.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bridges, § 52.]

2. MUNICIPAL CORPORATIONS — BRIDGES — WHEN PART OF STREETS.
A public bridge over a stream connecting streets of a city is a part of such streets.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1595.]

3. BRIDGES—LIABILITY FOR DEFECTS.
The city of Charleston is under duty to repair that bridge over Elk river connecting Lovell and Charleston streets, called the "Suspension Bridge," and is liable for damage to persons and property arising from injury to the same caused by defect or want of repair of the bridge.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bridges, § 52.]

4. MUNICIPAL CORPORATIONS—EXTENSION OF CORPORATE LIMITS—REPAIRS OF BRIDGE.
The Legislature has power to enlarge the corporate limits of a city or town and transfer the duty of maintenance and repair of a public bridge within such limits from the county to the town or city.

5. BRIDGES—LEGISLATIVE CONTROL.
Power of Legislature over municipal corporations discussed.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bridges, § 52.]

6. MUNICIPAL CORPORATIONS — DUTIES OF CITY.
Where a statute confers power upon a municipal corporation to be exercised for the public good, the exercise of the power is not merely discretionary, but imperative, and the words, "the council shall have power to," mean duty and obligation.
(Syllabus by the Court.)

Error to Circuit Court, Kanawha County.

Action by Lillian S. Cavender, by her next friend, against the city of Charleston. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Watts, Davis & Mathews, for plaintiff in error. A. S. Alexander, S. B. Avis, and W. R. Chilton, for defendant in error.

BRANNON, J. Lillian S. Cavender was crossing Elk river upon a wire suspension bridge, and, owing to a defective cable, the bridge fell, and she received bodily injury and brought an action for damages against the city of Charleston, and upon motion of the city, the court struck out the plaintiff's evidence as not warranting a verdict for the plaintiff, and the plaintiff has brought the case to this court.

It is not denied that the bridge was defective, nor is it denied that the plaintiff is entitled to have damages for her injury, but the question is whether the county of Kanawha is liable or the city of Charleston. The plaintiff contends that the city is liable. The defendant contends that it is not liable, but that the county is liable. We come first to sections 53 and 54 of chapter 43 of the Code of 1899 [Code 1906, §§ 1444, 1445], which contain the following provisions:

"Any person who sustains an injury to his person or property by reason of a public road, or bridge, in a county, or by reason of a public road, bridge, street, sidewalk or alley in an incorporated city, village or town, being out of repair, may recover all damages sustained by him by reason of such injury, in an action on the case in any court of competent jurisdiction, against the county court, city, village or town in which such road, bridge, street, sidewalk or alley may be, except that such city, village or town shall not be subject to such action, unless it is required by its charter to keep the road, bridge, street, sidewalk or alley therein, at the place where such injury is sustained, in repair. If it is not so required, the action and remedy shall be against the county court."

"Any person who may be injured as aforesaid by reason of a turnpike, road or bridge belonging to any company or person, or to any county in its corporate capacity, being out of repair, may recover all damages sustained by him by reason of such injury, in the manner prescribed in the preceding section, against such company, person or county, or against the lessee for the time being of any such road or bridge."

It seems that, under section 53, a city is only liable when by its charter the duty devolves upon it to keep a road, bridge, or street in repair. Then the material question here is: Did this duty rest upon the city of Charleston in respect to this bridge? The city of Charleston formerly bounded on the east side of Elk river and did not include Elk river. Years back an incorporated company, the Elk River Bridge Company, constructed this suspension bridge over Elk river. It owned land on both sides of the river on which were located the anchors supporting the cables of the bridge. Later that company sold and conveyed the bridge to the county of Kanawha. A street of Charleston, as it existed before the extension of its corporate limits, Lovell street, connected with this bridge, led to it. On the other side of the river the turnpike led to it; the bridge being thus a part of the turnpike connecting with Lovell street. The bridge was just as much a part of the turnpike as that part of the turnpike upon the soil. Later the town of Elk City was incorporated, and this turnpike approaching the bridge on the west side became a street of Elk City. Thus this bridge connected Lovell street in Charleston and Charleston street in Elk City. It was part of a continuous highway formed by those streets. Later the corporate limits of the city of Charleston were extended by an act passed in 1895 so as to include Elk river and the town of Elk City; the bridge being thus within the city of Charleston. It was so at the time Lillian S. Cavender received her injury. In 1895 by chapter 58, p. 126, Acts 1895, the charter of Charleston was amended.

It becomes then of importance, if not of decisive importance, to see whether this charter puts upon the city of Charleston the duty of maintaining this bridge in repair. Its twenty-first section (page 131) is of broad scope, giving the city many and ample powers to be exercised for the public benefit. It says: "The council shall have power * * * to open new streets and extend, straighten, widen and repair old streets and alleys, to curb and pave streets, sidewalks and gutters, for public use, and to alter, improve and light the same * * * and shall have control of all avenues for public use in said city, to have the same kept in good order and free from obstructions on or over them; to regulate and determine the width of all streets, sidewalks and public alleys; to order and direct the curbing and paving of all sidewalks and footways for public use in the city, to be done and kept in good order by the owner or occupant of the adjacent property; to control the construction and repair of all houses, bridges and culverts." These provisions manifest intent to give wide and general powers over streets of the city. These and many other powers are vested by its charter act in the city of Charleston for public benefit, as appears from the very letter of the act and from the very nature of the powers given the city. For no other purpose than to subserve the public welfare are these powers conferred. The city has not the choice to exercise powers vital for the public weal, such as the maintenance of highways, or not as it chooses, but it must exercise such powers as in their nature are essential to the public welfare. Therefore we say that this act imposes upon the city the duty, the binding duty, to keep its streets in repair. The nature of the powers conferred by the act demands this duty of the city. Not only so, but the letter of the statute not merely gives the power, but it says, in commanding language, that the city "shall have control of all avenues for public use in said city." For what purpose? The statute says this control is given "to have the same kept in good order and free from obstruction." Now, this bridge

within the corporate limits, essential to cross a large river, forming a part of connecting streets of the two cities as they once existed, and now practically made one street by the act enlarging the city, and connecting those streets and forming a continuous street—this bridge is surely, within the letter of the charter, an "avenue for public use in said city," which the city must keep in repair. This bridge is an avenue, a street connecting one part of the city with another, over a river. It is a part of the streets; for a bridge is just as much a part of a highway as that part of the highway passing over the earth. Elliott on Streets, § 27, says: "A public bridge is an essential part of a road, and the erection of a bridge is but the laying out of a highway." "The approach to the bridge and the bridge itself are both parts of the highway." 4 Am. & Eng. Ency. L. 920. City v. Drew, 19 Fla. 106, 45 Am. Rep. 5. Therefore we hold that this act itself, the charter of the city, does put upon the city the binding duty of maintaining the bridge in safe repair. "Whenever it is provided that a corporation or officer 'may' act in a certain way, or it 'shall be lawful' for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons." Mason v. Fearson, 9 How. 259, 13 L. Ed. 125; Ex parte Doyle, 62 W. Va. —, 57 S. E. 824; Mayor & C. C. of Balto. v. Marriott, 9 Md. 160, 66 Am. Dec. 326. This bridge once belonged to the county before it was taken into the corporate limits, but the Legislature in 1895 gave control of it to the city, and thus deprived the county of control of it. After this act was passed, the county court by resolution renounced all control over the bridge and conceded control to the city. It is true that the city by its council disavowed liability for the bridge, disavowed control over it; but it could not do so. Its disavowal of responsibility for the bridge would be a denial of a duty imposed by act of the Legislature. The true construction of the act puts upon the city the liability for this bridge within its limits, and relieves the county from liability. The city cannot evade this obligation. It is very well established doctrine that the Legislature may take from a county even its property. It can modify the powers or duties of a county or a municipal corporation. It can impose upon it any duties it pleases. It can amend its charter as it pleases, if the Constitution does not prohibit. "Municipal charters are not contracts, and may be amended or repealed at the discretion of the Legislature." Probasco v. Moundsville, 11 W. Va. 501. "Except to the extent limited by constitutional provisions, the legislative control over municipal corporations is absolute and unrestrained. Municipal powers may be abridged, charters may be modified and amended, territorial limits may be changed or the corporate existence extinguished entirely at the arbitrary exercise of legislative will, and wholly irrespective of the wishes or consent of those composing the body politic." 20 Am. & Eng. Ency. L. 1218. See New Orleans v. N. O. Waterworks, 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943. Hence we must say that the Legislature had power to take from the county this bridge and transfer it to the city.

But it is not necessary to concern ourselves with the question, where is the dry legal title? Sure it is that possession, control, and use of the bridge is given by the act to the city. This is all that counties and cities have; the soil being in the owners, and the town or county having only the use of the soil for easement. Gibson v. City, 38 W. Va. 179, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853, holds a city liable for a dangerous structure, though it did not erect it. The city used the bridge. It painted it and repaired its floor, thus accepting it. It held it out as a city bridge, and thus became liable for its condition. Wilson v. Wheeling, 19 W. Va. 323, Syl., point 12, 42 Am. Rep. 780. It is, however, unnecessary to rely upon this as an estoppel, because statute law makes the bridge a city bridge for present purposes. This repair is mentioned here to show the use of the bridge by the city, and its acceptance as a public bridge of the city. We need not inquire as to the mere legal title of this bridge. It is sufficient to say that the charter act gives control of it to the city; puts the bridge in the possession of the city as an avenue for public use, and imposes in express terms the duty of repair. What else does the act mean? The control of this bridge would alone impose the duty of maintenance, but the act says this control is given to enable it "to have the same kept in good order." When once by the act enlarging the corporate limits of Charleston the bridge came into the city, we think the general law, without any express words in the charter act, would put the bridge under the control of the city and impose the duty of maintenance. Chapter 47, section 28, Code 1899 [Code 1906, § 1868], says that the council of a "city, town or village shall have plenary power and authority therein to lay off, vacate, close, open, alter, curb, pave and keep in good repair, roads, streets, alleys, sidewalks, crosswalks, drains and gutters for the use of the public." This is the general statute applicable to all municipalities. The imparting of the power to do these things, as above stated, imposes the duty to do them. Chapter 43 makes general provision concerning the establishment of roads, bridges, and landings, giving county courts numerous powers touching the same; but in section 43 it denies the power of the county courts as to roads and bridges within its limits by saying: "Nothing contained in this act shall be construed to take from the jurisdiction, charge or control of the council, trustees or other authority of any town, village or city, so much of any road, bridge, landing or

wharf, as by the laws now in force is under such jurisdiction, charge or control exclusively." Chapter 43, § 3, says that no road precinct shall include any part of an incorporated village, town, or city which by the provisions of its charter keeps its own roads and streets in order. These general statutes surely exclude the power of the county court from control of any road or bridge within the corporate limits of a municipal corporation. These general statutes applicable to towns and cities generally furnish additional argument for the proposition that this bridge was intended by the Legislature by the act of 1895 to be under the control, the sole and exclusive control, of the city of Charleston. In view of them, it would be an anomaly to say that this bridge connecting streets in the city stood isolated and alone, not subject to the control of the city, but under the control of the county court, to say that the county authority was full over this bridge notwithstanding the Legislature put it within the corporate limits of Charleston, and that liability for its nonrepair rests upon the county, and not the city. According to this theory, the city would be liable for the streets leading upon the bridge, and there its jurisdiction and duty would end. Two authorities within the city limits. Our statute law upon the subject would certainly not bear this interpretation.

Here I may quote from Elliott on Roads and Streets, § 416: "There is some conflict in the cases as to whether the erection of a municipal corporation does of itself oust the jurisdiction of the county or township officers over existing highways. Our opinion is that, as soon as a town or city is incorporated, the public ways—that is, ways belonging to the public and not owned by private corporations—come within the jurisdiction and control of the new public corporation, unless the statute expressly or impliedly continues the authority of the county or township officers. It is apparent that the ways must of necessity change character and the servitude be much extended. This extension carries with it wider duties, and greater liabilities, thus requiring an essentially different control and care. The authority of county and township officers cannot be the same as that of city and town officers, and their power is consequently not adequate to the duty and the responsibility which the change from suburban to urban highways creates. The added responsibility and the augmented duty require broader authority than that requisite for the care and control of rural roads. The decisions in New England do not afford much assistance on this question, for the doctrine which there prevails is, as we have said, a peculiar one, and different from that which obtains in most of the states. Where there is no statute, the incorporation of a city seems naturally to imply that the highways within its territorial limits become streets, and, as such, subject to the control of the municipality. * * * It cannot be justly inferred that the Legislature meant to vest two distinct and different governmental subdivisions with control of the same subject, for it is evident that conflict and confusion must be the consequence of such a holding, and it ought not to be inferred without strong reason that the Legislature intended such a result. It is, indeed, by no means clear that officers chosen by a county can be placed in charge of streets which it is the duty of a town or city to maintain safe and convenient for passage. It is not, at all events, just to do so, and this result ought to be avoided by holding, as in truth sound principle requires that the courts should hold, that the creation of a municipal corporation does, in the absence of clear words to the contrary, imply that it shall have control of the streets within its territorial limits to the exclusion of the county and township officers." I quote also from section 417: "Exclusive Control of Municipality Over Streets. Investing 'the inhabitants of a locality with the government thereof' is a change in the political and governmental subdivisions, and the natural and reasonable intendment is that, when a new governmental instrumentality is established, it takes control of the territory and affairs over which it is given authority, to the exclusion of other local governmental instrumentalities. It displaces the old, and takes its place as its legal successor, and not as an auxiliary. This is the general rule as to school property and the like, and there is much stronger reason for applying this rule to public ways than to other public property, for a municipal corporation becomes liable for failure to keep the public ways safe upon the theory that it has exclusive control over them and the power to raise money to maintain them in safe condition for travel. In creating a town or city, the Legislature must be deemed to do so with knowledge of the general principles which apply to such political subdivisions and with the expectation that they shall exercise the usual jurisdiction of such subdivisions exclusively, and not divide it with other public or quasi public corporations. Acts for the incorporation of towns and cities are directed to a particular subject, and are of greater force, so far as that subject and its incidents are concerned, than laws of a wide and general sweep. The object of incorporating a town or city is to invest the inhabitants of the locality with the government of all the matters that are of special municipal concern, and certainly the streets are as much of special and local concern as anything connected with a town or city can well be. It ought, therefore, to be presumed that they pass under the exclusive control of the municipality as soon as it comes into existence under the law." Hanley v. City, 37 W. Va. 578, 16 S. E. 807, holds: "When a public road is taken into a city, town, or village by its charter of incorporation, it be-

comes the duty of such city, town, or village to keep such road in repair, unless it is abandoned as a public road in the manner provided by law. Proof of abandonment devolves on the city, town, or village." Therefore, as the charter and other general statutes give the city jurisdiction exclusive control over this bridge, and thus impose an obligation of repair, section 53 gives the plaintiff right of action against the city. Section 54 touches liability of a company, person or county, but section 53 also makes the city liable where the duty of repair rests on it.

It was argued that the clause giving the city control "of all avenues" does not include bridges, and that a subsequent clause of the Acts 1895, § 1, giving council power "to control the construction and repair of all houses, bridges, and culverts," does mention bridges, and that the inclusion of bridges in this clause excludes it from the clause giving control over public avenues, because it is not mentioned in that clause, but the answer is, first, that the words "all avenues for public use" must be construed, plainly must, to include a bridge; and, second, that the second clause is simply one giving the council power to regulate the construction of bridges, and it is not the office of that clause to impose duty to construct or repair. In the deed from the Elk River Bridge Company conveying the bridge to the county of Kanawha there is a provision binding the county to keep open the bridge as a free bridge, "and to keep and maintain the same in good repair and safe for public travel." Great stress is laid by the city's counsel on this clause. It is said that this makes a contract placing the obligation to repair on the county, and that it is not to be presumed that the Legislature intended to absolve the county, and that this liability rests on the county under that deed. What might be the rights of the bridge company under that deed we are not discussing, as between the city and the county the Legislature could transfer the duty of repair. That it has done by the act of 1895. The Legislature had power to impose this obligation upon the city, and it has done so, and that is enough to impose the liability. The city, under this power of the Legislature, was bound to exercise the power and duty to take possession of, use, and control this bridge for public convenience, and shoulder the responsibility of its repair, and that is enough to fix the liability.

Again, it is argued by counsel for the city that no regular conveyance of the bridge has been made by the county to the city. It is said that it is real estate and can only be conveyed by deed, whereas the resolution of the county court says that "the control and charge of said bridge be and the same are hereby turned over to the said city." As above stated, we are not dealing with the legal title to the bridge. True, the bridge company owned land on both banks of the river and passed the same to the county; and whether the legal title be in the county to that land we need not say. The title was conferred only for bridge purposes. The Legislature, acting upon the subject of the control of the bridge, upon the rights and duties of the county, took the control away from the county court and conferred it upon the city. Therefore the question is not one of ownership of the land or of the bridge, strictly speaking. It is only a question of where the liability for maintenance and repair rests, and we say it rests upon the city because the bridge is within the city and a part of its highways, and because the Legislature has expressly given it possession and control and commanded it to keep the bridge in repair. Therefore the want of a deed from county to city is immaterial. It is enough to say that the Legislature put the bridge under the jurisdiction and control of the city, and that the county court by a resolution stating that the bridge had by the act of the Legislature become a public street of the city turned over the control and charge of the bridge to the city.

Our conclusion is that the circuit court erred in striking out the evidence of the plaintiff and directing a verdict for the defendant, and therefore we reverse the judgment, set aside the verdict, and remand the case to the circuit court for further proceedings.

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(63 W. Va. 1)

## WILSON v. KENNEDY.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. TRUST—WHAT CONSTITUTES.
A confidence reposed in one to whom an estate in property is conveyed or set over, that he will permit another to take the profits and enjoy the estate according to terms agreed upon, is a trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 45.]

2. SAME—EQUITABLE JURISDICTION.
The jurisdiction of courts of equity to enforce performance of trusts arises where property has been conferred upon, and accepted by, one person, on the terms of using it for the benefit of another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 563–566.]

3. SAME—ACCOUNTING.
Courts of equity have jurisdiction over all trusts for the purpose of compelling an accounting, and the existence of any confidential or fiduciary relation is sufficient to invoke such jurisdiction whenever the duty arising out of such relation rests upon one of the parties to render an account to the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 417.]

4. EQUITY—JURISDICTION—ACCOUNTING.
Where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account to the plaintiff, equity will entertain jurisdiction of a suit for an accounting, although the account is neither mutual nor complicated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account, §§ 13, 14.]

5. SAME—TRUST RELATION.

Although it is the trust relation involved in such cases which gives jurisdiction to a court of equity, the relation need not be the strictly technical relation of trustee and cestui que trust; a quasi trust relation being sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account, §§ 13, 14.]

6. SAME.

Where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an account is sought are peculiarly in the knowledge of the latter, equity will assume jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account, §§ 13, 14.]

7. SAME—DECREE—VACATING.

A decree entered upon the default of a defendant to answer cannot be set aside during the term at which it was entered, at the instance of such defendant, and he be allowed to file such answer as would delay or continue the suit, unless he shows by affidavit good cause therefor, and such good cause can only appear by showing fraud, accident, mistake, surprise, or some adventitious circumstance beyond his control and free from his neglect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1037, 1041.]

8. SAME.

The good cause demanded to be shown by section 53 of chapter 125 of the Code of 1899 [Code 1906, § 3873] to justify the delay or continuance of a chancery cause by the coming in of an answer is such only as appears from a showing of fraud, accident, mistake, surprise, or some adventitious circumstance beyond the control of the defendant and free from neglect or fault on his part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1041.]

(Syllabus by the Court.)

Appeal from Circuit Court, Monongalia County.

Bill by Milton Wilson against William W. Kennedy. Decree for plaintiff. Defendant appeals. Affirmed and remanded for further proceedings.

Cox & Baker, for appellant. W. S. Meredith, for appellee.

ROBINSON, J. A farm of about 300 acres, in Clay district, Monongalia county, was conveyed by Milton Wilson and wife to W. W. Kennedy, on the 25th day of March, 1897, in consideration of the sum of $15,000, by deed of general warranty, subject to a lease for oil and gas, which lease was owned by the South Penn Oil Company, and upon which farm at the time of said conveyance there were two producing oil wells. The deed sets forth that "the grantors convey their interest or royalty in oil and gas with possession from and after April 9, 1897, and of the residue of the premises from the 1st day of November, 1897." As a part of the transaction of the sale and conveyance of this farm as aforesaid, the said Wilson and Kennedy entered into a written agreement under seal, dated the same day, reciting said conveyance, and stipulating that, in consideration thereof and other valuable considerations, "the said W. W. Kennedy agrees to accept the said conveyance subject to existing lease for oil and to collect the royalty accruing from the sale of the oil made under same from the wells now drilled on said farm or which may be hereafter drilled on any part of said farm and to pay over to said Milton Wilson the one-half part of the money received from the sale of said royalty of oil as produced under said lease."

At August rules, 1905, in the circuit court of said county, Wilson instituted this suit in equity against Kennedy, and by his bill then filed avers that on and after the 9th day of April, 1897, the South Penn Oil Company began to deliver, in the pipe line with which the said two wells were connected, the one-eighth part of all the oil produced and saved from the said two wells to the credit of the defendant; that said oil company has ever since that time delivered, and is still delivering, unto the defendant the one-eighth of all the oil produced from said two wells; that the defendant has from time to time sold the said oil in the market for large sums of money and has collected the said money; that by virtue of said deed and contract the defendant was and is chargeable with the duty and responsibility of a trustee for the benefit of plaintiff, and as such it was and is his duty to sell all of the said royalty of oil, to collect the price therefor, and to pay unto the plaintiff the one-half of the money so received; that, notwithstanding such duty of defendant as such trustee, he has constantly and persistently refused to account to or pay unto the plaintiff any part of the money so received, although repeatedly requested by the plaintiff so to do; that plaintiff is not informed how much oil produced as aforesaid has been delivered in the pipe line to the credit of defendant and by him sold as aforesaid, but is informed and so alleges that the same amounts to many thousands of barrels, all of which defendant has sold from time to time, has received many thousands of dollars therefor, and the one-half of which belongs to plaintiff, for which the defendant long ago should have accounted and paid over; and that the plaintiff has no means of learning how much oil has been so delivered and sold, or how much money defendant has collected from said sales, except through and by information obtained from defendant, which information he has constantly and persistently refused and still doth refuse to give plaintiff. The prayer of plaintiff's bill is, in substance, that defendant be required to answer and file therewith as part thereof a complete itemized statement of all of said oil, so delivered and sold by him, giving the number of barrels and when the same was delivered, also a complete itemized statement of all the sales of said oil made by defendant, when the same were made, the number of barrels sold, and the amount of money received therefor; that a decree be entered requiring defendant to pay unto the plaintiff the one-half of all money received by him from said sales of oil, together with its prop-

er interest, and that there be decree against the defendant in favor of the plaintiff for such amount; that the defendant be required at all times in the future when he makes a sale of any of the said oil royalty to make a report thereof to the plaintiff and to pay over to him the one-half of the proceeds thereof; and that general relief be granted in the premises. The bill exhibits the said lease for oil and gas and the said deed, and recites in full the said contract.

There was no appearance by the defendant at rules, and the bill was there regularly taken for confessed. No other order appears in the cause until at April rules, 1906, when the plaintiff filed an amended bill, repeating largely the allegations of the original bill, and praying that it be read as part of the amended bill, and further averring that, although process was duly served on defendant, he never made any appearance to the original bill and never answered the same; that after the defendant had ample time and opportunity for answering the allegations and requirements thereof, to wit, in January, 1906, the defendant (evidently meaning plaintiff) discovered through information obtained from the pipe line company and others the quantity of the royalty oil which had been delivered to the defendant by virtue of the operation of said two wells; that defendant received to his credit as such royalty from the time he took possession as aforesaid to January 1, 1906, 3,232.71 barrels of oil, which he sold for the sum of $3,781.66; that the defendant has not accounted to him for any of the money for which he sold said oil and is liable to account to him and pay him in full for his one-half interest in same; that the defendant is and was so constituted by the said deed and contract the trustee to sell the said royalty and account and pay over to him his said interest therein; that defendant should account to the plaintiff for the one-half of the said money for which he sold the oil, together with the interest on the same respectively from the date of each sale; that the interest to May 1, 1906, on the money for which the oil was sold, aggregates the sum of $1,344.13; that the amount of said sales, together with said interest, is $5,125.79; and that plaintiff is entitled to have and receive from the defendant the one-half thereof, to wit, the sum of $2,562.89. This amended bill then prays for a consideration of the prayer of the original bill; that the defendant be required to answer both the original and amended bills; and that a decree be entered requiring the defendant to pay the said sum to plaintiff, shown to be due as aforesaid, and for general relief.

There was no appearance at rules to the amended bill, but on the 19th day of May, 1906, the defendant appeared in court, by counsel, and demurred to the original and amended bills, which demurrer was joined in by plaintiff, and after argument and consideration was overruled, and, on motion of the defendant, he was granted leave to file his answer to the said bills in the clerk's office of said court within 30 days. No answer was filed by defendant in the time given him as aforesaid, or further appearance made by him, and on the 6th day of September, 1906, the court entered a decree granting the prayers of plaintiff's bills, and decreeing that the defendant pay unto the plaintiff, and that the plaintiff recover against the defendant, the sum of $2,600.71, with interest thereon from the 3d day of September, 1906, and the costs. On the 24th day of September, 1906, the defendant appeared by counsel, and asked that the said decree, entered at a former day of that term, be set aside, and that he be permitted to answer and make defense, and tendered and offered to file his answer, with which there was exhibited the affidavit of a physician. But the court, reciting in its order that it appears that the process commencing this suit was served upon the defendant in person on the 25th day of July, 1905, and the bill filed at August rules, 1905, that the process on the amended bill was served on the 28th day of March, 1906, and the amended bill filed at April rules, 1906, that at the May term, 1906, there was a demurrer overruled, and defendant given 30 days to file an answer in the clerk's office, and no such answer was tendered or filed, and that final decree was made and entered in the cause on the 6th day of September, 1906, upon consideration of the motions, the answer tendered, the affidavit, and the record of the cause, being of opinion that good cause was not shown, refused to set aside said decree and grant defendant's motions.

The answer tendered as aforesaid admits the arrangement and agreement between plaintiff and defendant relative to the royalty oil, and by inference admits the selling of the oil as alleged in the bills, but denies that no payments have been made to plaintiff on account of his interest in the oil, and alleges that defendant has made plaintiff various payments therein alleged, and for which it is insisted credit should be given. It denies the allegations of the bill, so far as not expressly admitted, and calls for strict proof thereof, and avers that the allegations of the bills are grossly wrong in claiming the amount which plaintiff demands, and that defendant will be defrauded out of hundreds of dollars if he is not permitted to file his answer in this cause setting up the payments he has made plaintiff on account of the oil sold by respondent. The answer then alleges: "Respondent has been sick for many months with a dangerous disease, and has not been able to get to Morgantown, and, being advanced in years, he has been unable to present his defense in this case until this time." The physician's affidavit, dated September 22, 1906, shows that he has been attending defendant, and he "has been suffering with a dangerous disease and has been for several months, and upon his advice he

has remained at home, and in his opinion it has not been safe for the said Kennedy to travel about"; that in the opinion of the physician it would have been dangerous for the defendant to have gone to Morgantown "until the last few days next preceding the making of this affidavit"; that defendant is suffering from a severe hurt from a log rolling over him, which has brought on valvular trouble of the heart, "which at times gives him a good deal of trouble, keeps him at home a good deal of the time"; and that he has been "dangerously sick and unable to attend court until within the last few days." The respondent avers that he is willing and anxious to pay the principal and interest of any balance that may be found due to plaintiff, and prays a reference to a commissioner to ascertain the correct amount due on a fair settlement between him and the plaintiff. The answer is verified by the oath of the defendant.

It is insisted, first, that the court erred in overruling the demurrer to the original and amended bills, and the defendant submits that the suit is simply one for the recovery of a legal demand, and that plaintiff has a full, complete, and adequate remedy at law. It is argued that, since the amended bill alleges the amount due to plaintiff from defendant, the suit ceases to be one for discovery and relief as made by the original bill, and, the necessity of a discovery having disappeared, the suit cannot stand for the mere relief for the recovery of the claim. We are not called upon to discuss whether it can so stand, since an inspection of the original bill, and which has become a part of the amended bill, shows it to be founded upon good ground of conceded equity cognizance, regardless of the discovery asked. By the deed aforesaid, the legal title to the oil was vested in the defendant, subject to the lease, and by said contract it expressly appears that defendant recognized the plaintiff's equitable title to one-half of the royalty oil. This makes the defendant a trustee for plaintiff, holding the legal title for him. The making of a trust may be embraced in more than one paper. McCandless v. Warner, 26 W. Va. 754. By the words of the contract, one of the papers by which this trust was created, the defendant "agrees to accept said conveyance subject to existing lease for oil and to collect the royalty," and to pay one-half thereof to plaintiff; that is, to hold the legal title, and to collect and pay over the royalty for another. This is exactly similar to the many pure trusts that we observe daily in the transactions of men. It comes plainly within the definitions. Underhill on Trusts & Trustees (Am. Ed.) pp. 1–5. A confidence reposed in one to whom an estate in property is conveyed or set over, that he will permit another to take the profits and enjoy the estate according to terms agreed upon, is clearly a trust. 2 Tucker's Comm. 430. A trust has been defined to be "an equitable right, title or interest in property real or personal, distinct from the legal ownership thereof. In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law, but the income, profits or benefits thereof in his hands belong wholly or in part to others." 2 Story's Eq. Jur. § 964. In the case under consideration, Kennedy holds the legal title to the oil and the direct and absolute dominion over it; but by the contract made between the parties a part of the income, profits, and benefits thereof in his hands belong to Wilson. This is a trust, pure and simple, and because of such trust, to say nothing of the alleged necessity for a discovery, equity has jurisdiction of the matters set forth in the bill. "The jurisdiction to enforce performance of trusts arises where property has been conferred upon, and accepted by, one person, on the terms of using it for the benefit of another." Adams' Equity, 26. This case being one for an accounting under a trust, it is peculiarly under the jurisdiction of equity. "Courts of equity have jurisdiction over all trusts for the purpose of compelling an accounting, and the existence of any confidential or fiduciary relation is sufficient to invoke such jurisdiction whenever the duty arising out of such relation rests upon one of the parties to render an account to the other." 1 Cyc. 427, and the cases there cited.

Did we not hold the relation of the parties to be one of pure trust, no one will deny that the relation of the defendant to plaintiff was such as to make him at least the agent of the plaintiff for the purpose of selling the oil and accounting to plaintiff therefor, and, such being true, under the allegations of plaintiff's bills, equity has jurisdiction of the suit. In Adams' Equity, 220, 221, it is announced: "One important instance of the jurisdiction over accounts occurs in the case of trustee and cestui que trust, where the cestui que trust demands an account of moneys received under the trust. The equity of this particular case is included under the general equity for enforcement of trust, but a corresponding one exists as against an agent or steward, or a person employed in any similar character, who is bound by his office to render regular accounts." In the same connection, the author says that if such duty is performed, and the accounts are regularly rendered, his employer can recover the balance at law on the evidence of the accounts themselves, and resort to a suit in equity is not required; but, if it is neglected, the employer "will also have an equity, arising out of the agent's failure in duty, to have the accounts taken in the court of chancery, where the evidence may be supplied by discovery on oath." And he further says: "It will be observed that this equity does not originate in the mere want of discovery, * * * but in the additional ingredient that such

want has been caused by the defendant's fault." This doctrine is perhaps more tersely vouched for in 6 Pomeroy, Eq. Jur., at sections 931 and 932: "Where a fiduciary relation exists between the parties, and a duty rests upon the defendant to render an account to the plaintiff, equity will entertain jurisdiction of a suit for an accounting, although the account is neither mutual nor complicated. The most common of such cases are those involving trustees, guardians, executors, and administrators, partners, agents, and co-tenants. Although it is the trust relation involved in such cases which gives jurisdiction to a court of equity, the relation need not be the strictly technical relation of trustee and cestui que trust; a quasi trust relation being sufficient." "Where the relation is such that a confidence is reposed by the principal in his agent, and the matters for which an account is sought are peculiarly in the knowledge of the latter, equity will assume jurisdiction." These principles have received apt recognition in the Virginias. Berkshire v. Evans, 4 Leigh, 223; Zetelle v. Myers, 19 Grat. 62; Coffman v. Sangston, 21 Grat. 269; Thornton v. Thornton, 31 Grat. 212; Vilwig v. B. & O. R. R. Co., 79 Va. 449; Bank v. Jeffries, 21 W. Va. 504. In the light of the foregoing, it is readily observed that either of the bills of plaintiff, the original or amended, presents matter of well-founded equity jurisdiction, and that the demurrer was most properly overruled.

Was the defendant entitled to have the decree set aside, his answer filed, and thereby be admitted to make defense, after his failure to appear to the original bill and the same as to him taken for confessed, and after his failure to answer the original and amended bills within the 30 days given him for that purpose, and his tendering no answer until 18 days after the entry of the decree?

The question itself does not speak well for defendant, reciting, as it does, his disregard of the process of the court and his continued delay in presenting his defense. His confession of the truth of plaintiff's bills by his silence until after the law had pronounced, in its ever direct and certain course, judgment upon such confession, puts upon him the burden of purging himself from the intention which the law understands and accepts by his silence. It is no slight thing to trifle with the process of the law, and those who are not impressed with the certainty, dignity, and power of our courts upon defined principles, taught by the experience of the ages to be for the welfare of the community as a whole, may well become examples for the furtherance of a recognition of such certainty, dignity, and power, since a loss to the individual by his own disobedience is not to be considered in comparison with the importance of the maintenance of a sound jurisprudence. Therefore, where one, called upon by the sovereignty under which he lives and which affords him protection from violation of his rights to say what he may in answer to allegations made against him by another, remains silent during the time that is fixed and published for one and all to answer, and the judgment of the law is pronounced against him upon the confession by his silence, he must come with no slight excuse if he is to be then heard. Mere apology or penitence will not do. To give ear to them would encourage delay and uncertainty. He must show that he did not intend to be silent, and that his silence has been caused by things beyond his power to prevent. He must clearly take his case out of the rule.

It is true that the decree which defendant moved to set aside, while final in character, was not final in relation to time; the term at which it was entered not having closed. During the term it was completely under the control of the court and could have been modified or wholly set aside. Kelty v. High, 29 W. Va. 381, 1 S. E. 561, and other cases. But it could only be set aside for good cause shown, and what is sufficient cause therefor is a matter in the sound discretion of the court. Mathews v. Tyree, 53 W. Va. 298, 44 S. E. 526. And our statute (section 53 of chapter 125 of the Code 1899 [Code 1906, § 3875]) provides: "At any time before final decree, a defendant may file his answer, but a cause shall not be sent to the rules or continued because an answer is filed in it, unless good cause be shown by affidavit, filed with the papers therefor." This statute virtually means that the filing of an answer in a chancery cause shall not work delay or continuance unless defendant shows by affidavit good cause to excuse the tardiness of his answer. Its apparent object is to prevent delay or dilatory action in the course of chancery proceedings, at the same time giving the right to defendant to be heard even to the very hour of final decree, provided his answer does not delay the progress of the suit, or he shows by affidavit good cause for a continuance. The rule that the decree could not be set aside without good cause shown and the purpose and force of this statute go well in hand in the case we are now considering. The defendant was not only asking that the solemn decree of the court be set aside, but that he be permitted to file his answer, putting the plaintiff to proof, and working a delay or continuance. To have either one or both done, he must show such cause as the court in the exercise of a sound judicial discretion, governed by established principles, can say is good; and that good cause can only appear by showing fraud, accident, mistake, surprise, or some adventitious circumstance beyond his control and free from his neglect. Post v. Carr, 42 W. Va. 72, 24 S. E. 583.

The statute we have quoted is clearly akin

to section 47 of the same chapter, relating to the opening of default judgment in an action at law. Their purposes are the same; one to prevent dilatoriness and uncertainty in law actions, and the other to prevent same in chancery suits. Section 47 provides for the filing of plea and counter affidavit before the end of the term at which the office judgment would become final, and then says: "If the judgment has been entered up in court or the order for an inquiry of damages has been executed, it shall not be set aside without good cause be shown therefor. Any such issue may be tried at the same term, unless the defendant show by affidavit, filed with the papers, good cause for a continuance." Section 53 says, in effect, that while one may come in with an answer, analogous to plea and counter affidavit in the other section, at the term when there is about to be final decree against him by reason of the tardiness of his answer, yet, similarly to the last clause above quoted, the chancery cause shall not be delayed or continued thereby, "unless good cause be shown by affidavit, filed with the papers therefor." Note the similarity of these statutes, not only in words, but in purpose. Mr. Minor recognizes this similarity. Institutes (3d Ed.) vol. 4, § 1348. By neither of them, can there be a continuance, caused by such appearance, unless for good cause shown by affidavit. Each of them in express terms so states. By one of them, in express terms, if the judgment has been entered up, it can only be set aside for good cause shown; and by the other, by implication, if the decree has actually been entered, as in the case before us, it cannot be set aside for the purpose of an answer which would delay or continue the suit, without good cause shown. There is no rule by which we can construe good cause in one of these sections to be different from that meant in the other. We must therefore say that the good cause required in section 53 is the same as that required in section 47, which has been held, in the case last cited, to be fraud, accident, mistake, surprise, or some adventitious circumstance beyond the control of the party and free from his neglect. To any of these causes courts of equity are never closed, but they turn deaf ears to neglect and laches.

Did the defendant show such good cause by his sworn answer and the affidavit of his physician? This question was peculiarly for the court below, and while its action in relation thereto may be reviewed here, yet the finding and order of the lower court thereon will not be disturbed unless there appears a plain abuse of sound judicial discretion as guided by established rules and precedents. Welch v. County Court, 29 W. Va. 63, 1 S. E. 337. We find no such abuse. In reading the answer and affidavit, there is not disclosed any definite showing sufficient to excuse the defendant for not getting his answer prepared and filed in time. His failure to appear for any purpose for several months is a circumstance evidencing gross tardiness, such as he also practiced after appearance and demurrer overruled. The facts set forth in relation to sickness are not of the defined character to show a total prevention of action on his part. He has been sick "several months," but nothing shows that this sickness existed over the whole period in which he was in default, and in fact it is so told us by him and the physician as to show that he was not so totally disabled as to be prevented from attending his defense. The doctor says he advised him to stay at home, but it is not stated that he was unable to prepare his defense at home. The contrary, in fact, is shown, for the doctor says that he was suffering from a hurt which brought on heart trouble, "which at times gives him a good deal of trouble; keeps him at home a good deal of the time." Here in this statement it is implied that there were times when the trouble did not affect him, and when he was not kept at home. In these times he should have prepared to prevent the decree of the court, which he knew was being sought against him. The fact that he could not get to the county seat does not excuse him, particularly in this era of rapid rural mails and telephones. His personal presence in court was not essential for the mere filing of an answer. The character of the answer which he tenders is such as is readily prepared by counsel upon information given by correspondence. It shows no complications. He need only have written counsel what payments he had made Wilson, and for which he should be credited. Upon this information the answer could have been prepared and filed without his presence. The bills were not sworn to, and the answer need not have been even delayed, or carried, for affidavit. While the answer tendered alleges payments to plaintiff, it has no probative force as to these, and no proofs are exhibited. The one exhibited check on its face does not show on what account payment was made by it. Had the answer exhibited absolute proofs of payment on plaintiff's claim, a stronger cause for setting aside the decree would be made; but, indeed, this of itself would not be sufficient cause. Upon the whole record, we are unable to observe such cause as should set aside the decree and work a continuance.

We are not unmindful of the earnest appeal made in the answer of this defendant; but, if actual loss occurs to him in the premises, he cannot in fairness blame the regularity and exactions of the law to which all are subject. It is chargeable to his own neglect. We cannot depart from the course of equal justice to favor the individual, as we are here asked to do, for to do so, " 'twill be recorded for a precedent; and many an error by the same example, will rush into the state."

There is no error, and the decrees are affirmed; and, it appearing that this cause has been retained on the docket of the circuit court for other and further proceedings, it is accordingly remanded thereto.

(63 W. Va. 14)

## MACKEY v. MAXIN et al.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. QUIETING TITLE — REMOVAL OF CLOUD — POSSESSION.

Mere constructive possession of land, accorded by law to him who has good title thereto, as a legal presumption, is not such possession as is required on the part of one who invokes equity jurisdiction to remove cloud from the title. He must have actual possession of the land in the sense of having a pedis possessio thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 44, 45.]

2. EQUITY—BILL OF REVIEW.

A bill in the nature of a bill of review cannot be maintained by one who was not a party to the suit in which the decree, reversal, or annulment whereof is sought was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1095.]

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by Laco Mackey against Wright Maxin and others. Decree for defendants, and plaintiff appeals. Affirmed.

J. Hop. Woods and W. T. George, for appellant. Wm. S. O'Brien and U. G. Young, for appellees.

POFFENBARGER, J. Laco Mackey, having legal title to land and claiming actual possession thereof, instituted a suit in equity in the circuit court of Barbour county, against a number of persons, to set aside a decree under which it had been sold, in a suit to which he was not a party, as well as the deed of the commissioner who made the conveyance, pursuant to the judicial sale, and other subsequent deeds. On final hearing, the court dismissed the bill, for want of equity, reserving to the plaintiff the right to sue at law, and from this decree he has appealed.

The facts developed are about as follows: Cora D. Love, owning two tracts of land, containing, respectively, 12 acres and 97 poles and 31 acres and 37 poles, conveyed the same to Sarah F. Fronsman, by deed dated April 15, 1897, in which she reserved a lien for $357.50 of the purchase money; and Sarah F. Fronsman, by deed dated December 6, 1897, conveyed the same to Mackey. On the 13th day of June, 1898, the lien remaining unsatisfied, Cora D. Love instituted a suit to enforce the same, making only Sarah F. Fronsman and Oscar F. Hodges, assignee of one of the purchase-money notes, parties thereto, and caused the land to be sold to Arnett Love, husband of Cora D. Love, in February, 1899, under a decree made at the October term, 1898. On the 2d day of September, 1899, W. T. Ice, Jr., the special commissioner who made the sale, and Arnett Love, the purchaser, and his wife, executed a deed, conveying the land to J. E. Maxin, who, on September 5, 1899, conveyed the coal under the smaller tract to John K. Shaw, trustee, and on the 4th day of January, 1901, the land, less the coal, to Albinus and Nathan Love, who, on the 1st day of November, 1901, conveyed it to Morgan L. Burner. On the 28th day of October, 1902, Shaw conveyed the coal, so held by him, to the Indian Fork Coal & Coke Company. Maxin, still owning the larger tract, died in February, 1905, leaving Wright Maxin as his only heir. The plaintiff had a tenant on the larger tract of land at the time Maxin bought, under a two-year lease, but he abandoned it long before the institution of this suit. Maxin had taken possession before Mackey's tenant left, and continued in possession until his death, and his son put a tenant on the land after his death. Burner took possession and held the smaller tract except as to the coal. When this suit was instituted, therefore, Mackey had not a shadow of possession. His tenant had left, the lease had expired, and Maxin had possession of one tract and Burner of the other, except as to the coal, which was not in the actual possession of anybody, or, if anybody, of Burner.

Want of equity was the manifest reason for the dismissal of the bill; it being a bill to remove cloud from title by a person not in possession of the land. At the time of the institution of the suit, he had no actual possession of any part of either tract, no pedis possessio, no actual foothold thereon. Not pretending to have had, he relies upon constructive possession, accorded by the law to him who has perfect legal title. But such possession does not confer jurisdiction in equity to remove cloud from title. To obtain a footing in equity for that purpose, the plaintiff must show his inability to sue at law because of his own occupancy of the land; it being impossible for him to sue himself, and there being no other person in possession. Carroll v. Brown, 28 Grat. 791; Steinman v. Vicars, 99 Va. 595, 39 S. E. 227. Possession by a tenant would suffice, for his possession is that of the landlord; but mere constructive possession is insufficient. To a person claiming good title, but not in actual occupation of the land, the law gives ejectment as a remedy against any other person out of possession and claiming title to the same land. Code, c. 90, § 5 (Code 1906, § 3340); Postlewaite v. Wise, 17 W. Va. 1; Harvey v. Tyler, 2 Wall. (U. S.) 328, 17 L. Ed. 871; Mitchell v. Baratta, 17 Grat. 445. Not only want of jurisdiction in equity, but also adequacy of the legal remedy, as the reason therefor, when the plaintiff, seeking removal of cloud from title, shows himself to be out of possession of the land, has been decided several times by this court, and must be regarded as settled law. Moore v. McNutt, 41 W. Va. 695, 24 S. E. 682; Clayton v. Barr, 34 W. Va. 290, 12 S. E. 704. See, also, United States v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110; Carrington v. Otis, 4 Grat. 235; Baker v. Briggs, 99 Va. 360, 38 S. E. 277.

Effort is made in argument to bring the case within the doctrine of Yock v. Mann, 57 W. Va. 187, 49 S. E. 1019, but the status of the plaintiff here differs materially from that of Mrs. Yock. She, as well as the purchaser, had been a party to the former suit in which the sale complained of had been made. The confirmation of the sale to Mann was an erroneous adjudication against her, apparent on the face of the record, in this, that Mann, the purchaser, had previously conveyed the property to Mrs. Yock, warranting generally the title, and then, in violation of his covenant, had acquired the title by purchase at the judicial sale, the result of which action was that, by force of the warranty, that after-acquired title passed immediately to Mrs. Yock by estoppel. Summerfield v. White, 54 W. Va. 311, 46 S. E. 154, Syl., point 8. His covenant of warranty was disclosed by the record, and the commissioner's report of sale, confirmed by decree, disclosed his new acquisition of title to the same land by virtue of a defect against which he had warranted, in view of which the court should have directed a deed to be made to Mrs. Yock, instead of Mann, and Rease, having taken the purchase from Mann by assignment and with notice, was in no better position than he. Clark v. Sayers, 55 W. Va. 512, 47 S. E. 312; Burtners v. Keran, 24 Grat. 42; Carver v. Jackson, 4 Pet. 86, 7 L. Ed. 761; Myers v. Croft, 13 Wall. 291, 20 L. Ed. 562; Irvine v. Irvine, 9 Wall. 618, 19 L. Ed. 800. The bill afterwards filed by Mrs. Yock was in the nature of a bill of review for error apparent, for which there was jurisdiction, not a mere bill to remove cloud, for which there was none; she having been out of possession. A bill of review can be filed only by a party to a suit in which the decree was made, correction whereof is sought, or some person who was privy thereto. Chancellor v. Spencer, 40 W. Va. 337, 21 S. E. 1011; Amiss v. McGinnis, 12 W. Va. 371. As Mackey sustained no such relation to the suit in which his land was sold, the decision relied upon is inapplicable.

Voss v. King, 33 W. Va. 236, 10 S. E. 402, is no authority for the position that a landlord has possession of land after his lessee has left it and his lease has expired. In that case, the tenant, still in possession, was attempting to deny the title of his landlord. Nor does Wilson v. Braden, 56 W. Va. 372, 49 S. E. 409, 107 Am. St. Rep. 927, or any of the other cases relied upon for it, assert such doctrine.

Seeing no error in the decree, we affirm it.

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(63 W. Va. 25)

## STATE ex rel. McDONALD v. WELLS et al.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. JUSTICES OF THE PEACE—LIABILITY ON OFFICIAL BONDS.

Sureties on the official bond of a justice are not liable for moneys collected by him on accounts placed in his hands for collection without suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 57.]

2. SAME—DUTIES OF JUSTICE.

A justice of the peace in his official capacity as such is authorized to receive money only when "tendered to him on any claim in suit before him, or on any judgment on his docket, or any docket lawfully in his possession, on which no execution has been issued or, if issued, has been returned unsatisfied and no other execution has been issued thereon since such return."

3. SAME.

A claim is not "in suit" before a justice until he has issued a summons thereon and delivered the same to an officer to be served, or by the appearance and agreement of the parties without summons and the case docketed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 231.]

(Syllabus by the Court.)

Error to Circuit Court, Taylor County.

Action by the state, on the relation of Delia E. McDonald, against I. W. Wells and others. Judgment for plaintiff, and defendant United States Fidelity & Guaranty Company brings error. Reversed and remanded.

J. H. S. Barlow and John L. Hechmer, for plaintiff in error. W. R. D. Dent, for defendant in error.

McWHORTER, J. This was an action of debt brought in the circuit court of Taylor county by the state of West Virginia, at the relation of Delia E. McDonald, administratrix of John O. McDonald, deceased, against Isaiah W. Wells, a justice of the peace, and the United States Fidelity & Guaranty Company, a corporation, surety on his official bond as such justice, for moneys collected on accounts placed in the hands of said justice for collection, amounting in the aggregate to $116.16. The defendant the United States Fidelity & Guaranty Company appeared and demurred to the declaration, which demurrer was overruled by the court. The defendant then entered its plea, accompanied by affidavit. A jury was impaneled, and returned a verdict for the plaintiff for the amount claimed in the declaration, upon which verdict the court entered up judgment. The plaintiff, in the course of the trial, took a bill of exceptions to certain rulings of the court and obtained a writ of error to said judgment.

The first question arising in the case is upon the demurrer to the declaration. After reciting the election of the said defendant as justice and the execution of his official bond, the declaration alleges that "on the ——— day of ——— 1902, the said Delia E. McDonald, administratrix as aforesaid, caused to be placed in the hands of said Isaiah W. Wells, justice of the peace as aforesaid for collection the following accounts, viz.: [then follows a list of the claims so placed in the hands of the defendant], amounting in the aggregate to the sum of $116.61, and that the said Isaiah W. Wells,

justice as aforesaid, received said accounts by virtue of his said office as justice, and collected each and every one of the same by reason of his being justice as aforesaid." Then follows the allegations that the said justice had collected all of said accounts and had failed and refused to pay over the money, whereby he had broken his obligation, and by reason of such breach his bond had become forfeited, and action had accrued to the plaintiff, etc. Section 2084, Code 1906, provides that: "Every justice shall receive the money tendered to him on any claim in suit before him, or on any judgment on his docket, or any docket lawfully in his possession, on which no execution has been issued, or, if issued, has been returned unsatisfied, and no other execution has been issued thereon since such return, and pay the same on demand to the person entitled thereto." This is the only statute under which a justice is authorized to receive money, and the language of this section would import that it is no part of his duties to collect unless the money is tendered to him and in no case except "on a claim in suit before him," or on a judgment on his docket or any docket in his lawful possession, on which no execution has been issued, or, if issued, has been returned unsatisfied, and no other execution has been issued since such return. Section 1970, Code 1906, provides how actions before justices are commenced either by summons or by the appearance and agreement of the parties without summons, "and not otherwise." And as provided in the following section, 1971, when a suit is commenced by summons, "the action is commenced upon the delivery of the summons to be served, and the constable shall note thereon the time of receiving the same"; and when by appearance and agreement "the action is commenced at the time of docketing the case." No claim is in suit until such action has been commenced in one of the ways provided by said sections. "If money was paid to the justice as a collection agent, the money is not received by him in an official capacity, and his sureties are not liable. But where the statute provides that justices may act as collection agents, the money collected by them without suit or process of any kind is received in an official capacity." 18 A. & E. E. L. 49. In Price v. Farrar, 5 Ill. App. 536, it is held: "Where a magistrate assumes to act in his official capacity in rendering judgment upon claims left with him for collection, he thereby abandons his agency in respect to such claims, if any such ever existed, and his securities on his official bond are estopped by his own docket from showing that he acted in their collection merely as agent."

In case at bar it is not alleged in the declaration that any of the claims, with which it is sought to charge the surety of Wells, were ever in suit, and no allegation in the declaration sufficient to entitle the plaintiff to recover in this action. In Cressey v. Gierman, 7 Minn. 398 (Gil. 316), it is held: "A justice of the peace is not authorized by statute to receive money as security for the appearance of a prisoner before him for examination on a criminal charge, and where he does so receive it, and refuses to return the money to the party entitled thereto, an action will not lie against his sureties for a breach of the official bond of the justice." And in McCormick v. Thompson, 10 Neb. 484, 6 N. W. 597: "The sureties of a justice are liable for all moneys receive by him in his official capacity; but not for moneys paid him on notes left in his hands for collection without suit." McKee v. Griffin, 66 Ala. 211, was an action brought upon the official bond of a register in chancery and conditioned as prescribed by law, and it was held that the sureties were not liable for the default of their principal as to moneys paid to him while acting in the capacity of probate judge, when there was no law in force at the time the payment was made authorizing such payment to be made to the probate judge. See, also, State ex rel. La Plante v. Woodman, 36 Ind. 511, and Stevens v. Breatheven, Wright (Ohio) 733.

The civil jurisdiction and powers of a justice of the peace are purely statutory, and his sureties cannot be held liable for moneys received by him, except where he is authorized by law to receive the same. He is not, by statute, made an agent for the collection of money, and he is only authorized to receive money tendered to him on claims in suit before him, or on judgments on his docket or a docket of which he has the lawful custody. Under section 2099, Code 1906, the sureties on a constable's bond are, by express terms, made liable for money received by him on account of any claim intrusted to him to sue upon or collect, or for money collected by him under execution; but there is no such provision in relation to a justice of the peace.

It is neither necessary nor proper to take notice of the other assignments of error.

The court erred in overruling the demurrer to plaintiff's declaration.

Therefore the judgment of the circuit court is reversed and set aside, and the court, proceeding to render such judgment as the circuit court should have rendered, doth set aside the verdict of the jury, sustain the demurrer to the declaration, and remand the cause, with leave to the plaintiff to amend its declaration if it shall be so advised, and for a new trial to be had.

(63 W. Va. 29)

## HEFLIN v. HEFLIN et al.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. SPECIFIC PERFORMANCE — DISCRETION OF COURT.

Specific performance is not a matter of right in either party, but of sound discretion in the court. If it will work injustice, it will be refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 17, 18.]

2. SAME—EVIDENCE.

In a suit for specific performance the court will look into all the circumstances of the case, and will not decree specific performance unless it appears from the whole record that justice and equity will be subserved thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 3, 4.]

3. VENDOR AND PURCHASER—BONA FIDE PURCHASER.

Where a vendee has a conveyance of land calling for the corners and lines laid down in a conveyance to another party, without notice of any provision in the deed of such other party affecting his rights in such dividing lines, such vendee is not bound by such provision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 502–507.]

(Syllabus by the Court.)

Appeal from Circuit Court, Doddridge County.

Bill by Hugh Leonidas Heflin against Creed C. Heflin and others. Decree for defendants, and plaintiff appeals. Affirmed.

J. V. Blair, for appellant. W. S. Stuart and H. L. Hammond, for appellees.

McWHORTER, J. B. F. Heflin was the owner of various tracts of land in the county of Doddridge, amounting in the aggregate to about 384 acres. On the 15th day of April, 1899, said B. F. Heflin and Susan, his wife, in consideration of $650, of which $450 was paid and the vendee's notes given for the remaining $200, conveyed to B. F. Heflin, Jr., 55 acres and 32 rods of said land by metes and bounds. Afterwards they divided the residue of their real estate among their four sons, conveying to B. F. Heflin, Jr., 51½ acres by deed of August 12, 1890, and on the 16th day of October, 1890, they conveyed to William S. Heflin 89½ acres, to Hugh Leonidas Heflin 96½ acres, and to Creed C. Heflin 96½ acres, mentioning in the last three deeds as a consideration a note of $270 of the vendees, respectively, to be paid by them. The four daughters of the vendors were to have their portions from the personal estate of the vendors, and it appears that the said three several notes of $270 each were given to assist, if necessary, to bring up the several amounts intended to be given to the said daughters.

The only question involved here is as to the dividing line between the two sons, Leonidas and Creed. One tract conveyed on the said 16th day of October, 1890, was mentioned as containing 193 acres, and one-half thereof, or 96½ acres, was conveyed to each of the said sons, Leonidas and Creed. That conveyed to Leonidas by the following description: "Beginning at a W. O. on the ridge between Jockey Camp Run, a corner to land of John McCardle; thence a straight line to a chestnut tree on the south edge of the county road above the residence of first parties; thence a straight line crossing the left hand branch of Jockey Camp Run to the top of the point and with said point to Jacob Coulchan's line; and with said Coulchan's line to lines of Jacob Swentzel, and with his lines to a C. O. a corner to Alpheus Smith 39½ acres; thence with three lines of same N. 83½ E., 44¼ poles, to a locust; S. 59 E., 84 poles, crossing Jockey Camp Run to a hickory (now down); and thence N. 75¾ E., 52¾ poles, to the beginning—supposed to contain 96½ acres, and if by survey it is found to not contain 96½ acres the lines to be so changed as to make one equal half of the whole tract 193 acres." And the tract conveyed to Creed upon the conditions and with description as follows: "The conditions of this deed are as follows: The first parties are to hold possession of the property hereby conveyed during the natural life of each of them, the said B. F. and Susan Heflin, and after the death of the said B. F. and Susan Heflin, then the said property goes to the said Creed C. Heflin as his portion of the estate of the said B. F. Heflin, and the said Creed C. Heflin is to have all of the personal property of said parties at the time of their deaths. The said parties of the first part grant unto the said party of the second part, the following described tract or parcel of land, situate in the county of Doddridge, state of West Virginia, and on the waters of Jockey Camp Run and bounded as follows, to wit: Beginning at a W. O. a corner to land of John McCardle; thence N. 86½ E., 36 poles, to a Pin Oak; S. 38½ E., 44½ poles, to a stone pile; south 28 poles to a Hickory; S. 40 W., 29½ poles, to a C. O.; S. 42 W., 28½ poles, to a C. O.; S. 25 W., 17¾ poles, to a locust bush; S. 46 W., 20⅛ poles, to a locust; S. 82 W., 23⅝ poles, to a stone pile; S. 42½ E., 10 poles, to a stone pile; S. 79 W., 10½ poles, to a locust; S. 46½ W., 20 poles, to a hickory and pointers; S. 32¼ W., 22 poles, to a stone pile B. O. & Hic'y ptrs.; S. 11½ W., 22 poles, to a black walnut, a corner to 51½ acres conveyed to B. F. Heflin, Jr., on the 12th day of August, 1890, and with 3 lines of same N. 55½ W., 17 poles, to a W. O.; N. 53 W., 37 poles, to a stone; S. 64 W., 37½ poles, to a stone in J. Coulchan's line; thence with same N. 54 W., 36 poles, to a R. O.; and with 2 other lines of said Coulchan's N. 34 E., 42 poles, to a stone & W. O. ptrs.; thence to the corner to the tract this day conveyed to Hugh Leonidas Heflin; and thence with the lines of the

same to the beginning supposed—to contain 96½ acres, it being one-half of the whole tract of 193 acres." Which deeds were duly entered of record in the clerk's office of said county on the 20th day of October, 1890. Leonidas immediately took possession of his parcel so conveyed to him, and has continued in possession ever since, recognizing the division line between himself and Creed, as made in said deeds, until a few months prior to the institution of this suit in January, 1903. The vendors, together with Creed, remained in possession of that portion so conveyed to Creed, and said Creed improved and worked the same up to the line of the said Leonidas' parcel, and Leonidas helped Creed to build a part of the line fence upon the recognized line between them, for which Creed paid him $50 for his work. Plaintiff testifies he worked for Creed 100 days at 50 cents per day on said fence building 105 pannels of fence.

At the February rules, 1903, Hugh Leonidas Heflin filed his bill in the circuit court of Doddridge county against Creed C. Heflin, B. F. Heflin, Sr., and Susan Heflin, founding his claim on that clause in the deed to himself that, "if by survey it is found to not contain 96½ acres, the lines to be so changed as to make one equal half of the whole tract 193 acres"; and alleging that by actual survey the tract contained 214.4 acres, and that the parcel so conveyed to him contained but 84 acres, while that conveyed to Creed contained 130.4 acres, and that he had not discovered the mistake in the survey until in March, 1902; and alleging that the defendants B. F. Heflin, Sr., and Creed C. Heflin colluded together to defraud plaintiff by withholding from him his just and full share of the said land, that in June, 1894, County Surveyor Daniel Sherwood made a partial survey of plaintiff's tract as conveyed to him, and reported that it contained 97 acres and 20 poles, that afterwards, in March, 1902, County Surveyor J. M. Martin surveyed the whole tract, and reported that it contained 214.4 acres, and that plaintiff's portion contained 84 acres, and Creed's portion contained 130.4 acres; and prayed "that said division lines may be changed, corrected, and so run as to embrace and include to plaintiff the equal one-half of said entire tract of 193 acres of land, now ascertained to embrace 214.4 acres, that commissioners for the purpose of making said change, locating, and marking the true division lines between said two shares and parts of land may be appointed with full power and instructions," and for general relief.

The defendant Creed C. Heflin demurred to plaintiff's bill, in which plaintiff joined, and the court overruled said demurrer and gave defendant Creed C. Heflin 60 days in which to file his answer. On the 24th of November, 1903, all the defendants filed their joint and separate answer to plaintiff's bill, denying all the material allegations thereof, and averring that B. F. Heflin and Susan Heflin, having advanced in years and becoming feeble and unable to look after and attend to the said lands and personal property, and having no use for the same except to have a comfortable home and the necessaries of life, and desiring to assist and provide for all their children, decided to divide up all their said real estate and personal property among their children while they both lived, making provision for their own support and the necessaries of life; that in pursuance of said conclusion they divided all their said real estate among their four sons —the plaintiff, respondent Creed C. Heflin, W. S. Heflin, and B. F. Heflin, Jr.—and conveyed the same to them, providing in the different deeds to all of them, except the said B. F. Heflin, Jr., that they should pay the sum of $270 each, which as a matter of fact was to be paid to the four daughters as part of their contingent interest in said land and property, the daughters not having received any of said land; that on the said 16th of October, 1890, they executed the two deeds set out in the bill to plaintiff and defendant Creed C. Heflin by proper metes and bounds, and also conveyed other parts of the real estate to their other sons, William S. Heflin and B. F. Heflin, Jr.; that at or about the same time the parents also divided up their personal property, money, and effects, or the greater part thereof, among their children, and it was part of the arrangement that the said four daughters should have and receive the sum of $1,800, in cash and property among them in lieu and instead of the said daughters receiving any of said lands, which was paid to them; that all of said conveyances were in fact gifts and free distributions of the property of the parents to the children, retaining only the life estate in the conveyance to respondent Creed C. Heflin as appears from the said deed, and that the said children took possession and control over their interests as conveyed to them, and had remained in possession of the same ever since the date of the said deeds, and they should all now be satisfied and contented, having now received all the earthly possessions of their said parents, who should at least be permitted to die in peace without strife, annoyance, and litigation in their declining years; that at the time of the making of said deeds respondent Creed C. Heflin was an infant, not being more than 16 or 17 years old, and was unable from his tender years to realize or know the effect of said arrangement, and while the deed made to plaintiff by his parents provides, "if by survey it is found to not contain 96½ acres the lines to be so changed as to make one equal half of the whole tract of 193 acres," no such provision was inserted in respondent's deed for the other part conveyed to him by definite metes and bounds, and claiming that

he was no party to the said deed to the plaintiff and in no way bound by the provisions and recitals of the same, and especially that recital, and was no party to any such agreement or arrangement. Averring that Daniel Sherwood, after the execution and delivery of the said deeds, did run and take the bearings and distances of said lines as called for in said deeds, and found the said tract conveyed to plaintiff to contain 97 acres and 20 poles; that plaintiff being raised from infancy upon said land, he and all the parties were well acquainted and very familiar with the same, and being fully advised, and knowing all about these matters, accepted a deed for said parcel of land by fixed and definite boundaries and was estopped and bound by such definite and fixed boundaries; that the parents retained the life estate in the part conveyed to respondent Creed C. Heflin, and that ever since the conveyance he had cared for and provided for his aged parents, and they had resided with him upon the land ever since, and would continue to do so as long as they or either of them should live. Denying that there was any mistake or error to be corrected, or that they ever talked as though they would correct any error or mistake, as there was none. And denied that their refusal to change the lines was a fraud upon the rights of plaintiff, or that they had colluded together for the purpose of withholding from plaintiff his full share of the lands or to cheat and defraud him out of the same. And averred that by reason of said improvements placed upon his land by respondent Creed C. Heflin, and for other reasons mentioned in the bill, all of said lands had materially increased in value as alleged in the bill, for which reasons and others the plaintiff was seeking to fraudulently procure the changes in the division lines and to cheat and defraud the respondent out of said land after acquiescing in and recognizing the said division lines as the true division lines for many years; that the plaintiff had all the land that was ever conveyed to him or intended to be conveyed to him at any time, and much more than his equal share of said lands and property in value and to the full extent of his boundary and lines as contained in his deed and as fixed and designated at the time. And prayed that the bill be dismissed and the relief prayed for therein be refused, and that the division lines of said tracts, as fixed and expressed in said deed, be sustained as the true division lines of the said land.

The plaintiff filed a special replication in writing to defendants' answer, denying all the allegations of the answer setting up new matter of defense. Depositions were taken and filed in the cause on behalf of both the plaintiff and the defendants, and the cause came on to be heard on the 15th day of March, 1905, upon the bill and exhibits and other proceedings and orders, and the answer and exhibits and general replication thereto, and upon the depositions, when the court was of opinion that the plaintiff was not entitled to the relief prayed for in his bill, and that the same should be dismissed, and it was accordingly so decreed, with costs to the defendants. From which decree the plaintiff appealed, and says that the court erred in refusing to grant the relief prayed for and in dismissing his bill.

It is difficult to determine from the bill, its allegations and prayer, just what relief plaintiff seeks. The bill alleges "that said land is susceptive of partition as was by said agreement and deeds intended and therein set out should be done." The prayer is for a changed and corrected running of said division lines so as to give to plaintiff one equal half of the said entire tract of 193 acres, since ascertained to embrace 214.4 acres. The lines between that conveyed to Leonidas and that to Creed were well-defined lines and corners mentioned and distinctly set out in the deed to Leonidas, while the conveyance to Creed calls for those lines which mark the land conveyed to Leonidas. Plaintiff undertakes to set up in his bill an agreement on the part of B. F. Heflin, Sr., to convey to plaintiff the one equal half of said tract of 193 acres, and relies upon the clause in his deed providing for a change in the location of the division lines so as to give plaintiff the agreed quantity of land. B. F. Heflin, Sr., conveyed to Creed in fee the other portion of said tract, retaining only the rights of occupancy during the life of himself and wife, Susan, and the record shows that Creed had no notice of such provision for changing the division lines, and he has a right to rely upon his own deed to define the boundaries of the land conveyed to him. While the deed provides for the possession of the land by the said B. F. Heflin, Sr., and Susan Heflin during the natural life of each of them, the record shows that it was given over entirely into the control of Creed. Plaintiff himself testifies that Creed hired him to work for him in clearing the land up to the line and building a part of the line fence on the recognized lines. In Daugherty v. Marcum, 3 Head (Tenn.) 323, it is held: "If a deed is executed reserving an occupancy during life to the doner or bargainor, the entire estate passes, as between the parties to the deed. No right would remain in the donor or bargainor except, merely, the right to possess, and, perhaps, to enjoy the profits during life." And in Haynes v. Boardman, 119 Mass. 414, it is held: "There is sufficient privity of estate between a testator, a person to whom he has devised land for life, and the remainderman under his will, to establish a title by adverse possession, if the possession by the testator and his devisees is continuous for 20 years." Not only was the land conveyed to Creed in fee, subject only to the life es-

tate of the vendors, but they had turned over to him the actual control of the land. Creed, being neither a tenant in common, a joint tenant, nor coparcenor with plaintiff as to the land, cannot be compelled to partition under the statute. He is holding under a separate conveyance distinctly defining his boundaries, and had not been disturbed in the enjoyment of it since the date of his deed, some 18 years prior to the bringing of this suit. B. F. Heflin, Sr., had divested himself of the legal title to that portion of the land from which Leonidas is claiming shall be conveyed to him enough to make up the full quantity his father agreed to convey to him, and he could get no title to it unless Creed would join with his father in a conveyance thereof, and there is no reason why he should do so, being no party to such an agreement, if any there was, as claimed in plaintiff's bill.

Plaintiff alleges that the lands have materially increased in value since the said conveyances were made, not noly by reason of the material improvements and growth of the country, but by reason of the oil, gas, and coal that have been developed and ascertained to exist in said county and in close proximity to said lands, and it is supposed at least that coal underlays said land. The answer admits all this to be true, and avers that the land by reason of the improvements placed on it by Creed, and for the other reasons mentioned in the bill, had materially increased in value. It is insisted that this increase in value is the cause of the institution of this suit. It is shown by the evidence of Mrs. Gawthrop, a sister of Creed and Leonidas, that at the time the deeds were written the dividing lines between Leonidas and Creed were agreed upon by the vendors and plaintiff, and "Brother Lon was to have that boundary above this line and Brother Creed was to have what was below the boundary line to keep the old folks their lifetime. It was understood that he would be satisfied with that boundary." She also states that her father objected to that recital in the deed which provided for a change in the boundary lines and refused to sign, and wanted another deed drawn; that Mr. Sherwood, who was acting as the scrivner, said he could not draw it that evening. "Lon said it would make no difference. That boundary was all he wanted. And afterwards, after it was drawn up, he seemed satisfied, and said he had the heart of the place and did not have to keep the old folks." Plaintiff denies this conversation. Mrs. Gawthrop is corroborated in her statements by B. F. Heflin, Sr., who further says that Leonidas has all the land that he ever intended him to have; that he gave Creed the old home part "for to take care of me and Mrs. Heflin as long as we lived and then it was his'n. It will take $1,500 to keep us, me and Mrs. Heflin"; that he cleared Lon of all expenses, and that Lon said he was perfectly satisfied and didn't want any more. In Ford v. Euker, 86 Va. 75, 9 S. E. 500, it is held: "Specific performance is not a matter of right in either party. It will be granted only when the contract is clear, distinct, and mutual. If it will work injustice, the party will be left to his action for damages. Generally he should not have been backward awaiting change of circumstances so as to enforce or abandon the contract, as may be most advantageous." And in Anthony v. Leftwich, 8 Rand. 238: "A specific execution will not be decreed where its operation would be harsh on any person concerned." In Darling v. Cumming's Ex'r, 92 Va. 521, 23 S. E. 880, it is held that applications for specific performance of contracts are addressed to the sound discretion of the court, regulated by established principles; that "if there has been a change of circumstances or relations, which renders the execution of the contract a hardship to the defendant, and especially if there has been a great change in values, and it is accompanied by an unexcused delay on the part of the complainant, the change and delay together will constitute ground for denying specific performance when sought by the one in default." And further, in Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339, it is held: "Specific performance being addressed to the sound discretion of the court, the party asking it must have been ready, willing, and prompt in the performance of those things incumbent on him, and where he has not been so, and it would impose hardship and be inequitable upon the other party, specific performance will be refused." As held in Harrison v. Harrison, 36 W. Va. 556, 15 S. E. 87: "The court will look into all the circumstances of the case and will not decree specific performance unless those circumstances render such a decree just and equitable."

We are unable to see where, or how, the appellant has any equity as against Creed C. Heflin, or that he has shown himself entitled to the relief prayed for, and the decree of the circuit court is therefore affirmed.

(63 W. Va. 18)

## JACKSON v. BIG SANDY, E. L. & G. R. CO.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. RAILROADS—GRANTS OF RIGHTS OF WAY—EXTENT AND USE OF RIGHTS ACQUIRED—RIGHT OF WAY ANNEXED TO MINING RIGHTS.

Railroad rights of way, annexed and subsidiary to mining rights, cannot be used for other purposes, such as the business of carrying passengers and freight generally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 180.]

2. INJUNCTION—SUBJECTS OF PROTECTION AND RELIEF—RAILROAD ON MINING RIGHT OF WAY—OPERATION AS COMMON CARRIER.

Equity has jurisdiction, independently of the constitutional inhibition of the taking of private property for public use without payment of compensation or security therefor, to enjoin the operation of a railroad built on a mining right of way as a common carrier, no possessory remedy at law being available for ejection from the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 15.]

3. EMINENT DOMAIN—REMEDIES OF OWNERS OF PROPERTY—JURISDICTION OF EQUITY—RESTRAINING UNAUTHORIZED USE OF RAILROAD RIGHT OF WAY GRANTED.

The constitutional inhibition of taking private property for public use without compensation gives equity jurisdiction to prevent such unauthorized use of a mining right of way or railroad, since the law affords no adequate remedy for the possession and use of the property, deprivation of which amounts in law to a taking thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 774.]

4. EQUITY—PLEADING—ANSWER—ABATEMENT FOR WANT OF PARTIES.

An answer to a bill seeking abatement for want of necessary parties, which fails to aver facts showing an interest on the part of the absent party in the subject-matter of the bill that will be affected by the achievement of the object of the suit, is insufficient for the purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 398.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wayne County.

Bill by Virginia Jackson against the Big Sandy, East Lynn & Guyan Railroad Company. Decree for plaintiff, and defendant appeals. Affirmed.

Holt & Duncan, for appellant. William Fry and Campbell, Heffley & Davis, for appellee.

POFFENBARGER, J. The questions presented here are whether a railroad built on a right of way, granted to a railroad only for the transportation of minerals of the grantee to be taken from the land over which the right of way is, can be operated as a common carrier, and, if not, whether equity will enjoin such use thereof.

The plaintiff, owner of a small tract of land containing about three acres, which came to her out of a tract of 62⅞ acres once owned by Samuel Osburn, and another tract, the two having an aggregate area of 62½ acres, obtained from the judge of the circuit court of Wayne county on the 6th day of May, 1903, an injunction restraining and inhibiting the Big Sandy, East Lynn & Guyan Railroad Company from proceeding further to enter upon said tracts, on a bill alleging that said company, without having in any way acquired a right of way over the same, and without her consent and over her protest, had entered upon and taken possession of a portion of her land, and was then, and had been for some time, engaged in building and constructing its railroad thereon. On February 24, 1905, the defendant filed an answer denying that it had built, was building, or intended to build, any railroad on any portion of any of plaintiff's land, and also that any railroad had been built on the larger of the two tracts, but averring that a railroad had been built by the East Lynn Coal Company over said three-acre tract, on a right of way granted by said Samuel Osburn to C. Fry and B. J. Pritchard by deed dated the 8th day of May, 1890, by which Osburn had conveyed to said Fry and Pritchard all metals, coals, iron ores, fireclay, stone for building purposes, gas, and oil, in, under, and upon said 62⅞-acre tract of land which then included plaintiff's said three-acre tract together "with the right of way for railroads or other roads over and through the surface thereof for the transportation to market of said minerals, and mineral substances and products, whether in the raw or manufactured state," which deed was exhibited with the answer. It was further averred that the minerals and rights of way so granted had become the property of said East Lynn Coal Company. On the 8th day of May, 1905, a supplemental bill alleging the completion of said railroad and its operation as a common carrier, and praying that the defendant be enjoined from operating the same over and through said lands, or in any manner entering thereon, until it should have acquired the right of way by purchase or condemnation, was filed in court, and an injunction, in conformity with the prayer thereof, was awarded. To this bill an answer was filed admitting the completion of the railroad and its operation by the defendant as alleged, but denying that said company had built it or owned it, and averring that the same had been built by the East Lynn Coal Company, and was operated by the defendant, under an agreement or arrangement with the coal company, as a common carrier as well as a carrier of coals from the mines of the East Lynn Coal Company on said tract of land, and claiming the right to so operate it. This appeal is from an order refusing to dissolve said last-mentioned injunction.

Conceding the right of the coal company, after having constructed its railroad, to lease the same to the appellant, which seems to

be admitted by counsel for the appellee, it does not follow that the lessee may use or operate it for a purpose other than that for which the way was granted. The coal company could not vest in the railroad company, by lease or otherwise, any greater right or interest in the land, or subject it to a heavier burden or more extensive easement, than the clause in the deed granting the easement passed or authorized. It could vest in another only such right as it had acquired. The easement granted is defined and limited by the terms of the grant. It authorizes the construction, maintenance, and operation of railroads on the land for the transportation to market of the mineral and mineral substances and products granted by the deed, and nothing more, in the absence of circumstances not here disclosed, calling for an interpretation or construction accordant with the true intent and meaning of the parties, giving a greater right of use. A railroad to be used merely as an instrumentality in the marketing of the coal granted would impose a burden upon the land shorter in duration and lighter in character than a railroad operated as a common carrier. In point of time the operation of the road would be coextensive with the working of the mines, commencing with the opening of the mines, ceasing temporarily while they are closed, and terminating altogether upon the exhaustion of the mines; and, while in operation, the number of cars and trains run over the land would depend upon the extent of the mining operations and the quantity of the output. On the other hand, a common carrier road is in constant operation, doing a regular and much heavier traffic, carrying, in addition to the output of the mines, a large amount of freight not emanating from them, as well as passengers, all of which necessitates the running of heavier and more numerous trains, and this burden would be indefinite in point of time. It might, and probably would, be permanent. Moreover, such a railroad requires better construction and maintenance, a better roadbed, grade, equipment, and speed, involving graver injury to the surface and more frequent interruptions, in divers forms, to the occupancy and use of the land for other purposes. To the earnest contention of counsel for the appellant that the grant of a right of way for mining purposes, impliedly or otherwise, authorizes the use of it for general railroad purposes, the considerations just mentioned seem to respond sufficiently; but the conclusion to which they unerringly lead has long ago found expression in a canon of interpretation and judicial precedents. "Rights of way annexed to rights to mine, or granted for the purpose of removing and transporting minerals from and materials to the mine, may not be used for other purposes, as for general railroad purposes." Barringer & Adams, Mines & Mining, 584. "It being clear from the above facts that the purpose of the provisions in the decree relating to the building of branch railroads was to afford to the owners of the coal property facilities for removing and marketing the coal upon it, said provisions did not justify the attempt to build a branch railroad not necessary and not to be used as an appurtenance to the coal property." Republic I. Works v. Burgwin, 139 Pa. 439, 21 Atl. 386. "The grant of a private right to quarry rock from the lands of the grantor, with a right of way to remove the same, is not a grant of the exclusive possession of the land, or any possession, except for the sole purpose of enjoying the license and easement created by the grant. Such grantee cannot authorize a railroad operated for the general public to be constructed over the land, even though the major part of its business be the transportation of the rock quarried under the license; if he does, the grantor, as the owner in fee, may maintain ejectment against it." Snell v. Railway Co., 3 Utah, 192, 2 Pac. 193.

The observations just expressed, respecting the consequences of the perversion of the right of way to purposes aside from and beyond those specified in the grant, taken in connection with the character of the defendant, it being a corporation organized for the carrying on of business of a public nature—the transportation of passengers and freight generally—have important bearing on the question of remedy, plainly demonstrating that the result is the subjection of private property to a public use without compensation, in violation of the Constitution of the state. Such use of the right of way is not, and cannot be, a mere incident of its use in connection with mining. To hold that it is would make the incident broader than the thing to which it is said to be incident, both in respect to its nature and the burden it imposes upon the land; and this is true notwithstanding the duration of the burden would be limited to correspond with the operation of the road for mining purposes. The character of the use is not determined by the length of time. It depends upon the interests affected, the rights or advantages of which the landowner is deprived, on the one hand, and those bestowed upon the general public, on the other. Neither a railroad corporation nor a railroad is required to be perpetual, and whether it operates as a common carrier for 10 years or 50 years the nature of its business is the same. Subjection of private property to the uses and purposes of a common carrier amounts to a taking thereof within the meaning of the Constitution, for prevention of which equity interposes by injunction. Foley v. County Court, 54 W. Va. 16, 46 S. E. 246; Spencer v. Point Pleasant, etc., R. R. Co., 23 W. Va. 406; Arbendz v. Wheeling, etc., R. R. Co., 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371; Taylor v. B. & O. R. R. Co., 33 W. Va. 39, 10 S. E. 29; Watson v.

Fairmont, etc., R. R. Co., 49 W. Va. 528, 39 S. E. 139. All these decisions say an action sounding in damages, such as assumpsit or trespass on the case, is not an adequate remedy for the taking of private property for public use. This is obvious, since assumpsit would treat the land as sold, given up by its owner without having been paid for it, in exchange for a right of action for money which might prove worthless owing to insolvency of the corporation or person taking it or other adventitious circumstance. The Constitution inhibits the taking of land for public use until compensation therefor shall have been paid or secured, from which it is plain that no remedy that allows the land to be used for such purpose before payment of compensation is adequate. In order to enforce the mandate of the Constitution, the courts must give a remedy that will secure to the citizen the possession and use of his land until compensation is paid or payment thereof secured.

Independently of this inhibition of the Constitution calling for injunction to protect the possession, there is equity jurisdiction on another ground. Possession of the right of way for mining purposes under the grant precludes resort to ejectment or unlawful entry and detainer. The relation subsisting between the parties is analogous to that of landlord and tenant. In attempting to use the railroad, rightfully constructed for a limited purpose—transportation of coal from the mines, as a common carrier—the railroad company, as tenant, subtenant, licensee, or sub-licensee, is doing an act on the premises which the license or grant of privilege does not authorize. It is an act in excess of the rights conferred upon the tenant. In all such cases equity has jurisdiction to restrain and confine the tenant or licensee within the scope of the tenancy or license. Carnegie Natural Gas Co. v. The South Penn Oil Co., 56 W. Va. 402, 415, 49 S. E. 548; Oil Co. v. Oil Co., 47 W. Va. 84, 34 S. E. 923; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; West Virginia, etc., Co. v. Vinal, 14 W. Va. 637.

In view of this relation of the parties, the principles here adverted to, and the promptness with which the plaintiff sought relief—she having filed her original bill before the railroad was built, and her supplemental bill on completion thereof, and vigorously and diligently prosecuted the suit—the action of the court, in overruling the motion to dissolve the injunction in respect to the operation of the railroad as a common carrier, was manifestly proper and right, unless failure to make the East Lynn Coal Company a party was cause for dissolving it, as has been suggested in argument. The right to build the railroad and use it for mining purposes only is not contested. The bill takes no notice of its character as a mining road. It proceeds against the defendant as the operator of a common carrier and against the road as a railroad constructed and used for general purposes. Its character as a mining road is brought into the case by the answers, but no affirmative relief is asked in respect thereto. They are merely defensive answers against bills seeking prevention of the use of the road for general purposes, a matter outside of and beyond any rights conferred by the grant, and therefore a matter in which the East Lynn Coal Company has no interest whatever. As determined by the allegations of the bills admitted in the answers, the defendant is a trespasser in that it has acted in excess of the rights conferred upon the party under whom it claims. Neither it nor the East Lynn Coal Company has obtained from the landowner a right of way for general railroad purposes. If it be conceded that the answer sets up a claim of right on the part of the coal company to lease the railroad built by it for use in the manner in which the appellant is using it, by the averment that it has leased the same for such a purpose, both lessor and lessee are thus shown to be wrongdoers, for no acquisition of the right claimed is shown. On the contrary, it is thus revealed that the basis for the claim is a granted right of an entirely different character. To obtain abatement or suspension of proceedings in equity in the nature of an abatement on the ground of want of necessary parties, it must appear that the absent party has an interest in the subject-matter of the suit that will be affected by the achievement of its object. It is not enough to show that he merely claims an interest. Facts must be disclosed from which the court can see that he has such an interest, if the statements of fact are true. Though want of necessary parties in equity may not constitute ground for abatement in the common-law sense of the term, it operates to suspend or delay the suit until the defect is cured, and the plea or answer setting it up for this purpose ought to be tested as to its sufficiency by the rules of pleading. The statement of a mere conclusion of law is not sufficient in a declaration, plea, bill, answer, or any other paper known in pleading. In order to avail himself of a legal principle for an abatement or any other purpose, a party must set forth sufficient facts to bring himself within that principle. Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366; Quarrier v. Peabody Ins. Co., 10 W. Va. 507; Horton v. Townes, 6 Leigh, 47; Patton v. Elk River, etc., Co., 13 W. Va. 259; Hogg's Eq. Pro. 277.

As the bill seeks an injunction to the operation of the railroad as a common carrier and not otherwise, and the injunction follows the prayer of the bill strictly, and no complaint is made here on the ground of failure to so modify the order as to permit the operation of the road as a mining road, or except such use thereof from its terms, the argument on both sides being confined to the contention as to the right to use the road for general pur-

poses, we deem it unnecessary to inquire whether the order should be modified. As it is merely interlocutory, the court below can so modify it at any time as to prevent interference with any rights the appellant possesses under the easement granted to Fry and Pritchard, and now held by the East Lynn Coal Company. Seeing no error in the order complained of, we affirm it.

Affirmed.

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(63 W. Va. 45)

## FERRELL v. SIMMONS et al.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

JUDGMENT—VALIDITY—UNCERTAINTY.

A judgment that does not show for and against whom it is is void for uncertainty. A judgment must show in what case it was rendered, else it is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 7–12.]

(Syllabus by the Court.)

Appeal from Circuit Court, Roane County.

Bill by A. D. Ferrell against G. B. Simmons and others. Decree for plaintiff, and defendants appeal. Reversed.

Wm. A. Parsons, Wm. O. Parsons, and Walter Pendleton, for appellants. Schilling & Harper and R. G. Linn, for appellee.

BRANNON, J. A. D. Ferrell filed a bill against G. B. Simmons and others, stating that the firm of Tyree & Helwig had recovered judgment before a justice in Roane county against said Simmons; that Simmons gave a stay bond, in which Ferrell was surety; and that execution issued on the bond, and Ferrell had paid it. And the bill, claiming that Ferrell was entitled to be subrogated to the lien of the judgment, sought to sell certain realty of G. B. Simmons. The bill alleged that G. B. Simmons had transferred his real estate and a large amount of personalty to his brother T. R. Simmons; but, while it avers that before such transfer T. R. Simmons had notice of the judgment, it does not aver any notice on his part of his brother's fraudulent intent. A copy of the judgment was exhibited with the bill. The bill averred that T. R. Simmons had later reconveyed to G. B. Simmons some of the real estate—likely we may say all that had been conveyed to him. A decree subjected real estate of G. B. Simmons to renting, and G. B. Simmons and T. R. Simmons unite in an appeal.

The bill seeks subrogation to the lien of a judgment. There is no judgment. The only exhibit to prove the judgment is so uncertain and incomplete that we cannot make a judgment out of it. It contains no captions to show the parties. There is on the margin the words "Tyree & Helwig v. G. B. Simmons" and under it a taxation of plaintiffs' costs. That is not a caption to the judgment giving parties. We may guess it is an action between the parties, but it is guess or surmise. But worse yet, waive that, as we might, if there were no other objections, the judgment does not show for or against whom it is. It says: "I therefore render judgment on the note filed in this action for the sum of $127.96 and costs of this action." The record does not show in whose favor the summons was. Except for forced inference we cannot say for or against whom the judgment is. "A judgment not designating in whose favor it is rendered is void for uncertainty." "The judgment must designate with certainty the party against whom it is rendered." 11 Ency. Pl. & Prac. 949, 951. "Judgment without parties, however perfect in form, is not attended with any of the consequences of a judgment, and is void." Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66. In this vital feature we can neither guess a judgment nor guess its parties. Courts have gone far in relieving justices' proceedings from formality, but they have gone far enough. They cannot dispense with substance, and by mending supply a substance not present. There should be some show of compliance with law even in justices' courts. Reference to the note and summons cannot be made, as they were not before the circuit court as parts of the record. The transcript of the justice appearing in the record shows no note, though the judgment paper says that a note was filed. We cannot base an estoppel to deny the judgment on the stay bond, first, because it is not in the record, and, next, we do not know its recitals, unless we presume that it recited the judgment, as likely we could do; but, the judgment being void, so would the stay bond be void. We do not think that a stay bond can alone create from the first a judgment. White v. Lumber Co., 29 W. Va. 385, 1 S. E. 572, 6 Am. St. Rep. 650; Boslow v. Shenbarger, 52 Neb. 164, 71 N. W. 1012, 66 Am. St. Rep. 487; Ex parte Cheatham, 1 Eng. (Ark.) 531, 44 Am. Dec. 525. If a judgment is void, would not a forthcoming bond on it also be void? Upon demurrer and on hearing the bill should have been held bad as to subrogation. It could not be supported as against G. B. Simmons on the simple contract arising from payment by the surety. I thought at first that it might be a bill to set aside a fraudulent transfer of realty and personalty, and have a decree against T. R. Simmons for the personalty; but this view cannot be sustained, as there is no charge in the bill of notice on the part of T. R. Simmons of fraud.

Decree reversed, demurrer sustained, and bill dismissed.

(63 W. Va. 51)

## PARKS v. MORRIS, LAYFIELD & CO.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. APPEAL — NEW TRIAL — REVIEW — EXCEPTIONS.

If there is a motion for a new trial and an exception to its refusal, no exception to the action of the court for entering judgment need be made to authorize the Supreme Court to review the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1572, 1574.]

2. SALE—CONTRACT.

To make a contract of sale there must be both a proposal and acceptance of that proposal. The minds of the parties must meet and agree finally upon the sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 39, 43.]

3. ACTIONS—WAIVER OF TORT—ACTION IN ASSUMPSIT.

When a trespasser cuts and sells, or converts to his use, trees growing on land, the owner of the land may waive the tort, and, instead of bringing action for the tort, sue in assumpsit and recover on the common court for money had and received, or on a quantum valebat for their value; but he cannot maintain assumpsit when the title to the land is in contest between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, § 198.]

4. EVIDENCE—OPINION.

A witness cannot upon a jury trial give his mere opinion or conclusion that he has valid title to land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149–2185.]

(Syllabus by the Court.)

Error to Circuit Court, Ritchie County.

Action by W. H. Parks against Morris, Layfield & Co. Judgment for plaintiff. Defendants bring error. Reversed and remanded.

Fidler & Adams, for plaintiff in error. Freer & Robinson, for defendant in error.

BRANNON, J. W. H. Parks brought an action of assumpsit in the circuit court of Ritchie county against Morris, Layfield & Co., and recovered a verdict and judgment, and the defendants bring the case to this court.

The first point arising is the claim for Parks that we cannot consider the evidence or instructions or rulings upon evidence for the reason that no exception was made to the action of the court in rendering judgment. There is nothing in this point. There was a motion to set aside the verdict, and an exception to the ruling of the court refusing to do so. This court has repeatedly held that, while there must be a motion for a new trial and exception for its refusal, that is enough to authorize the review of the case where bills of exception present the case properly. This court has never demanded, as a requisite for such review, that there shall be an exception to the rendering of judgment. By making the motion for a new trial, and exception to its refusal, the party has protested against carrying the verdict into judgment. In Congrove v. Burdett, 28 W. Va. 220, it is explicitly held that when points in the case are saved, and a motion for a new trial overruled, and exception to the action of the court in overruling such motion, that is enough. In the case decided at this term (Chadister v. B. & O. R. Co., 59 S. E. 523) this is distinctly held. Parks' demand is for timber cut upon land claimed by him and also claimed adversely to him by Simon Sterne. Morris, Layfield & Co. received a deed from Sterne conveying the timber and cut the timber from the land. Parks claims that Morris, Layfield & Co. made a contract with him for the conditional purchase of the timber. Parks exhibited a deed to him from one H. H. Bennett for the land. Sterne brought an action of ejectment years ago against Parks on account of the latter's claim to the land. Sterne claimed the land under a sale and deed made by the commissioner of forfeited and delinquent lands in 1846, under an old title emanating from the commonwealth of Virginia in 1797, and, claiming that in the conveyance to him from the commissioner of forfeited and delinquent lands there had occurred a mistake in boundary, so that the conveyance ought to have included, but did not, the land in controversy, Sterne brought a chancery suit, stating that owing to such mistake he might be embarrassed in the prosecution in a law court of this action of ejectment, and he sought to have said conveyance corrected so as to give the true boundary of the land. On the trial of this action of assumpsit, Parks gave evidence, as a basis for recovery for the timber, of an alleged contract between him and the defendants. An important question occurs: Was there such contract for the purchase of the timber from Parks by Morris, Layfield & Co.? Parks, as a witness in the case, stated that he made a contract for the sale of the timber with W. B. Morris, one of the defendant firm, in which the defendants were to take the timber at $6 per acre, "and the contract was he was to pay for it at the decision of these lawsuits that were pending." He stated that he met Morris on the land, casually, and on cross-examination he was asked to state just what was said in the interview with Morris, and he made this statement: "Well, my recollection is that I asked him, when he offered to buy it, what he was paying for the Sterne timber, and he told me $6 per acre, and asked me if I would take that for mine, and I told him I would." When asked if that was all that was said, he said that he did not remember whether that was all that was talked or not. He said that he did not remember whether Morris asked him what he would take. That is inconsistent with his statement that Morris offered to buy. "He (Morris) said what he was paying Sterne for the timber, and I told him I would take that for mine." Was this a contract? We say not. Morris made no actual proposal to buy. Parks simply asked

Morris what he was paying Sterne for timber, and Morris asked him if he would take the same. He made only an inquiry, but he made no acceptance of the proposition of Parks to take $6 per acre. A contract cannot bind a party proposing it until acceptance of the other party. The minds of the parties must meet in a consummated contract. If anything remains to be done to make a contract, if the agreement is not consummated, if all the terms have not been mutually agreed upon, no contract arises between the parties. McCully v. Phœnix Ins. Co., 18 W. Va. 782. "A mere proposal to sell land does not become a sale until accepted and notice of acceptance given the proposer." Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339. For the want of a complete contract Parks could not recover by force of a contract. The evidence shows no finished contract.

Several instructions submitted to the jury the question whether such a contract was made and predicated recovery on it, if there was such contract, and such instructions are bad for that reason; no such contract having been proven. For this reason plaintiff's instructions Nos. 1, 3, 7, and 8 are bad. Even if we take Parks' own statement of the contract, it is not sufficient for recovery. He states that he was to be paid for the timber only at the decision of the two cases then pending, the ejectment and chancery suits. Such is the fair interpretation of his evidence. His words are: "The contract was he was to pay for it at the decision of these lawsuits that were pending." They never were decided on their merits. A nonsuit was entered in the action of ejectment. As is well known, a nonsuit decides nothing of the merits. The chancery suit was dismissed for failure to file an amended bill, "without prejudice to the plaintiff and their ejectment suit now pending in this court on the docket in the name of Simon Sterne v. W. H. Parks et al." So, nothing was decided as to the merits in the chancery suit. Now, if Morris did agree to pay Parks for the timber on the decision of these suits, what was the true meaning of the parties? Was it the intention to pay without such a decision of those suits as would decide their merits? Surely not. If there should be a final decision on the merits in favor of Sterne, the timber would belong to Morris, Layfield & Co.; whereas, if such decision should be in favor of Parks, the timber would belong to him. The chancery suit was dismissed on the motion of Parks, and presumably the nonsuit likewise, as the order shows the defendants were present when the nonsuit was entered. So Parks prevented a decision on the merits. Therefore the alleged contract as stated by Parks would not support the verdict, because a condition of it was that payment for the timber was to be made only upon a determination of those suits; that is, a determination which should settle the title to the land finally and be res judicata. Under this principle there was error in giving printed instruction No. 6, saying that, though Sterne should yet have the right to institute suit for the land, yet as there was no pending litigation between Sterne and Parks, and that the litigation pending at the time of the oral contract had ended, as shown by the records, and that too favorably to Parks, the condition had happened on which payment was recoverable from Parks. The instruction was bad because it told the jury that the mere nonsuit in the ejectment and dismissal without prejudice of the chancery suit were decisions such as to call for payment by the defendants. The instruction told the jury that such dismissals were in favor of the defendants in those suits, when the dismissals decided nothing. Although I have supposed a conclusion in instruction No. 6 by saying that it told the jury that such dismissal of those suits would entitle Parks to the money for the timber, yet we guess at that conclusion, since the instruction itself contains no legal conclusion from the facts stated in it. That is by inadvertence omitted. For the same reason there was error in giving the plaintiff's instruction No. 7. Also, instruction No. 8 for the plaintiff is bad, because it, too, told the jury that the nonsuit and dismissal of the chancery suit were of such effect in law as would under the contract make the defendant liable. For that reason, too, plaintiff's instruction No. 1 is bad.

But though there was no contract to justify a recovery by Parks, we must inquire whether a recovery, in an action of assumpsit, could be had on the ground that the defendants cut and converted to their own use wrongfully by trespass the timber of Parks, belonging to Parks, if even it did belong to him. Parks showed no title paper save the deed to him from Bennett. He traced no title from an original or common source. There is no doubt that an owner of land whose timber is wrongfully taken from it and sold or converted from it by trespass may waive the tort and recover the value of the timber upon the common counts. He may recover on a quantum valebat, if not sold, and for money had and received, if sold. The timber having been converted into personalty by severance, its true owner may recover its value in assumpsit. Maloney v. Barr, 27 W. Va. 381. The plaintiff himself, by introducing the record of the chancery suit, showed abundantly that the defendants claimed right to take the timber under an old title dating back to 1797. The plaintiff himself showed that defendants were in actual possession taking the timber under that claim. Parks claimed under a different, hostile title. Thus, it is a contest between two hostile titles. Now, where the title in the plaintiff is plain, and no adverse claim to the land, he may waive the tort of a trespasser taking timber and sue in assumpsit; yet surely the law ought not to convert assumpsit into ejectment for title and

mesne profits or trespass, and try title to land. Baker v. Howell, 6 Serg. & R. (Pa.) 476, thus states the law: "An action for money had and received will not lie for the price of sand taken from a sand bar to which both the plaintiff and defendant claim title, and sold by the defendant." The reason is that assumpsit is for money had and received. The court said it would be strange to convert the trespasser into an agent and sue him for money he received for the same. The court said according to that theory assumpsit could be maintained in one state, where the defendant may be found, and, if title could be tried, the judgment would be conclusive in an action of ejectment for land situated in another state and thus settle title to land in that state. The court said: "It is not in the power of a party to change a local into a transitory action, and try title to land in another county ex directo, where the right to the land is the very foundation of the plaintiff's action. Brown v. Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660, was an action of replevin for slate taken from land. The action was disallowed. The court said that action 'is to try title to personal property, and replevin will not lie for land.' Title to land cannot be decided in an action merely personal or transitory, no matter whether replevin, trover, or assumpsit." The right to the slate depended on title. We find in King v. Mason, 42 Ill. 223, 89 Am. Dec. 426, the holding: "Title to real estate cannot be tried in action of assumpsit." In a note to that case in 89 Am. Dec. 429, we find the proposition that a disseisee, "until he has regained seisin and possession by judgment or entry, has no such interest in the land as will give him an interest in the trees which have been severed therefrom and sold during the continuance of the disseisin; and, of course, he has no such interest in the money for which they were sold as will enable him to maintain assumpsit for money had and received. Bigelow v. Jones, 10 Pick. (Mass.) 161. See Baker v. Howell, 6 Serg. & R. (Pa.) 476." Miller v. Miller, 7 Pick. (Mass.) 135, 19 Am. Dec. 264, holds that an action of assumpsit for trees taken from land and sold will lie, provided that no question is made in regard to the title of the land. "In suits for timber cut and removed, as in this case, the true rule, so far as the title to the land is concerned, is this: The plaintiff out of possession cannot sue for the property severed from the freehold, when the defendant is in possession of the premises from which the property was severed—holding them adversely, in good faith, under claim and color of title. In other words: The personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants." Halleck v. Mixer, 16 Cal. 574. The same principle will be found in 4 Cyc. 321. In Lewis v. Robinson, 10 Watts (Pa.) 338, a party brought assumpsit to recover money for land claimed by him, but sold by the defendant. The title of the parties to the land was in contest. It was held that assumpsit would not lie, "although the plaintiff may have had a good title to it." "If the occupancy of a trespasser, who severs trees or stone from the land of another and converts the property taken to his own use, is such as to create an adverse possession, assumpsit does not lie for the value of such property, for it is a settled principle that title to land cannot be tried ex directo in transitory actions." Downs v. Finnegan, 58 Minn. 113, 59 N. W. 981, 48 Am. St. Rep. 488 North Haverhill v. Metcalf, 63 N. H. 427, clearly sustains this holding. Mather v. Trinity Church, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663, in full opinion and note so holds. For this reason, as the right to those trees depended absolutely on title, this action cannot be maintained. The plaintiff must sue in ejectment for title and mesne profits, or trespass, if he has title. Note in 89 Am. Dec. 429, 430. Therefore, instructions Nos. 2, 7, and 8 for the plaintiff were erroneous because they submitted the question of title to the land to the jury, because the title could not be at all tried in the action.

Complaint is made of the action of the court in allowing a question to be put to Parks as a witness as to whether or not he had title to the land at the time the chancery suit and ejectment were instituted and prosecuted, and to his giving this answer: "Yes, sir; I did. Yes, sir; I had at the time and all through the pendency of the suit, and have yet." This is the mere opinion of Parks. The question of title depends upon documents and their legal force and facts. The question is whether a given state of documents and facts does, in law, confer title; but here Parks is allowed to give his ipse dixit, his mere conclusion or opinion. This is error.

Plaintiff's instruction No. 3 told the jury that the recordation of the deed from Bennett to Parks gave the defendants notice of the title of Parks, and therefore the defendants could not be innocent purchasers for valuable consideration without notice of Parks' title. That meant that such notice would affect the defendants so that they could not buy the timber from Sterne. This instruction is erroneous. These parties claimed by adverse title. The record of a deed is notice to purchasers and creditors from the same grantor who made the deed. It has no effect at all on one purchasing from another party. Though the defendants had notice of that deed, actual or constructive, or both, that had nothing to do with this case. Sterne had one title; Parks another hostile one. It will not do to say that, when one man purchases land from one claimant, another cannot purchase the same land from a hostile claimant, simply because he had notice of the other man's purchase. The very letter of section 10, c. 74, of the Code of 1899 [Code 1906, § 3108], is

that "a purchaser shall not under this chapter, or chapter 75, be affected by the record of a deed or contract made by a person under whom his title is not derived." Hoult v. Donahue, 21 W. Va. 294. "Constructive notice, by recordation of deeds and other instruments, is operative only among parties claiming rights under the same title. Between claimants under distinct and hostile titles, notice is ordinarily immaterial and inoperative." Webb v. Ritter, 60 W. Va. 195, point 15, 54 S. E. 484. This instruction not only puts bad law, but is objectionable also in that it went to support Parks' claim of title to the land, which is inadmissible in assumpsit where there is conflict of title. For two reasons it had nothing to do with the case.

Another point. If title could be investigated in such an action, it might be (I say it might be) that, possession being prima facie evidence of title where a party is in possession, and another party takes and sells timber from the land, the party in possession can recover on title shown prima facie by mere possession. Of course, the defendants were in possession when the timber was cut. The plaintiff, Parks, would assert that he was in possession, and not showing actual physical possession otherwise he would say that the declaration in ejectment would supply this proof, because it alleges that its defendants entered into and withheld the possession from Sterne. The plaintiff's instruction No. 5 says that that declaration estopped the defendants in this action to deny that Parks was in actual possession. This instruction is erroneous, and for at least one reason: First, it makes that declaration prove Parks' actual physical possession conclusively. Here we have the record in another suit used to prove an admission of possession. It is not conclusive. It is no absolute estoppel. In no view could it be used as anything but an item of evidence rebuttable by evidence. I think authorities given in Hast v. Railroad Co., 52 W. Va. 407, 44 S. E. 155, will show this. There it is stated upon authority that "the pleadings of a party in one suit may be used in evidence against him in another, not as an estoppel, but as proof open to rebuttal and explanation." But this instruction made it a conclusive estoppel. Tabb v. Cabell, 17 Grat. (Va.) 160, is clear on this point.

We think, from principles above stated, that the court erred in refusing defendants' instruction No. 3, telling the jury that the plaintiff must have good title. We think the court erred in refusing defendants' instruction No. 4, telling the jury that, the mere deed to Parks from Bennett itself conferring no title, he could only get title under it by actual possession for the time required for it by the statute. We think the court should have given defendants' instructions 10 and 11, saying that to make such contract as is claimed by the plaintiff binding there must be offer and acceptance, and that the mere inquiry by Parks of Morris what he was paying Sterne, and the question by Morris to Parks whether he would take that price if the suits involving title should result favorably to Parks, did not constitute a complete contract. We think, also, No. 12 should have been given. We think the insertion, as an important element in the case, in instructions for the defendants Nos. 3, 6, and 10, of notice on the part of the defendants of Parks' adverse claim, was erroneous for the reasons above given. Such notice is immaterial. But as instructions Nos. 3, 4, 6, and 8 introduce the question whether Parks had good title, when that matter could not be tried in assumpsit, we think these instructions are not important to be considered. Really not proper for the case, as the action cannot be sustained owing to conflicting title, and only justified by the instructions of the plaintiff. If title could be tried, they would be sound. It follows that the court should have set aside the verdict and not rendered judgment on it.

Other matters are discussed in briefs; but they are irrelevant to the case, and any expression upon them would be obiter, since, it being a case dependent on conflict of title to land, the action of assumpsit does not lie.

Our conclusion is to set aside and reverse the verdict and judgment, and remand the case for a new trial.

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(63 W. Va. 47)

## WARE v. HEWETT et al.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. MORTGAGES—FORECLOSURE—RIGHT TO SUE IN EQUITY—TRUST DEEDS.

The mere existence of a prior lien on land reserved in a deed conveying legal title does not give the trustee, who has legal title, jurisdiction in equity to enforce the trust by sale under decree, unless there is doubt or controversy or uncertainty as to the validity or amount of such lien, or some circumstance constituting an impediment to a fair and advantageous sale, likely to cause sacrifice of the property if sold under the deed of trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1151.]

2. SAME—FORECLOSURE—DECREE OF SALE.

It is error to decree land to sale making payments of the sale price fall due sooner than the installments of the debt for which it is decreed to sale become payable by their terms.

3. SAME.

It is error to combine principal and interest of several notes given for a debt, payable at different times, into a new principal, and decree its payment, with interest, from the date of the decree, when some of the notes have not matured at that date.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by J. Blackburn Ware against Ida B. Hewett and others. Decree for plaintiff, and defendant Hewett appeals. Reversed and remanded.

W. T. George, for appellant.

BRANNON, J. J. Blackburn Ware, as trustee, filed a bill in equity in Barbour county against Ida B. Hewett and others, stating that Ida B. Hewett and her husband had executed a deed of trust conveying to Ware certain real estate to secure a debt to Behr Bros. & Co., and that there existed a number of judgments constituting liens on the land subsequent in date to the deed of trust, and stating that in a deed from F. P. Rease and wife to Ida B. Hewett, by which she derived the land conveyed in the deed of trust, there was reserved in favor of Rease a vendor's lien for $2,450, which was to be paid according to 11 promissory notes mentioned in the deed from Rease. The bill also states that Ida B. Hewett owned another small parcel of land not conveyed in the deed of trust. The bill asks that the debts be ascertained, and that the real estate be sold to satisfy the vendor's lien, the deed of trust debt, and the said judgments. The case was referred to a commissioner to report the land of Ida B. Hewett and the liens thereon. The commissioner filed a report of the debts and their priorities. The court made a decree subjecting to sale both said parcels of real estate to pay the vendor's lien, the deed of trust lien, and divers judgments. On the next day after the entry of this decree, Ida B. Hewett went into court and offered her written demurrer to the bill, and moved the court upon the filing of the demurrer to set aside the decree entered on the day before. The court entertained the demurrer, but overruled it, and overruled the motion to set aside the decree. Ida B. Hewett asked leave for a day to file an answer, but the court denied her such leave.

It seems immaterial to raise the question whether the demurrer came too late, because: First, the court did receive and act on the demurrer; and, if that be not a good reason, then the motion to set aside the decree for error therein would call upon us to consider that decree, and thus look at the bill. Therefore the first question arising, not only on that demurrer, but on the motion to reverse the decree, is whether the bill shows a rightful jurisdiction in equity for it. Has the trustee right to file this bill? A full discussion of the right of a trustee under a deed of trust to go into equity to enforce the deed of trust is to be found in the opinion by Judge Poffenbarger in the case of George, Trustee, v. Zinn, 57 W. Va. 15, 49 S. E. 904, 110 Am. St. Rep. 721. By that case the mere fact that there is a prior lien to that of a deed of trust will not confer equity jurisdiction to entertain a suit by a trustee to enforce the trust. There must be uncertainty as to the validity or amount due under the trust or under the prior lien, a controversy as to the amount, or some other impediment to a favorable sale under a deed of trust. I suppose that if the legal title be outstanding under a prior deed of trust, so that a sale under a second deed of trust would not pass legal title, the trustee can go into equity, bringing in the parties to the first deed of trust, and have a decree binding all so as to pass legal title, and that he ought not to sell without such decree. Rossett v. Fisher, 11 Grat. 492. But in this case the legal title was in Ware, and the prior vendor's lien was only a lien. Sale could be made subject to it. In the case of a deed of trust the parties have chosen their own remedy, and it should be used and costs of a chancery proceeding avoided, unless there is some valid legal obstacle in the way tending to prevent a sale without sacrifice. The only suggestion in this bill to justify an equity suit is that the plaintiff was not advised and could not say when any of the notes given to Rease for purchase money would mature, nor could he state the amount of the notes, but that he was advised that there yet remained unpaid the greater part of the money due thereby, and that part of it was then due, but the plaintiff could not say when the residue would become due, nor state the exact amount unpaid, and that he could not safely sell under the trust, because the title was incumbered by such prior and subsequent incumbrances, and was therefore compelled to go into equity and ask the direction and advice of the court as to the manner in which the sale should be made and the funds arising thereby distributed. I may remark that the deed from Rease, though it stated that the purchase money was $2,500, of which $50 was paid in cash, did not state the respective amounts of the promisory notes or when payable. These statements constitute the only excuse for going into equity. Now there is not a suggestion that there was any dispute as to the amount of the prior lien, or as to its validity; no suggestion that the trustee could not ascertain from the parties the amount of the debt, or whether there was any dispute about it, and when the debt was payable. Not the slightest controversy in these respects appears from the bill. Thus no solid ground for equity jurisdiction is shown by the bill. For that reason the decree should have been set aside. Of course, these subsequent judgment liens could not give equity jurisdiction for the case. A sale under the trust would pass good title over those judgments.

The decree was for the whole of the vendor's lien debt to Rease, requiring sale for nonpayment, when it appeared from the commissioner's report that only a part of the debt was due at the date of the decree. The decree was on the terms of sale of half cash and the balance in 12 months, when a part of the debt would not mature until after such 12 months. The case of Gates & Bros. v. Cragg, 11 W. Va. 300, holds that it is error to decree a sale of land on terms making the payments fall due more rapidly than the installments of the debt become payable. Such a decree departs from the terms of the contract. The court combined the principal and interest of this Rease debt into a new

principal at the date of the decree, making interest bear interest from the decree, when some of the notes were not yet payable. Our Code (chapter 131, § 16 [section 3986]) allows aggregation of principal and interest of a past due debt, but not on notes or installments not yet matured and payable. Where one or more notes are matured, others not, a decree can be made aggregating principal and interest of the note or notes past due, and selling land for nonpayment; but other notes not mature cannot go into that sum. A lien may be declared for them, and in a future decree, when they have become due, provision be made for their payment, and the case retained for that purpose.

Another objection to the decree is that it sells, not only the land conveyed by the deed of trust, but also land not covered by the deed of trust, to pay the judgments. This is not a suit to enforce judgment liens, but simply a suit to enforce a deed of trust.

For these reasons we must reverse the decree and remand the case to the circuit court, with leave to the plaintiff to amend his bill, if he shall be so advised.

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(63 W. Va. 69)

## STATE v. McCOY.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. ROBBERY—DESCRIPTION OF PROPERTY.
An indictment for robbery of "one promissory note of the value of $50.85, one purse of the value of 25 cents, and one time check of the value of 50 cents," sufficiently describes the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 279, 280; vol. 42, Robbery, §§ 19, 20.]

2. SAME—INTENT.
The animus furandi, or the intent to take and deprive another of his property, is an essential element in the crimes of robbery and larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Robbery, § 3.]

3. SAME—INSTRUCTION.
An instruction to the jury, in a trial for one of such offenses, which ignores this essential element, is bad, and the giving thereof constitutes reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3090–3099.]

4. CRIMINAL LAW—APPEAL—PRESUMPTIONS.
In this state the presumption is that an exceptor is prejudiced by the giving of an erroneous instruction, and a judgment based thereon will be reversed for this cause, unless it clearly appears from the record that he could not have been prejudiced by the giving thereof.

(Syllabus by the Court.)

Error from Circuit Court, Mingo County.

Tug McCoy was convicted of robbery, and brings error. Reversed and remanded.

John L. Stafford and Marcum & Marcum, for plaintiff in error. C. W. May, Atty. Gen., for the State.

MILLER, P. Tug McCoy, who stood indicted for robbery jointly with one Goodman, was tried alone in October, 1905, but the verdict of conviction was set aside, and a new trial awarded. In July, 1906, he was again put upon trial; the jury acquitting him of robbery, but finding him guilty of grand larceny. From the judgment overruling his motion for a new trial and of imprisonment for three years, he is prosecuting this writ of error.

The judgment overruling his demurrer to the indictment and his motion for a new trial, giving instructions Nos. 1 and 2 of the state, and refusing his instruction No. 1, are the alleged errors relied upon. The substantial charge in the indictment, containing but one count, is that McCoy and Goodman, on the 1st day of June, 1905, in Mingo county, armed with a loaded pistol, feloniously assaulted E. F. Chapman and put him in bodily fear, "and one promissory note of the value of $50.85, one purse of the value of 25 cents, one time check of the value of 50 cents, and divers United States Treasury notes, divers United States silver certificates, divers United States bank notes, divers United States gold certificates, United States coin, and United States gold coin in the aggregate of $19.33, and of the value of the goods, chattels, property, and money of the said E. F. Chapman, from the person and against the will of the said E. F. Chapman, then and there, to wit, on the day and year aforesaid, in the county aforesaid, feloniously and violently did steal, take, and carry away, against the peace and dignity of the state."

Robbery at common law is the felonious taking from the person of another of goods or money to any value, by violence or putting in fear. Our statute does not define robbery. Code 1899, c. 144, § 12 [Code 1906, § 4211], prescribes the punishment: "If any person commit robbery, being armed with a dangerous weapon, he shall be confined in the penitentiary not less than ten years; if not so armed, he shall be confined therein not less than five years." Robbery is but larceny, with the aggravated circumstances of force and arms added. Code 1899, c. 145, § 15 [Code 1906, § 4254], provides that: "If any person steal any bank note, check or other writing or paper of value, or any book of accounts for or concerning money or goods due or to be delivered, he shall be deemed guilty of larceny thereof, and receive the same punishment, according to the value of the thing stolen, that is prescribed for the punishment of larceny of goods or chattels." It is only by force of this statute that bank notes, checks, and other writings and papers of value are made the subject of larceny. At common law they were not so.

Counsel for the prisoner and for the state both argue alleged ground of demurrer, but the record shows no demurrer or action of the court thereon. The only ground of demurrer is the omission of a more particular description of the note and check. As a gen-

eral rule, an offense is sufficiently charged if stated in the language of the statute, and with respect to notes, checks, and other writings the name or designation by which they are commonly known is sufficient. Fredrick v. State, 3 W. Va. 695; Commonwealth v. Gallagher, 126 Mass. 54; Commonwealth v. Brettun, 100 Mass. 206, 97 Am. Dec. 95; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670; Commonwealth v. Campbell, 103 Mass. 436. It is conceded that the indictment is good with respect to the United States money alleged to have been stolen; but it is claimed that the aggregate value thereof was insufficient to make the offense grand larceny, and that, the indictment being bad as to the note and check, the value of the money and purse would not raise the offense to grand larceny. If this were so, it would not make the indictment bad on general demurrer, for, as to such of the subjects of larceny as were not sufficiently charged, they would be treated as surplusage and as not vitiating the indictment. State v. Howes, 26 W. Va. 111. As, however, the record does not show any demurrer or action of the circuit court thereon, the question is not before us, and the demurrer need not be further considered. The point, however, recurs upon the second ground of error assigned, for it is said that if the indictment was bad as to the note and check, and no proof under the indictment was admissible as to them, the verdict of grand larceny could not stand, because the aggregate of the money and the value of the purse was not sufficient to make grand larceny, and that the motion for a new trial should have prevailed. Conceding the premises, the conclusion would follow; but, as we have indicated, we think the indictment is good as to the note and check, and that the second ground of error is not sustained.

With respect to instructions for the state Nos. 1 and 2, we think they are both fatally defective. No. 1 properly defines robbery in technical language to be the felonious taking of money or goods of any value from the person of another or in his presence against his will by violence or putting in fear. It told the jury that if they believed from the evidence that McCoy, by himself or with Goodman, procured the money alleged in the indictment from Chapman by putting him in fear or by force or violence, they should find him guilty of robbery. This instruction wholly ignored any of the articles alleged to have been stolen except the money. The second instruction told the jury that if McCoy and Goodman, armed with a dangerous weapon, and acting in concert, feloniously and by force or violence, or by putting him in fear, took from him or in his presence money or property of any value mentioned in the indictment, he was guilty of robbery. The evidence shows that both the defendant and Goodman were policemen, and whatever money or other articles were taken from Chapman were taken in an alleged attempt to make an arrest. These instructions cover robbery. Neither considers the subject of larceny, covered by the greater offense charged. To make the offense grand larceny, more than the money would have to be considered. The first instruction would be bad as covering grand larceny if the effect was to tell the jury that the taking of the money alone would constitute grand larceny. Both instructions are defective also, not for the reasons which we understand are assigned, but for the more potent reason that each ignores the element of intent necessary. Each assumes that the taking, by violence or putting in fear, of the money and property constituted the offense; whereas, the animus furandi is an essential element in the crime of robbery. Jordan's Case, 25 Grat. 943. The first instruction did tell the jury the felonious intent might be collected from all the evidence and circumstances, and the second limited the same to the taking of the property feloniously by force or violence; but neither stated in what the specific felonious intent necessarily consisted. To make the offense robbery or larceny, and particularly so in the case of public officers, the intent to take from another and deprive him of his money or property is essential.

But it may be inquired: Did the giving of these erroneous instructions prejudice the rights of the prisoner? In this state the presumption is that an exceptor is prejudiced by the giving of an erroneous instruction, and the judgment will be reversed for this cause, unless it clearly appears from the record, which is not the fact here, that the exceptor could not have been prejudiced by the giving thereof. State v. Douglass, 28 W. Va. 297; Ward v. Ward, 47 W. Va. 766, 35 S. E. 873; Ward v. Brown, 53 W. Va. 227, 44 S. E. 488.

Instruction No. 1 for the defendant was, in substance, that, if the jury believed from the evidence that McCoy was a policeman at the time and place mentioned, then it was his duty and right to arrest any person violating the law or acting disorderly in his presence, and that he was justified in carrying the pistol referred to. This instruction attempts somewhat inartistically to define the rights and duties of a police officer; but it is made inapplicable to the facts in the case, and is without conclusion justifying it. It was properly rejected.

As the judgment must be reversed, and a new trial awarded, for the erroneous giving of instructions 1 and 2 on behalf of the state, we make no further comment on the evidence.

(63 W. Va. 74)

## RUCKMAN v. COX et al.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. TRUSTS—EXPRESS TRUSTS—EVIDENCE.

Where, at the sale of land under judicial decree to satisfy claims of judgment creditors, a third person agrees with the owner, in consideration of $100 and repayment to him by the latter of the purchase money, to bid in the land and convey it to the wife of the owner, such third person is thereby constituted trustee of an express trust in favor of the beneficiary so designated in said agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 45.]

2. APPEAL—REVIEW—FINDINGS OF FACT.

In equity the finding of any fact by the circuit court will not be disturbed upon appeal, unless contrary to the plain preponderance of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3974.]

3. TRUSTS—EXPRESS TRUSTS—LACHES.

Neither the statute of limitations nor laches applies to express trusts, until and from the time the trustee repudiates the trust by unequivocal words or acts, and such repudiation is so brought to the notice of the beneficiary as to call upon him to promptly assert his equitable rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 507; vol. 47, Trusts, §§ 571-573.]

(Syllabus by the Court.)

4. WORDS AND PHRASES—LACHES.

Laches, in legal significance, is not delay, but delay which works a disadvantage to another.

Appeal from Circuit Court, Marshall County.

Action by Dorothy Ruckman against Friend Cox and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Simpson & Showacre and Caldwell & Caldwell, for appellants. Robert White and Riley & Ritz, for appellee.

MILLER, P. George W. Ruckman owned two tracts of land in Harrison county, containing in the aggregate 152½ acres, which were sold June 10, 1899, under decree in a suit by his creditors, and purchased by R. D. Leggett at $2,205. Either shortly prior or shortly subsequent to the sale, the defendant Friend Cox became interested in the purchase. The original and amended bill alleged, substantially, that on the day of sale, before the land was knocked down to the purchaser, George W. Ruckman, representing his wife, Dorothy Ruckman, entered into an oral contract with R. D. Leggett, by which the latter, in consideration of $100, agreed to bid in the land and convey it to the said Dorothy for the purchase money paid by him; that, about the time of this agreement, the land was being cried at $2,200, and, Ruckman being asked by Leggett what he should bid, Ruckman requested him to add $5, which he did, whereupon said land was knocked down to him at the price of $2,205; that subsequently Leggett went to the home of the plaintiffs, and represented to them that there was likely to be some trouble about the confirmation of the sale, and that one Rosser was proposing to make an upset bid, and prevailed upon them to have said George W. Ruckman go to the courthouse on the day the subject of confirmation was to be presented to the court and assist him therein, which Ruckman did, with assurances from Leggett and Cox, and it was communicated to the judge of the court that Leggett and Cox would carry out the agreement to convey the property to Dorothy Ruckman, whereupon the sale was confirmed. This suit was brought to and the bill filed at November rules, 1902, against Cox and the executors and devisees of Leggett, to enforce said agreement. The separate answers of the executors and of Cox denied the agreement alleged; and that of Cox denied any knowledge of such contract, and alleges that he was an innocent purchaser without notice. There was no formal appearance or plea to the amended bill, filed at April rules, 1905. Upon the pleadings and proofs the circuit court, by final decree of June 18, 1906, found and decreed it to have been clearly proven that R. D. Leggett made an agreement with Dorothy Ruckman, before his purchase, whereby he was to purchase the property for her, and receive for his services the sum of $100 and be reimbursed the purchase money; that Cox knew of this agreement; that the purchase by Leggett and Cox at said sale was made subject to said agreement; that Dorothy Ruckman had complied with the agreement, and Leggett and Cox had refused to comply therewith; that Cox and C. D. and R. J. Leggett, executors and devisees of R. D. Leggett, held the legal title to said property in trust for Dorothy Ruckman; and that, upon her payment to them of the purchase price and $100, she was entitled to a conveyance of the legal title.

The contract alleged and established by proof made Leggett and Cox trustees of an express trust, growing out of the agreement and the trust and confidence reposed in Leggett by Dorothy Ruckman. The rules and principles controlling such cases have been frequently declared in the decisions of this court; and it would serve no good purpose to do more now than refer to them. See Nease v. Capehart, 8 W. Va. 95; Seiler v. Mohn, 37 W. Va. 507, 16 S. E. 496; Currence v. Ward, 43 W. Va. 370, 27 S. E. 329; Hamilton v. McKinney, 52 W. Va. 317, 43 S. E. 82; Hatfield v. Allison, 57 W. Va. 374, 50 S. E. 729.

But it is argued that the contract has not been as distinctly alleged, nor as clearly proven by competent evidence, as required. The findings of the circuit court were based on the testimony, unaffected by the incompetent evidence excluded. The contract we think is sufficiently alleged. We have examined the evidence with great care, and are unable to say, as a prerequisite to reversal, that the findings of the lower court are not

supported by the testimony. In Weaver v. Akin, 48 W. Va. 456, 37 S. E. 600, it is said: "The rule established by the repeated decisions of this court, both as to law and equity, is that the finding of any fact by the circuit court will not be disturbed unless it is contrary to the plain preponderance of the evidence." And the cases referred to are there fully cited.

The question of laches is presented, though it does not seem to have been presented to the court below by plea or otherwise. When applicable, this defense may be made by demurrer or plea where the facts sufficiently appear upon the face of the bill. Phillips v. Piney Coal Co., 53 W. Va. 543, 44 S. E. 774, 97 Am. St. Rep. 1040. In proper cases it seems it may be made without foundation laid in plea or demurrer. 5 Pom. Eq. § 36; Sullivan v. Railroad Co., 94 U. S. 806, 24 L. Ed. 324. But this defense is inapplicable in cases of express trust, until and from the time the trustee repudiates the trust in unequivocal words, and such repudiation is brought to the notice of the beneficiary in such manner as to call upon him to assert his equitable rights. Philippi v. Philippe, 115 U. S. 151, 5 Sup. Ct. 1181, 29 L. Ed. 336; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; Curtis v. Lakin, 94 Fed. 251, 36 C. C. A. 222; Newman v. Newman, 60 W. Va. 371, 377, 55 S. E. 377; Gapen v. Gapen, 41 W. Va. 422, 23 S. E. 579. In recognition of the law of these cases, certain pertinent facts are presented for our consideration as bringing the appellants within their protection: First, it is said that, conceding the agreement made as alleged, Leggett shortly after the sale was confirmed, when Ruckman tendered to him in the presence of Cox a check for the cash payment on the land plus $100 for his services, refused to accept the money; second, that in August, 1899, Leggett and Cox dispossessed the plaintiffs by a writ of possession awarded; third, that subsequently, in 1900, Leggett, as shown by the evidence, stated to the attorney employed by Ruckman to procure execution of the trust that he did not recognize any agreement whereby he was to convey to Ruckman the property for what he had in it plus $100; fourth, that the plaintiffs stood by and saw the defendants improve the property by the erection of a small dwelling house for tenants, in place of the one destroyed by fire. It is claimed that these acts amounted to a repudiation of the trust, if any, and the assertion of title to the trust estate, with notice to the plaintiffs, and that the plaintiffs, having failed to assert their rights in some legal or equitable proceeding within a reasonable time thereafter, are now barred by laches.

Refusal to accept the money tendered and the notice to plaintiffs' attorney are not without force, but these acts were not of that unequivocal character required in such cases. At the time Leggett refused to receive the plaintiffs' money, he gave them until 5 o'clock of that day to close the matter up. In the meantime he and Cox took a deed from the commissioner, and then demand was made upon the plaintiffs by Leggett that they pay them the whole of the purchase money and the $100 compensation at once. The original agreement was frequently thereafter acknowledged by Leggett to other persons, and to the plaintiffs' attorney Leggett admitted some prior arrangement or agreement with the plaintiffs in regard to conveying them the land. What he said to the attorney at the time he first saw him was, not that he did not have an agreement, but that he did not recognize any agreement between him and Ruckman, and in his conversation with the attorney Leggett referred to the fact that on the day the money was tendered to him he wanted the plaintiffs to pay him all the money. Dispossession of the plaintiffs is a stronger circumstance; but it was a forceful one, not voluntary abandonment, and was not wholly inconsistent with the rights of the plaintiffs. The land stood as security to Leggett for the repayment of his money. Possession strengthened that security. The decree of the circuit court made him agent and trustee of Mrs. Ruckman. Possession by the trustee is presumed to be possession by the cestui que trust. Speidel v. Henrici, supra. The erection of a tenement house was made a necessary expenditure to preserve the trust estate, and entitled the trustee to reimbursement out of the rents and profits of the land.

Are the plaintiffs then, barred by lapse of time? The statute of limitations would bar them in 10 years after the right accrued; but courts of equity are not bound by the rules of law in this respect, except that in analogous cases and cases of concurrent jurisdiction they feel bound as a general rule to enforce the statute. Godden v. Kimmell, 99 U. S. 212, 25 L. Ed. 431; York's Appeal, 110 Pa. 69, 1 Atl. 162, 2 Atl. 65. They act upon their own inherent doctrine of discouraging antiquated demands, and will refuse to interfere where there has been gross laches in prosecuting a claim. Badger v. Badger, 2 Wall. 87, 17 L. Ed. 836; Sullivan v. Railroad Co., supra; Insurance Co. v. Austin, 168 U. S. 685, 696, 18 Sup. Ct. 223, 42 L. Ed. 626; Whittaker v. Improvement Co., 34 W. Va. 217, 12 S. E. 507; Phillips v. Piney Coal Co., supra. There is no fixed rule applicable to every case. "Every case is governed chiefly by its own circumstances. Sometimes the analogy of the statute of limitations is applied. Sometimes a longer period than that prescribed by the statute is required. In some cases a shorter time is sufficient. And sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of juris-

prudence, and to decide accordingly." Sullivan v. Railroad Co., supra. Many cases cited and that might be cited show the varying circumstances under which these rules are applied. In the case of Curtis v. Lakin, 94 Fed. 251, 255, 36 C. C. A. 222, it is broadly stated that, in cases of express trust, where the trustee repudiates the trust and asserts title in himself, the reasons requiring the exercise of diligence are the same as where the object is to fasten upon another a constructive trust, or to rescind a contract upon the ground of fraud or mistake. We do not understand this to be the true doctrine. In the case of fraud or constructive trust, all the cases hold prompt action necessary, else waiver or relinquishment will be imputed. But in cases of express trust relief will not be denied within a less period than the statute of limitations after repudiation, unless some superior, equitable circumstances or rights of third parties have intervened; and, if the defendant would defeat recovery within a less period, he must put in issue by proper plea the facts upon which the defense is predicated, unless those facts sufficiently appear in the bill. 5 Pom. Eq. § 20, and notes. "Laches, in legal significance, is not delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but when a court sees negligence on one side, and injury therefrom on the other, it is ground for denial of relief." 5 Pom. Eq. § 21, and cases cited.

We do not think the facts proven in this case show any unreasonable delay on the part of the plaintiffs. The defendants are not shown to have repudiated the trust by such unequivocal acts as to call upon the plaintiffs for prompter action. It fully appeared that almost continuously since the purchase of the land by Leggett they had been making demands upon him, and had placed the matter in the hands of an attorney, who had been negotiating with Leggett down to within a short time before his death. Nor has any such change of circumstances or conditions or value of the property intervened as would under these authorities deny the plaintiffs the relief they seek. To deny them that relief would work great hardship and injustice, and relieve the defendants of the trust which they voluntarily assumed.

Perceiving no material error therein, we affirm the decree of the circuit court.

(63 W. Va. 60)

## SMITH et al. v. OWENS et al.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. QUIETING TITLE—LACHES.

Laches will not be imputed to one in possession of land who resorts to a court of equity to settle a question of title, as against an adverse claimant who is out of possession, no matter how long his delay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 63.]

2. VENDOR AND PURCHASER—BONA FIDE PURCHASER.

It is the duty of one purchasing real estate to examine the records; and, whether he does so or not, he is affected with notice of every fact the knowledge of which might have been obtained from the record, or to which the facts there appearing would have led him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 513–539.]

3. DEED—DESCRIPTION.

The main object of a description of land, in a deed conveying the same, is not in and of itself to identify the land, which it rarely does or can do without aiding evidence, but to furnish the means of identification. If it does this, it is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 65–79.]

4. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE.

Possession of land is sufficient notice to a purchaser, contracting with a claimant thereof not in possession, to put him on inquiry; and if he takes a conveyance from such claimant he will be charged in favor of the person so in possession with all information such inquiry would have given him if diligently pursued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 540–562.]

5. REFORMATION OF INSTRUMENTS — DEED — EVIDENCE.

The evidence required by a court of equity to correct a deed on the ground of mistake must be clear, convincing, and free from reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 157–164.]

6. DEEDS—DESCRIPTION.

Where the description of land by monuments, distances, or otherwise is vague and indefinite, by reason of conflicting lines or omission of a line, or from any other cause, the statement of the acreage is an essential part of the description.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 65–69.]

7. REFORMATION OF INSTRUMENTS.

Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman either as to fact or to law does not accomplish the purpose intended, or violates it, equity will relieve from such mistake.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 69–71.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County.

Bill by Henry L. Smith and others against J. D. Owens and others. Decree for plaintiffs, and defendant Owens appeals. Affirmed.

Thayer M. McIntire, for appellant. Dave D. Johnson and E. O. Keifer, for appellees.

MILLER, P. Elizabeth A. Starkey, wife of John T. Starkey, owned in 1884 two tracts of land adjoining each other on Stouts run in Wetzel county; one called in the record the "Lauck 14-acre tract," containing 28 acres, conveyed to her by R. W. Lauck and wife in 1881, and the other called the "Peterson 50-acre tract," lying directly north of the first, purchased by her of George Fox in 1879. On February 28, 1884, she and her husband conveyed to Sarah A. Lowe 5 acres of the Lauck tract, being a narrow strip on the western side thereof. As to the Peterson tract, title to the southeastern part thereof, containing 17 acres, was asserted by one Eliza Monroe; but the interest so claimed was conveyed to said Starkey by said Monroe and husband February 25, 1884, and this parcel is referred to in the pleadings and evidence here as the "Eliza Monroe 10 acres." On June 12, 1884, Elizabeth A. Starkey and husband, in consideration of $55 cash and $195 in deferred installments, conveyed to Elizabeth Shreves a tract of land described as follows: "Beginning at a cucumber, thence S. 88½° E., 86 poles, to a stone; thence S. 21° E., 26 poles, to pointers; thence S. 35° E., 20 poles, to a rock oak; thence S. 89° E., 16 poles, to a stone; thence with the agreed line between Elizabeth Ann Starkey and Sarah Lowe to a stone in the run; thence up the run with the agreed line of John T. Starkey and J. M. Monroe to a white walnut at the foot of Polly Point; thence up the center of the Polly Point, agreed line of J. T. Starkey and J. M. Monroe, to chestnut oak, corner in the land purchased of Fox by Elizabeth A. Starkey; thence with the same to a white oak, corner to E. J. Stout's land; thence with E. J. Stout's line home to the beginning—supposed to contain forty-five acres, be the same more or less." On December 3, 1892, H. L. Smith, by agreement of that date, purchased from said Shreves for $450 the land so conveyed to her, and on December 15, 1892, the Shreves deed never having been recorded, or the deferred installments therein mentioned paid, said H. L. Smith and W. A. Smith obtained, in lieu thereof, a deed from Elizabeth A. Starkey and her husband for the same land; the description therein being identical with that in the Shreves deed, and the consideration therein being also the same except as to the time of the deferred installments. It is claimed by both Shreves and the plaintiffs here that these deeds were intended, by the description so given, to embrace and convey not only the Eliza Monroe 10 acres, but also the Lauck 14-acre tract, but, by mutual mistake in said description, failed to do so; and it is the sole object of this suit to so correct the description in the deed to the plaintiffs as to make the same conform to this alleged intent of the parties thereto.

The amended bill, upon which the final decree is based, filed at May rules, 1906, referring to and reiterating in substance the allegations of the original bill, alleged, after setting forth the foregoing facts: That an action of ejectment was then pending in the Circuit Court of the United States for the Northern District of West Virginia, wherein the plaintiffs and the South Penn Oil Company were made defendants, instituted by the defendant J. D. Owens, who was therein setting up title to said Lauck tract by virtue of two pretended conveyances therefor; one executed in 1898 by Elizabeth A. Starkey and husband to him, and the other in 1902 by the husband and heirs of said Elizabeth A. Starkey after her death, to replace the former one of 1898, which was claimed to have meanwhile been lost before recordation. That the plaintiffs and their immediate predecessor in title had been for 20 years in actual possession of the land so claimed by them under said deed of December 15, 1892. That they had discovered a discrepancy in the boundaries of the land recited in said deed. That said boundaries were intended by the grantors to embrace not only the Eliza Monroe 10 acres, but also the land described in the declaration in said ejectment suit, except the 5 acres thereof theretofore conveyed to said Lowe, but by mutual mistake such true intention had not been correctly set out in said deed. That the scrivener had attempted, in drawing said deed, to follow the calls of the original Lauck deed to Elizabeth A. Starkey. except as to said Lowe parcel, but had so utterly confused the same as to make them unintelligible, reversing the first, and omitting the second thereof. That, "by commencing at the cucumber in the S. J. Stout line, and running thence with the last four courses of the Lauck deed, reversing the calls, namely, S. 10° W., 55 poles, to pointers; thence S. 85° W., 11 poles, to a stone; thence S. 38° W., 16 poles, to a stone; thence N. 89° W., 16 poles, to a red oak; and thence with the line between Elizabeth Ann Starkey and Sarah A. Lowe to a stone in the run; thence up the run with the agreed line of Elizabeth A. Starkey and Eliza Monroe to a white walnut at the foot of Polly Point; thence up the center of Polly Point, agreed line between Elizabeth A. Starkey and Eliza Monroe, to a chestnut oak, corner in the land purchased of Fox by Elizabeth A. Starkey; thence with the same to a white oak, corner to S. J. Stout's land; thence with E. S. Stout's line home to the beginning"—all the calls in said description would be rendered plain and simple and conform to the true intention of the parties. That the said Starkeys had never made any claim to either of said two tracts since their deed to said Shreves. That said Owens was not a bona fide purchaser, but took his conveyances with full knowledge and notice of the title and possession of the plaintiffs, and of the fact that they had leased said Lauck tract to the South Penn Oil Company, which then had two producing wells thereon. And the prayer of said bill was that, in order to make said deed a proper defense to said action of ejectment, the description therein be

corrected and reformed according to the true intent of the parties, and that the heirs of said Elizabeth A. Starkey be required to execute to the plaintiffs such corrected and reformed deed, or, if they failed to do so, that the same be executed by a commissioner appointed.

The defendants Owens and John T. Starkey, in their answers filed, after admitting the pendency of said action of ejectment and the execution of said deed to the plaintiffs here, denied that it was the intention of Elizabeth A. Starkey and husband to convey the Lauck tract by said deed, that the possession of Elizabeth Shreves and the plaintiffs of said tract was by virtue of their said deeds, or that Elizabeth A. Starkey or her husband had not since the execution of said deeds claimed to own the same; and further denied that, prior to the conveyances procured by him, Owens had notice of the alleged title of the plaintiffs thereto, but averred that he was a bona fide purchaser for value. By final decree of June 19, 1906, from which this appeal is prosecuted, the relief sought was granted, the description in said deed to the plaintiffs corrected in accordance with the statement of the true boundaries set forth in the amended bill as above quoted, and such corrected deed ordered to be executed to them by the husband and heirs of Elizabeth A. Starkey, or, in case of their default therein, then by the special commissioner thereby appointed.

The questions involved in this cause and argued for our consideration are three, embracing alleged laches on the part of the appellees, purchase without notice and for value on the part of the appellant Owens, and the alleged insufficiency of the evidence to support the decree complained of.

First, as precluding the relief sought, the appellant would interpose the bar of laches on the part of the appellees in applying for reformation of their deed. This defense is not tenable here. The pleadings allege, and the proofs disclose, that the appellees had been in actual and continuous possession of the Lauck tract since their deed of 1892, duly recorded and its discrepancy in description undetected; that, unmolested by any one, they had during all that time exercised absolute ownership over said tract, improving the same and leasing it for oil, resulting in very valuable oil developments. There is no proof of negligence on their part as to the discovery of the mistake, or of delay in the assertion of their rights after such discovery. Holding a deed duly recorded, drawn by a scrivener who professed, but had inadvertently failed, to correctly follow the courses and distances of prior deeds in the chain of title, they, with their rights acknowledged and unquestioned, were without an inducing motive to minutely examine and compare the records to ascertain the discrepancy later brought to light. The appellant is shown to have been out of possession. In his declaration of ejectment in 1905, he lays the ouster on the day following the execution of his deed in 1898. The claim of the appellees is shown to have been as fully known to him in 1898 as in 1905, and the question naturally arises why this unexplained delay on his part meanwhile in the assertion of his alleged rights? Promptly when attacked by said action of ejectment, the appellees filed their bill to so correct their deed as to constitute the same an available defense thereto. Under this state of facts, no laches will be imputed to them. They were at liberty to wait until their title was attacked before being obliged to act, for it is a well-settled principle that one in possession of land who resorts to a court of equity to settle a question of title, as against an adverse claimant who is out of possession, is not chargeable with laches, no matter how long his delay. 5 Pom. Eq. § 33; Coal Co. v. Doran, 142 U. S. 448, 12 Sup. Ct. 239, 35 L. Ed. 1063; Waldron v. Coal Co., 54 W. Va. 617, 46 S. E. 603; State v. Sponaugle, 45 W. Va. 431, 32 S. E. 283, 43 L. R. A. 727; Hayes v. Carroll, 74 Minn. 134, 76 N. W. 1017; Thompson v. Dumas, 85 Fed. 517, 29 C. C. A. 312; Gunnison Co. v. Whitaker (C. C.) 91 Fed. 191; Shaw v. Allen, 184 Ill. 77, 56 N. E. 403; Gordon v. Johnson, 186 Ill. 18, 57 N. E. 790; Brumback v. Brumback, 198 Ill. 66, 64 N. E. 741; Sheldon v. Dunbar, 200 Ill. 490, 65 N. E. 1095.

Again, the appellant claims that he was a bona fide purchaser for value without notice. In our opinion, the evidence unmistakably tends to prove the contrary. He admits in his deposition, contrary to the averments of his answer, that he made no investigation of the title when he took his deed in 1898. This is was his duty to do; and, whether he did so or not, he was affected with notice of every fact the knowledge of which might have been obtained from the record, or to which the facts there appearing would have led him. Miller v. Holland, 84 Va. 652, 5 S. E. 701; Coles v. Withers, 33 Grat. (Va.) 186; Brush v. Ware, 15 Pet. 93, 10 L. Ed. 672; Burwell's Adm'rs v. Fauber, 21 Grat. (Va.) 446; Coal Co. v. Doran, supra. True, the boundaries of the Lauck tract given in the deed to the appellees were confused, but they were all there save one; the description called for old and established landmarks, and to run with the agreed line between the five acres of the Lauck tract conveyed to Sarah A. Lowe and the residue thereof still owned by Elizabeth A. Starkey; and the appellant could not have closed his eyes to these significant facts appearing upon the face of the deed, sufficient to put a reasonable man on inquiry. The main object of a description of land sold and conveyed, in a contract of sale or in a deed, is not in and of itself to identify the land sold, which it rarely does or can do without aiding evidence, but to furnish the means of identification. If it does this, it is sufficient.

Thorn v. Phares, 35 W. Va. 772, 14 S. E. 399. The actual possession by the appellees was also notice to Owens, constituting prima facie evidence of title in them. Possession of land is sufficient notice to a purchaser, contracting with a claimant thereof not in possession, to put him on inquiry; and if he takes a conveyance from such claimant he will be charged in favor of the person so in possession with all information such inquiry would have given him if diligently pursued. Campbell v. Fetterman's Heirs, 20 W. Va. 398; Ellison v. Torpin, 44 W. Va. 436, 30 S. E. 183; Weekly v. Hardesty, 48 W. Va. 39, 35 S. E. 880. Moreover, in addition to these elements of notice from the record and the possession of appellees, Owens was otherwise charged with actual notice. His own witness, John T. Starkey, practically admits in his testimony that the deed to Owens was a venture on the part of all concerned in its making, and that the payment of the deferred purchase money therein mentioned was made contingent upon the success of Owens in holding the land as against Smith, and there is other evidence tending to prove actual notice unnecessary to be referred to.

Lastly, it is argued that the evidence in this cause is not of that reliable character required by courts of equity as prerequisite to reformation of deeds on the ground of mistake. It is undoubtedly true that the evidence in such case must be clear, convincing, and free from reasonable doubt. Allen v. Yeater, 17 W. Va. 128; Jarrell v. Jarrell, 27 W. Va. 743; Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39; Fisback v. Ball, 34 W. Va. 644, 12 S. E. 856; Koens v. Kerns, 47 W. Va. 575, 35 S. E. 902. But we think the proof here overwhelmingly tends to support the decree. It being apparent that a mistake was made, but the true intention not being discoverable with certainty from the deed itself, we must look to the surrounding facts and circumstances and to the acts of the parties in order to ascertain what was intended to be conveyed. We will, however, refer to only a few of the decisive facts shown in evidence. The description as corrected by the final decree is not greatly variant from that inserted in the deed originally, and is in almost literal accord with the statement of the true boundaries alleged in the amended bill. As to the Eliza Monroe 10 acres included, the calls inserted in the deed are certain and admittedly correct. Both the Shreves deed and the one to appellees purported to convey 45 acres, the true acreage of the Monroe and Lauck tracts. Where the description of tracts of land by monuments, distances, or otherwise is vague and indefinite, by reason of conflicting lines or the omission of a line, or from any other cause, the statement of the acreage is an essential part of the description. Hostetter v. Railway Co., 108 Cal. 38, 41 Pac. 330; Kirkland v. Way, 3 Rich. Law (N. C.) 4, 45 Am. Dec. 752; 2 Devlin on Deeds, § 1045; Barbour v. Tompkins, 58 W. Va. 590, 52 S. E. 707, 3 L. R. A. (N. S.) 715. The county clerk testified, and the records of his office as exhibited by him also showed, that up to 1894 Elizabeth A. Starkey was charged on the land books with the Eliza Monroe and the Lauck tracts, the deed to Shreves in 1884 not having been recorded (although Mrs. Shreves testified that she paid the taxes on both tracts while in possession under her deed); that, having in 1894 conveyed to H. L. Smith the residue of the Peterson 50-acre tract, said Starkey was not assessed thereafter with any land whatever in Wetzel county; and that from 1894 up to the institution of this suit 45 acres were assessed to H. L. Smith, with the marginal note in the former year, "From E. A. Starkey." Further indicative of the true intent of the parties in the deed to the appellees, John T. Starkey testified as follows respecting the negotiations with Owens for the purchase of the Lauck tract from his wife: "She claimed that she had a right she thought to sell it and to get her money out of it that Smith had agreed to pay her. Q. You mean to sell the land that she had already sold to Smith? A. He would not pay it, and never has paid it. Q. Then her intention was to convey to Owens the land that she had already conveyed to H. L. and W. A. Smith? A. It might have been, I don't know. Q. Didn't you just say that she told you that Smith had not paid for the land? A. She said she had a right to get her money out of it. Q. And in doing so she attempted to include in the deed made to Owens the land that she had already conveyed and deeded to Smith, did she not? A. That was my intention, but she talked just as I told you, and I said Smith would maybe give it to her some day, but he never has." He further said: "I recollect of him (Owens) getting the land of the old woman and paying her some on it, and he was to pay no more if there was a suit on it, until after it was ended." It is also shown that Mrs. Starkey and her husband accepted from Smith a life estate in, and resided thereafter on, the land conveyed to appellees although it seems they resided on the Peterson tract; and in their deed to Owens in 1898 for the Lauck tract they significantly "reserve their lifetime rights of surface and buildings thereon." It is unnecessary to further detail the evidence. It is clear to us, from the evidence as a whole, that the true intent was to convey to the appellees the Lauck 14-acre tract, together with the Eliza Monroe 10 acres, and that through mistake the scrivener failed to embody such intention in the deed he drew for that purpose. It is well settled that where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman either as to fact or to law does not accomplish

the purpose intended, or violates it, equity will relieve from such mistake. Troll v. Carter, 15 W. Va. 567; Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39; Lough v. Michael, 37 W. Va. 679, 17 S. E. 181, 470; Taylor v. Godfrey (decided at the present term) 59 S. E. 631; Russell v. Mixer, 42 Cal. 475; 1 Story, Eq. § 115.

For the reasons stated, the decree of the circuit court is affirmed.

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(63 W. Va. 39)

## COTTS v. WHEELING & E. G. R. CO.

(Supreme Court of Appeals of West Virginia. Nov. 26, 1907.)

1. EMINENT DOMAIN—DAMAGES TO ACCESS.

The right of access to a lot bounding on a public street is a vested property right appurtenant to the lot, and a legal condemnation of a part of the lot for a street railroad includes damage to access to the residue of the lot, and the owner of such residue cannot recover for damage thereafter done to such access from the lawful operation of the railroad.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 365, 627.]

2. SAME—DAMAGES.

A lawful condemnation of part of a lot in a city for a street railroad covers all damage thereafter occurring to the residue of the lot from the proper and lawful construction and operation of the railroad. Mere change of the size of cars used, proper for the convenient carriage of passengers, will not call for damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 304–311.]

3. SAME—WHO ENTITLED TO DAMAGES.

Where damage to a lot bounding on a public street comes from the proper construction and operation of a street railroad in it, the owner at the time of construction may recover damage therefor, but not a subsequent owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 407–416.]

4. SAME—ELEMENTS OF DAMAGE.

Recovery of damages for land actually taken for, or damaged by, the construction of a public railroad, mentioned and discussed.

(Syllabus by the Court.)

Error to Circuit Court, Ohio County.

Action by W. J. Cotts against the Wheeling & Elm Grove Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. E. Krupp and Robert White, for plaintiff in error. Henry M. Russell, for defendant in error.

BRANNON, J. The Wheeling & Elm Grove Railroad Company was granted leave by the city of Wheeling to lay its track along McColloch street, and did lay its track there. Later the city gave the company leave to occupy Baker street with its track. Baker street does not intersect McColloch street at right angles, but their junction forms an acute angle, shaped like the letter V. The ordinance of the city granting leave to lay the track in Baker street provides that the track shall connect with the McColloch street track where the center of Baker street meets the McColloch street track. The acute angle so formed by these streets was occupied by a lot of land, abutting on both streets. The lot was shaped like the letter V. The railroad company laid its track in Baker street, but it did not join the McColloch street track where the center of Baker street comes to the McColloch street track; but, commencing at a point on the McColloch street track some distance from the point where the center of Baker street meets the track on McColloch street, it laid its track by a curve from the McColloch street track into Baker street, thus somewhat departing from the location fixed by the city ordinance. In making this curved track it became necessary to occupy the acute point of said lot, at the acute angle of the V, and the railroad obtained by condemnation a small portion of the lot of land at that acute angle. W. J. Cotts owns the residue of said city lot. On it he erected a building for a storehouse and residence fronting 25 feet on McColloch street and 25 feet on Baker street, with entrances on both streets. This building runs along the line of the portion of the lot condemned by the company. It was built after the construction of the curved track. The said curved track, passing over that curve, passes over the sidewalks on those streets; one of the rails invading the sidewalk lying along the portion of the lot owned by Cotts, and the cars in passing hang still more over the sidewalks, bringing the cars within six feet at one point and ten feet at another of Cotts' house and lot, leaving only a small portion of the sidewalk between the cars and plaintiff's lot free from the cars. Cotts brought an action against the company to recover damages for injury to his house and lot from the operation of the street cars, owing to such occupation of the sidewalk, rendering access to his property inconvenient and dangerous, and injuring the value of the house for store and residence purposes. The court sustained a demurrer to the declaration, and, amendment not being asked, the court rendered judgment for the defendant, and Cotts brings the case to this court.

Counsel for Cotts state the proposition that an owner of a lot bounding on a public street has the right to use the street for access to his lot, and that this right is appurtenant to his lot and that for deprivation, total or partial, of such access, the lot owner may recover damages. There can be no denial of this proposition, if the deprivation be unlawful. We said, in Pence v. Bryant, 54 W. Va. on page 270, 46 S. E. 278, that many cases hold this right of access to be vested property right annexed to or inhering in the lot. So it is treated in Stewart v. Railroad Co., 38 W. Va. 438, 18 S. E. 604. Were this right of access not a vested property, no action would lie for injury to access; but many of our

cases give action in such case. This right of access so being a property right appurtenant to the lot, a part of its ownership, when this railroad company condemned a portion of the lot, the compensation paid for not only the part of the lot actually taken, but also damages to the residue of the lot, including damage to such right of access, for it is plain that in assessing damages to the residue of a lot or tract any interference with access to the residue left to the owner must be taken into account, since there is not a more vital interest connected with that residue than such right of access and right to light and air. Richmond, etc., Co. v. Chamblin, 100 Va. 401, 41 S. E. 750; 10 Am. & Eng. Ency. L. 1169; 15 Cyc. 746. The statute requires the assessment of compensation to cover all assessable damages to the residue of the lot. This damage was satisfied by payment to the man who owned the lot at the date of condemnation, and for all time, and neither he nor subsequent owners can recover damages for injury to this right of access. As stated in Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894, the sum of compensation is "to cover past, present, and prospective damages to such residue that are the natural, necessary, or reasonable incidents to the work." Lewis on Eminent Domain, § 565, so states the law. But the effort of counsel is to say that, as the track was not laid in the exact location fixed by the city ordinance, the curved track is wholly a nuisance, unauthorized by the city ordinance. We regard this as an immaterial matter in this case. Say that this change of location inflicted injury upon the part of the lot not condemned. That injury was paid for by the compensation assessed. That compensation took in the very damage flowing from the change of location. The city might complain; but, so far as Cotts is concerned, the wrong, if any, of departure from the location fixed by the ordinance, was paid for. In fact, it may be seriously questioned whether the real intent of the counsel of Wheeling was to fix the location in the center of Baker street where it meets the McColloch street track. Surely we may say that the intent was to let the company so connect its tracks in those streets that cars could pass from the one to the other street, and this could not be done if the location made by the ordinance for the Baker street track should be rigidly adhered to. To enable cars from one street to pass into the other would require a turntable right in the center of McColloch street, which was never designed.

Another obstacle in the way of recovery by Cotts lies in the fact that, when the Baker street track was laid down and the damage done by the invasion of the sidewalks, Cotts was not owner of the lot. He acquired the residue of the lot five years later. His counsel, to avert this trouble, say that the damage is continuous, from time to time, every day's operation of the railroad calling for damages, and every successive owner of the lot is entitled to sue. It is very clear that a public railroad is, in its nature, a permanent structure or thing, and that any damage to adjoining property from its construction is, in its nature, a permanent damage to be reckoned for at the time when it is inflicted. Our cases say so. They say that when a permanent structure is made the damage to land therefrom is a permanent damage, occurring at once, and the owner must sue once for all for permanent damage, and one recovery bars any future recovery. Where there is condemnation by legal proceedings, the compensation assessed covers damages through all time flowing from the proper exercise of the franchise, as stated above. Where there is no condemnation by law, but consequential damages from the railroad, the landowner may recover damages, and his recovery gives license and right to continue the operation of the road through all time, and there can be no future recovery for damages afterwards sustained from the lawful operation of the road, because the damage is in nature permanent. If this were not so, when would the liability end? Never. The point is that, if the structure and consequent damages are permanent in nature, one recovery answers for all time. Our cases so hold in consonance with general law. Guinn v. Railroad, 46 W. Va. 151, 33 S. E. 87, 76 Am. St. Rep. 806; McKensie v. Railroad Co., 27 W. Va. 306, and citations; Watts v. Norfolk Co., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 45 Am. St. Rep. 894, and citations; Virginia Hot Springs Co. v. McCray (Va.) 56 S. E. 216. Even where, without legal condemnation, a railroad is built on land, without the consent of the owner, the owner may waive condemnation and let the company build the road, and treat the taking of the land actually taken and occupied by the road as a taking under eminent domain, and recover compensation for the land actually taken and damages resulting to the residue. The opinion by Judge Holt in Stewart v. Ohio River R. Co., 38 W. Va. 446, 18 S. E. 604, so holds, citing United States v. Manufacturing Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846, and other authorities. Johnson v. Parkersburg, 16 W. Va. 420, 27 Am. Rep. 779, holds that, as the Constitution prohibits damage to property from a public work without compensation, therefore action lies for such damage. So the Constitution says that private property shall not be taken for public use without compensation, and on similar principles action would lie by the owner for the land actually taken. Such recovery would, of course, give title to the right of way. He who owns the land at the time of the construction of the road may thus sue for damage to the residue of the tract, and his recovery once is for all time, and make good the right to

continue the operation of the road. But this is a right to a personal action, a money demand, and, if he does not sue, the right does not pass to his alienee. The damage is permanent and done at once to him then owning the property. Hence Cotts cannot sue for this permanent injury.

The plaintiff's house having been erected during his ownership, the declaration goes for damages to it, especially damages caused by jar from the passing of street cars close to it. He erected the house after the road was built. The compensation paid, covering future damages, as above stated, included this damage. The declaration also goes for damages from the use of wider and heavier cars than those originally used; they overhanging the pavement more. Is it possible that when once land is condemned for a railroad a mere change in the size of cars will call for additional damages? The proposition itself suggests its own refutation. Lewis on Eminent Domain, § 565, says: "It is a doctrine often repeated in the decisions that the damages must be assessed once for all, and that when once assessed according to law they include all the injuries resulting from the particular appropriation and from the construction and operation of the works in a reasonable and proper manner for all time to come. * * * The assessment is final and conclusive for all damages accruing to the owner from any and every physical effect from the construction and use of the canal, whether the same were clearly to be seen and easily to be estimated before the construction of the canal, or whether they were uncertain and doubtful results from such construction. * * * He whose land is taken for a railroad is to be equally protected. He is to receive all that equity and justice require, when the nature and extent of the property and rights to be affected are considered. The corporation acquire the right to construct their road in any suitable and proper manner, for their own convenience and public accommodation, and the right to vary and change that construction, within the established limits of the road, from time to time, forever, until the state resume the right and privilege of the corporation, or until the charter be altered, repealed, or annulled. Accordingly, the commissioners or jury should take into consideration and appraise all damages, direct or consequential, present and prospective, certain and contingent, which may be judged by them fairly to result to the landowner by the loss of his property and rights, and the injuries done thereto. * * * And for any loss or injury which results from building the road in a suitable and proper manner, the landowner can maintain no action against the company; the whole matter is concluded by the award of the commissioners or the verdict of the jury on appeal." "Compensation for all such damages, present and future, should be assessed once for all." 10 Am. & Eng. Ency. L. 1173.

For these reasons we affirm the judgment.

(129 Ga. 694)

## BROOKE v. DAY et al.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. PARTNERSHIP — CORPORATIONS—DEFECTIVE ORGANIZATION — LIABILITY OF INCORPORATIONS.

Where several persons unite to form a corporation, apply for and obtain a certificate of incorporation, inaugurate and conduct the business described in the application for incorporation in the corporate name, and contract a debt in behalf of the corporation during the course of the business, they will not be held liable as partners by reason of a defective organization of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 58.]

2. SAME—LIABILITY AS PARTNERS.

If, however, after obtaining the charter, they do no act indicating acceptance of the charter, or colorable compliance with its requirements, or user of the rights claimed thereunder, they will be liable as partners to third persons dealing with them, not in any corporate capacity, but as individuals using the corporate name solely as a trade-name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 58.]

(Syllabus by the Court.)

Error from Superior Court, Milton County; Geo. F. Gober, Judge.

Action by J. P. Brooke against J. L. Day and others. Judgment for defendants, and plaintiff brings error. Reversed.

Arnold & Arnold, for plaintiff in error. Smith, Hammond & Smith, for defendants in error.

EVANS, P. J. Brooke brought his action against Day, Wood, Hardin, Parker, and Anderson for an amount alleged to be due upon four promissory notes, signed: "Roswell Hdw. Co. [Seal.] per C. F. Wood. [Seal.]"—payable to the Beck & Gregg Hardware Company, and by it indorsed to plaintiff. The original petition alleged: "The defendants hereto petitioned Cobb superior court for the granting of a charter to the Roswell Hardware Company. The capital stock was to be $3,000, with the privilege of increasing the same to $10,000. The defendants were the petitioners for incorporation. The business proposed to be conducted was a hardware business at Roswell in Cobb county, Ga. Plaintiff alleges that the defendants, after the granting of said charter, embarked in the business therein proposed to be conducted under the name of the Roswell Hardware Company. Plaintiff alleges, however, that there was never any legal organization. The business was started by the defendants hereto, and all the defendants participated in the conducting thereof, and it is alleged that the capital stock of the corporation was never subscribed for, nor was the same ever paid in, nor was the same ever issued. The defendants, however, held out said business to the world as that of the Roswell Hardware Company, and bought and sold goods, and contracted debts. Plaintiff is a creditor of defendants; his debt having been contracted by the defendants in the operation of the said hardware store so conducted by them, as aforesaid. Plaintiff's indebtedness amounts to $1,695.38 principal, besides interest at 8 per cent. [per] annum thereon. Said indebtedness is evidenced by four promissory notes, described as follows, and which will be exhibited to the court: The first note, dated August 12, 1903, and signed in the name of the Roswell Hardware Company by C. F. Wood (plaintiff alleging that this is the name under which the defendants, as partners, did business) for the sum of $538 principal, with interest at 8 per cent. per annum, and due December 15, 1903, and payable to the Beck & Gregg Hardware Company. This note was properly indorsed to plaintiff." After fully describing the other three notes, "plaintiff alleges that under the facts aforesaid, the defendants being the petitioners for incorporation, and having inaugurated said business and conducting the same, and having failed to legally organize the corporation, having failed to subscribe for or pay in or even issue the capital stock, and having failed to accept the charter, that the defendants, as joint operators of said business, are liable to the plaintiff as partners, the plaintiff's debt having been contracted for goods and supplies furnished to said business and the said defendants so conducting said company. Plaintiff alleges that the business name adopted by the defendants, and which they held out as representing said business, was that of the Roswell Hardware Company. Plaintiff avers that the defendants are liable upon the notes and upon the indebtedness which the notes represent, because of the fact that the same represents supplies furnished the business, and he brings this suit against the defendants as joint and several promisors, and as joint contractors, and as copartners." The defendants specially demurred to the petition on the ground that it was duplicitous in the manner of declaring upon defendants' liability. Plaintiff undertook to remove this objection by an amendment, which, in substance, alleged that there had never been any legal organization of the corporation; that, in doing the business in the corporate name without corporate organization, the defendants adopted such name as a business name; and that the payee of the notes sued on never dealt with them as a corporation, but as proprietors of the business, and that defendants knew they were not a corporation. There was also a general demurrer, and other grounds of special demurrer. The court sustained the demurrer and dismissed the petition.

1, 2. If several persons obtain a charter to do a particular business, and thereafter engage in the business without doing any act indicating an acceptance of the charter, or colorable compliance with its requirements, or user of the rights therein claimed, they will be deemed partners relatively to credit-

ors who did not deal with them as a corporation. Unless something is done towards organization, so as to show an intention to conduct the business as a corporation, it will be presumed to be an individual enterprise. Parsons on Partnership (4th Ed.) § 56. But, where several persons unite to form a corporation, apply for and obtain a certificate of incorporation, inaugurate and conduct the business described in the application for incorporation, and in the corporate name contract a debt in the course of the business as a corporate liability, they will not be held liable as partners by reason of a defective organization of the corporation. 2 Morawetz on Priv. Cor. (2d Ed.) § 748. In order, however, to constitute a corporation de facto so as to exempt the members of the association from liability as partners, there must be a charter or law under which such corporation could exist with the powers it assumes to exercise, and a colorable compliance with the requirements of the charter or the law, and a user of the rights claimed under the same. Brown v. Atlanta Railway Co., 113 Ga. 468, 39 S. E. 71. Third persons dealing with an association as a legal entity, capable of transacting business and contracting with it as such, are estopped from denying the legality of its corporate existence, or its rights to contract as such. Petty v. B. & W. Ry. Co., 109 Ga. 666, 35 S. W. 82; Planters' & Miners' Bank v. Padgett, 69 Ga. 159; Imboden v. Etowah Mining Co., 70 Ga. 86.

The petition is so framed that some difficulty is presented in the application of these principles to the pleaded facts. While it is alleged that the notes upon which the action is predicated were given in the corporate name, it is also alleged that the members of the association were not acting as a corporate entity, but used the corporate name as a trade-name. The allegations respecting the inauguration of the business and its conduct, and the manner in which the payee of the notes dealt with the defendants, disclose no act referable to the charter after its procurement. Individuals who embark in a business cannot escape a personal liability because prior thereto they had secured a charter to conduct a business of the character in which they have engaged. They must do some act manifesting an attempt at corporate organization. If the corporation be defectively organized, the corporators will not be liable to third persons who deal with them as a corporation. The petition, however, negatives any act indicating an organization under the charter and an intention to claim the rights conferred thereunder. It is charged that at the very beginning they never accepted the charter; that they failed to perform the first act usual and customary in the organization of a corporation, to wit, subscribe for the capital stock or pay in any part thereof, or issue certificates to shareholders, and it is further alleged that the defendant knew they were not a corporation, and that the payee of the notes never contracted with them as a corporation; and that the defendants did business as partners under the name of the Roswell Hardware Company. The case is before us on demurrer, and the allegations of the petition must be taken as true. From these allegations we are forced to the conclusion that, if the debt evidenced by the notes was contracted in the manner and under the circumstances alleged in the petition as amended, the defendants would be liable as partners. But, if on the trial it should appear that the corporators did some act towards the organization of the corporation under the charter, and exercised some of the powers conferred by its charter, however defective the organization may have been, they would not be liable as partners. Or, if it appears that the payee of the notes contracted with the defendants as a corporation, the plaintiff would be estopped from denying that the notes sued on were a corporate debt.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 732)

## FORBES v. NOEL.

(Supreme Court of Georgia. Dec. 19, 1907.)

INJUNCTION—DISCRETION OF COURT

The evidence was of such character as to show no abuse of discretion in granting the injunction complained of.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between J. R. Forbes and M. E. Noel. From the judgment, Forbes brings error. Affirmed.

Maddox & Sims, for plaintiff in error. Lewis W. Thomas, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

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(129 Ga. 747)

## MILLER v. PERKERSON et al.

(Supreme Court of Georgia. Dec. 19, 1907.)

INJUNCTION—REFUSAL.

Under the pleadings and evidence there was no error in refusing to grant an injunction in this case.

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by D. F. Miller against J. D. Perkerson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

See 57 S. E. 787.

H. B. Moss, for plaintiff in error. D. W. Blair and R. N. Holland, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

(128 Ga. 306)

HARRIS et al. v. SHEFFIELD, Judge.

(Supreme Court of Georgia. May 15, 1907.)

EXCEPTIONS, BILL OF—SIGNING—MANDAMUS.

The application for mandamus in this case is to compel the judge to certify a bill of exceptions complaining of errors committed on the trial, and is controlled by the case of Harris v. Sheffield, 57 S. E. 305.

(Syllabus by the Court.)

Application by T. B. Harris and others for writ of mandamus to H. C. Sheffield, judge. Writ denied.

Byron Collins and Pope & Bennet, for plaintiffs. Peeples & Jordan, for defendant.

EVANS, J. Mandamus denied. All the Justices concur.

(129 Ga. 734)

CONNER v. FLANDERS.

(Supreme Court of Georgia. Dec. 19, 1907.)

WRIT OF ERROR—DISMISSAL—SERVICE OF BILL OF EXCEPTIONS.

The bill of exceptions containing no entry of service on the opposite party, or waiver thereof, the same is dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2775.]

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by L. A. Conner against G. F. Flanders. From the judgment, Conner brings error. Dismissed.

B. L. Strange, B. B. McCowen, and H. B. Strange, for plaintiff in error. Smith & Kirkland, for defendant in error.

EVANS, J. Dismissed. All the Justices concur.

(129 Ga. 636)

YEATES v. STATE.

(Supreme Court of Georgia. Nov. 15, 1907. Rehearing Denied Dec. 21, 1907.)

CRIMINAL LAW—WRIT OF ERROR—REVIEW—AFFIRMANCE—DIVIDED COURT.

The entire court concur in the opinion that none of the rulings complained of contain reversible error, except as to one ground of the motion for a new trial. In regard to the ground which complains that the presiding judge committed error in that portion of his charge where, after stating that the defendant insisted that the homicide was justifiable, he added that the defendant further insisted that there was an effort to illegally arrest him, that he resisted reasonably, "that he took the life of the deceased, not in any spirit of revenge, not with malice aforethought, but either in the heat of passion, or under such circumstances as that the offense would be reduced to voluntary manslaughter," the court is equally divided. Three members are of the opinion that this charge was a misstatement of the defendant's contentions, and was calculated to lead the jury to believe that the defendant admitted that the homicide was unlawful, and tended to prejudice the jury in regard to the defense of justifiable homicide. The other three members are of the opinion that, taking the charge in connection with its context, the judge substantially charged the jury that the defendant had two possible defenses against the charge of murder: (1) That the homicide was justifiable; and (2) that, if not so, it was no more than manslaughter. They further think that the evidence authorized a charge on both of these branches of the law, and that it appears from the record that the former decision in this case (127 Ga. 813, 56 S. E. 1017) was read in argument and commented on by counsel before the jury, which decision presented the theory of manslaughter; that the charge was not calculated to mislead the jury, and was not error merely because defendant's counsel contended before the jury that the homicide was justifiable; and that the charge was not reversible error. The court being equally divided in opinion as to this ruling, the judgment is affirmed by operation of law.

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

J. S. Yeates was convicted of homicide, and he brings error. Affirmed.

The judge charged the jury in part as follows: "The defendant in this case insists that this killing was done by him in self-defense; that at the time he fired the fatal shot, at the time he killed Mr. Freeman, the party named in the bill of indictment, he insists that he did it in order to save his own life or to prevent a serious personal injury, amounting to a felony, being committed upon his person by Mr. Freeman, or by the other parties engaged in the rencounter at the time. The defendant insists that at the time he fired the fatal shot it was necessary for him to do it in order to save his own life, that it was absolutely necessary for him to take the life of Mr. Freeman in order to save his own life, or that the circumstances surrounding him at the time, the conduct of the deceased, W. B. Freeman, and the others that were with him at the time, was such as to arouse in his breast—in the defendant's breast—the fears of a reasonable man, and that he really acted under the fears of a reasonable man in taking the life of the deceased; that is, that he acted under the fears of a reasonable man that his own life was in imminent danger at the hands of the deceased, or at the hands of the other parties who were aiding the deceased, or that his person was in imminent danger of a felony being committed upon it, an assault with intent to commit murder, with a weapon likely to produce death, an offense punishable by a term in the penitentiary, and that he took the life of the deceased in order to prevent what he believed was an effort to take his (the defendant's) life, or an effort to commit a felony upon his person, and not in a spirit of revenge. The defendant insists, further, that what he did was done to prevent an unlawful arrest which was sought to be made by the deceased, W. B. Freeman; that the deceased, in company with Sam Freeman and West Oliver, were attempting to illegally arrest him, illegally deprive him of his liberty, and that he resisted reasonably, in a reasonable way was attempting to resist, this unlawful arrest; that he took the life of the deceased,

not in any spirit of revenge, not with any malice aforethought, but either in the heat of passion, or under such circumstances as that the offense would be reduced to voluntary manslaughter. These are about the contentions, gentlemen, made by the defendant in this case—the defenses set up by the defendant." The law of justifiable homicide was fully charged, and also that of manslaughter.

R. G. Hartsfield, J. H. Gilpin and Jno. R. Cooper, for plaintiff in error. W. E. Wooten, Sol. Gen., Jno. C. Hart, Atty. Gen., J. J. Hofmayer, and W. D. Sheffield, for the State.

PER CURIAM. Judgment affirmed.

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(129 Ga. 785)

## HARRIS v. EPSTEIN et al.

(Supreme Court of Georgia. Dec. 21, 1907.)

RECEIVERS—APPOINTMENT—GROUNDS.

Under the pleadings and evidence in this case, it was not error to appoint a receiver.

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action between A. E. Harris and Jacob Epstein and others. From an order appointing a receiver, Harris brings error. Affirmed.

Minter Wimberly and Jesse Harris, for plaintiff in error. Edwin L. Bryan and J. D. McKenzie, for defendants in error.

HOLDEN, J. Judgment affirmed.

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(3 Ga. App. 325)

## FORT v. STATE. (No. 821.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

CRIMINAL LAW—APPEAL—REVIEW.

There was evidence of the defendant's guilt. The exception to the charge is not meritorious.

(Syllabus by the Court.)

Error from City Court of Americus; C. R. Crisp, Judge.

Seaborn Fort was convicted of crime, and brings error. Affirmed.

Allen Fort & Son, for plaintiff in error. Zack Childers, Sol., for the State.

POWELL J. Judgment affirmed.

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(129 Ga. 711)

## BALDWIN v. LOWE.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. WRIT OF ERROR—RIGHT TO SUE—INTERMEDIATE ORDER—FINAL DETERMINATION.

Save as to cases specially provided by law (such as exception to the grant or refusal of an injunction, or the appointment of or refusal to appoint a receiver), no case can be brought to this court by bill of exceptions, so long as the same is pending in the court below, unless the decision complained of would have been a final disposition of the case, had it been rendered as the excepting party claims that it should have been. Civ. Code 1805, § 5526.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 329–343.]

2. SAME—FINAL JUDGMENT—PLEA TO JURISDICTION—MOTION TO STRIKE—AMENDMENT.

Striking an imperfect plea to the jurisdiction filed by the sole defendant, and rejecting an amendment thereto, is not a final judgment, and does not dispose of the case, nor would it have done so had the amendment been allowed and the motion to strike been overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 370.]

3. SAME—DISMISSAL OF WRIT.

Where exception was taken to such a ruling, and it appears from the bill of exceptions that, after the plea to the jurisdiction had been stricken, the case was continued in order to allow the decision to be brought to this court for review, this was an interlocutory ruling, leaving the case still pending; and the writ of error will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 370.]

4. SAME—SUPREME COURT—JURISDICTION—AGREEMENT.

Parties cannot confer jurisdiction on this court by agreement to review such an interlocutory ruling while the case remains pending in the trial court; nor does it matter that the bill of exceptions recites that it was "considered" by counsel that, under the facts of the case, if the plea to the jurisdiction should be allowed, it would be a final disposition of the case. Such would not have been the legal result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 88, 370.]

(Syllabus by the Court.)

Error from Superior Court, Chattahoochee County; W. A. Little, Judge.

Action between A. W. Baldwin and J. G. Lowe. From a judgment in favor of the latter, the former brings error. Writ dismissed.

H. C. Cameron and H. V. Hargett, for plaintiff in error. C. C. Minter, for defendant in error.

LUMPKIN, J. Writ of error dismissed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 791)

## SHACKELFORD et al. v. ORRIS et al.

(Supreme Court of Georgia. Dec. 21, 1907.)

DEED—DESCRIPTION—UNCERTAINTY.

A deed described the land conveyed as follows: "A tract or parcel of land situate, lying and being in the county of Richmond and state of Georgia, containing fifteen acres, more or less, on the Louisville public road, about seven miles from Augusta; and being a portion of a tract of land bought by the party of the first part from Butler and Mims, and from Mrs. Francis Shopp, in 1878, deeds to said property being duly recorded in the clerk's office. The 15 acres hereby conveyed are bounded as follows: North by lands of T. B. Crouch and Wm. Stucker; south by lands of the party of the first part; east by the Louisville public road; and west by the Louisville plank road (Old Southwestern road)." *Held*, that such description afforded sufficient means of ascertaining and identifying by competent extrinsic evidence the land intended to be conveyed, and was therefore not void for uncertainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 65–79.]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by Sterling E. Shackelford and others against Anna A. Orris and others. Judgment for defendants, and plaintiffs bring error. Reversed.

Sterling E. Shackelford and others brought an action against Anna A. Orris to recover a described parcel of land. Upon the trial, plaintiffs offered in evidence, as a necessary link in the chain of title upon which they relied, a deed from Ann E. Wilkinson to Wm. E. Shackelford, trustee, dated May 24, 1893, and recorded January 17, 1894, in which the property sought to be conveyed was described as follows: "A tract or parcel of land situate, lying and being in the county of Richmond and state of Georgia, containing fifteen (15) acres, more or less, on the Louisville public road, about seven miles from Augusta; and being a portion of a tract of land bought by the party of the first part from Butler and Mims, and from Mrs. Francis Shopp, in 1878, deeds to said property being duly recorded in the clerk's office. The 15 acres hereby conveyed are bounded as follows: North by lands of T. B. Crouch and Wm. Stucker; south by lands of the party of the first part; east by the Louisville public road; and west by the Louisville plank road (Old Southwestern road)." Defendants objected to the deed going in evidence, on the ground that it was "void, because the description in it is too uncertain to be supplemented by parol evidence." Before ruling on the admissibility of the instrument, the court permitted the plaintiffs to introduce certain oral and documentary evidence tending, as claimed, to support the admissibility of the deed. Such documentary evidence, in our opinion, threw no light on the question. The substance of the testimony of James M. Rozier, so far as material, was as follows: He and William Hill own the land formerly owned by Crouch and Stucker. The line between the land of witness and the Wilkinson land is straight. Witness does not know whether the land between the land owned by Hill and the Wilkinson land is straight or not. The Louisville road and the Southwestern plank road are not parallel. They have crooks in them. D. V. Reeves testified: He is the county surveyor of Richmond county. He surveyed and platted a 15-acre tract of land, the same being a portion of the Wilkinson place, and described in the deed under consideration. "The north line of that tract is marked straight on the plat. It is straight on the ground. There may have been a time, perhaps, when there was a bend in it; but now, by agreement of all parties, the line has been made perfectly straight from the Louisville road across to the Southwestern plank road. It is not the north line, but it is the northeast line. I suppose it is what is called the north line of the property. We know it now as the 'Rozier' line. It is a straight line. This survey was begun at the intersection of Rozier's line, the northern line of this property and this Louisville plank road, a distance of 267 feet and 6 inches. * * * I ran another line to cut off 15 acres as I understood this deed to direct, running exactly parallel to Rozier's line, to the northern line. Both those lines were not the same length when I got them run. The line denominated the Rozier line is a little bit longer than the outside line, but this distance was put down on both lines as being the same to convey the idea I was laying off a parallelogram. The average length of this parallelogram is 2,435 feet, with a width of 267 feet, 6 inches, makes 15 acres. The deed did not describe that line at all, but described 15 acres, and gave me a base line and the Rozier line was the base line. Those two roads are straight, absolutely straight, for that little distance, 267 feet. I don't know what they are beyond that. They are not exactly parallel. The Louisville road makes a right angle with the north line. The other road is not exactly at right angles. To make up that deficiency, I put six inches to the width of the whole thing, and the average length is 2,435 feet by 267 feet, 6 inches; and that south line is a perfect parallel to the Rozier line. The north line is a straight line, perfectly straight." After hearing this evidence, the court rejected the deed, on the ground that it did not set forth with sufficient certainty the land sought to be conveyed therein, and granted a nonsuit, to which ruling plaintiffs excepted.

Salem Dutcher, for plaintiffs in error. Hamilton Phinizy and F. W. Copers, for defendants in error.

FISH, C. J. (after stating the facts as above). The question whether the deed excluded from evidence was void for uncertainty in the description of the land sought to be thereby conveyed may be readily solved, in our opinion, by the application of a few well-settled rules of construction of descriptions of realty sought to be conveyed. A deed will not be held to be void for uncertainty, if, by any reasonable construction, it can be upheld. 3 Washb. Real Prop. § 2320; Payton v. McPhaul, 128 Ga. 510, 58 S. E. 50. In other words, that construction which renders the instrument valid and operative shall be adopted, rather than one which renders it void. Martindale on Conveyancing, § 100. If the description of the premises given in a deed affords sufficient means of ascertaining and identifying the land intended to be conveyed, this is sufficient to sustain the conveyance, notwithstanding there may be errors or inconsistency in some particulars. Id. § 87; 2 Devl. on Deeds, §§ 1012, 1016; Johnson v. McKay, 119 Ga. 196, 45 S. E. 992, 100 Am. St. Rep. 166; Payton v. McPhaul, supra. Where, in a deed, there are two descriptions of the premises conveyed, and there is a clear re-

pugnance between them, the court will look into the surrounding facts and give effect to the description which is most definite and certain, and which will carry out the evident intention of the parties. Martindale on Conveyancing, § 97; Wade v. Deray, 50 Cal. 376; Raymond v. Coffey, 5 Or. 132; Driscoll v. Green, 59 N. H. 101. Under the doctrine, "Falsa demonstratio non nocet," a false description may be rejected, provided that, after so doing, there is left a sufficient description to identify the property intended to be conveyed. Oliver v. Henderson, 121 Ga. 836, 49 S. E. 743, 104 Am. St. Rep. 185; 4 Am. & Eng. Enc. L. 797. What is most material and most certain in a description shall prevail over that which is less material and less certain. Harris v. Hull, 70 Ga. 831. "Where a deed contains two descriptions of the land conveyed, one general, the other particular, if there is any repugnance, the latter will prevail." Hannibal & St. Joseph R. Co. v. Green, 68 Mo. 169; 2 Devl. on Deeds, § 1039, and a number of cases cited. To these rules may be added another, that where all other means of ascertaining the true construction of a deed fail, and a doubt still remains, that construction must prevail which is most favorable to the grantee. Harris v. Hull, supra; Tyler on Boundaries, 123.

In the deed under consideration the general description, viz., "A tract or parcel of land situate, lying and being in the county of Richmond and state of Georgia, containing fifteen acres, more or less, on the Louisville public road, about seven miles from Augusta; and being a portion of a tract of land bought by the party of the first part from Butler and Mims, and from Mrs. Francis Shopp, in 1878, deeds to said property being duly recorded in the clerk's office"—is immediately followed by the particular and more definite description, to wit: "The 15 acres hereby conveyed are bounded as follows: North by lands of T. B. Crouch and Wm. Stucker; south by lands of the party of the first part; east by the Louisville public road; and west by the Louisville plank road (Old Southwestern road)." The general description, coupling the number of acres with the phrase "more or less," must be taken as excluding an intention to convey an exact quantity, and therefore it is evidently inconsistent with and repugnant to the subsequent particular description specifying a definite number of acres intended to be conveyed. This being true, under the rule followed in Hannibal & St. Joseph R. Co. v. Green, supra, and a number of adjudicated cases cited in 2 Devlin on Deeds, § 1039, the particular and definite description must prevail. This construction is also in complete harmony with the other rules referred to above. This construction being adopted, the definite number of 15 acres of land is described as being bounded north by lands of Crouch and Stucker, south by lands of the grantor, east by the Louisville public road, and west by the Louisville plank road. This description is sufficient, even if the whole of the general description were rejected, as the deed is headed, "Georgia, Richmond County," and prima facie refers to land located in that county (Horton v. Murden, 117 Ga. 72, 43 S. E. 786); and, under the ruling in Walden v. Walden, 128 Ga. 126, 57 S. E. 323, as a definite number of acres was conveyed, the fact that the tract was bounded on one side by the land of the grantor does not render the deed void for uncertainty. It was held in the case last cited: "Where a mortgage described the land conveyed by it thus: 'One tract or parcel of land lying in Jefferson county, Georgia, in the 79th district, G. M., containing one hundred acres, and bounded as follows: On north by my own land; east by land of K. P. Walden; on south by W. L. Philips; on west by Sarah and Emily Walden'—such description was not void for uncertainty. Parol evidence to identify such description with the land to which it applied was admissible." In the opinion in that case it was distinguished from Huntress v. Portwood, 116 Ga. 351, 42 S. E. 513, in that in the Walden Case a definite number of acres and the boundaries on three sides were given, and it was held that the fourth line could be readily located, while in the Huntress Case the quantity of land was not definitely fixed, but was described as "more or less," and therefore the line between the land sought to be conveyed and that retained by the grantor was necessarily too indefinite. Under the particular description of the land conveyed in the deed in the case at bar, we think the land can be readily located by extrinsic evidence, and it seems that it was so located by the surveyor who testified in the case. See Atlanta & West Point R. R. Co. v. Atlanta, B. & A. R. R. Co., 125 Ga. 540, 54 S. E. 736.

Our conclusion, therefore, is that the court erred in ruling out the deed and directing a nonsuit.

Judgment reversed. All the Justices concur.

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(129 Ga. 727)

## DOTSON v. STATE.

(Supreme Court of Georgia. Dec. 19, 1907.)

1. HOMICIDE—DEGREES—INSTRUCTIONS—VERDICTS.

On the trial of one accused of murder, where the evidence on behalf of the state showed a case of willful murder, and that on behalf of the accused and his statement made a case of justifiable homicide, neither involving any question of manslaughter, it was not error to charge the jury that there could be only one of two verdicts, either a verdict finding the accused guilty of murder or one finding him not guilty; the court having also charged as to the right to recommend that the defendant be imprisoned for life, if found guilty of murder.

2. SAME—PRIOR DIFFICULTY.

Although it may not have been a perfectly clear and exact statement of the law as a general rule, under the special facts of this case, and in view of the fact that the difficulty referred to in the charge was a mere exchange of

words, it did not constitute reversible error that the court charged as follows: "If you find the truth to be that he [the defendant] went up in the darkness of the night to the door of that house, and while John Willbanks was not making any effort to get to him, or to inflict any kind of injury upon him, he came to that door, and opened fire upon Willbanks and tried to kill him, it would be your duty to convict the defendant, and that would be true, regardless of whether they had any difficulty in the morning or any words in the morning, or regardless of anything with reference to any disagreement between them that may have been had between them with regard to the woman in the case."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 65–69.]

3. SAME—REASONABLE FEARS—ACTUAL DANGER.

Where a case against one accused of murder involved the doctrine of reasonable fears, it was error to charge as follows: "An apparent necessity, acted upon in good faith, is the equivalent of a real necessity, but it is for you to determine whether or not this deceased had his gun pointed and aimed at the defendant at the time, and whether he was undertaking to inflict injury upon him or to take his life." Such a charge first gave the theory of reasonable fears, but then practically limited the defense to actual danger, and to the question whether the deceased was, in fact, undertaking to inflict injury upon the accused or to take his life.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 153–163, 616, 617.]

4. CRIMINAL LAW—INSTRUCTIONS — REQUESTS —REASONABLE DOUBT.

If, in a criminal trial, the judge fully and fairly charged the jury concerning the law of reasonable doubt, he was not bound to give a request instructing them, in effect, that if they had a reasonable doubt as to whether the circumstances surrounding the defendant at the time of the killing of the deceased were sufficient to excite the fears of a reasonable man that his life was in danger, or that a felony was about to be committed upon his person, then it would be their duty to give the defendant the benefit of such doubt and acquit him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1904–1922, 2011.]

5. SAME.

None of the other grounds of the motion for a new trial require a reversal.

(Syllabus by the Court.)

Error from Superior Court, Appling County; T. A. Parker, Judge.

Randolph Dotson was convicted of murder, and he brings error. Reversed.

W. W. Bennett, for plaintiff in error. John W. Bennett, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Randolph Dotson was indicted for the murder of John Willbanks. He was found guilty, and, upon recommendation of the jury, sentenced to the penitentiary for life. He moved for a new trial. The motion was overruled, and he excepted.

1. The evidence on behalf of the state showed a case of willful murder, growing out of ill will on the part of the accused toward the deceased on account of jealousy in regard to an immoral woman. The case made by the statement of the accused and the evidence introduced by him was one of justifiable homicide. The evidence on behalf of neither side involved manslaughter. It was therefore not error to charge that there could be only one of two verdicts, either that of guilty of murder, or that of not guilty; the court having also informed the jury that, if they found the defendant guilty, they might recommend punishment by imprisonment for life.

2. Error was assigned because the court charged as follows: "If you find the truth to be that he [the defendant] went up in the darkness of the night to the door of that house, and while John Willbanks was not making any effort to get to him, or to inflict any kind of injury upon him, he came to that door and opened fire upon Willbanks and killed him, it would be your duty to convict the defendant, and that would be true, regardless of whether they had any difficulty in the morning or any words in the morning, or regardless of anything with reference to any disagreement between them that may have been had between them with regard to the woman in the case." While this charge, taken alone, is not a very clear-cut enunciation of a principle of law, and under some circumstances might be held to be erroneous, yet, under the facts of this case, it does not require the grant of a new trial. The occurrence of the morning was a mere passing discussion about a woman, of whom both parties appeared to have been enamored. There was no fight, no assault, and nothing of any character which could have reduced the crime from the grade of murder, or have justified the homicide. The charge was not reversible error.

3. We are constrained to reverse the judgment because of the error referred to in the third headnote. A reversal is the more necessary because this charge occurred at the close of the general charge, and left the last impression on the minds of the jury, and because there were other more or less slight inaccuracies in the charge.

4. Error is assigned in the motion for a new trial because the court refused to give in charge the following request: "Gentlemen of the jury, if, after a thorough consideration of all the facts and circumstances of this case, there should remain in your minds a reasonable doubt, as to whether the circumstances surrounding this defendant at the time of the killing of the deceased were sufficient to excite the fears of a reasonable man that his life was in danger, or a felony was about to be committed upon his person, then it would be your duty to give the defendant the benefit of that doubt, and acquit him." This request is substantially taken from the seventh headnote in Mitchell v. State, 71 Ga. 128. Of that decision it may be said that it was concurred in by two justices, not by the entire bench, and that, while it has often been cited on the subject of dying declarations, it has not been followed or approved as to requiring the presiding judge, not only to charge correctly in reference to

the doctrine of reasonable doubts, but also to single out particular points and to reiterate that doctrine and apply it separately to each. In McDuffie v. State, 90 Ga. 786, 17 S. E. 105, it was held that "where, in a criminal trial, the judge fully and fairly charged the jury concerning the law of reasonable doubt, he was not bound to give a request instructing them, in effect, that if they have a reasonable doubt as to the existence of some particular and specially enumerated fact, or what should be the proper inference therefrom, it would be their duty to give the accused the benefit of such doubt." In the opinion it was said (page 788 of 71 Ga.): "Even if following the rule in the Mitchell Case, supra, which certainly went a great length, the court could properly have given this request to the jury, we do not think he was bound to do so." In Delk v. State, 92 Ga. 453, 17 S. E. 269, a request to charge was preferred almost in the exact language of that involved in Mitchell's Case. The presiding judge declined so to charge, and this was assigned as error. It was held that, the general charge being full and fair on the subject of reasonable doubt in connection with the law of self defense, including reasonable fears, there was no error in refusing to give the request in charge, "even if this request was a correct statement of the law." See, also, Carr v. State, 84 Ga. 250, 10 S. E. 626; Nix v. State, 97 Ga. 211, 22 S. E. 975; Williams v. State, 123 Ga. 138 (6), 51 S. E. 322; Cress v. State, 126 Ga. 564 (3), 55 S. E. 491; Tolbert v. State, 127 Ga. 827, 56 S. E. 1004.

5. The other grounds of the motion for a new trial were not such as to require a reversal. The evidence was sufficient to sustain the verdict. The requests to charge, which were refused, in so far as they were proper, were covered by the general charge. One of the grounds was practically disapproved by the note of the presiding judge.

Judgment reversed. All the Justices concur.

(129 Ga. 755)

## TOWN OF WRENS v. SAMMONS.

(Supreme Court of Georgia. Dec. 20, 1907.)

1. WRIT OF ERROR—HARMLESS ERROR.

In trespass to land, where the defendant admits the plaintiff's title, proof thereof is not required. If, notwithstanding such admission, the plaintiff offers a deed to show title to the premises, and it is admitted over objection, it is immaterial whether the objection be well taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4171.]

2. SAME.

In a suit to recover unliquidated damages, a defendant will not be heard to complain that the verdict is not so large as the testimony warranted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3. Appeal and Error, §§ 4052–4062.]

(Syllabus by the Court.)

Error from Superior Court, Jefferson County; B. T. Rawlings, Judge.

Action by C. N. Sammons against the town of Wrens. Judgment for plaintiff, and defendant brings error. Affirmed.

Phillips & Phillips and B. F. Walker, for plaintiff in error. Cain & Hardeman, for defendant in error.

EVANS, P. J. This was an action by Mrs. C. N. Sammons against the town of Wrens to recover damages for the opening of a street through her land. The town admitted that it laid out a street through the plaintiff's land; but pleaded that she had sold the town the right to open the street for a named sum, which had been tendered to her. On the trial the plaintiff offered a deed to prove her title to the land. Objection was made to the deed being received in evidence on the ground of the indefinite description of the land. The deed was allowed in evidence. The plaintiff denied any agreement with the town authorities to construct a street through her land. The town submitted witnesses to prove such an agreement. The only testimony on the subject of damages was that the land was worth $2,000 before the construction of the street, and $1,500 after the street was laid out. The jury returned a verdict for $100.

The defendant moved for a new trial on the ground that the verdict was without evidence to support it, and that the court erred in admitting in evidence a certain deed under which the plaintiff claimed title. The court refused a new trial, and exception was taken by the defendant. The points stated in the headnotes control the case, and require no elaboration. That stated in the first syllabus is axiomatic, and the proposition contained in the second is sustained by the case of Pullman Co. v. Schaffner, 126 Ga. 609, 55 S. E. 933, 9 L. R. A. (N. S.) 407; Mullins v. Murphy, 69 Ga. 754.

Judgment affirmed. All the Justices concur.

(129 Ga. 716)

## JACKSON v. WILLIAMS.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. HUSBAND AND WIFE — CONVEYANCE TO WIFE—PRESUMPTIONS.

If a husband buys and pays for land, and takes a deed in his wife's name, a presumption arises of a gift to her; but this presumption is rebuttable. Civ. Code 1895, § 3160.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 253.]

2. HOMESTEAD—SETTING APART—VALIDITY.

A husband cannot take a homestead in land belonging to his wife. A homestead so set apart is invalid as against a judgment creditor of the wife. Civ. Code 1895, § 2827; Williams v. Webb, 99 Ga. 301, 25 S. E. 654; Bennett v. Trust Co. of Ga., 106 Ga. 578, 32 S. E. 625.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 125.]

3. EXECUTION—PROPERTY SUBJECT.

The verdict finding the property subject to the execution levied upon it was demanded by

the evidence, and there was no error in directing it accordingly.

(Syllabus by the Court.)

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action by L. M. Williams against G. R. Jackson. Judgment for plaintiff, and defendant brings error. Affirmed.

G. Y. Harrell and B. F. Harrell, for plaintiff in error. J. E. Chapman and E. T. Hickey, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 788)

## YANCEY v. KARWISCH.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. FORCIBLE ENTRY AND DETAINER—DISMISSAL—COUNTER AFFIDAVIT.

Where an affidavit was made for the purpose of having an intruder on land evicted therefrom, under section 4808 of the Civil Code of 1895, and a counter affidavit was interposed and the papers returned to the superior court for trial, upon the call of the case it was error to dismiss the counter affidavit because of nonappearance of the defendant.

2. SAME—TRIAL.

When the counter affidavit was dismissed, no case was left in court to be tried, and it was error to allow the plaintiff thereafter to proceed to introduce evidence, and to take a verdict and judgment.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by H. Karwisch against M. J. Yancey. From a judgment for plaintiff, defendant brings error. Reversed.

W. C. Munday and Hines & Jordan, for plaintiff in error. W. H. Terrell, for defendant in error.

LUMPKIN, J. H. Karwisch made affidavit, alleging that he in good faith claimed the right of possession of a certain described strip of land; that it was in the hands of Mrs. Mary Yancey, who did not in good faith claim a right to the possession of such property, and yet refused to abandon the same. This affidavit was placed in the hands of the sheriff of Fulton county for the purpose of having Mrs. Yancey ejected as an intruder, under section 4808 of the Civil Code of 1895. The defendant delivered to the sheriff a counter affidavit, stating that she did in good faith claim a legal right to the possession of the land described in the affidavit of Karwisch; and also that the case involved the same issue that had previously been tried in the superior court, and determined in her favor. The papers were returned to the superior court for trial. When the case was called, the defendant did not appear, and the presiding judge dismissed the counter affidavit on the ground that she failed to appear to prosecute it. After this, the court permitted the plaintiff to proceed with the trial, and a verdict was rendered in favor of the plaintiff, and a judgment was entered that he should recover of the defendant possession of the premises described. The defendant excepted, and assigned error on the dismissal of her counter affidavit, and also because the court, after such dismissal, allowed the plaintiff to proceed with the trial and to obtain a verdict and judgment against her.

1. Where the plaintiff makes and places in the hands of the sheriff an affidavit in terms complying with the statute, for the purpose of ejecting an intruder, the sheriff is required at the earliest practicable day to exhibit such affidavit to the person described as being in possession of the land, and to turn such person out of possession, unless a counter affidavit is tendered to him. If a counter affidavit is tendered, it is the duty of the sheriff not to turn the party out of possession, but to return both affidavits to the clerk of the superior court of the county where the land lies, "the contending parties shall be remitted to their respective rights," and upon the affidavits "an issue shall be made up and tried by a jury, according to the laws of this state." Civ. Code 1895, §§ 4808, 4810. When the affidavits have been returned to the superior court, the person seeking to have the alleged intruder evicted occupies a position analogous to that of a plaintiff in an ordinary proceeding, and the person filing the counter affidavit a position similar to that of a defendant. When the case is reached for trial, the burden of proof is upon the plaintiff.

The defendant's counter affidavit should not be dismissed for want of prosecution, or because the defendant does not appear. Here the defendant, in addition to the statutory denial of the allegation in the plaintiff's affidavit, also pleaded a former adjudication; but this added allegation did not destroy the effect of her compliance with the statute, which sufficed to cause the affidavits to make a case for trial in the superior court. Dismissal of a case for want of prosecution is applicable to the party whose duty it is to prosecute, not to one who stands on the defensive by denying the plaintiff's alleged right of recovery. There may be cases where a defendant sets up a cross-action, or assumes the position where the duty of moving properly devolves upon him; but this is not one of them. The ruling of the court in this case was somewhat like that sought in the case of Andrews v. Andrews, 85 Ga. 276, 11 S. E. 771, where a motion was made to strike a plea because it was not supported by the evidence. The striking of the counter affidavit was error. McConnell v. Bryant, 38 Ga. 639. Rule of the superior court No. 22 (Civ. Code 1895, § 5653) imposes a penalty for disregard of the rule requiring prompt procedure. It does not authorize the striking of a defendant's plea because he does not appear at all.

2. Under the procedure provided by the statute for the summary eviction of an in-

truder, the defendant will be turned out of possession by the sheriff unless a counter affidavit is tendered. It is such counter affidavit alone which makes a case for the court to try, or which gives the superior court jurisdiction. There is no regular petition and prayer for judgment, no pleadings as in an ordinary litigation, no process bringing the defendant before the court.

The affidavit and counter affidavit are returned, and upon them an issue is made up and tried by a jury. The whole proceeding is summary in character, and dependent upon the statute. When the counter affidavit was dismissed, no case was left in court to try. The issue provided for by the statute was rendered impossible. There is no law for a plaintiff in such a proceeding to make up an issue on his own affidavit alone, or to have a recovery predicated upon it, in the absence of any counter affidavit. Doubtless, if the counter affidavit had not been dismissed, the court might have allowed the plaintiff to make up an issue and proceed before the jury, though the defendant was absent. But, when he struck the counter affidavit, he left no case in court to try. The only thing which could be done was to have the plaintiff's affidavit returned to the sheriff. Similar rulings have been made in cases where counter affidavits interposed to prevent the enforcement of distress warrants have been dismissed by the court (Habersham v. Eppinger & Russell, 61 Ga. 199; Griggs v. Willbanks, 96 Ga. 744, 22 S. E. 327, and cases cited; Withers v. Hopkins Place Savings Bank, 104 Ga. 89 [3], 30 S. E. 766), also in proceedings to dispossess a tenant holding over beyond the end of his term (Clark v. Lee, 80 Ga. 617, 6 S. E. 170, s. c. 86 Ga. 28, 12 S. E. 184), and a proceeding by the proprietor of a sawmill to foreclose a lien on the product thereof (Murphey v. McGough, 105 Ga. 816, 31 S. E. 757).

Judgment reversed. All the Justices concur.

(129 Ga. 744)

## ROOKS v. TUCKER et al.

(Supreme Court of Georgia. Dec. 19, 1907.)

1. EJECTMENT — PLEADING — FACTS SHOWING TITLE.

A plaintiff bringing suit for land in statutory form can allege facts showing title inside the petition, instead of annexing thereto an abstract of title.

2. WRIT OF ERROR—REVIEW—WAIVER OF OBJECTIONS.

Where to a suit for land in statutory form the defendant files no plea, and does nothing except to make, at the trial term, an ineffectual motion to dismiss the petition because no abstract of title is annexed thereto, he cannot by direct bill of exceptions have set aside a verdict for the plaintiff for the premises sued for on the ground that such premises are insufficiently described in the petition.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by L. A. Tucker and others against A. H. Rooks. Judgment for plaintiffs, and defendant brings error. Affirmed.

F. W. Capers, for plaintiff in error. Pierce Bros., for defendants in error.

HOLDEN, J. The petition of the plaintiffs, bringing complaint for land in the statutory form, was duly paragraphed. The petition described a tract of 130 acres of land, and described the land sued for as "40 acres of the northern part of said tract of land." There was no other description of the 40 acres sued for in the pleadings or in the evidence. Plaintiffs alleged a statement of facts in lieu of an abstract of title, in which they set forth that the land contended for was purchased from Rufus Wren by their father, Isaac Allen, in 1866 or 1867, and that the latter from that date until his death in 1897 was in peaceable, quiet, and uninterrupted possession of the land, and that they claimed the right of possession of the land upon the adverse possession of their father, of whom they were the sole heirs at law. Defendant filed no answer to the suit, but upon the trial thereof moved to dismiss the petition on the ground that no abstract of title was attached thereto. This motion the court overruled, and, upon some evidence being introduced by the plaintiffs as to the purchase of the land by their father, and his death, upon motion of the plaintiffs on the ground that the defendant had filed no answer, and that they were entitled to a verdict upon the petition, the court directed a verdict in favor of the plaintiffs "for the land sued for in the within petition." To this ruling of the court directing a verdict, the defendant filed his bill of exceptions, and alleges that error was committed (1) in that the court erred in overruling his motion to dismiss the petition because of the absence of an abstract of title; and (2) because there was in the petition no sufficient description of the land sued for.

1. The plaintiffs, instead of attaching an abstract of title to the petition, embodied a statement of their source of title in the petition. We can conceive of no good reason why a petition should be dismissed because the showing of title is set forth on the inside, instead of the outside of the petition. The object of the statute is to require the plaintiff to put the defendant on notice of the source through which the plaintiff claims title; and the method by which this is done is directory rather than mandatory. The defendant made no complaint that the abstract of title was defective. His only complaint was that no abstract of title was attached to the petition, but it appears that the plaintiff did disclose in the body of the petition the source through which they claimed to derive title. Even if what plaintiffs alleged as constituting their source of title could not be technically called an abstract of title, the allegations made, if true, were sufficient to

prima facie show title to the land. They averred that they were the sole heirs at law of Isaac Allen, and that he was in adverse possession of the land for more than 20 years prior to his death in 1897.

2. The defendant filed no answer or demurrer to the petition. The only effort he made to defend was to appear at the trial term and move to dismiss the petition because there was no abstract of title attached thereto. This motion was overruled, and the court, upon motion of the plaintiffs, directed a verdict in their favor. Defendant now complains in his bill of exceptions that the court should not have directed a verdict because of insufficiency of the description of the land sued for contained in the petition, but he did not make this objection in the court below. Can he make it for the first time in this court? In the following cases it was held that the description of the premises involved was too uncertain and indefinite: Grace v. Martin, 83 Ga. 246, 9 S. E. 841; Harwell v. Foster, 97 Ga. 264, 22 S. E. 994; Hicks v. Brinson, 100 Ga. 595, 28 S. E. 380; McCullough v. Railway Co., 106 Ga. 275, 32 S. E. 97; Lee v. English, 107 Ga. 152, 33 S. E. 39. But in each of these cases the facts were different from the facts in this case, and in none of them was the question now under consideration involved. In the present case the defendant made no point in the court below on the insufficiency of the description of the premises contained in the petition, and filed no plea whatever. Hence the allegations in the petition, being duly paragraphed, were, according to Civ. Code 1895, § 4961, to be considered by the court as being true. Could the defendant, by filing a bill of exceptions, have the verdict set aside because it was void by reason of the premises not being described in the petition with sufficient definiteness and certainty, when he did not make this point in the court below? In Halman v. Moses & Gerrard, 39 Ga. 708, 712, this court says: "Generally, when a party permits proceedings to be had, in the progress of his case, without making any objection, the court will hold him to have waived the objection, and will not relieve him against the consequences of the proceeding, to which he did not object at the proper time." See, also, Eaves v. State, 113 Ga. 749, 39 S. E. 318; Mayor v. Johnson, 84 Ga. 279, 10 S. E. 719; Roberts v. Keeler, 111 Ga. 181, 36 S. E. 617; Phillips v. Railway Co., 112 Ga. 197, 37 S. E. 418. In the Roberts Case, supra, it is said: "* * * A new trial will not be granted in a case where the petition is fatally defective in substance. In such a case the remedy is by general demurrer before a trial on the merits, or by motion in arrest after verdict." There is no exception to the judgment in this case, nor was any motion for a new trial made. The verdict is not different from the one prayed for. If the premises are not sufficiently described, the trouble is primarily in the petition, to which no objection was made in the court below. It is in this court, by bill of exceptions, that the defendant makes his first objections to the petition, since his objection to the verdict, which follows the petition, is practically an objection to the petition. His failure to object to the petition places him where he cannot, by direct bill of exceptions, object to the verdict, as the verdict follows the petition. The defendant cannot have the verdict set aside by a direct bill of exceptions, when it appears that he filed no plea to the suit, in which the petition was duly paragraphed, and made no objections to the petition, or to the direction of a verdict, even though the premises sued for were not sufficiently described in the petition or verdict, when it appears that the verdict is precisely the verdict prayed for in the petition.

The judgment of the court below is affirmed. All the Justices concur.

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(129 Ga. 660)

## LONG v. McINTOSH et al.

(Supreme Court of Georgia. Dec. 20, 1907.)

1. TROVER—WHEN MAINTAINABLE.

Trover may be maintained by the maker of a negotiable promissory note against the payee, after the same is fully paid, if the payee, having the note in his possession, refuses to deliver it to the maker upon demand, or if, after payment, the payee disposes of the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 60–71.]

2. INJUNCTION—PROSECUTION OF ACTION.

Where a suit was brought by the maker of a promissory note against the payee and his agent to recover possession of it, on the ground that it had been fully paid, and its possession had been refused on demand, it furnished no ground for an equitable proceeding on behalf of the payee that he denied the full payment of the note, and that he could not obtain judgment on it in the trover suit, or that the city court in which that suit had been brought had no equitable jurisdiction.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action by N. G. Long against James McIntosh and R. E. Hudgins. Judgment for defendants, and plaintiff brings error. Affirmed.

R. E. Hudgins and James McIntosh brought an action of trover in the city court of Elberton against the Bank of Elberton, J. H. Blackwell, H. B. Hunter, and N. G. Long, seeking to recover a certain promissory note, alleged to be of the value of $2,890.03. The petition alleged that the note was made by them payable to the order of N. G. Long, and was deposited by him with the Bank of Elberton as his agent, for the purpose of collecting the amount of it from them; that it had been paid off; that Hunter and Blackwell were officers of the bank, and in that capacity and as individuals refused to deliver up the note; that the defendants were all

citizens of Elberton; and that they colluded and conspired to hold the note from the plaintiffs, to their damage in the sum of $2,890.03. The copy note attached to the petition was dated February 6, 1895, due December 1st, after date to the order of N. G. Long, for the principal sum of $1,323.37, with interest at 8 per cent. per annum. It was signed by Hudgins and McIntosh, and indorsed by the Elberton Loan & Savings Bank and N. G. Long. Long answered the action of trover, admitting that the note had been placed with the bank of Elberton for collection, but denying that it had been paid, or that the plaintiffs were entitled to its possession. He alleged that the note was his property, and not that of the plaintiffs. The other defendants answered that the bank of Elberton had received the note from Long for collection, but denied any collusion or conspiracy. They could not say whether or not the note had been paid to Long prior to its delivery to the bank for collection. Long filed his equitable petition, seeking to have the action of trover enjoined. He alleged, in brief, as follows: He is the owner of the note in controversy. It was transmitted in the regular course of business to the bank for collection. The bank and its officers have no interest in the note or its proceeds. It was long past due and unpaid, and the principal and accumulated interest due to Long amounted to $2,890.03. McIntosh and Hudgins brought the trover suit above referred to, and made an affidavit in order to obtain bail process. The city court of Elberton has no jurisdiction to adjudicate and determine the issues arisng out of the bail and trover proceeding, for the reason that the plaintiff is a bona fide owner and holder of the note, and in that suit he cannot have a judgment upon it. If the allegations of the plaintiffs in the trover case were true, the note would have no value at all except as a mere paper. It is past due, and any person taking it would receive it with notice of dishonor and subject to any defenses which the makers might have to a suit upon it. In a trover suit the plaintiff has a right to elect an alternative verdict, a money verdict for the value of the property, or a verdict for the return of the property; and, if the plaintiffs in that case should be allowed to take a money verdict against any of the defendants therein, it might result in irreparable wrong. An action of trover is not the proper remedy, but the proper proceeding would be by an equitable action to compel the delivery and cancellation of the note. The city court of Elberton has no equitable jurisdiction. No judgment on the note in favor of this plaintiff can be rendered in the trover case, and a multiplicity of litigation will result. It was prayed that further prosecution of the trover suit should be enjoined, and that the petitioner should have judgment against Hudgins and McIntosh jointly and severally in the sum of $2,890.03. The defendants substantially denied the allegations of the equitable petition. On the hearing of the application for injunction it was denied, and Long excepted.

**Sam L. Olive, J. H. & L. F. McClelland, for plaintiff in error. Jos. N. Worley, for defendants in error.**

LUMPKIN, J. (after stating the facts as above). The controlling question in this case is whether the maker of a negotiable promissory note past due can bring an action of trover against the payee to recover possession of it, on the ground that it has been paid in full, and that delivery of it has been refused on demand. It requires no argument or citation of authorities to establish the general proposition that promissory notes, bills, and bonds are personal property, which may be the subject of conversion, and for which an action of trover will lie. If a note should be stolen from its owner, or if it should be placed with another for a particular purpose, and should be wrongfully converted, it will not be denied that an action of trover could be brought to recover it.

But it is contended that, after it has matured and been paid, it ceases to have any value, except as a mere piece of paper, and that its possession cannot be recovered from the holder by a trover suit. The general commercial practice has long been to require the delivery of a note to the maker when he pays it in full. It has been declared that the holder of a negotiable promissory note is not entitled to demand payment without delivering up such note, at least where it is payable to bearer, or to order and indorsed. Such appears to be the rule in England. In America the authorities are not all agreed on the point. In England it has been held in some cases that no recovery can be had at law upon such a negotiable instrument alleged to be lost or destroyed, the title to which might pass by delivery; but that relief must be sought in equity which in granting it could require a proper indemnity. Story on Promissory Notes (6th Ed.) §§ 106–111. The contention that trover will not lie for a promissory note after payment is based on the idea that it is no longer of value. This, we think, is not sound in principle. Before payment, the note is the evidence of indebtedness. If it is lost or destroyed by accident, the debt is not thereby discharged. After maturity, or even after payment, it is still valuable as evidence. If suit should be brought upon it, the production of it by the payee or transferee would make a prima facie case, if it were not canceled. On the other hand, its possession by the maker would be valuable evidence to show payment. So that a note, even after payment, has a value as evidence. It is property and valuable to the owner, although it may not have a market value. In Moody v. State, 127 Ga. 821, 56 S. E. 993, a written notice which was

fastened to a telephone pole, and which warned trespassers against hunting or fishing on land, was held to be property which might be the subject of malicious mischief. Suppose, instead of a promissory note, upon payment of the debt, the debtor should receive a receipt, and that this should be stolen or wrongfully converted, would there be any doubt of its value as evidence, and that the owner might recover it in an action of trover? In Fullam v. Cummings, 16 Vt. 697, it was held that where a debtor had made copies of his creditor's accounts against him, and the creditor had got possession of such copies and refused to redeliver them, the debtor might bring an action of trover therefor.

The best-considered case on the question now before us which has come to our notice is that of Stone v. Clough, 41 N. H. 290, in which it was held that "trover may be maintained by the maker of a promissory note against the payee after the same is fully paid, if the payee having the note in his possession refuses to deliver it to the maker upon demand, or if, after payment, the payee disposes of the note." See, also, Inhabitants of Otisfield v. Mayberry, 63 Me. 197; Buck v. Kent, 3 Vt. 99, 21 Am. Dec. 576; Pierce v. Gilson, 9 Vt. 216; Fletcher v. Fletcher, 20 Vt. 98; Spencer v. Dearth, 43 Vt. 98; Olson v. Thompson, 6 Okl. 576, 52 Pac. 388. In Pierce v. Gilson, 9 Vt. 216, supra, there was a dictum of Williams, C. J., that the action could not be maintained where the fact of payment was denied by the payee, but this was criticised and disapproved in Gleason v. Owen, 35 Vt. 590, and in Spencer v. Dearth, 43 Vt. 98, supra. In Thayer v. Manley, 73 N. Y. 305, where an action was brought for the conversion of three notes, it was said that "although plaintiff has an equitable remedy, he may sue for the conversion." Story's Eq. Jur. § 906. In Rushin v. Tharpe, 88 Ga. 779, 15 S. E. 830, it was held that the owner of a promissory note of which another fraudulently obtains possession and which he converts to his own use by suing it to judgment and collecting the amount due thereon may, in an action of trover, recover from the latter the value of the note, notwithstanding such suit and judgment and the collection thereof, and notwithstanding the plaintiff had knowledge of these facts before bringing suit. The statement in the opinion that authorities were cited to show that if the note was paid, or in any manner legally discharged, trover would not lie to recover the value of it, for it would have no value, was obiter dictum.

The right of a plaintiff in trover in this state to elect to take a money verdict does not alter the case. If he so elects, it would only affect the question of the amount of damages. If the note is converted before due, its amount furnishes evidence as to its value. But, where it has been paid, its amount will furnish no measure of damages. In that event, the damages recoverable would be those actually resulting from the conversion; and, if a money verdict was asked and no special damages shown, probably the damages recoverable would be nominal. If the plaintiff elected to take a verdict for the property alone, under section 5335 of the Civil Code of 1895, the rule just stated would not apply.

The action of trover will determine the title to the note. If the plaintiff recovers it, the payee would, of course, not be entitled to any judgment upon it. If the plaintiff fails to recover it, the payee will have the note, and can sue upon it, or deal with it as he sees proper. The fact that the payee cannot recover a judgment on the note against the plaintiff in the trover suit, but must first abide the determination of its ownership, furnishes no such case of multiplicity of actions as to authorize equitable interference with the suit in trover.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 732)

## PROCTOR v. CROOKER.

(Supreme Court of Georgia. Dec. 19, 1907.)

PLEADING — BILLS AND NOTES — ACTION — STRIKING PLEA.

Where a petition alleges that defendant is indebted to plaintiff 10 per cent. of principal and interest as attorney's fees in a suit on notes providing only for reasonable attorney's fees, and defendant duly filed a plea denying owing such 10 per cent. as attorney's fees, it was error to strike said plea and refuse an amendment to same on the ground that said plea afforded no issuable defense. The meaning of such plea could not be less than that 10 per cent. was not reasonable attorney's fees, and the effect of it was to make an issue for the jury.

(Syllabus by the Court.)

Error from Superior Court, Toombs County; E. T. Rawlings, Judge.

Action by E. P. Crooker against A. H. Proctor. Judgment for plaintiff, and defendant brings error. Reversed.

Lankford & Dickerson and Corbett & Lankford, for plaintiff in error. Collins & Gray, for defendant in error.

HOLDEN, J. This is an action based on two promissory notes. The second paragraph of the petition alleged that the defendant was indebted to the plaintiff certain amounts as principal and interest on the notes, copies of which were attached to the petition. The third paragraph alleged that the defendant was indebted to the plaintiff in the sum of 10 per cent. of the principal and interest due on the notes as attorney's fees, and that written notice of intention to bring suit had been given as required by law. The prayer of the petition was for judgment for "said principal, interest, and attorney's fees." The copies of the notes attached to the petition show that the only reference they contained as to attorney's fees was the following: "I fur-

ther agree to pay reasonable attorney's fees and all costs for the collection of this note." The defendant, at the appearance term, filed a verified answer, in which he denied the second paragraph of the petition, and in answer to the third paragraph stated: "All of paragraph 3 is denied, except that notice was given of the intention to collect attorney's fees." At the trial term the defendant tendered an amendment to his plea, setting up various matters of defense. The court refused to allow the amendment as appears from the record, because "the plea filed by the defendant was only a plea of the general issue, and as such could not be amended." The court then struck the original plea of the defendant, "because said plea was only a plea of the general issue, and because said plea made no sufficient defense to the suit as filed by the plaintiff." It does not appear from the record that there was made, or passed on by the court, any other objection to the amendment or to the original plea. After refusing to allow the amendment and striking the original plea, the court rendered judgment for "the amount sued for in plaintiff's petition." To these rulings of the court defendant filed a bill of exceptions and brings the case here for review.

It will be seen from the petition that the plaintiff sued for 10 per cent. upon the principal and interest due on the notes as attorney's fees, whereas the defendant only agreed in the notes to pay reasonable attorney's fees. The defendant in his answer denied that portion of paragraph 3 of plaintiff's petition wherein it was alleged that defendant owed 10 per cent. of the principal and interest due upon the notes as attorney's fees. The meaning of such denial could not be less than that the attorney's fees claimed were not reasonable, and the effect of it was to create an issue for the jury. Baker v. Richmond Works, 105 Ga. 225, 31 S. E. 426. The plea filed by the defendant at the appearance term under oath making an issuable defense, the court committed error in striking the plea, "because said plea was only a plea of the general issue, and because said plea made no sufficient defense to the suit as filed by the plaintiff," and in refusing the amendment, because "the plea filed by the defendant was only a plea of the general issue and as such could not be amended."

The judgment of the court below is reversed. All the Justices concur.

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(129 Ga. 781)

## LEWIS v. STATE.

(Supreme Court of Georgia. Dec. 19, 1907.)

1. CRIMINAL LAW—CONTINUANCE—EVIDENCE—ABUSE OF DISCRETION.

The evidence submitted in support of the motion to continue did not comply with the requirements of Pen. Code 1895, § 962, and was not of such character as to render the ruling of the court refusing the motion an abuse of discretion.

2. SAME—VENUE—PROOF—PRESUMPTION.

Upon the trial of one in the superior court of Berrien county, charged with murder, testimony to the effect that the offense was committed in Berrien county, although it does not expressly state that it was committed in the state of Georgia, was sufficient to make prima facie proof of venue. In such case, upon proof that the offense was committed in Berrien county, the presumption arises that the county referred to is in the state of Georgia. Mitchum v. State, 11 Ga. 615. See, also, Porter v. State, 76 Ga. 658; Wright v. Phillips, 46 Ga. 197.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1277–1281.]

3. SAME—INSTRUCTIONS—FAILURE TO CHARGE—REQUESTS.

In the absence of a timely written request to charge, it is not cause requiring the grant of a new trial that the judge failed to charge the law with respect to contradictory evidence or with respect to the credibility of witnesses. Lewis v. State, 125 Ga. 48, 53 S. E. 816; Graham v. State, 125 Ga. 48, 53 S. E. 816.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2007.]

4. HOMICIDE — INSTRUCTIONS — FAILURE TO CHARGE.

Where, upon the trial of one charged with murder, the court, after giving the definition of murder as contained in section 60 of the Penal Code of 1895, charged the law upon the subject of malice substantially in the language of Pen. Code 1895, §§ 61, 62, and also charged that, "in order to constitute the offense of murder, there must be malice," it is not cause requiring the grant of a new trial that the court did not further charge that "there can be no malice without motive."

5. SAME—SENTENCE—PROVINCE OF COURT AND JURY.

With respect to the crime of voluntary manslaughter, the jury is concerned only with the question of the guilt or innocence of the accused. In case of conviction, the penalty by service in the penitentiary for a term within the limits specified in the statute rests solely within the discretion of the judge. It was not erroneous for the judge to omit to instruct the jury "what would be the result of a conviction of voluntary manslaughter with a recommendation to mercy." See, in this connection, Meeks v. State, 57 Ga. 329 (3).

6. SAME—EVIDENCE.

The evidence was sufficient to support the verdict, and we see no cause for the grant of a new trial for any reason assigned.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Joe Lewis was convicted of homicide, and he brings error. Affirmed.

W. R. Smith, C. C. Hall, and J. C. Smith, for plaintiff in error. W. E. Thomas, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

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(129 Ga. 756)

## DICKS v. ANDREWS.

(Supreme Court of Georgia. Dec. 20, 1907.)

1. BILLS AND NOTES — PLEADING — PLEA — CONSIDERATION.

A plea alleging that the note sued on is "without any valuable consideration, either moral or legal," involves only a reference to a "val-

uable" consideration, and does not mean that the note is without a "good" consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1590, 1520.]

2. SAME—DEFENSES—COMPOSITION IN BANKRUPTCY.

The allegations in the sixth paragraph of defendant's plea, construed in connection with the allegations in other paragraphs of the plea, set up an issuable defense.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by E. F. Andrews against J. J. Dicks. Judgment for plaintiff and defendant brings error. Pending error on death of defendant in error, Julia J. Andrews, his administratrix, was substituted. Reversed.

B. B. McCowen, for plaintiff in error, W. H. Fleming, for defendant in error.

HOLDEN, J. Suit was brought in Richmond superior court by E. F. Andrews against J. J. Dicks. The plaintiff in the court below, defendant in error here, died while the case was pending in this court, and, upon motion, Julia J. Andrews, as temporary administratrix of his estate, was made a party defendant in error. The following is a copy of the note upon which the action is based: "$1,050.00 Augusta, Ga., July 1, 1905. One year after date I promise to pay to C. H. Cohen or bearer, one thousand and fifty dollars at any bank. Value received. J. J. Dicks." The pleas filed by the defendant, omitting that portion unnecessary here to consider, are as follows: "(2) Defendant admits the execution of the note as set out in paragraph 3 of plaintiff's petition, except as to its apparent date of execution, and says that the note was really signed on the 3d day of April, 1905, while a petition in bankruptcy was pending against defendant before the Honorable Joseph Ganahl, referee in bankruptcy in the United States court of this district. (3) Defendant, further answering plaintiff's petition, says that said note was given to the said C. H. Cohen at said time wholly without any valuable consideration, either moral or legal, and that defendant received no benefit, or thing of value therefor, nor was said note given in renewal of any account or obligation due by defendant to the said Cohen. (4) Defendant further shows that the plaintiff E. F. Andrews, suing as the bearer of said note, at time he took same, knew that said note was given to the said C. H. Cohen by defendant without any valuable consideration whatever. (5) Defendant shows that the said E. F. Andrews received and acquired said note from the said C. H. Cohen without consideration, and without the payment to the said Cohen of anything of value whatever, and is therefore not a purchaser for value without notice. (6) Defendant further shows that, after the note sued on was signed by defendant, there came on to be heard the petition in bankruptcy against defendant, to which plaintiff was a party, and, after the hearing of said petition and consideration of the evidence therein by the Honorable Joseph Ganahl, referee in the United States court of bankruptcy for the Northeastern Division of the Southern District of Georgia, a composition of defendant's debts were allowed at 25 cents on the dollar of defendant's indebtedness, which was accepted by the plaintiff E. F. Andrews along with other creditors as a settlement and release in full." When the case was called for trial, the court ruled that said pleas made no issuable defense, and entered judgment against defendant on the note. The defendant thereupon filed a bill of exceptions, complaining that this ruling of the court was error.

1. The only question involved in this case is whether or not any issuable defense was made by the plea filed by the defendant. This plea only undertakes to set up two defenses. The first defense undertaken to be set up by the plea is that the note sued on was "without any valuable consideration, either moral or legal." A good consideration, as well as a valuable consideration, will support a contract. Civ. Code 1895, § 3658, provides: "Considerations are distinguished into good and valuable. A good consideration is such as is founded on natural duty and affection, or on a strong moral obligation. A valuable consideration is founded on money, or something convertible to money, or having a value in money, except marriage, which is a valuable consideration." Does this allegation in the plea that the note was "without any valuable consideration, either moral or legal," mean that it was without any "good" consideration. If it does not mean that it was without any good consideration, as well as a valuable consideration, it is not a good plea to the effect that the note is without any consideration to support it. The words in the plea that the note was given "without any valuable consideration, either moral or legal," has no reference to any consideration except a valuable one; the words "either moral or legal" qualifying the words "valuable consideration." The proper construction of this language in the plea is that there was no moral or legal valuable consideration. The construction that the pleader in that portion of his plea above referred to only had reference to a valuable consideration is sustained by the language used in the next succeeding paragraph of his plea, wherein he alleges that the plaintiff knew that the note was given "without any valuable consideration whatever." The other language in the plea relating to a consideration is "that the defendant received no benefit, or thing of value therefor, nor was said note given in renewal of any account or obligation due by defendant to the said Cohen." But there is nothing in this part of the plea to show that there was no good consideration behind the note. There is no language in any part of the plea filed by defendant negativing the

idea that the note was founded upon a good consideration. Everything alleged by the defendant might be true, and still there might be a good consideration upon which the note rested. The idea that there was a good consideration behind the note is not inconsistent with any statement in the plea.

2. In the second paragraph of defendant's plea, he alleges that the note was really signed on the 3d day of April, 1905, and in the third paragraph he states that "said note was given to the said C. H. Cohen at said time wholly without any valuable consideration." Properly construed, the meaning of this allegation is that the note was given to Cohen when it was signed, which was the 3d day of April. In the sixth paragraph of the plea, the defendant alleges "that, after the note sued on was signed by defendant, there came on to be heard the petition in bankruptcy against the defendant." Construing this language in connection with what is alleged in the second and third paragraphs, it would mean that the petition in bankruptcy was heard after the note was given to Cohen, as it is alleged in the third paragraph that the note was given to Cohen at the time of its signing, which was the 3d day of April, 1905. Hence all that occurred in the bankruptcy court, according to the sixth paragraph of the defendant's plea, is alleged to have occurred after the note was given to Cohen. In this paragraph the defendant alleges that, after the hearing before the referee in bankruptcy, "a composition of defendant's debts were allowed at 25 cents on the dollar of defendant's indebtedness." The words "defendant's debts" included the note sued on, as it was alleged that this note was given to Cohen before the composition was allowed. It is further alleged in this paragraph that this composition was accepted by Andrews as a settlement and release in full. This allegation, in connection with the others referred to, means that Andrews held the note sued on at the time of this acceptance, and that the debt sued on was then embraced in the composition, and that Andrews accepted 25 cents on the dollar as a settlement and release in full of this debt. We are of the opinion that the allegations contained in paragraph 6 of the defendant's plea, taken in connection with the allegations in other paragraphs of the plea, set up an issuable defense. The court, therefore, committed error in holding that the plea as a whole set up no issuable defense and in entering judgment against the defendant.

The judgment of the court below is reversed. All the Justices concur.

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(129 Ga. 652)

## CENTRAL OF GEORGIA RY. CO. v. INMAN & CO.

(Supreme Court of Georgia. Dec. 19, 1907.)

1. WRIT OF ERROR—REVIEW—RULINGS ON DEMURRER.

A petition was twice amended, and special demurrers were filed thereto. The court sustained some and overruled others, but allowed plaintiff 10 days within which to meet the demurrers which were sustained. Within the time limited, the court allowed a third amendment, striking the matter added to the petition by the former amendments. The effect of the elimination of the two former amendments by the last was to render immaterial the rulings on the demurrers so far as they related to the amendments which were allowed to be withdrawn.

2. PLEADING—PETITION—AMENDMENT.

A petition stating a cause of action, good as against a general demurrer, may be purged by amendment of general allegations, which do not of themselves set forth a different cause of action, but are inappropriate to the real cause of action declared on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 676.]

3. RAILROADS — FIRES — PETITION — AMENDMENT.

The cause of action alleged in the original petition was the negligent destruction of cotton deposited at a particular place by fire set out by the defendant's negligence. It was amendable by adding a more specific description of the cotton, and an amplification of the acts of alleged negligence on the part of the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 680.]

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. A. Little, Judge.

Action by Inman & Co. against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Charlton E. Battle, for plaintiff in error. Wm. H. Barrett and Sam. B. Hatcher, for defendant in error.

EVANS, P. J. Inman & Co. brought suit against the Central of Georgia Railway Company to recover damages for the negligent destruction by fire of 3,113 bales of cotton. To the original petition the defendant filed general and special demurrers, attacking the petition as duplicitous, in that it did not clearly appear from its various allegations whether the defendant was sued as a common carrier for failure to safely transport and deliver the cotton, or as a warehouseman for failing to exercise ordinary care in properly storing and protecting the cotton, or for negligently setting the cotton on fire by the operation of defective engines. The special demurrers were aimed at specific paragraphs of the petition because of indefinite allegations. The petition was twice amended, and afterwards the court passed on the various demurrers, overruling some, sustaining others, and adjudging the petition as amended to be insufficient, but allowed the plaintiffs 10 days in which to amend the petition to meet the demurrers so sustained. Within the time limited the plaintiffs presented a third amendment, striking both of the former amendments and certain paragraphs in the original petition, and adding other paragraphs thereto. The last amendment was allowed over defendant's objections, and to the petition as amended the defendant renewed its demur-

rers, with additional grounds, including an objection that the last amendment introduced a new cause of action. The court overruled all the demurrers to the petition as thus amended, and defendant excepts to this judgment, and also to the judgment of the court on its demurrers before the petition was last amended.

A consideration of the intermediate amendments and so much of the judgment on demurrer as relates to them is rendered unnecessary by their elimination from the petition by the last amendment. The only practical questions left are whether there was enough to amend by in the original petition, and, if so, was the last amendment germane and sufficient to remove the various objections raised by special demurrers. The substance of the case set out in the original petition was that plaintiffs had shipped over the defendant's railway to Columbus, Ga., a certain number of bales of cotton to be delivered to a compress company. The cotton was deposited upon a vacant area of land owned by the railroad company, and adjacent to the compress company. A large quantity of cotton other than that belonging to plaintiffs was also stored on this vacant area. Adjacent to the place where the cotton was stored was other land of the defendant, upon which were constructed numerous switching tracks and a roundhouse, making it a dangerous place to store cotton on account of the exposure to passing trains, and the absence of any provision for fire protection. The defendant was declared to be negligent in storing the cotton under such conditions. The defendant was also negligent in using certain switch engines which were not properly equipped with spark arresters so as to prevent the throwing of sparks while engaged in shifting cars on the tracks near the place where the cotton was stored, and in operating such engines in a negligent manner. Defendant as a common carrier contracted to transport and deliver plaintiffs' cotton to the compress company, and it was their duty to unload the cotton at a place where the same would not be exposed to the danger of being destroyed by fire from sparks emitted from passing locomotives or from the roundhouse. The cotton was alleged to have been entirely destroyed by fire caused by sparks from the defendant's locomotives, and its value was stated.

Throughout the original petition, the pleader's purpose is manifest to declare on a liability arising from the destruction of the plaintiffs' cotton by fire originating from the negligent operation of the defendant's locomotives. There were some indefinite references tending to imply an intention to also hold the defendant liable for failure to deliver or properly store the cotton, but such were removed by the last amendment. If a cause of action be stated in a petition, confusing or inappropriate allegations may be eliminated by amendment. Hodges v. Wheeler, 126 Ga. 848, 56 S. E. 76; Rushin v. Central Ry., 128 Ga. 726, 58 S. E. 357. The only matter contained in the last amendment was a more accurate and definite description of the cotton, and an enumeration of the various acts of the defendant which were alleged to have resulted in the loss of the cotton by fire. The cause of action in the original petition was for the loss of cotton by fire negligently set out by the defendant company's engines, and the amendment did not introduce a new cause of action. See City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318; Sou. Ry. v. Gardner, 127 Ga. 320, 56 S. E. 454. The special demurrers as to the description of the cotton, the points whence shipped, the number of bales destroyed, etc., were satisfactorily met by the last amendment. This amendment also alleged that such of defendant's locomotives which were run on the day of the fire on the tracks near the cotton were defective, in that they were not equipped with proper spark arresters and proper devices to prevent the emission of more and larger sparks than would locomotives properly equipped; that the spark arresters were not in proper condition, the holes in the netting being too large; that the netting had been patched and the patches allowed to become loose; that the netting was not properly or closely fitted to the sides; that the lids of the spark arresters were not properly or sufficiently fitted to the netting, and were partially open; that the spark arresters were not properly fitted around the steam pipes, thus leaving openings larger than those around the steam pipes; and that the spark arresters were so worn as not to serve the purpose for which they were intended, and that any of these defects would permit the emission of sparks larger than if the locomotives had been in proper condition. It was further alleged that these particular locomotives were so improperly handled while in proximity to the cotton that they emitted more and larger sparks than would have been emitted if properly handled, that such improper handling consisted in using too great an exhaust; in not shutting off the exhaust when near the cotton; in not keeping the locomotives free from accumulations of ashes and cinders; in using coal that was too fine; in running at too great speed at or near the cotton with the result that more and larger sparks were emitted than if running slowly; in starting too quickly when near the cotton, with the result that more and larger sparks were emitted than if a slower start was made; in hauling with these locomotives too near the cotton too many cars for the locomotives to haul, with the result that more and larger sparks were emitted than if smaller loads and a proper number of cars were handled; in otherwise improperly using the locomotives; and in neglecting to reduce as far as possible the number and size of the sparks when near the cotton, any of which acts would cause more and larger sparks to be emitted from the locomotives than if they

had been properly handled. Surely the defendant cannot complain of such specific charges of negligence.

The special demurrers were numerous, and it would not be profitable to spread them out in detailed discussion, as we have referred sufficiently to the allegations of the petition to show that, as amended, it alleged the plaintiffs' cause of action to be the negligent destruction of specifically described cotton, deposited at a particular place, and that the fire was caused by the negligence of the defendant, which consisted in the negligent handling of its locomotives, and the defective condition of its locomotives in the particulars enumerated.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 656)

## CENTRAL OF GEORGIA RY. CO. v. INMAN, AKERS & INMAN.

(Supreme Court of Georgia. Dec. 19, 1907.)

This case is controlled by the decision this day rendered in the case of Central of Ga. Ry. Co. v. Inman & Co., 59 S. E. 784.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. A. Little, Judge.

Action between Inman, Akers & Inman and the Central of Georgia Railway Company. From the judgment, the railway company brings error. Affirmed.

Charlton E. Battle, for plaintiff in error. Goetchins & Chappell, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 705)

## SOUTHERN RY. CO. v. ELLIOTT.

(Supreme Court of Georgia. Dec. 21, 1907.)

RAILROADS — FIRES — NEGLIGENCE — VERDICT—EVIDENCE.

The evidence was sufficient to support the verdict, and there was no error in refusing to grant a new trial. Upon the general grounds contained in the motion that the verdict was contrary to law, to evidence, and without evidence to support it, etc.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by H. S. Elliott against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Elliott sued the railroad company for damages on account of the burning of certain cotton, which was stored in a warehouse, located in the town of Stockbridge, near the railroad track of the defendant. The grounds of negligence alleged were that the servants of the railroad company in charge of the train negligently caused and permitted the engine to emit large quantities of sparks and fire cinders and other combustible matter as it passed the warehouse, and that the sparks so emitted were blown into the warehouse, and thereby caused the fire. It is further alleged that the defendant railroad company negligently failed to equip its engine with any sufficient spark arresting apparatus, and that the fireman and other employés of the defendant were negligently and carelessly firing said engine as it passed the warehouse. On the trial a verdict was rendered for the plaintiff. A motion for new trial was made on the four usual general grounds, that the verdict was contrary to law, contrary to evidence, without evidence to support it, etc. There were no other grounds of the motion for new trial. The judge overruled the motion and the defendant excepted.

There was much conflict of evidence, but from the plaintiff's standpoint there was evidence substantially to the following effect: Plaintiff's cotton was stored in a warehouse constructed of corrugated iron, and painted. Its dimensions were 50 by 100 feet, and lengthwise extended parallel with the railroad, which at that point ran north and south. Upon the railroad there were three tracks, two side tracks and a main line, which ran between the two first mentioned. The railroad was immediately to the east of the building. Immediately to the north of the building was a street which crossed the railroad and passed by the north end of the warehouse. Immediately to the west of the warehouse was another street which ran parallel with the railroad, thus placing the warehouse between this street and the railroad. A few feet to the south of the warehouse was a seedhouse. On the east side of the warehouse there were two doors and one window opening onto a small platform which extended out at a line within about two feet from the sidetrack. Just beyond the sidetrack was the main line of the railroad, which was about 18 or 20 feet from the east side of the warehouse. In the north end of the warehouse there was one glass window, from which a pane was missing, thus leaving an open entrance of dimensions about 12 by 18 inches into the warehouse. On the west side there were two windows and two doors. On the south side there were two windows. At the time of the fire all of these windows and doors were closed. In the warehouse there were stored large quantities of cotton, both baled and loose, some of which was lying close by the aperture left by the missing pane from the window in the north end of the building. The cotton was very inflammable. Across the street, and opposite to the northwest corner of the warehouse, was a store and negro house. Across the street, which lay to the west of the warehouse and just opposite the southwest corner of the warehouse, there is a ginhouse. The railroad depot was south of the warehouse,

and about 250 feet therefrom. The head of a grade in the railroad track was about opposite the depot, and from that point it was downgrade in both directions. About 11:30 o'clock on the night of September 9, 1905, the warehouse was found to be on fire, burning from within, and was destroyed with its contents, including the plaintiff's cotton. A few minutes before the fire was discovered a freight train of the defendant, containing about —— cars, had run along the main line going north through the town without stopping. It passed the warehouse, and went around the curve and on to the station known as Ellenwood, a distance of about one-half a mile, and there stopped. There is a sharp conflict of evidence as to whether the engine was working steam and emitting sparks, but there was evidence to the effect that the engine was working steam hard, and that sparks were being emitted in large quantities, sparks as large as the little finger going 40 feet high; that sparks were being so emitted all along as the engine passed the warehouse and until it passed around the curve out of sight. The wind was very slight, but was blowing from the northeast, and in such manner as to blow the sparks on to the warehouse as the engine passed by. The engine would be a distance of from 60 to 200 feet from the warehouse at the times it would be in position for sparks emitted to be blown into the warehouse through the opening in the window at the north end. All other windows and doors were closed and it was very improbable that sparks could have entered elsewhere than through the north window. There had been no other fire in the warehouse or near the same for several hours. The gin had been operated during the day, but the fire in the engine used at the ginnery had been put out about dark on the afternoon before. There was considerable grease, machinery, and combustible matter about the gin. The gin was not burned during the conflagration. If the wind had blown sparks from the gin in any direction, it was coming from the northeast, and would have blown them away from the warehouse on account of the gin being located opposite the southeast corner of the warehouse. A few minutes before the train came along the town marshal, who was night watchman, was at the warehouse, and saw no sign of smoke or fire or loafing or other suspicious circumstances. The marshal left and went up the street about 150 or 200 yards, and was sitting in front of the store when he discovered the fire. The train had in the meantime passed. Dr. Hightower and a friend passed the warehouse, and saw the marshal before he went up the street. The doctor had crossed the railroad at the public crossing at the north end of the warehouse, and had gone down to a livery stable. As he passed the northwest corner of the warehouse, he thought he detected the odor of grease, or a hot box. He saw no smoke or fire. On his return in a few minutes, he did not notice the odor. He, with his friend, recrossed the railroad track, and proceeded to his home nearby, and the train passed while they were on their way. In a short time after the train passed, about 15 minutes, the fire was discovered. The fire was altogether within the building. Owing to the density of the smoke and heat from within, it was never possible to tell in what part of the building the fire originated. but it first broke out of the building on the northwest side, about 20 or 25 feet from the window with the missing pane. After the train passed and stopped at Ellenwood, the engineer saw the reflection, and reported it to the dispatcher, giving as his reason therefor that he feared that the railroad property was being damaged. He was ordered back to return to the scene of the conflagration. The spark arresters used on his engine were of the "standard" kind and in general use on the Southern Railway. Inspectors testified that they had examined the spark arrester on the day of the fire and on several days immediately preceding, and on several days immediately succeeding the date of the fire, and that they were in perfect order at the time of each examination. The engineer and fireman both testified that, if in fact sparks were emitted 40 feet high, the spark arresters would not be in good condition.

C. E. Battle, for plaintiff in error. E. M. Smith and Arnold & Arnold, for defendant in error.

ATKINSON, J. Under the rulings in the cases of Southern Ry. v. Herrington, 128 Ga. 438, 57 S. E. 694, and Southern Ry. v. Williams, 113 Ga. 335, 38 S. E. 744, and Central Ry. v. Trammell, 114 Ga. 312, 40 S. E. 259, the evidence in the case now under consideration was sufficient to support a finding by the jury that the fire which destroyed the plaintiff's cotton was caused by sparks emitted from the defendant's engine while being operated by its servants in the regular course of their duty, and while passing the warehouse in which the cotton was stored. Proof of the injury caused by sparks emitted from the engine of the defendant while operated by its servants in the conduct of its business raised a presumption of negligence against the defendant. Gainesville R. Co. v. Edmondson, 101 Ga. 747, 29 S. E. 212.

But it is contended that this presumption was overcome upon the part of the defendant by proof that the engine was properly equipped with spark arresters, and that the engine was properly handled so as to avoid the emission of sparks. To meet this contention by the defendant, there was testimony both by the engineer and fireman in charge of the train, to the effect that, if sparks were in fact emitted by the engine and blown up 40 feet high, the spark arrester would not be in good condition; that no such thing could occur if the spark arrester was in good condition. There was also testimony

of another witness to the effect that he saw the engine as it passed the warehouse, and that all along by the warehouse and until it passed around the curve and out of sight the engine was, in fact, emitting sparks 40 feet high. Under these circumstances, the jury was authorized to find that the engine was not properly equipped. Upon this point the facts last stated bring the case under the ruling in Southern Ry. v. Herrington, Southern Ry. v. Williams, and Central Ry. v. Trammell, supra, and distinguish it from Southern Ry. v. Pace, 114 Ga. 712, 40 S. E. 723, Southern Ry. v. Horine, 115 Ga. 664, 42 S. E. 52, Ala. Midland Ry. v. Swindell, 117 Ga. 883, 45 S. E. 264, Gainesville R. v. Edmondson, supra, Fla. R. v. Rudolph, 113 Ga. 143, 38 S. E. 328, and Georgia R. v. Wall, 80 Ga. 202, 7 S. E. 639. Under the authorities herein recited, the evidence in this case upon every point was sufficient to support the verdict in favor of the plaintiff.

Judgment affirmed.

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(129 Ga. 759)

## FREENEY v. STATE.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. JURY—TALESMEN—MODE OF SUMMONING.

In the light of the note appended by the presiding judge to the first ground of the motion for a new trial, the mode of summoning tales jurors will not require a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 333, 334.]

2. CRIMINAL LAW—TRIAL—INTRODUCTION OF EVIDENCE—RIGHT TO OPEN AND CLOSE.

From a note of the presiding judge, it appears that one of the contentions of the state was that the person who was slain had an interest in the house where the accused woman lived, and went there to collect his rent or to see about it; that this was controverted by the defendant, who claimed that the deceased had no interest in the house, and that no rent was due at the time of the homicide; that in making her statement the accused referred to certain receipts given to her for rent, and exhibited them; that her counsel told her to hand them to the jury, which she did; that, after the jury had examined them and handed them back, the Solicitor General requested the official stenographer to mark them for identification, which was done; that later, when a witness for the state was being cross-examined, counsel for the accused handed to the witness a rent receipt and proved its execution by him, and then said (referring to the receipt), "We offer that with the others. They are already in evidence"—to which the Solicitor General replied, "All right." *Held*, that this showed that evidence was introduced on behalf of the accused; and her counsel were not entitled to the opening and conclusion of the argument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1507, 1508.]

3. SAME—WITHDRAWAL.

Where evidence has been introduced on behalf of the accused, and heard or examined by the jury, and counsel for the state therefore has the opening and conclusion of the argument, counsel for the accused cannot as matter of right withdraw the evidence, and thus regain the right to open and conclude.

4. HOMICIDE—DEFENSE OF HABITATION—STATUTES.

Section 72 of the Penal Code of 1895 provides that "If after persuasion, remonstrance, or other gentle measures used, a forcible attack and invasion on the property or habitation of another cannot be prevented, it shall be justifiable homicide to kill the person so forcibly attacking and invading the property or habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that a serious injury was intended, or might accrue to the person, property, or family of the person killing." *Held*, that the words, "a serious injury," in this section, are not limited to a felony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 182, 183.

For other definitions, see Words and Phrases, vol. 7, pp. 6420, 6421.]

5. CRIMINAL LAW — WRIT OF ERROR — EQUAL DIVISION OF COURT.

As to whether the charge of the court on this subject requires a reversal or not, the justices of this court are equally divided in opinion. On this question, therefore, the judgment is affirmed by operation of law. On all other questions the court is unanimously of the opinion that no reversal is required.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3206.]

6. SAME.

None of the other grounds of the motion for a new trial require a reversal.

(Syllabus by the Court.)

Error from Superior Court, Dodge County; J. H. Martin, Judge.

Sallie Freeney was convicted of murder, and she brings error. Affirmed.

It is unnecessary to report the facts further than they are set out in the opinion, except to give the material portions of the prisoner's statement, as follows: "I married the first time Jesse Rogers, who was over 50 years of age, father of Sheriff Rogers. He was cruel and unkind to me. He shot at me and beat me, leaving knots on my head. We could not get along. I had one child by him, named Lueva, who since married a man by the name of Martin. I worked hard in the house and in the field, and even taken the plow to try to make a living, and it seemed that I could not have anything. We separated, and he taken everything that I had worked for, and I was sick and not able to work, and George Freeney came to me, and told me that he would take care of me and work for me, and we would marry as soon as I got my divorce. It was about two years before the divorce, and that time I had my baby there. But I have been living just as near right as I knew how; and would pray and ask the Lord to help me. * * * He came down just before dark, and knocked at the door. I went out and said: 'Good evening Mr. Harrell.' He said: 'How are you getting along Mrs. Freeney?' I said: 'I am well, I thank you. How are you?' He said he was all right. Just the very way he said it. He said: 'I am all right.' I told him to have a seat. He said he didn't care to sit down, and started to push in by me. I had hold of the bolt of the door, and he started to push in by me. I told him to go in the boy's room that my room had not been cleaned up all day, and not to go in there; that my cook was sick, and I had not had time to clean up the room,

which everybody in the whole country know I was run to death all the time. He said, 'You need not get mad, nor fuss, nor rear, but I am going to sleep with you before I leave here.' I says, 'Why, Mr. Harrell, what is the matter with you.' He said: 'I have got as much money as anybody, and you can get it'—and grabbed hold of my arm there. I jerked away from him, and thanked him; I didn't want a cent of his money. If I did I would go to him like a lady and ask him for it, and pay it back to him. I says: 'Are you drunk, crazy, or sober, or what is the matter?' He said he was as sober as I was. I says: 'Well, you go home to your wife and children.' I says: 'If I had time, I would go to your wife and tell her right now.' I says: 'Now, you had better go on, and let me alone.' I says: 'Please get out of here.' He walked on out, and I heard him say at the gate—I was standing in the door—I heard him say at the gate that 'My wife and children go to hell.' I started back into the kitchen. It was getting late, and I hadn't fixed supper. He opened the door and started in my room. I turned around and says, 'Didn't I tell you to go on and let me alone,' just like I was talking to any one. I was not mad a bit, but my feelings were hurt. He says, 'I told you, God damn you,'—that is the very way he spoke—'that I was going to sleep with you. If you don't sleep with me, I will blow your head off, or run you out of town.' I said, 'I will see'; and started out for an officer. He was standing in my front room door. I started out. When I did, he hit me right in the breast, just as hard as he could drive me, and made an awful wound on my breast. For a week I could hardly get breath. I started out at the other kitchen door, and he told me that, if I didn't come back, he would blow my head off, and 'I have a pistol to do it with.' I knew he always toted a pistol in the country, because, when he would come to the house, he would give it to Mr. Freeney, and Mr. Freeney would put it away. He would not let me out of the front door or the back door. I didn't know what else to do. I could not let him take me and let him shoot me down. I knew something was wrong. He was either drunk or crazy one, or he would not have come down there and approached me in any such way as he did, because he had been to my house a whole lot, and always treated me just as kind as if he had been a brother of mine. I went back to the bed. When I went to the bed, he stepped inside. I run there as quick as I could, raised a corner of the mattress, and got my pistol, and got between the doors, and he was in my front door, and I shot at him. He stepped out back on the veranda, and threw his hand back of him and stooped over, acted as I thought he was drunk, and didn't know where his pistol was. I am satisfied he was drunk. When he threw his hand back, I knew I had to do something. I shot at him again. He turned around, and walked out to the corner, and fell. I didn't know whether I had hit him or not. As soon as I shot the next time and he started out the door, I went back to the bed, and put my pistol under there, and went right on to the door. I was kinder frightened. I didn't know hardly how I did feel. I didn't know but what he was gone home. When I got to the door, I looked and didn't see him anywhere. I went up to the other end of the porch, and came back to this end. When I got there, he was lying there. It was just like Mr. Andrew's boy said. He was the first one there. He saw me shoot. I told him I did it. Mr. Harrell came down there and insulted me, and struck me, and I told him I could not take everything because I was a poor woman, and had nobody to protect me. It was too bad, and the crowd come and didn't give me time to say anything. Mr. Harrell thought he would make me yield to him because I thought he had plenty of money and friends, and because I was just a poor woman and didn't have any one to protect me and without money, just working for what I eat, that he would take the advantage of me. My breast was bruised clean through and through back to my shoulder blade. * * * I just could not stand there right in the house tired and worked down, and let a man, because he was strong, come in and beat me around and threaten to shoot me twice before I ever done anything. I talked to him just as kind as I ever did to anybody, and [could not] stand there and let him kill me."

De Lacy & Bishop, C. T. Atwell, and John R. Cooper, for plaintiff in error. E. D. Graham, Sol. Gen., Jno. C. Hart, Atty. Gen., and C. W. Griffin, for the State.

LUMPKIN, J. Mrs. Sallie Freeney was indicted for the murder of W. P. Harrell, committed by shooting him with a pistol. She was convicted and recommended to be imprisoned for life. She moved for a new trial, which was refused, and she excepted.

1. Of the 21 grounds which make up the original and amended motion for a new trial only a few require special mention. Several of them consist of long colloquies between the court and counsel, followed by explanatory notes by the court, which altogether make no very exact and clear-cut point. Of this character was the first ground of the amended motion, which complained that the court committed error after the regular panel of jurors had been exhausted in not drawing the balance of the jury from the jury box at the request of defendant's counsel, instead of ordering the sheriff, who was active in the prosecution, to summon tales jurors in and about the courtroom and in the city of Eastman, where the trial took place. Attached to this statement is a copy of argumentative statements by counsel on both sides, and answers of the deputy sheriff to questions put to him, covering nearly two typewritten pages, and followed by a

note of the presiding judge, covering a third page. From these it may be gathered that no objection was made to the jurors who were summoned, nor any challenge; that no proof was offered to show that the sheriff was unfriendly to the defendant, or was in any way engaged in assisting the prosecution; that he was related to the defendant by marriage, but was sick at home, and took no part in summoning the jurors, and this was done by a deputy under special instructions from the court; that the son of the sheriff was a bailiff, but was not present when the jury was secured, and had nothing to do with the matter; and that no request was made to draw the names of additional jurors from the box "until after the jury sworn and canvassed had been exhausted," when the request was made, but was refused because citizens from all parts of the county were in the courtroom and in the town, and to stop and draw tales jurors and send to remote parts of the county to serve them would have involved a delay of a day or two. Apparently the relationship of the sheriff to the defendant, without any proof of ill feeling toward her, would be favorable to her, rather than otherwise. See Downing v. State, 114 Ga. 30, 39 S. E. 927. But, if there was anything presumptively injurious to the defendant, the sting was drawn by the judge's note.

2, 3. One ground of the motion for a new trial contended that the court improperly ruled that counsel for the state were entitled to the opening and conclusion of the argument. Counsel for the accused claimed that no evidence had been introduced in her behalf, and that certain rent receipts were merely referred to by her in her statement and exhibited by her and handed to the jury, but not introduced in evidence. Counsel for the state contended that the receipts were introduced in evidence, and that the right of opening and concluding the argument on behalf of the accused was thereby lost. The court sustained this position. Counsel for the accused then asked leave to withdraw the receipts from evidence if they were held to have been introduced. The court ruled that they could withdraw the evidence, but could not thereby regain the right to open and conclude the argument. The right to open and conclude the argument in a criminal case is an important right. If it be improperly denied, this furnishes ground for a new trial. In criminal trials the accused has a right to make to the court and jury a statement not under oath. Counsel for the defendant have the right to comment upon the statement so made. It was held in Nero v. State, 126 Ga. 554, 55 S. E. 404, that the statement cannot properly be made the vehicle for the introduction of documentary evidence, which should be formally offered, and that the presiding judge could decline to allow such documents to be read to the jury by the accused. In Nobles v. State, 127 Ga. 212, 56 S. E. 125, the accused, while making a statement, used for the purpose of illustration a map which he held in his hand, but it was not introduced in evidence. The majority of this court held that the presiding judge did not err in refusing to allow counsel for the defendant to make use of the map during his argument. The writer of this opinion dissented. See, also, Crawford v. State, 117 Ga. 247 (5), 43 S. E. 762. If it were clear that the rent receipts which formed the subject of the ruling in regard to the opening and conclusion of the argument were merely read by the defendant as a part of her statement, without objection from counsel or ruling thereon by the court, and were not introduced in evidence, the writer would be strongly of the opinion that this would not have affected the right of her counsel to open and conclude the argument. But the exact question is whether, under what transpired, as appears in the ground of the motion for a new trial and the note appended thereto, these receipts were simply read or spoken of in the defendant's statement, or were introduced in evidence. On this subject the court added a note containing the following: "One of the contentions of the state was that W. P. Harrell had an interest in the house where Mrs. Freeney lived, and went there to collect his rent or see about it. This contention was controverted by the defendant, who claimed that Harrell had no interest in the house, and that there was no rent due until March 25th, and that Harrell was killed on the 9th of March. Mrs. Freeney, while on the stand, referred in her statement to the receipts given for rents and exhibited them, when her counsel told her to hand them to the jury, and she did so, and, after the jury had examined them and handed them back, then the Solicitor General requested the stenographer to mark them for identification. When Mr. Bowen, from whom Mrs. Freeney claimed the house was rented and who had been paid the rent by her, took the stand and was being cross-examined by Mr. De Lacy, who was conducting the examination for the defendant, Mr. De Lacy handed Bowen one of the receipts, and put the following question: Q. "Did you make that receipt? Ans. Yes, sir. Q. That covered the 9th of March, the day he was killed, did it not—from February 25th to March 25th? Ans. No, sir; February 25th to whatever day this was. Q. When did you collect? Ans. This is the 18th of March. I got it after Mrs. Freeney was in jail." Immediately after this answer, which was the last one made by the witness, Mr. De Lacy said, referring to the receipt on which Bowen had been examined: "We offer that with the others. They are already in evidence." To this remark of Mr. De Lacy the Solicitor General replied: "All right." Under this statement from the court, the defendant did introduce evidence, and thus lost the right to the opening and conclusion of the argument. It is said that the receipts are

not in the brief of evidence, and that this shows that they were not introduced. They are briefly described at the close of the statement.

The court refused to allow the evidence to be withdrawn so as to give the defendant the right to the opening and conclusion. This was not error under the case of Zipperer v. Mayor and Aldermen of Savannah, 128 Ga. 135, 57 S. E. 311. While in this case the effort to withdraw was doubtless made in entire good faith, and we do not mean to intimate anything to the contrary, yet the establishment of a rule that the defendant has the right to introduce evidence, and afterwards withdraw it, and claim the opening and conclusion of the argument, might lead to a situation not contemplated by the statute. Suppose that the defendant in a criminal case should introduce all the evidence, oral and documentary, which he could obtain; but the state should introduce evidence overwhelmingly rebutting and disproving it, if the rule suggested were adopted, upon finding that the evidence would probably not avail him, he might, just before the beginning of the argument, announce that his evidence was withdrawn, and claim the conclusion of the argument. Thus he might experiment by introducing evidence, and securing such impression as it might have on the jury, and still retain the option to return to the position of having introduced no evidence, and thereby securing the advantage of the opening and conclusion in the argument.

4, 5. It is often said that every man's house is his castle. In early days men were compelled to protect themselves in their habitations by preparing them against attacks; and thus in time the dwelling came to be known as the "dweller's castle"; the name probably having its origin in feudal times. If attacked in his home, he did not have to retreat, but could use necessary force to eject the intruder. It was not lawful to kill for a bare trespass on property. It must have been at least forcible. The exact character of invasion which would authorize a killing under the common law has brought out different expressions. In some cases it was stated that the owner of the dwelling could resist a forcible entry therein by force, but had no right to kill the trespasser, unless necessary to prevent the commission of a felony on his person or property, or on the person of some one under his protection in the house. In others the words "serious injury" were also used. State v. Taylor, 143 Mo. 150, 44 S. W. 785. Some other authorities seem not to limit the rule so strictly. On the general subject, see 1 Bish. Cr. L. (8th Ed.) § 859; Young v. State of Nebraska (Neb.) 104 N. W. 867, 2 L. R. A. (N. S.) 66, and note; Askew v. State, 94 Ala. 4, 10 South. 657, 33 Am. St. Rep. 83, and note; Carroll v. State 23 Ala. 28, 58 Am. Dec. 282; note to State v. Sumner, 55 S. C. 32, 32 S. E. 771, 74 Am. St. Rep. 707, 726-730; State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200, and note; Allen v. State (Tex. Cr. App.) 66 S. W. 671; Clark's Cr. Law (2d Ed.) 170; Archbold's Cr. Pl. & Ev. 796, and note. In the Penal Code enacted by the Legislature in 1833 occurs the section which is now codified as section 72 of the present Penal Code of 1895. It reads as follows: "If after persuasion, remonstrance, or other gentle measures used, a forcible attack and invasion on the property or habitation of another cannot be prevented it shall be justifiable homicide to kill the person so forcibly attacking and invading the property or habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that a serious injury was intended, or might accrue to the person, property or family of the person killing." In section 70 it had been provided that it would be justifiable homicide to slay in self-defense, or in defense of habitation, property, or person against one who manifestly intends or endeavors by violence or surprise, to commit a felony on either. Under that section persuasion, remonstrance, or gentle means are not declared to be first required. Section 72 quoted above has reference to forcible attacks and invasions of property or habitation. In such cases, if gentle measures will not avail, homicide becomes justifiable, provided such killing is absolutely necessary to prevent such attack and invasion, and that a serious injury is intended, or might accrue to the person, property, or family of the person killing. If this section meant that the injury must necessarily amount to a felony, it would require more forbearance and precaution to justify defense of person or property in an attack upon one's own home than anywhere else. Such is not the meaning of the statute.

In Pound v. State, 43 Ga. 88, 136, it was said that the section under review (then numbered 4266) applied only to the defense given to a person in protecting his habitation, or property, or family, or himself, while in such place, from forcible attack. Some doubt as to this was afterwards expressed (Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242); but we think it is sound. The property concerned in the Crawford Case was meat which was being hauled on a wagon traveling along the road; and what was said as to the necessity for the crime to be a felony had reference to the case before the court, not to a question of forcible attack and invasion of the habitation. In Pound's Case, 43 Ga. 135, it was said that the section (now 72 of the Penal Code) "classes another line of defense after remonstrance. Such forcible attack may not comprehend felony, but serious injury." This was said in the opinion in discussing the two sections above mentioned. See on general subject, Horton v. State, 110 Ga. 739, 743, 35 S. E. 659; Palmour v. State, 116 Ga. 269, 271, 42 S. E. 512.

And compare (on section 70 as to riotous and tumultuous entry by two or more) Smith v. State, 106 Ga. 674, 682, 32 S. E. 851, 71 Am. St. Rep. 286. It must be carefully borne in mind that this does not give a free license to kill for slight provocation. It must appear that such killing was absolutely necessary to prevent the forcible attack and invasion, and that a serious injury was intended or might accrue to the person, property, or family of the slayer. No exact definition of the words "serious injury," as used in this statute, has been made. Clearly it does not authorize the taking of human life because of every mere trespass upon property, or because of mere insulting words. In Nix v. State, 120 Ga. 163, 47 S. E. 516, Mr. Justice Cobb said: "It may be that a case might arise where a trespass upon property would be of such a grave nature as to amount to a serious injury within the meaning of the section; in other words, that a trespass in its nature, gravity, and consequences would be such that the law might authorize the taking of human life to prevent its commission. But such a condition of affairs would be of rare occurrence in the transaction of human affairs, and certainly would not arise out of one of the ordinary and every-day quarrels about property rights." The threatened injury must be grave in its character and consequences. Human habitation is sacred, but so likewise is human life, and the necessity for slaying and the seriousness of the impending injury to person, property, or family must concur to render the homicide justifiable under this section of the Penal Code after gentle measures to prevent the forcible attack and invasion have been used.

It being error, as an abstract proposition, to charge that the serious injury referred to in this statute must amount to a felony, was this error such as to require a reversal in the present case? On this point the justices of this court are equally divided in opinion. Justices BECK, ATKINSON, and HOLDEN entertain the view which may be thus stated: The statement of the accused, if accepted by the jury, would have authorized a finding that there was a forcible attack and invasion on her habitation, and that a serious injury was intended or might have accrued, which did not amount to a felony, and therefore an error in charging on that subject was material, and should require a new trial. The view of Chief Justice FISH and Justices EVANS and LUMPKIN may be thus stated: No theory of forcible attack and invasion upon the habitation of the accused can arise out of the evidence; and it is exceedingly doubtful if any such theory can be properly derived from the statement of the accused. It would seem to make rather a case of attack upon her person than upon her habitation. If such a theory can arise from the statement, and it be accepted by the jury, the facts which she stated make a case of an effort by the deceased to commit a felony on her (rape, homicide, or shooting at another), and raise no theory of "a serious injury" less than a felony. The charge, therefore, could not have injured her. The court charged fully on the law of voluntary manslaughter (including provocation by assault), and the law of self-defense, and of defense of person and property against one who attempts by violence or surprise to commit a felony on either, and the law of reasonable fears. The accused had the full benefit of every theory in her case; and the inaccuracy in regard to section 72 furnishes no ground for a reversal.

6. The remaining grounds of the motion for a new trial do not require special mention. Some of them complain of a failure to give certain charges; but the presiding judge certified that no written requests to give them were made. Some of the grounds complain of charges which in themselves were correct; others of charges which, when considered in connection with the notes of the presiding judge and the entire charge of the court, were not such as to require a reversal. Some complain of the admission of evidence, without setting out the evidence itself. One complains of the testimony of a named witness (without stating what it was) that it was admitted over objection by the defendant, "upon the ground that she had been previously examined." It would serve no good purpose to take up each of these grounds and show wherein it is deficient in itself, or is explained by the note of the court, or that it is not error for the reason assigned, or that, when taken in connection with the charge as a whole, it is not of such a character as to necessitate a new trial. Without pronouncing the charge or rulings perfect in all respects, if there were any other inaccuracies, they do not require a new trial.

Judgment affirmed.

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(129 Ga. 770)

## HARPER v. STATE.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. HOMICIDE—ARRESTING OFFICER—EVIDENCE.
In a prosecution for the homicide of an arresting officer, evidence which tends to show the purpose of the deceased was to effect an arrest, and that the slayer was a fugitive from justice, is competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 373.]

2. CRIMINAL LAW — WRIT OF ERROR — HARMLESS ERROR.
Resolving any possible doubt as to the admissibility of parol evidence to prove the contents of a collateral writing, in favor of the defendant, under the facts of this case (even if error was committed), it was harmless.

3. HOMICIDE — DYING DECLARATIONS — PRESENCE OF DEATH.
The evidence submitted to the court was sufficient to show that the dying declarations were made in articulo mortis, and that the declarant was at the time conscious of his condition, and there was no error in submitting such to the jury. The charge of the court on the

subject of dying declarations was not open to the objections made against it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 425–428.]

4. SAME—EVIDENCE—EXPERTS.

Where it was shown that the bullet which inflicted the wound was metal jacketed, and the wound was infected, it was proper to allow an expert to testify that a bullet of that character would produce infection, and that an inflammatory condition would follow.

5. SAME — WITNESSES — INSTRUCTIONS — ACCUSED—CROSS-EXAMINATION.

"It was not error to inform the jury that the prisoner was not subject to be cross-examined on his statement without his consent."

6. SAME — INSTRUCTIONS — FAILURE TO PRODUCE EVIDENCE—PRESUMPTIONS.

In a prosecution for homicide, where the state omits to offer a witness who was present at the place of the homicide, but who is not shown to have seen the killing, and relies on circumstantial evidence, incriminating admissions, and the dying declarations of the deceased to establish the defendant's guilt, and where the witness is in court accessible to the defendant, it is not error for the court to refuse to charge Pen. Code 1895, § 989, relating to the "presumption arising from failure to produce evidence."

7. HOMICIDE—ARREST—KILLING OFFICER—DEGREE OF OFFENSE.

An officer may arrest an escaped felon without a warrant, and, if such escaped felon slay the officer, without notice of his official character, solely to prevent an arrest, the crime is murder.

[Ed. Note—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 33, 34.]

(Syllabus by the Court.)

Error from Superior Court, Murray County; A. W. Fite, Judge.

John Harper was convicted of murder, and he brings error. Affirmed.

W. W. Sampler and Griffin & Attaway, for plaintiff in error. C. L. Henry, C. N. King, Geo. G. Glenn, Sam P. Maddox, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

EVANS, P. J. John Harper was convicted of the murder of Ben C. Keith, and excepts to the court's refusal to grant him a new trial. The proof submitted by the state disclosed that the homicide occurred under these circumstances: A warrant had issued from the superior court of Fannin county against the defendant for a murder alleged to have been committed in that county in December, 1906. He had eluded the officers of Fannin county, and had taken refuge in Murray county, passing under an assumed name. The deceased was the sheriff of Murray county, and had been pointed out to the defendant as such. The deceased received notice that the defendant was domiciled at a certain house in Murray county, and was wanted by the authorities of Fannin county to answer to the crime of murder. Accompanied by a posse, on July 25, 1907, the sheriff went to the house where the defendant was staying to effect his arrest. The defendant was not at the house, and the sheriff and posse stationed themselves so as to keep the house under surveillance. The deceased and a young man named Foster concealed themselves behind a stump. About 9 o'clock at night the defendant came along the highway, and was commanded by the sheriff to halt. As soon as the sheriff called upon him to halt, he fired upon the sheriff. The sheriff returned the fire. The defendant fired two or three times, inflicting a mortal wound, which caused the sheriff's death three or four days later. The defendant was immediately taken in custody. He was armed with a very large pistol, loaded with metal capped bullets. He was asked why he carried the pistol, and replied "that he didn't aim to go back to Fannin county, and aimed for that gun to defend him." He said that he shot the deceased to get away from him.

1. The court allowed in evidence a postal card, containing an offer of reward for the arrest of the defendant, who was said to be wanted in Fannin county for the assassination of J. A. England on December 21, 1906. The postal card gave a minute description of the defendant. The card was unsigned. Objection was made to the card being received in evidence, on the ground that it was irrelevant, and the statement in the card that the defendant was wanted for assassinating one England, was calculated to arouse the prejudice of the jury. It was shown that this card had been given to the deceased. The state submitted evidence tending to show that the defendant had escaped from Fannin county, and was evading arrest for a crime committed in that county. The deceased was the sheriff of the county where the fugitive had taken refuge. The offense committed by the fugitive was a felony, and the sheriff or any private person may lawfully arrest a fugitive felon upon reasonable and probable grounds of suspicion of his guilt. Pen. Code 1895, § 900; Snelling v. State, 87 Ga. 50, 13 S. E. 154. Upon proof that the deceased was acting upon information derived in part from this postal card, it was admissible as explanatory of the conduct of the deceased at the time of receiving his mortal wound. The denomination of the homicide as an assassination would not render the card inadmissible. A bench warrant against the defendant issued from Fannin superior court upon an indictment for murder was allowed in evidence. The warrant was admissible as one of the elements tending to show that the defendant was a fugitive from justice. The language of Lumpkin, J., in Small's Case, 99 Ga. 31, 25 S. E. 614, is peculiarly appropriate to the facts of the present case: "The vitally controlling issue in the case was whether, in committing the homicide, the accused was resisting a lawful attempt to arrest him, or in good faith making a defense against an unlawful assault upon himself, or what he honestly believed was such an assault. The motives of the accused were directly in issue, and any evidence fairly illustrating or throwing light upon the same was competent as be-

ing explanatory of his conduct under the surrounding circumstances."

2. The court allowed a witness, the sheriff of Fannin county, to testify that he received a telegram from one Russell, asking if the defendant was wanted in Fannin county for murder, and that he replied that the defendant was wanted. The objection to this testimony was that the telegrams were the best evidence of their contents. Mr. Russell, who sent the telegram of inquiry, and received the reply, testified that he communicated the information derived in this way to the deceased, and accompanied the deceased as a member of the posse to arrest the defendant. The exception to this testimony relates to the mode of proof, and not to the competency of what was therein contained as evidence. Even if it was error to allow parol proof of the contents of the telegrams, such error was not prejudicial to the accused. Russell testified that he had given the information derived from the telegrams to the deceased, and the only effect the alleged objectionable testimony could have had was to disclose the source of Russell's information. It was immaterial through what medium Russell obtained his knowledge that the defendant's arrest was desired by the Fannin county officer. He did give this information to the deceased, upon the faith of which deceased acted. The source of Russell's information was not an issue, and the defendant was not hurt by the court allowing parol proof of the telegrams.

3. The deceased was shot Wednesday night, and died the following Sunday. The state offered three witnesses to prove the dying declarations of the deceased as to the cause of his death, and the person who killed him. The declarations were made by the deceased, respectively, Wednesday night, Thursday, and Friday evening before his death. The objection was that the evidence did not disclose that the declarant was in the article of death and conscious of his condition at the time of making the declaration. It appears from the evidence of each witness that the deceased just before making the statement declared that his wound was mortal, and that he thought he was going to die. One of the witnesses testified that he tried to encourage him, and told him that he would probably not die, but the deceased declared that "he was done for or would die, or something to that effect." The ball penetrated the abdomen and perforated the intestines, and physicians testified that it was necessarily mortal. The character of the wound, and the persistent declaration of the deceased that he knew he would die from it, made such a prima facie case as to carry such declarations to the jury. The mere fact that death did not supervene immediately would not render the testimony incompetent. In Bryant v. State, 80 Ga. 272, 4 S. E. 853, the dying declarations were made on Friday before the declarant's death on the following Wednesday, and the declarations were held competent. In Jackson v. State, 56 Ga. 235, some of the statements were made on Friday and others at an earlier period, and the deceased died on Saturday. The deceased declared, when he made each statement, that he felt that he would die, and this evidence was held competent. The test is not so much the contiguity between the making of the statement and the death of the declarant, as whether they were made in articulo mortis, and when he was conscious of his condition. We think the proper foundation for the admission of the dying declarations was made, and the court properly submitted them to the jury. The exception to the charge on this subject is manifestly without merit.

4. It was shown that the bullet which caused the death of the deceased was "metal jacketed." A physician was asked what would have been the result of a flesh wound made with that character of bullet, and answered that it would produce infection in a wound, and an inflammatory condition would follow. Objection was made to this testimony on the ground that it was hypothetical, not based on the facts, and was irrelevant and immaterial. The objection was not well taken, as the physician also testified that the wound was infected.

5. Exception is taken to the following charge, the criticism being that it was misleading, and calculated to impress the jury that the defendant could have testified in his own behalf, and been cross-examined, had he consented thereto: "The law provides that, upon the trial of a criminal case, the defendant may make to the court and jury such statement as he may deem proper in his defense. He is not under oath nor subject to cross-examination without his consent, and you may give this statement just such weight as you may see proper." This was substantially the section of the Code. Pen. Code 1895, § 1010. It was not error to give it. Murray v. State, 85 Ga. 381, 11 S. E. 655.

6. Counsel requested the court to charge Pen. Code 1895, § 989, as follows: "When a party has evidence in his power and within his reach, by which he may repel a claim or charge against him, and omits to produce it, or, having more certain and satisfactory evidence in his power, relies upon that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded, but this presumption may be rebutted." It was contended that this section was applicable, inasmuch as it appeared from the testimony that one Carl Foster was present and witnessed the homicide, and that his name appeared upon the indictment as a witness. It also appeared that the witness was under subpœna, and was in court. The court refused this request, and stated in the presence of the jury that he would not give it in charge as the witness was present, and could have been introduced by either party. The plaintiff in error insists that his request should have been given because the prosecu-

tion, instead of introducing an eyewitness to the homicide, relied upon the dying declarations of the deceased and other circumstances, to establish the defendant's guilt. This section appears both in Civ. Code 1895, § 5163, and in Pen. Code 1895, § 989. In a criminal case the prosecution is not called upon to produce every eyewitness to the transaction. The burden which the law places upon the prosecution is to establish the defendant's guilt of the crime charged by competent evidence beyond a reasonable doubt. Although the evidence tends to show that Foster was near the deceased at the time he received the mortal wound, it does not show that Foster really saw or heard what transpired at the time. Besides, the witness was in court, accessible to the accused, and could have been called by him to disprove the facts and circumstances relied on by the state, if in point of fact he would have delivered such contradictory testimony had he been called. It is sometimes the case that the only eyewitness to a crime is unfriendly to the state, and his sympathies are enlisted in the defendant's behalf. It may be that such a witness is so devoid of character that he would not hesitate to perjure himself in order to assist the defendant to escape the consequences of his criminal act. To require the state to produce such a witness under penalty of an instruction that the failure to produce him would raise the presumption that the other testimony offered to establish the defendant's guilt is unworthy of belief would paralyze courts of justice in the enforcement of the criminal law.

7. The court charged: "Now gentlemen, as to whether or not the defendant killed the deceased to prevent an arrest, you may, and should, take into consideration all the testimony with reference to the charge against him in Fannin county. A certain warrant has been introduced before you and the evidence of the sheriff of that county, and a certain card purporting to be an offer of a reward. All of these facts are before you, not for the purpose of showing that the defendant is guilty of the offense charged there, but you may consider them in so far as they may throw some light upon the question as to whether or not he knew that he was charged with that crime, whether or not he was a fugitive from justice, and whether or not he believed and had cause to believe, when Keith ordered him to hold up his hands, if he did so order, as the state contends, whether he, in fact, believed and had cause to believe that the deceased, Keith, was making an arrest, and whether or not he did the killing to prevent an arrest." This charge is alleged to be error because it "takes from the consideration of the jury the defendant's theory of the case, and leaves the jury to believe that if he was charged with a crime in Fannin county that he would not be justified, even though the deceased, Keith, fired upon him without giving him knowledge or information that he was the sheriff and authorized to arrest him, even though the jury might believe that the deceased fired upon him without imparting information as to the purpose of the deceased when he accosted him on the public highway." The defendant in his statement claimed the homicide to be justifiable; and as we interpret this assignment of error, the criticism of the charge is that it excluded his defense of justification because it was charged with a crime in Fannin county. We do not think the charge is open to this objection. Exception is also taken to the following excerpt from the charge: "As I have said, if you find that he shot and killed Keith to prevent an arrest, as the state contends, he would be guilty of the offense of murder, whether he knew Keith was an officer or not." This excerpt was taken from the court's instructions as to the grade of a homicide when committed by an escaped felon to prevent an arrest. The exception to the quoted extract was that it was misleading, and caused the jury to ignore the defendant's theory of the case. The assignment of error does not disclose the defendant's theory, and we must look to his statement to discover it. There we find it to be justifiable homicide. A sheriff may arrest an escaped felon on probable grounds of suspicion without a warrant (Johnson v. State, 30 Ga. 426). And so may a private person (Pen. Code 1895, § 900). "To slay an officer to avoid being taken in custody, knowing that his object is to make an arrest for felony committed several months previously, is murder, but done suddenly, without knowledge of his purpose or official character, and without malice, it is manslaughter. Belief or reasonable grounds of belief would be equivalent to knowledge." Croom v. State, 85 Ga. 718, 11 S. E. 1035, 21 Am. St. Rep. 179. There was evidence from which the jury could infer that the defendant was an escaped felon, and killed the deceased to prevent an arrest. The homicide under these circumstances would be murder, whether the officer had a warrant or whether the defendant knew he was an officer. Snelling v. State, 87 Ga. 50, 13 S. E. 154.

After a careful consideration of the entire record, we find nothing which requires the grant of a new trial, and the judgment is affirmed. All the Justices concur.

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(129 Ga. 688)

BOWEN, JEWELL & CO. et al. v. ADAMS.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. MASTER AND SERVANT—DEATH OF SERVANT—DANGEROUS MACHINERY—ASSUMED RISK—DUTY TO WARN.

Though a servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself, this assumption of risk, where the employment concerns the operation of a machine with a defective or dangerous appliance, is subject to the limitation that the servant must not only have actual or imputable knowledge of the defective machinery, but also of the danger attendant upon its use, where such danger is not

so obvious as to be apparent to a person in the exercise of ordinary care. With respect to such unassumed risks, the master is under duty to warn the servant.

(a) The petition was not subject to general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 310.]

2. PLEADING — AMENDMENT — NEW CAUSE OF ACTION.

An amendment, which sets forth an act of negligence additional to others originally pleaded as being a concurring and contributing cause of the injury for which damages are asked in the original petition, does not add a new and distinct cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39. Pleading, § 694.]

3. MASTER AND SERVANT—DEATH OF SERVANT —EVIDENCE.

There was sufficient evidence to support the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 909–912.]

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Action by A. D. Adams against Bowen, Jewell & Co. and others. From a judgment for plaintiff, defendants bring error. Affirmed.

Wm. H. Burwell, for plaintiffs in error. L. D. McGregor and W. H. Fleming, for defendant in error.

EVANS, P. J. This is an action by Anna Drucilla Adams against Bowen, Jewell & Co. to recover damages for the negligent killing of the plaintiff's minor daughter, who at the time of her death was an employé of defendants. The material parts of the petition relied on as showing that the death of plaintiff's daughter was occasioned by the defendants' negligence may be briefly summarized as follows: The defendants operated a bag factory, and the plaintiff's daughter, aged 16, in good health, and of average intelligence, was employed in the printing and press room of defendants' factory. In this room were three printing machines. The particular machine at which plaintiff's daughter worked was what is known as a single printing machine, of old pattern and a second-hand machine, and unlike the other two machines, which were of modern type. The duties of the employé were to feed the single machine, and to clean it when ordered by the defendants' foreman. One Zimmerman was employed by the defendants to act as "vice principal or quasi master" over the defendants' servants working in the printing room. On the day of the catastrophe, Zimmerman stated to the employés of defendants in the printing room that he had filled all orders on hand, and directed the employés to clean the printing machines underneath. It was Zimmerman's duty to throw off the main belt that ran from the main shafting to the shafting that was connected to the printing machines, which duty he failed to perform at the time of giving the command to clean the machines. Instead of throwing off the main belt, he pulled a lever that threw the minor belt from the machine where the employé worked to a loose wheel, which caused this machine to stop without stopping the other two machines. This lever was used for the purpose of throwing the minor belt back to the wheel of the printing machine and putting it in motion. These conditions were not patent, and were unknown to the employé, who had never been warned of the dangers incident thereto. There were two rods underneath the single machine; one of them connecting the levers, and by moving the rod a certain way the lever would shift the belt from the loose pulley to the rigid pulley on the machine, and the machine would be put in motion. The employé did not know that by rubbing the rod attached to the lever the belt would be shifted from the loose pulley to the machine, nor was such condition visible, nor was the employé warned of the danger. Neither did the employé know that the rod under the machine was attached to the lever. In obedience to the command of Zimmerman, after the single printing machine had been stopped, the employé went underneath the machine for the purpose of cleaning it, and while so employed she moved the rod attached to the lever so as to cause the machine to be put in motion, and without fault on her part she was instantly killed by the machinery. It was alleged that the single printing machine was not fit for the purpose for which it was used; that it was a risk to work at the same on account of its pattern, and the length of time it had been used. An oral motion was made to dismiss the petition because the defendants were not liable in damages for the death of the plaintiff's daughter, occurring in the manner therein alleged. The court refused to dismiss the petition, and this is assigned as error.

1. The chief dereliction of duty of the master, as alleged, consisted in his failure to warn the servant of the danger incident to her employment, which danger was latent in character and unknown to the servant. The servant worked at the machine which killed her; but in avoidance of the possible inference from that fact of her knowledge of the machine, and the danger incident thereto, it was alleged that the rod attached to the lever was underneath the machine, that she did not know it was so attached, that the danger from the mechanism was not patent, and that she did not know of the danger, and had not been warned as to the same. These allegations assign a sufficient reason why the servant did not apprehend the unknown peril associated with her employment. Ga. R. R. Co. v. Rayford, 115 Ga. 937, 42 S. E. 234. The law imposes upon the master, if there are latent defects in the machinery, or dangers incident to an employment unknown to the servant, of which the master knows or ought to know, the duty to give the servant

warning in respect thereto. Civ. Code 1895, § 2611. The servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. Civ. Code 1895, § 2612. This assumption of risk is subject to the limitation that the servant must not only know, or in the exercise of ordinary care should know, the existence of the defect in the machinery, but of the danger attendant upon its use, where such danger is not so obvious as to be apparent to a person of ordinary intelligence. Pitts v. Fla. Cent. R. Co., 98 Ga. 655, 27 S. E. 189. It was alleged that the single printing machine was unfit and dangerous on account of its pattern and the long time it had been in use. There were two rods underneath it; one attached to the lever, which started the machine, and the other connected with other parts of the machinery in such a way that it was not dangerous in handling during the cleaning process. But there lurked peril in the rod attached to the lever. The petition affirms the servant's ignorance of the danger, and that the peril was not so obvious as to be discernible by the use of ordinary diligence. Under such circumstances, the master owed a duty to the servant to warn her of the hidden danger, and the servant, not knowing of the peril, and engaged in the work of cleaning the machine under the master's order, had a right to rely on the master to perform this duty. We are of the opinion that, as against a general demurrer, the declaration set forth a cause of action.

2. The plaintiff voluntarily amended her petition by striking paragraph 16, which alleged that the servant, in obedience to the order of the superintendent, went under the single printing machine, after the same had been stopped, and began cleaning it; that while in the execution of this order she moved the rod that ran underneath the machine, which was attached to the lever, in such a way and manner as to cause the machine to be put in motion; and that this was without fault on her part, she being ignorant of the danger to which she was exposed at the time she was killed. The amendment proposed to substitute for the stricken paragraph allegations to the effect that, in obedience to the order of the superintendent, she went underneath the single machine, after the same had been stopped, and began cleaning it, and while so engaged the machine, without fault on her part, was put in motion by the shifting of the minor belt from the loose to the rigid pulley, which controlled the motion of the machine; that the shifting of the belt could have been caused, and was caused, in one of two ways: Either in the manner as described in the stricken paragraph, or by friction of the belt on the loose pulley, which would force the belt to jump or slide back to the rigid pulley. It was further alleged that this occurrence happened frequently before the catastrophe, and was due to the imperfect adjustment of the belt and the loose pulley, by allowing too much friction between the two, and that the employe was ignorant of this condition of the machine. The defendants objected to the amendment, because it was contended that it added a new and separate cause of action. No point was raised that the allegation as to the manner or cause of the machine being put in motion was expressed in the alternative. The new matter introduced in the amendment, which it is contended adds a new cause of action, is the allegation that the belt and the loose pulley were so imperfectly adjusted that the friction of the belt on the loose pulley forced the belt to jump or slide back on to the rigid belt, and thus start the machine. At most, this is but an additional allegation of negligence on the part of the defendant. Where a petition sets out certain acts of negligence to show a violation by a defendant of plaintiff's right, such petition may be amended by setting out additional acts of negligence to show the same violation of the same right. City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318.

3. Upon the conclusion of the plaintiff's testimony, the defendants moved a nonsuit, which was refused by the court. The defendants then introduced testimony, and a verdict was rendered in favor of the plaintiff. Error is assigned upon the refusal of the nonsuit and because the verdict is without evidence to support it. Proof was submitted to support all the substantial allegations of the petition. It appeared that the two modern machines were equipped with a safety clutch which held the lever when the belt was shifted from the rigid to the loose pulley. Plaintiff's daughter usually worked at one of these new machines. The old single printing press was unprovided with this safety contrivance, and sometimes a rope was used to tie the lever so as to prevent the belt being inadvertently or accidentally shifted to the rigid pulley so as to start the machine. At the time plaintiff's daughter met her death, the lever was not tied with a rope. The single printing machine was equipped with a lever on either side designed to shift the belt back and forth from the rigid to the loose pulley. The levers were connected underneath the machine by a rod. When the body of the employé was taken from under the machine, her hand with a rag in it was on this shifting rod. There was another rod near to and parallel with the rod connecting the levers. Four employés of the press room were introduced as witnesses, three of whom testified that they were not warned nor did they know of the danger of rubbing the rod underneath the machine. The fourth, who was introduced by the defendants, did not testify upon this subject. The superintendent said that he warned plaintiff's daughter that when she went to clean the press to always tie the shifting rod lest she might get hurt, and knew that the employé had seen the press tied. He further testified: "I did not

give Celia [the employé] any different instructions from the others." Inasmuch as other employés who testified denied receiving any instructions collectively or individually, and as the superintendent contended that he gave the deceased employé no different instructions than he gave the others, the jury could infer that the employé had not been warned of the peril incident to the shifting rod because of the failure to provide a safety clutch to prevent an involuntary shifting of the belt. Besides, as the rod was underneath the machine, and concealed from view, and in close proximity to another rod, which did not control the motion of the machine, the jury might also infer that the danger was latent, and not discoverable by a person of average intelligence in the exercise of ordinary care. The printing press was of complicated mechanism. The deceased employé was 16 years of age, and had been working in the printing room but a few months, most of the time using one of the new machines, which were provided with safety appliances. There was testimony that it was the duty of the room foreman to stop the machines when they were cleaned, and that this could only be done without danger to those engaged in cleaning the presses by throwing the belt from the shafting above. The press was not stopped in this manner upon the occasion when plaintiff's daughter was killed. Immediately after her death, an order was given that the belts were to be thrown off from the shafting above when the presses were cleaned, and the employés were ordered not to get under the presses unless this was done, and the danger of doing so was then pointed out. It did not appear that the employé had ever used the lever. The only contested issues in the case were the negligence of the defendants, and the lack of diligence on the part of the employé, and on these issues there was sufficient evidence to uphold the verdict.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 709)

## MAYNARD et al. v. GREER et al.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. WILLS — CONSTRUCTION — ESTATE DEVISED —CONDITION SUBSEQUENT.

In 1859 a testator executed his will, in which he bequeathed certain property to a named trustee for the sole and separate use of three daughters of the testator, and any other child or children who might be born to him, share and share alike, and in no manner to be subject to the debts or contracts of the husbands of said children, "but to be held in trust by the said (trustee) for their sole and separate use upon the following condition and limitation: that is to say, if either of my children now in life or hereafter born should die without issue living at the time of their death, then the portion of such child or children so dying is to be held in trust for the survivor or survivors equally, share and share alike; if all of my children should die leaving no issue living at their death; then the whole property bequeathed them in trust in this the sixth item of this my will, with the increase, is to revert and become the property of my estate, share and share alike, to my nephews and nieces, the children of" certain named parents. *Held*, that the estate created for the benefit of the testator's daughters was one in fee, subject to be divested upon the happening of the contingency specified. See Hill v. Terrell, 123 Ga. 49, 51 S. E. 81.

2. TRUSTS — SALE — AUTHORITY OF TRUSTEE — ORDER OF COURT.

Another item of the will provided that: "For the purpose of managing and preserving the property bequeathed to my children in the sixth item of my will, I hereby appoint and constitute (a named person) before mentioned, trustee, to manage and control their property, and also as testamentary guardian to superintend, control and direct the education and maintenance of my children; hereby vesting and clothing him as such trustee with full force, whenever he shall deem the interest of the trust estate requires it, to sell any part or portion of the estate, and reinvest it for the benefit and use of the children, at his discretion, subject to the trust and limitation before specified. I further give him full power and authority to invest such portion of my estate as may be in money, in money bonds, notes or other obligations, as well as the whole or any portion of the profit or net income from the estate in such manner as he may deem most conducive to the interests of the estate and [to] carry out the purpose of the trust." *Held*, that the trustee named in the will was authorized to sell property forming part of the trust estate without an order of court; but, if a successor of such trustee were appointed by the court, he would not be so authorized.

3. ADVERSE POSSESSION—COLOR OF TITLE.

Where a person purporting to act as successor of such a trustee, and who had given bond for his conduct and had made returns as trustee, though no order of appointment appeared, executed a deed, without any order of court, conveying a portion of the trust estate, such deed would not convey a valid title to the property; but it would serve as color of title when taken in good faith, under a belief that he had authority to sell, induced by his representation that an order had been passed conferring it.

4. WITNESSES—TRANSACTIONS WITH TRUSTEE —DECEASED BENEFICIARY.

One of the purchasers from such trustee was not an incompetent witness to testify to transactions with the trustee because of the death of one of the testator's daughters, whose administrator and her children brought suit to recover the land.

5. ADVERSE POSSESSION—PRESCRIPTIVE TITLE.

The uncontradicted evidence showed a perfect prescriptive title, and there was no error in overruling a motion for a new trial after a finding for the defendant.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

Action between P. B. Maynard and others and W. G. Greer and others. From a judgment in favor of the latter, the former brings error. Affirmed.

Robt. L. Berner, for plaintiffs in error. F. Jordan & Son and F. C. Foster, Sr., for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 717)

## CARTER et al. v. CARROLL.

(Supreme Court of Georgia. Dec. 21, 1907.)

CERTIORARI—REVIEW—REFUSAL OF CERTIORARI—BILL OF EXCEPTIONS.

To bring to this court for review a refusal to sanction a petition for certiorari, such petition should be incorporated in the bill of exceptions or otherwise verified by the judge. Such petition cannot be considered here when it is sent up as a part of the transcript of the record and certified as a part of the record, for it is not a part of the record until after it has been sanctioned. Tompkins v. Newman, 120 Ga. 173, 47 S. E. 557.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 201.]

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action between G. M. Carter and others, and Timothy Carroll, executor. From the judgment, Carter and others bring error. Dismissed.

J. G. & J. F. McCall and J. D. Wade, Jr., for plaintiffs in error. M. Baum, for defendant in error.

BECK, J. Writ of error dismissed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 754)

## GASTON v. THOMPSON et al.

(Supreme Court of Georgia. Dec. 20, 1907.)

1. PARENT AND CHILD—MEDICAL SERVICES RENDERED CHILD—LIABILITIES.

Where a surgeon, at the instance and request of a father, rendered necessary professional services to his minor child, solely on the credit of the father, the child having no estate at the time, but subsequently becoming possessed of property for which a guardian was appointed, an equitable action did not lie against the guardian and his ward to subject the property of the latter to the payment of the debt for such services, though the father was insolvent. This ruling is evidently not in conflict with the intimation in Poole v. Wilkinson, 42 Ga. 539, that if necessary medical services were rendered to the ward on the credit of the ward's estate, and not on the credit of the guardian, equity might, if the guardian were insolvent, grant relief by causing the debt to be paid out of the ward's property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, §§ 36, 37.]

2. SAME.

The petition was properly dismissed on general demurrer.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. McF. Gaston against Nellie Thompson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Ulysses Lewis, for plaintiff in error. J. E. & J. F. McClelland, for defendants in error.

PER CURIAM. Judgment affirmed. All the Justices concur.

(129 Ga. 647)

## SOUTHERN RY. CO. v. TOLLERSON.

(Supreme Court of Georgia. Dec. 19, 1907.)

1. CARRIERS—INJURY TO STOCK SHIPMENT—NOTICE OF CLAIM.

A stipulation, in a contract for the shipment of live stock requiring "that, as a condition precedent to any right to recover any damages for loss or injury to said live stock," written notice of a claim therefor shall be given "before said live stock is removed or is intermingled with other live stock," is reasonable and valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 938.]

2. SAME.

The evidence showed that the plaintiff—the shipper—failed to comply with such a stipulation in this case, and therefore was not entitled to recover damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 938.]

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action by H. M. Tollerson against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Charlton E. Battle, for plaintiff in error. Brown & Brown, for defendant in error.

FISH, C. J. H. M. Tollerson brought an action against the Southern Railway Company, in which he claimed that he had delivered a car load of live stock to the defendant company at Shelbyville, Ky., for shipment to McDonough, Ga.; that the stock were in good condition when delivered to defendant, and were in a depleted, exhausted, and famished condition when delivered to him at McDonough, from lack of food, water, and proper care and attention while en route. Upon the trial there was a verdict for plaintiff, and the case is here for review upon a bill of exceptions sued out by defendant, in which error is assigned on the overruling of its motion for a new trial.

There were several points made in the motion for a new trial and insisted on in this court; but we deem it necessary to deal specifically with one of them only, as it will control the case as made by the present record. Upon the trial the plaintiff put in evidence a written contract entered into between himself and the Southern Railway Company in Kentucky, Inc., for the shipment of the stock in question. In this contract there was the following stipulation: "That, as a condition precedent to any right to recover any damages for loss or injury to said live stock, notice in writing of the claim therefor shall be given to the agent of the carrier actually delivering said live stock wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock." In Southern Railway Company v. Adams, 115 Ga. 705, 42 S. E. 35, it was held that such

an agreement was reasonable, and that a consignor entering into the same is not entitled to recover against the carrier damages for loss or injury to the live stock, unless it be shown that such notice has been given in accordance with the terms of the contract. We are aware that contrary rulings have been made by a number of courts, but the weight of authority seems to be in accordance with such former ruling of this court, which, in addition to the cases cited when it was made, is supported also by the following: Baltimore & Ohio S. W. R. Co. v. Ross, 105 Ill. App. 54; Smith v. Chicago, R. I. & P. R. Co., 112 Mo. App. 610, 87 S. W. 9; Baltimore & Ohio R. Co. v. Hubbard, 72 Ohio St. 302, 74 N. E. 214; Eckert v. Pennsylvania R. Co., 211 Pa. 267, 60 Atl. 781, 107 Am. St. Rep. 571; Bellows v. Wabash R. Co., 118 Mo. App. 500, 94 S. W. 557; Hatch v. Minneapolis, St. P. & S. S. M. Ry. Co. (N. D.) 107 N. W. 1087; Louisville & Nashville R. Co. v. Landers, 135 Ala. 504, 33 South. 482. The plaintiff testified: The stock were in good condition when they were shipped from Shelbyville. "They were in bad condition when they arrived at McDonough. They ran out of the car, or a lot of them did, with their tails wagging like you have seen sheep, and lots of them looked like they had been gutted. I paid $50 more for one of the horses than I did for the others [there were four horses and twenty-seven mules], but, when they ran out of the car, I could not tell which one it was. They all looked alike to me. I brought the stock to town, and turned the mules in the pen. One of them died on Sunday. [They were delivered to him at McDonough Saturday afternoon about 5 o'clock.] On Monday morning another laid down, and a lot of mules trampled over it. I got it up and worked with it, and they have been all the spring getting over it. On putting them to work, they would give out. Their condition was caused by being on the car too long without feed and water. * * * The Monday morning after the stock arrived I called up the agent, Mr. Williams, and, while talking with him and telling him, over the 'phone, about the mule being dead, he said, 'I have a feed bill against you.' * * * I could not ascertain the damage before the stock was unloaded. I had to take them out and put them in the pen before I could really examine them, and I did not know the damage until I had taken them out and put them in the pen. * * * I put the stock in my stable when I brought them over from the depot; not with any other stock, but in a separate department. They were in a separate part of the stable when I notified Mr. Williams of my claim for damages, and had not been mixed with any other stock then. * * * I do not recollect when I made the written demand on the Southern Railway Company for damages for injury to my stock. I made one through my attorneys. I could not say positively when it was—four or five days afterwards. It was not when the suit was filed. I did not make any written demand myself on the Southern Railway Company. I could not tell that the filing of this suit was the only demand that I ever made. I do not recollect what I asked my attorneys to claim for me for damages. It was what they sued for. I made my claim to my attorneys four or five days afterwards; but I did not make any written demand myself. I do not know how my attorneys got at it—do not know whether they wrote the railway company about it or not, or whether they made any written claim or not. * * * This stock was not intermingled with other stock, but has been since. They were removed from the depot to my stables. I kept them there and afterwards sold them to other people." H. S. Williams, sworn in behalf of plaintiff, testified as follows: "I am agent of the Southern Railway Company at McDonough. Mr. Brown, the plaintiff's attorney, filed a written claim with me for damages to this shipment of stock a month or two after they were received. * * * I have not the writing that was given to me. I turned it over to the proper authorities of the railway company. * * * To the best of my recollection it was not filed with me until several months after the stock was received."

There was no other evidence whatever in reference to service of notice on the railway company of the plaintiff's claim for damages. It thus clearly appears from the evidence submitted by the plaintiff on the trial that the stipulation as to giving the written notice of the claim for damages was not given within the time specified in the contract, and therefore a verdict was demanded in behalf of the defendant, and accordingly the court erred in not granting a new trial.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 711)

## McDANIEL v. SWIFT MFG. CO.

(Supreme Court of Georgia. Dec. 21, 1907.)

TRIAL—NONSUIT.

This being a suit by a servant against a master for damages arising from personal injuries caused by the alleged negligence of the master in furnishing to the servant, who was engaged in operating machinery in a cotton factory, a belt which was rotten and unsound and improperly joined together, and the evidence failing affirmatively to show that the belt was defective in either particular, as alleged, there was no error in granting a nonsuit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 338–340.]

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; T. T. Miller, Judge pro hac.

Action by W. B. McDaniel against the Swift Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Girard & Girard, J. H. Martin, W. Cecil Neill, T. L. Bulger, and A. W. Cozart, for

plaintiff in error. C. E. Battle, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 650)

GEORGIA R. & BANKING CO. v. LLOYD.

(Supreme Court of Georgia. Dec. 19, 1907.)

1. CARRIERS—INJURY TO PASSENGERS—ACTION—PETITION.

The petition sets forth a good cause of action, and was not subject to general demurrer.

2. NEW TRIAL—GROUNDS OF MOTION—RULINGS ON EVIDENCE.

A ground of a motion for a new trial based on the admission of evidence should set forth the evidence literally or in substance, unless the evidence is attached to the motion as an exhibit, and it must further appear from the motion what specific objections were raised to the admission of the testimony, and, further, that such objections were made when the testimony was offered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 255-262.]

3. CARRIERS — INJURY TO PASSENGERS — EVIDENCE.

The evidence authorized the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Action by Gertrude Lloyd against the Georgia Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and Jas. B. & Noel P. Park, for plaintiff in error. John T. West and S. H. Sibley, for defendant in error.

BECK, J. 1. This was an action brought by Miss Gertrude Lloyd against the Georgia Railroad & Banking Company to recover damages for personal injuries. According to the allegations of the petition, the plaintiff was a passenger en route from Athens to Harlem; both stations being on defendant's road. At Union Point, where the injury occurred, plaintiff was required to change cars and wait for her train. She remained in the waiting room of the depot until time for the arrival of the train on which she was to continue her journey, and then, with other passengers, left said waiting room to go out upon the platform preparatory to boarding the train. The passageway from the waiting room to the point where passengers board the train ran between the depot and the railroad track, and was not more than three feet wide. Upon this passageway several baggage trucks had been placed by the employés of the defendant, and a number of negroes were seated upon said trucks, thus compelling plaintiff to pass between said trucks and the edge of the passageway next to the track. As petitioner was passing said trucks, walking upon said platform, entirely ignorant of the near approach of the train, the engine of defendant approached her from the rear; and, without any warning or signal to her, a portion of the engine which projected over the platform struck petitioner on the back, knocking her down and inflicting the injuries complained of. Plaintiff alleges that defendant was negligent in failing to provide an adequate depot and platform for the accommodation and safety of its passengers, in that it built said platform too near the track, so that it was overhung by a part of the engine as aforesaid, and placed said trucks upon said platform and permitted negroes to congregate thereon, thus compelling petitioner to walk too near the track. It is also alleged that the engine of defendant which struck plaintiff was running at a high and dangerous rate of speed, and the persons in charge thereof failed to keep a proper outlook, and failed to give any signal or warning to petitioner of the approach of said train, the nearness of which was unknown to petitioner. We are of opinion that the petition sets forth a good cause of action, and that the court did not err in overruling the general demurrer of the defendant. See Georgia R. R. & Bnkg. Co. v. Adams, 127 Ga. 408, 56 S. E. 409. The allegations in the case at bar, in so far as they relate to the relation of the plaintiff to the defendant at the time the injuries complained of were received by the former, as well as the allegations relative to the acts of negligence upon the part of the defendant, and those setting forth various facts and circumstances upon which plaintiff's cause of action is based, are substantially the same as those in the Adams' Case, supra, where it was held that the petition was not subject to general demurrer.

2. The second ground of the amended motion complains of the admission of testimony, but fails to state what, or that any, objections were raised and urged to the admission of the testimony upon the trial of the case. In this ground of the motion is set forth colloquies between the court and counsel for both parties, upon which it is to be inferred that the testimony referred to was objected to, and then follows a statement of the grounds upon which it is now contended that such testimony was illegally admitted, but it is nowhere in the motion distinctly or directly stated that these grounds were urged before the trial judge. It is unnecessary to cite any one of the numerous cases decided by this court in which it has been held that the ground of a motion for a new trial based upon the admission of testimony should show what objections were made to the admission of the testimony at the time it was offered during the progress of the trial. A number of such cases can be found in 9 Michie's Digest of Georgia Reports, 701. Another ground of the motion for a new trial also complains of the admission of the testimony of a named witness, but it states neither literally nor in substance the testimony of the witness there

referred to. Consequently no question is raised by this assignment of error for decision by this court.

8. While the case is a close one upon the facts, and the evidence is conflicting upon several of the issues involved, there was sufficient evidence to support the verdict. The trial judge in the exercise of his discretion has seen fit to approve the finding of the jury, and the judgment will not be disturbed.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 665)

## SOUTHERN RY. CO. v. JORDAN.

(Supreme Court of Georgia. Dec. 20, 1907.)

1. CARRIERS — INJURY TO PASSENGER — PETITION—AMENDMENT.

In an action for a tort alleged to have been committed by defendant to the plaintiff's person, it is not error to allow an amendment claiming exemplary damages in which it is, in effect, alleged that the act complained of amounted to willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences.

2. DAMAGES — INSTRUCTIONS — DOUBLE DAMAGES.

One of the charges excepted to was subject to the criticism that it authorized a double finding of damages for wounded feelings, and the court erred in not granting a new trial on account of this error.

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

Action by Nannie Jordan against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Mrs. Nannie Jordan brought an action for damages against the Southern Railway Company, alleging, in substance, that while a passenger on one of defendant's trains she was unnecessarily required by the conductor thereof to leave a coach where she had been riding, in a comfortable seat, and to go out into the cold, at night, and into another coach where, by reason of its extremely overcrowded condition, she was forced to ride, for the remainder of her journey, in a smoking apartment, which was very uncomfortable and unpleasant to her, because greatly crowded with men, some of whom were smoking and drinking, and by reason of all of which she was made ill and caused to suffer much mental and physical pain, and made to keep her bed for several days. Over defendant's objection, an amendment to the petition was allowed, alleging, in substance, that the conductor who ordered her to change from one car to the other knew of the crowded and otherwise uncomfortable condition of the car to which she was ordered by him to go, and that she would be exposed to all of the discomforts and suffering which she had to undergo by reason of the change from one car to the other, and that this conduct of the conductor was such a gross, willful, and malicious violation of the duty defendant owed the plaintiff as a passenger as to entitle her to exemplary damages. There was a verdict in behalf of the plaintiff. Defendant moved for a new trial, which motion was overruled, and it excepted, assigning error upon the allowance of the amendment to the petition and upon the refusal of a new trial.

C. E. Battle, for plaintiff in error. Smith, Berner, Smith & Hastings, for defendant in error.

FISH, C. J. (after stating the facts as above). 1. The court did not err in allowing the amendment to the petition, as the allegations of the amendment charged willful misconduct by the conductor, or such entire want of care on his part, as would raise the presumption of a conscious indifference by him to the consequences to the plaintiff of a compliance by her with his order. Southern Railway Co. v. O'Bryan, 119 Ga. 147, 45 S. E. 1000.

2. One ground of the motion for a new trial was that the court erred in instructing the jury as follows: "She [plaintiff] alleges that the wrongful conduct of the agents of the defendant company wounded her feelings, and asks damages for wounded feelings. If there was a tort or wrong done her by the defendant company, and it caused her wounded feelings, then she would be entitled to recover damages for this. Then, in addition to this, gentlemen, she asks that she be allowed additional damages as exemplary damages on account of the wrongful conduct of the defendant company. Now, this is the rule as to that: In every tort there may be aggravating circumstances either in the act or intention, and in that event the jury may give additional damages either to deter the wrongdoer from repeating the transgression, or as compensation for the wounded feelings of the plaintiff. Gentlemen, before the plaintiff would be entitled to recover additional damages as exemplary damages, it must appear that there were aggravating circumstances either in the acts or intention of the agents or employés of the defendant company." One of the exceptions to this charge was that it authorized a double finding by the jury for wounded feelings. We think this exception well taken, as it will be seen that the court instructed the jury that the plaintiff would be entitled to recover damages for wounded feelings, if her feelings had been wounded by a tort committed on her by defendant, and then further instructed the jury that, in addition to such damages, the plaintiff asked that she be allowed exemplary damages, on account of the wrongful conduct of defendant's agents, and, in effect, charged that the plaintiff would be entitled to recover such additional damages for wounded feelings, if it appeared that there were aggravating circumstances either in the acts or intention of the agents of the defendant. This authorized a double

finding for wounded feelings. Under the provisions of section 3906 of the Civil Code of 1895, which the court, in substance, gave to the jury, exemplary or punitive damages are allowed, where there are aggravating circumstances, as compensation for wounded feelings, or to deter the wrongdoer from repeating the trespass. The plaintiff was therefore not entitled to recover damages for wounded feelings caused by a tort committed upon her by the defendant, and, in addition thereto, exemplary or punitive damages for wounded feelings, which would be for the same thing.

3. Error was assigned upon the following charge: "The jury are to take all the proven facts and circumstances and assess the damages and do right between the parties." The exception to this instruction was that it was an expression of opinion by the court that such facts and circumstances had been proven as authorized the plaintiff to recover. This extract from the charge, considered by itself, seems open to the criticism made thereon; but, when taken in connection with what immediately preceded and what immediately followed it, as shown by the entire charge, sent up with the record, it is doubtful if it is open to the objection made. However, as a new trial will be granted for the erroneous charge noted above, we deem it unnecessary to make an express ruling on the question here raised, as the judge will no doubt, upon the next trial, avoid using language liable to the construction that it is an expression, or intimation, of his opinion as to the facts of the case.

Some of the grounds of the motion for a new trial are not referred to in the brief of counsel for plaintiff in error, and some of the questions made by the motion are not likely to arise upon another trial, and for these reasons such grounds are not dealt with.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 747)

## HAMILTON v. STATE.

(Supreme Court of Georgia. Dec. 20, 1907.)

1. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

It was not reversible error for the court, in giving in charge to the jury a request to charge presented by defendant's counsel, to state that it was given by request. The better practice, however, would be for the court, under such circumstances, to omit any reference to the fact that counsel had requested the charge. Comer v. Allen, 72 Ga. 1.

2. HOMICIDE—INSTRUCTIONS.

There being evidence from which the jury might have found that the accused shot at Owens, but killed Robinson, it was not error for the court to charge as follows: "It would make no difference, gentlemen of the jury, whether the deceased was the man he really intended to kill or not, provided that you find that he did shoot at some member of that crowd with a felonious intent, and without being justified or excused under the law—he would be held accountable. In other words, if a man attempts to kill another without justification, without provocation, and not under circumstances of mitigation, and in pursuance of that effort shoots, and, instead of hitting the man at whom he shoots, hits and kills another, he is guilty. The killing of the other is measured by the same standard as though he had killed the one originally intended." Charlon v. State, 106 Ga. 400, 32 S. E. 347.

3. SAME.

The facts of the case authorizing such instruction, it was not error for the court to charge the jury that: "Suppose he [defendant] had not intended to kill any specific member of that crowd that was standing there, if you find there was a crowd standing there, and he shot into that crowd and killed one of them, it would make no difference, because, in its jealous regard for human life, the law holds a man accountable for the result or consequence of his acts, provided he acts without justification, provocation, or mitigation. For instance, if a man feloniously, with reckless disregard for human life, takes a loaded weapon and deliberately points into a crowd and fires and kills a member of the crowd, why, the law would hold him accountable for murder, independently of whether he intended to kill any individual member of that crowd or not." Smith v. State, 124 Ga. 213, 52 S. E. 329.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 14, 23.]

4. CRIMINAL LAW—INSTRUCTIONS.

The request to charge which the court refused to give was fully covered by the charge given, and a new trial will not be granted for a refusal to charge as requested. Battle v. State, 105 Ga. 703, 32 S. E. 160.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

(Syllabus by the Court.)

Error from Superior Court, Wayne County; P. E. Seabrook, Judge.

Dock Hamilton was convicted of murder, and brings error. Affirmed.

Jas. R. Thomas, for plaintiff in error. Jno. W. Bennett, Sol. Gen., W. W. Lambdin, and Jno. C. Hort, Atty. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

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(129 Ga. 704)

## BARHAM et al. v. WEEMS et al.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. HIGHWAYS — ESTABLISHMENT — STATUTES—REPEAL—ALTERNATIVE ROAD LAW.

"The alternative road law contained in the Political Code, when duly adopted for a county, only repeals therein so much of the old road law as is inconsistent with it. Section 520 of the Political Code of 1895, is not inconsistent with such alternative road law, and must be complied with before a new public road can be lawfully established in a county wherein such alternative road law is operative." Howell v. Commissioners of Chattooga County, 118 Ga. 635, 45 S. E. 241. It follows that, when a new public road has been established in accordance with section 520 of the Political Code of 1895, such procedure is not objectionable, whether or not the alternative road law has been adopted in the county where it lies.

2. SAME—EVIDENCE.

The evidence was sufficient to sustain the judgment of the ordinary, and there was no error in overruling the certiorari.

8. WRIT OF ERROR—QUESTIONS NOT MADE AT TRIAL—REVIEW.

Questions argued in the brief of counsel for plaintiff in error as grounds of reversal, but not appearing to have been made or passed on in the court below, will not be decided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1018.]

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action between George Barham and others and J. H. Weems and others. From a judgment in favor of the latter, the former bring error. Affirmed.

Brown & Brown, for plaintiffs in error. G. W. Bryan, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 712)

## EAGLE & PHENIX MILLS v. MUSCOGEE MFG. CO.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. WRIT OF ERROR — REVERSAL — AMENDMENT OF PLEADINGS.

Where a demurrer to an equitable petition was overruled, and on exception to this court the judgment was reversed, when the remittitur was returned to the trial court, and before it was made the judgment of that court, an amendment could be offered to the petition, provided it was a proper amendment, and there was enough in the pleadings to amend by.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 4680.]

2. PLEADING—AMENDMENT OF PETITION.

A petition showing a plaintiff and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. The jurisdiction of the court may be shown and the details and circumstances of the particular transaction may be amplified and varied by amendment. If the declaration omitted to allege facts essential to raise the duty or obligation involved in the cause of action which was evidently originally intended to be declared upon, the omitted facts may be supplied by amendment.

3. SAME—NEW CAUSE OF ACTION.

The amendment which was offered in this case was not subject to objection, on the ground that it sought to add a new and distinct cause of action to that originally involved, or that there was not enough in the original petition to amend by.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 708½.]

(Syllabus by the Court.)

Error from Superior Court, Muscogee, County; Z. A. Littlejohn, Judge.

Action by the Eagle & Phenix Mills against the Muscogee Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

Goetchins & Chappell, C. E. Battle, and Spencer R. Atkinson, for plaintiff in error. Slade & Swift, J. H. Mortin, and S. B. Hatcher, for defendant in error.

LUMPKIN, J. This case was formerly before us on exception to the overruling of a demurrer to the plaintiff's equitable petition. The judgment was reversed. 126 Ga. 210, 54 S. E. 1028, 7 L. R. A. (N. S.) 1139. The petition is there briefly reported. On the return of the case to the superior court, and on the presentation of the remittitur from this court, the plaintiff offered an amendment to its petition, the principal allegations of which were substantially that the plaintiff and the defendant each held by a chain of conveyances under Howard; that the plaintiff's chain conveyed to it the 18 water lots below the one held by the defendant, with the appurtenances thereof; that the water right asserted by the plaintiff was such an appurtenance and passed to it; and, also, that the defendant was estopped from denying such right by reason of certain facts alleged. Objection was made to the allowance of the amendment on two grounds: First, that there was nothing in the original petition to amend by; and, second, that the amendment added a new cause of action. The objection was sustained, and the petition dismissed. The plaintiff excepted.

We shall not enter into a general discussion of the petition and the amendment, but shall confine ourselves to the two grounds of objection to the latter which were urged and sustained.

The object of amending is ordinarily to cure some mistake or defect, or to perfect that which is not already complete. If the petition is already perfect, it requires no further perfecting. If there is no defect or mistake, there is nothing to cure. If the rule were established that, to contain enough to amend by, there must be enough to withstand a demurrer, the utility of the right to amend would be largely abrogated. Civ. Code 1895, § 5097, declares that parties may amend their pleadings "in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by"; but the defendant, after the first term, cannot set up new matter by way of amendment, except as elsewhere in the Code provided. Section 5098 reads as follows: "A petition showing a plaintiff, and a defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. The jurisdiction of the court may be shown, and the details and circumstances of the particular transaction may be amplified and varied by amendment. If the declaration omit to allege facts, essential to raise the duty or obligation involved in the cause of action which was evidently originally intended to be declared upon, the omitted fact may be supplied by amendment." These two sections point out the right of amendment and what will constitute enough to amend by, and throw light on the question of the extent to which the right may be exercised without being obnoxious to the rule against adding a new and distinct cause of action stated in the next section (5099).

The original petition may be thus briefly summarized: The defendant owes a duty to the plaintiff not to use more than a certain described proportion of the water power, or the water generating such power, at the place named. It is violating that duty. The plaintiff has been injured thereby, and will be irreparably damaged unless injunction shall be granted. It sought injunction for the future and damages for the past injury. It is a somewhat technical and restricted construction to say that the original petition is confined solely to complaining of excessive use of the power, that the amendment deals with unlawful use of the water, and that these are two distinct things. What both parties want with the water is to generate power, and the water plus the head creates the water power. To treat the power as so totally distinct from the water generating it that contentions about the two constitute distinct and separate causes of action, so that allegations as to the one cannot be ingrafted by amendment on those as to the other, is too scholastic a refinement for ordinary proceedings in a court of equity. One might almost as well declare that a suit about an orange could not be amended by any allegation about its peel; or that a contention in regard to steam power was not amendable by adding any allegation touching the steam itself.

Counsel for the defendant in error dealt with the original case as if it were merely a suit on a breach of a covenant. But we cannot concur in this view. It was primarily an effort to enjoin the alleged wrongful use of more water or water power than the defendant was entitled to draw from the stream, according to the plaintiff's contention. Incidentally damages were sought for the alleged injury in the past. One or two references to the original petition will suffice to show that the water, as well as the power generated by it, was in the view of the pleader. At one point in the petition it was alleged that "under none of the different arrangements for confining the water of the river was it [the defendant] to have or use more than its proportionate part of the water as designated and fixed in said original conveyance." At another it was alleged that the defendant claimed the right to take from the canal or basin "as much of the water of the river as it desires," etc.; again, that during a dry season in the year 1902 the defendant "continuously used and took from the canal or basin water largely beyond the amount to which it was entitled, and to the extent of from one-fourth to one-half of the entire water power of the river as developed by the existing dam," causing injury to the plaintiff. It was also alleged that in 1904, during a drought, if the mills of the plaintiff and defendant ceased operating at night, the water would rise in the pond, and by carefully husbanding it the mills could be operated the next day, "provided the defendant at lot No. 1 only drew from the canal or basin its fair proportionate part of the water, to wit, less than one-nineteenth," but that it drew from the canal and basin such an amount of water as aggregated one-half of the water power developed by the dam of the plaintiff. Among the prayers was one that the defendant be enjoined "from taking and using at any time and at any stage of water in the river for uses on lot No. 1 any amount of water which would generate a power greater than the one-nineteenth of the whole power which may be generated at various stages of the river by the existing dam." Other citations might be made; but we think these will serve to show that the design of the pleader comprehended the water producing the power, as well as the power produced.

But it was said that the alleged duty on the part of the defendant not to use more than a certain quantity of water or water power depended, in the original petition, solely upon certain covenants, which this court held were not shown to run with the land, and that the amendment sought to add a new cause of action by showing additional reasons why this duty existed. Even in the original petition there are allegations that the plaintiff held under conveyances coming down from Howard, and that its immediate predecessor in title had built a new stone dam, instead of the old wooden one, at a slightly different place. The statements were insufficient to make out a case. But, as already stated, the design of the pleader was sufficiently indicated to show that the plaintiff claimed that it and the defendant both held factory sites under conveyances from Howard, that there was a duty on the part of the defendant to limit the amount of water or water power taken from the stream to not more than one-nineteenth part of the whole, and that it was violating that duty to the damage of the plaintiff. This presents a case within the contemplation of section 5098 of the Civil Code of 1895, above quoted.

This whole question of amendment has been so thoroughly discussed in Ellison v. Georgia R. Co., 87 Ga. 691, 13 S. E. 809, and City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318, that little more can be done than to cite and apply those decisions. There are cases in which rulings have been made not in harmony with the two just cited. But, speaking in general terms, they may be divided into two classes—those which preceded the Ellison Case and were overruled by it, and those which came after it and were overruled by the Anglin Case. And now the rule has been crystallized into a section of the Code. We have no disposition to wander again, certainly not intentionally, from a rule which looks to substance more than to mere form, which treats amendment as "a resource against waste," where there is enough to amend by, and which has in view the practical administration of justice rather than the dialectical niceties of ancient pleading. See, also, Reid v. Jones, 127 Ga. 114, 56 S. E. 128;

Reid v. Hearn & Green, 127 Ga. 117, 56 S. E. 129; Southern Ry. Co. v. Gardner, 127 Ga. 320, 323, 56 S. E. 454; Georgia Ry. & Elect. Co. v. Reeves, 123 Ga. 697, 51 S. E. 610; Sweat v. Hendley, 123 Ga. 332, 51 S. E. 331; Wright v. Horne, 123 Ga. 87, 51 S. E. 30; Western & Atlantic R. Co. v. Burnham, 123 Ga. 28, 50 S. E. 984; Swindell & Co. v. Saddler, 122 Ga. 15, 49 S. E. 753; Insurance Co. of North America v. Leader, 121 Ga. 260, 48 S. E. 972; Willis v. Meadors, 64 Ga. 721; Deas v. Sammons, 126 Ga. 431, 432, 55 S. E. 170.

The deeds under which the plaintiff claims are not before us. When they shall have been produced, we cannot say what they may show as to the water rights sought to be asserted; nor can we foresee what the evidence may develop. What we now hold is that the two grounds of objection made to the proposed amendment were not well taken.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 698)

## DENMOND v. HILLYER.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. NEW TRIAL—GROUNDS—ABSENCE OF PARTY.

Where, upon the call of a case, counsel entered upon the trial thereof without making any motion for a continuance or any suggestion of his client's absence, or of his desire to have her present, or of the materiality of her evidence, it will not necessitate the grant of a new trial that she made affidavit that for several days before the trial she was ill and could not attend the trial and testify, or communicate with her counsel, especially where the statement contained in her affidavit as to the evidence which she would have given was of the vaguest and most general character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 196.]

2. SAME—NEWLY DISCOVERED EVIDENCE.

Where property was levied on as belonging to a woman and was claimed by her daughter, and on the trial was found subject, newly discovered evidence of a witness that, while the claimant was working for wages, her mother bought the property in dispute, and partly paid therefor from the proceeds of the daughter's wages, did not require the grant of a new trial. Under the general issue of subject or not subject, such evidence would not likely change the result; nor does it appear that such facts were unknown to the claimant, though not communicated by her to her counsel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 226, 227.]

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by J. F. Hillyer, for the use, etc., against M. A. Denmond. From a judgment for plaintiff, defendant brings error. Affirmed.

Henry Walker, for plaintiff in error. J. F. Hillyer and W. M. Henry, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 734)

## SYLVANIA & G. R. CO. v. HOGE et al.

(Supreme Court of Georgia. Dec. 19, 1907.)

1. RAILROADS — INCORPORATION — MEETINGS —ELECTION OF DIRECTORS—MANDAMUS.

The general railroad incorporation act (Civ. Code 1895, § 2163) gives the management of the affairs of the corporation to a board of directors of not less than 5, and not more than 15, members. The act further provides for the annual election of directors. Where stockholders attend a regular annual meeting of stockholders, they may transact the business of that meeting, and elect officers, although a majority in interest or in number of the stockholders are not present. If at any such meeting they fail or refuse to elect directors, any stockholder may by mandamus compel the corporation and the directors holding over to call a meeting for the purpose of electing a board of directors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 262.]

2. CORPORATIONS—RIGHTS OF SHAREHOLDERS—BENEFICIAL INTEREST.

A shareholder is not prevented from exercising his right as such because another may be beneficially interested in the ownership of the stock.

3. SAME—TRANSFER—VALIDITY.

A sale of stock by one who is a party to a pooling agreement to some of the other stockholders, in violation of its terms, does not justify the corporation of its own motion for that reason alone to refuse to recognize the validity of such transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 489.]

4. SAME—MODE OF TRANSFER.

Where neither the charter nor any statute or by-law of the corporation require that stock be transferred on the books of the company, or the surrender of the certificate and the issuance of a new certificate to the assignee, a mode or form of conveyance sufficient in law to transfer the absolute title to the assignee entitles such assignee to all the rights and benefits accruing to the assignor, just as if the certificate of shares stood in the assignee's name.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 529.]

5. SAME—ABSENCE FROM MEETING—EFFECT.

A shareholder who designedly absents himself from a stockholders' meeting surrenders no right appertaining to the ownership of his stock, except the right to participate in the meeting which he refuses to attend.

6. SAME—MEETING OF DIRECTORS—RE-ELECTION.

Where stockholders failed to hold a regular annual stockholders' meeting, and elect directors, a meeting of the old board of directors on the day on which the stockholders should have acted, in which they resolved to hold over until their successors were elected, is not in effect a re-election of them by the stockholders for another term.

7. SAME—VACANCY—SUPPLY.

Where the directors are reduced by death below the minimum number prescribed by the charter, and there is no provision in the charter or by-law for filling the vacancy by the directors, the stockholders may supply the vacancy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1197.]

(Syllabus by the Court.)

Error from Superior Court, Screven County; B. T. Rawlings, Judge.

Application by S. C. Hoge and others for a writ of mandamus to compel the Sylvania & Girard Railroad Company and three of its

directors to cause a meeting of the stockholders to be held for the purpose of electing a board of directors. From an order granting the writ, respondents bring error. Affirmed.

S. C. Hoge, L. H. Hilton, W. P. Williams, E. H. Hill, Jr., G. M. Hill, J. A. Mills, and J. R. Wells applied for a writ of mandamus to compel the Sylvania & Girard Railroad Company, and three of its directors, J. J. B. Morel, P. A. Mock, and J. W. Overstreet, to cause a meeting of the stockholders of the corporation to be held for the purpose of electing a board of directors. Applicants alleged in their petition that they were stockholders of the railroad company; that the capital stock of the corporation was $10,000, divided into 100 hundred shares of the par value of $100 each; that the Sylvania & Girard Railroad Company was organized on the 16th day of November, 1906, at a meeting of the stockholders of the company held at its principal office in Sylvania. At this meeting L. H. Hilton, H. C. Perkins, J. J. B. Morel, P. A. Mock, and J. W. Overstreet were elected directors of the corporation. The stockholders present at this meeting represented 88 shares of the capital stock of the company, and the following resolutions were adopted: "Resolved first: That the annual meeting of the stockholders of this company shall be held on the first Wednesday in January of each year. Resolved second: That a meeting of the stockholders be called to be held on the first Wednesday in January, 1907, at twelve, noon, at the office of the company in Sylvania, Georgia. Resolved third: That the committee appointed to draft by-laws make their report at that time. Resolved fourth: That the present board of directors hold over until the said annual meeting to be held on the first Wednesday in January, 1907, at which time an election shall be held to elect directors for the next year." On the first Wednesday in January, 1907, a minority of the stockholders met pursuant to the foregoing resolutions, but failed to elect a board of directors. The old board of directors, with the exception of H. C. Perkins, who departed this life intermediate his election and the meeting of the stockholders on the first Wednesday in January, 1907, continued to hold over and exercise the duties of the office of directors. Applicant, S. C. Hoge, is now the owner of 25 shares of stock formerly owned by H. C. Perkins. On April 11, 1907, applicants addressed a communication in writing to the four surviving directors, requesting that a meeting of the stockholders be called for the purpose of electing a board of directors. The board of directors refused to comply with this request, and still refuse to call a meeting of the stockholders to elect their successors. The charter of the company requires a board of five directors to manage its affairs, and, since the death of H. C. Perkins, this board is not constituted as required by law, and has no power to elect a successor to the deceased director. The prayer is that the directors Morel, Mock, and Overstreet be required to call a meeting of the stockholders for the purpose of electing a board of directors.

In response to the mandamus nisi, the defendants appeared and demurred to the sufficiency of the petition as affording ground for the relief prayed. They also filed an answer, in which it was charged on belief that, though the 25 shares alleged to be owned by Hoge stood in his name, he held them for L. H. Hilton, and he was not a real and bona fide stockholder. They denied that Mills was the lawful owner of the five shares which he claimed to own, on account of the following fact: That they were originally issued to his brother-in-law, J. A. Enneis, and were sold by Enneis to Hilton in violation of his agreement hereinafter set out, and in some way transferred to Mills, but not on the books of the company. The corporation, through its president, Morel, refused to make the transfer, and these five shares stand on the books of the company in the name of Enneis. Defendants believe that they are held by Mills for the benefit of Hilton, but do not recognize either Mills or Hilton as the owner of these five shares. When Mills was endeavoring to purchase these shares from Enneis, he was informed by the latter that he could not sell his stock to him, and was in honor bound to keep it in pursuance of the agreement hereinafter set forth, of which Mills, Enneis, and Hilton were advised. It was admitted that the other applicants were stockholders as alleged. It was further averred that the railroad company was incorporated under the general law by the Secretary of State on October 18, 1905, and subsequently leased the railroad running from Rocky Ford to Sylvania, known as the "Sylvania Central Railroad," for 10 years, with the privilege of renewal for a like term; that this was the only road running into Sylvania; that the citizens of Sylvania were willing to get the charter for the Sylvania & Girard Railroad Company either to build or control a railroad running into Sylvania, provided L. H. Hilton should be kept out of the control of the company. At one time when the publication for a charter was running the publication was stopped because of the apprehension as to Hilton's control. Subsequently, and before the granting of the charter, there was a meeting to compromise and adjust matters at Sylvania, and at this meeting Hilton stated that he would offer a resolution giving to J. J. B. Morel and his friends, if they would go into the enterprise, one half of the capital stock, and that he and his friends would take the other half, and that Morel and his friends should have the right to name three out of five of the directors, and thus exercise a control. It was known by Hilton and all present that Morel and his friends would not go

into the enterprise but for the understanding embodied in such a resolution; and but for this understanding the enterprise would not go through. According to this understanding, a meeting of the citizens was held and took the following action, as embodied in the minutes of the meeting: "Office of Screven County Bank. Meeting of citizens of Sylvania held for the purpose of considering the proposition to lease the Sylvania Central Railroad. Present: G. M. Overstreet, P. A. Mock, J. W. Newman, J. A. Enneis, H. C. Perkins, L. H. Hilton, H. B. Mills, J. W. Overstreet. G. M. Overstreet was elected president of the meeting and J. W. Overstreet secretary. On motion of L. H. Hilton, it was decided to readvertise for charter of the Sylvania & Girard Railroad Company. Resolved that Mr. H. C. Perkins be allowed to subscribe $2,500 to the capital stock of $10,000, and Mr. L. H. Hilton and his friends be permitted to subscribe $2,500 to said capital stock, and the remaining to be subscribed by J. J. B. Morel, G. M. Overstreet, and such of their friends as they may select or designate. Resolved, further, that three directors be selected from the last apportionment of $5,000 and two be selected from the first apportionment of $5,000, all of the subscribers to be residents of this community, except Mr. Perkins, who has business interests here. Mr. L. H. Hilton, Mr. J. J. B. Morel, Mr. H. C. Perkins, P. A. Mock, and J. W. Overstreet were proposed as board of directors to be notified after the charter is obtained." The answer further alleges that, "after the charter was obtained, these minutes were read and ratified, and at this last-mentioned meeting the directors were elected. J. J. B. Morel, P. A. Mock, and J. W. Overstreet were the three directors representing Mr. Morel and his friends. The stock was subsequently apportioned as follows: J. J. B. Morel, 14 shares; P. A. Mock, 12 shares; H. S. White, 7 shares; G. M. Overstreet, 7 shares; J. A. Ennels, 5 shares; J. W. Overstreet, 5 shares; H. C. Perkins, 25 shares; L. H. Hilton, 17 shares; G. M. Hill, 3 shares; E. H. Hill, Jr., 2 shares; W. P. Williams, 2 shares; R. W. Wells, 1 share. The first six mentioned constitute what may be called the 'Morel party,' or interest. It was distinctly agreed among the six stockholders representing the Morel party or interest that they would not sell outside of their friends, and J. A. Enneis was a party to this agreement; and in selling out to the Hilton interest he violated the agreement. It was thoroughly understood by the incorporations that the balance and control with the Morel party was to be permanent, and, but for this, the charter would not have been obtained or accepted."

At the meeting of the stockholders on November 16, 1906, a committee was appointed to draft a set of by-laws for the company, with direction to report at the meeting to be held on the first Wednesday in January, 1907. At the meeting of the stockholders on the first Wednesday in January, 1907, no election of directors was had because only a minority of the stock was represented. The meeting was not held, because, although thoroughly aware of the meeting and its purpose, the plaintiffs Hilton, E. H. Hill, Jr., and G. M. Hill, though present in Sylvania, and their attendance urged, they nevertheless designedly and purposely absented themselves from the meeting to prevent the presence of a majority of the stock. S. C. Hoge was not a stockholder at this time, and Hilton then held a transfer of the five shares of the Enneis stock, although it had not been recognized by the president or on the books of the company, and since this meeting Hilton has in some way put these five shares in the name of Mills. At this meeting of the stockholders on the first Wednesday in January, 1907, there were present P. A. Mock, J. W. Overstreet, J. J. B. Morel, W. P. Williams, and G. M. Overstreet, who together held 47 shares. At that time the directors held a meeting and adopted a resolution to the effect that they would hold over until the next regular meeting of the stockholders in the following January, unless a meeting was called before that time by the president or a majority of the directors. It was averred that there was no objection to the resolution by anybody, and therefore it represented the unanimous action of the minority stockholders at the meeting, although it was adopted technically at a directors' meeting. It was admitted that a request had been made to call a meeting of the stockholders, and declined by the directors. No by-laws have been adopted by the corporation, although they would have been adopted at the last regular meeting of the stockholders if applicants had not absented themselves; and, as no provision is yet made for the filling of vacancies, respondents contend that the four directors hold over and constitute a lawful organization. It was averred that the corporation was well managed, and in the first year of its existence declared a dividend of 125 per cent., which had been paid, and also had earned an additional dividend of 50 per cent., which had been declared, but had not been paid because one of the applicants, Williams, who is the treasurer of the company and also cashier of a bank which Hilton controls, has refused to pay the same. For these reasons it was contended that the plaintiffs were not entitled to the writ of mandamus as prayed.

The case was heard by the judge on the petition, demurrer, and answer, and the mandamus nisi was made absolute. Respondents excepted to the granting of the mandamus absolute, and assign error thereon because the petition for mandamus did not set forth any cause or reason for the issuance of the writ, and that the matters therein alleged constitute no basis for the relief prayed; that the judgment granting the mandamus absolute is contrary to law and unau-

thorized by the evidence; that the answer was uncontradicted, and the facts therein alleged demanded a finding in favor of the respondents and against the petition for the rule absolute, but, if any issue of fact was involved, such issue was triable at the next term of the superior court of Screven county as other jury cases are tried, and the judge erred in determining the same.

E. K. Overstreet, J. W. Overstreet, and Adams & Adams, for plaintiffs in error. Jos. H. Hall and Warren Roberts, for defendant in error.

EVANS, P. J. (after stating the facts as above). 1. The petition presents the case of stockholders seeking to compel a corporation and a majority of its directors to call a meeting of the stockholders for the purpose of electing a board of directors after a failure to elect at the last annual meeting. The corporation was chartered under the general railroad law, which provides that a regular election for directors shall be annually held at the principal office of the company. Civ. Code 1895, § 2163. The corporation had duly organized agreeably to law, and adopted a resolution providing that the annual meeting of the stockholders should be held on the first Wednesday in January, 1907. The statute imposes the duty on the corporation to hold annual meetings; but fixes no time when they shall be held. As the statute prescribed no fixed time for holding the annual meeting, it was competent for the stockholders to fix the date of such meeting. When so fixed, it became the statutory duty of the corporation to hold the annual meeting at the time thus appointed. At the annual meeting in January, 1907, a minority of the stockholders assembled, but did not resolve themselves into a stockholders' meeting. It was within the power of the minority of the stockholders at the annual meeting to have elected a board of directors. "The law is clear that those stockholders who attend a duly called stockholders' meeting may transact the business at that meeting, although a majority in interest or in number of stockholders are not present." 1 Cook on Stock & Stockholders, § 607. Section 2193 of the Civil Code of 1895 requires a representation of a majority of the stock only at the meeting for organization, and there is nothing in the section to change the general rule as stated by Mr. Cook. For some reason, presumably because they were not informed that it was in their power to legally elect a board of directors, no action was taken at the January meeting. The term of the old board of directors expired at this time, and it was the duty of the stockholders to have elected their successors. As no election was held, any stockholder could by mandamus compel the calling of a meeting for the purpose of complying with the statutory duty. Accordingly the petition was not open to demurrer because it failed to allege facts entitling the plaintiffs to the remedy of mandamus.

2, 3, 4. We will next inquire as to whether the answer raised any disputed issue of fact. At common law the return to the writ of mandamus was not traversible, and the court determined whether the writ should issue upon the matters set up in the return. By St. 4 Anne, the return was made traversible, and this was the condition of the common law at the time of our adopting statute. Johnson v. State, 1 Ga. 273. The common-law practice, however, has been modified by our statute, which provides that, if the answer makes an issue of fact, the petition and answer shall be returned to the next term of the superior court, and the issue thus made tried by a jury. Civ. Code 1895, 4872. The petition alleges that all the applicants were stockholders of the railroad corporation. The answer undertakes to join issue as to the ownership of stock in the corporation by two of the applicants. It is admitted that the stock, which formerly belonged to H. C. Perkins, now stands in the name of the plaintiff S. C. Hoge, but it is charged on belief that the holding of Hoge is really for the benefit of L. H. Hilton. If the certificate of the shares stands in the name of Hoge, we are at a loss to see why he is any the less a stockholder because Hilton may have an interest in his holding, and particularly so when Hilton is a party plaintiff in the petition. The stock which the plaintiff Mills claims to own was issued to J. A. Ennels; and Mills is his transferee. Mills applied to the proper officer of the corporation to have the transfer from Ennels to himself entered upon the books of the corporation, which was refused. It is contended that the transfer of the stock by Ennels to Mills was in violation of a pooling agreement entered into between the stockholders, whereby Ennels agreed that he would not sell or transfer his stock to any one unfriendly to the Morel interest, and that the transfer to Mills, who is friendly to Hilton, was in violation of this agreement. Any such private agreement or understanding between the individuals holding the legal title to the stock in due form and others is a matter between themselves, with which the corporation has no concern. Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429. It is no excuse for the corporation to refuse to issue stock to Ennels's assignee, or to refuse to recognize such assignee as a stockholder, that Ennels may have violated his pooling agreement with certain other stockholders, with the knowledge of his assignee.

Where the charter of a corporation provides that shares of stock can only be transferred on the corporate books, the transfer must be made in the way pointed out in the charter before the transferee would become a shareholder so as to be entitled to participate in the internal affairs of the corporation.

Witham v. Cohen, 100 Ga. 674, 28 S. E. 505. The general railroad law under which this corporation was chartered makes no provision as to the manner in which transfers of stock shall be made. It is also within the power of a corporation to adopt by-laws providing how transfers of stock shall be made, and, if a by-law be adopted requiring all transfers of stock to be entered upon the books of the corporation, it would be necessary that this requirement be complied with before the transferee of a shareholder could participate as a shareholder in a stockholders' meeting. This corporation was duly organized. With the exception of the resolutions adopted at the organization meeting, and which appear in the statement of facts, no by-laws were adopted by the corporation. The defendant corporation, therefore, has neither charter nor by-law which requires a transfer of stock on the books. Our Code declares that, "except as against the claims of the corporation, a transfer of stock does not require a transfer on the books of the company." Civ. Code 1895, § 1855. This section was codified from the decision in Southwestern R. Co. v. Thomason, 40 Ga. 408, and its meaning is clear in connection with its context in the decision. On page 411 McCay, J., said: "The transfer upon the books of the company is only for the protection of the company. It may have liens upon the stock, or it may require this mode, in order that its own management may be complete and within its grasp." The section does not mean that an assignee of stock is not a stockholder of the corporation for lack of a book transfer, when neither charter nor by-law required this mode of transfer. See Buena Vista Bank v. Grier, 114 Ga. 400, 40 S. E. 284; Bates-Farley Savings Bank v. Dismukes, 107 Ga. 212, 33 S. E. 175. Where neither the charter, the statute, nor corporate by-law requires a book transfer, the assignee of a certificate of stock may vote thereon, although the stock stands on the books of the company in the name of the assignee. 1 Cook on Stock and Stockholders and Corporation Law, § 611; Allen v. Hill, 16 Cal. 113. In the absence of a regulation requiring a book transfer, or the surrender of the old certificate, and the issuance of a new certificate to the assignee, any mode or form of conveyance sufficient in law to transfer the absolute title to the assignee entitles him to all the rights and benefits accruing to the legal owner of the stock, just as if the certificate of shares stands in the assignee's name. People v. Devin, 17 Ill. 84. The transferee, Mills, therefore, acquired from the shareholder by the assignment title to the stock, and was a stockholder. The facts set up in the answer were insufficient to raise an issue that he was not a stockholder.

5. The other matter set up in resistance to the issuance of the writ was the conduct of the applicants in purposely absenting themselves from the stockholders' meeting, in order to prevent an election of directors at that time. We have shown that the minority of the stockholders had the right at a regular annual meeting to elect a board of directors. We cannot perceive any distinction between negligently omitting to attend a meeting of the stockholders and staying away by design. The only forfeiture of right which the absent stockholder incurs is the surrender of his right to participate in the stockholders' meeting. It was the duty of the stockholders present at the annual meeting, even though their holdings were less than a majority of the stock, to have proceeded with the transaction of the proper business, which included the election of directors; and neither the old directors nor the corporation can insist upon the old board holding over another year because the stockholders failed to exercise a duty enjoined by law. The action of the minority stockholders would have been just as legal as if these applicants had been there, and no estoppel arises against them from insisting that the corporation perform its duty under the law because they voluntarily absented themselves from the meeting.

6. It is further alleged that the directors, when they discovered that a majority of the stock was not represented at the stockholders' meeting, immediately held a directors' meeting, and adopted a resolution declaring that they would hold over until their successors were legally elected, and that this was, in effect, action by them as stockholders. Not so. The pleadings of both sides are in complete harmony that the stockholders took no action as stockholders, and caused an entry to this effect to be made upon the minutes of the stockholders' meeting. The directors in passing the resolution extending their terms did not undertake to act as stockholders, but as directors. Indeed, the resolution that they should hold over until their successors were elected amounted to no more than an incident which the law attaches to the failure of the stockholders to elect their successors.

7. We have not adverted to the point made in the petition that under the law the railroad corporation must have not less than 5, nor more than 15, directors, and that, as one of the directors had died, the board was not legally constituted. The statute specifically provides that the corporation may provide by by-law for the filling of vacancies in the board of directors. Civ. Code 1895, § 2163. The corporation by failing to elect did not forfeit its corporate existence. But the stockholders, in the absence of authority under a by-law, could have supplied the vacancy. In re Union Ins. Co., 22 Wend. (N. Y.) 591. This proceeding is not to cause the election of a single director to fill a vacancy, but to compel corporate action looking to the election of a full board.

Judgment affirmed. All the Justices concur.

(129 Ga. 638)

## GRACE v. MEANS et al.

(Supreme Court of Georgia. Dec. 19, 1907.)

EJECTMENT—DEFENSES OF VENDEE—PAYMENT OF PRICE—PARTIES—TENDER—OFFER—JUDGMENT.

Where a vendee of land enters actual possession and pays the entire purchase price, he thereby acquires a perfect equity which is the equivalent of legal title, and upon the strength thereof can successfully defend in ejectment against the vendor, or any one claiming under him, although no formal deed conveying the legal title was ever executed.

(a) But full payment of the purchase price, or tender thereof, is requisite to the establishment of such title.

(b) In complaint for land, where the plaintiff and defendant claim from a common propositor, the plaintiff claiming under a deed, and the defendant under a prior parol purchase and actual possession at the time the plaintiff received his deed, if, in order to show full payment of the purchase money, and thereby to establish a perfect equity, the defendant relies upon certain payments made to the vendor, and others made to one claiming them under an independent contract with such vendor, and the plaintiff disputes the fact of appropriate payment, both the vendor and the other person, to whom the payments are alleged to have been made, are essential parties.

(c) In the absence of such parties, an offer to pay "to whomsoever may be entitled" a certain amount which the defendant alleges is due, after taking into consideration all the payments made to both of such parties, is not a legal tender or the equivalent thereof, and, in the absence of proof of payment of the full purchase price to the vendor, is not sufficient to show a title under the perfect equity doctrine.

(d) Under the pleadings and evidence in this case, and with the parties before the court, it was erroneous to direct a verdict that the ownership of the premises in dispute be decreed to be in the defendant upon the payment to plaintiff, before a stated time, of $18.90, with interest; and that, if such amount is not so paid, then the claims of the defendant to the premises shall cease, and the legal title shall be in the plaintiff, upon his paying to the defendant the sum of $100, with interest, less $18.90, with interest; and, further, that the above payments might be made to the clerk of court, instead of the parties, to be applied as indicated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 82.]

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; T. A. Parker, Judge.

Action by T. H. Grace against R. L. Means, Minerva Pate, and others, revived after the death of defendant Pate in the name of one Lancaster and others. From a decree in favor of defendant administrator, plaintiff brings error. Reversed.

This is a complaint for land, instituted by T. H. Grace against Minerva Pate et al. After suit was instituted, Minerva Pate died, and Lancaster, as administrator, was made party defendant in her place. The plaintiff amended by striking all other defendants. The suit as amended was for the recovery of one acre of land. It appeared that, during the year 1893, W. J. Grace owned a tract of 20 acres, known as the "Old Grace Place," and sold one acre in the southeast corner thereof to Minerva Pate for $100. There was no written contract. She paid a part of the purchase money, and was to pay the balance in the future. Under this arrangement, she was admitted into immediate possession and made valuable improvements and remained in actual possesssion always, until after the institution of this suit. After Minerva Pate had gone into actual possession, W. J. Grace, her vendor, entered into a contract with R. L. Means for the sale to him of the entire 20 acres, but verbally informed Means' attorney that, when Minerva Pate should have paid enough more of the purchase money owing by her to amount to $25, he would require Means to execute to her a bond for title. Under such circumstances, W. J. Grace sold the entire 20 acres to Means. No deed was made, but half the purchase price was paid, and a note given for the balance by Means, who, in turn, received a bond for title from W. J. Grace. The note was negotiated and assigned by W. J. Grace to T. H. Grace. Afterwards, to wit, on the 6th day of October, 1896, negotiations were had between Means and W. J. Grace and the plaintiff, T. H. Grace, which resulted in Means surrendering to W. J. Grace his bond for title, whereupon W. J. Grace conveyed the property for value to T. H. Grace in fee, who, in turn, executed to Means his bond to convey the property upon payment of the said purchase money note, which T. H. Grace then held. In this manner T. H. Grace acquired a deed from W. J. Grace, dated 6th day of October, 1896. T. H. Grace, otherwise than as charged by law, did not have notice of Minerva Pate's possession. After all of this, Means, without the knowledge or participation of T. H. Grace, on the 16th day of October, 1896, required Minerva Pate to execute to him promissory notes for $9.45 each, to become due on the 16th days of April, July, and October, 1897, and on the 16th days of January, April, July, and October, 1898, aggregating $75.60, claimed as the balance due on account of the purchase money owed by the defendant for the one acre in dispute with respect to the several notes last mentioned. The defendant's plea contained the following: "Defendant paid all of said notes, with interest thereon, except two, amounting to $18.90."

With respect to the two notes not paid, the plea contained the following: "Defendant was ready when such notes fell due to pay them, and is now and at any time ready to pay them, and hereby makes a tender of the said sum of $18.90, with interest thereon, and will pay the same on said notes in any manner that the court may direct." In addition to setting up the equities as already indicated, the defendant's plea contained the following: "Defendant denies the right of the plaintiff to maintain his action against her for the reason that the deed under which he claims was made to secure a debt, and that said debt is tainted with usury, the consideration being usurious, and is therefore

absolutely null and void." Neither W. J. Grace nor R. L. Means were parties to the suit. The plea concluded with the following prayer: "The defendant having fully answered the plaintiff's petition, and having made valuable improvements on said lot, and having paid all of the purchase money for the same, except $18.90 and interest, and being ready at all and any times to pay the same as the court may direct, she therefore prays the court to decree that she pay the balance of such purchase money to whomever may be entitled to it, and that good and sufficient title be made to her, and * * * for general relief."

No demurrer to the plea was filed. No evidence was submitted upon the subject of tender, either before or after the institution of the suit. There was no evidence offered tending to show that the deed from W. J. Grace to T. H. Grace was based upon a usurious consideration. In all other respects, the evidence, without substantial conflict, was in accordance with the foregoing recitals. Upon the conclusion of the evidence, the court directed a verdict as follows: "We, the jury, find in favor of the defendant; that is to say, that the ownership of the premises sued for as being in the possession of Minerva Pate be decreed to be in her administrator upon the payment to the plaintiff of the sum of $18.90, principal, besides interest at the rate of 8 per cent. per annum from October 6, 1896, provided said balance due of $18.90, principal, together with interest thereon, be paid or tendered to the plaintiff in a reasonable time, to wit, on or before the 16th day of October, 1905. And if said amount is not paid or tendered to the plaintiff on or before said last-named date, then all claims of the estate of Minerva Pate to said premises shall cease, and the legal title to said premises shall be in said plaintiff upon his paying to said administrator the sum of $100, besides interest from October 16, 1896, at 8 per cent. per annum, less $18.90, with interest on said last-named sum from October 16, 1896, at 8 per cent. per annum, or the above payments may be made to the clerk of the court to be applied as herein found." The plaintiff moved for a new trial upon the grounds, among others, that the verdict was contrary to law and without evidence to support it, etc. The motion being overruled, the plaintiff excepted.

Fort & Grice, for plaintiff in error. A. C. Pate and W. L. & Warren Grice, for defendants in error.

ATKINSON, J. This is a complaint for land. Two defenses are made: One, that the deed under which the plaintiff claims was a mere security deed, based upon a usurious consideration, and therefore void; the other, that the defendant had equities, of which the plaintiff had notice at the time of his purchase, of such a character as would create superior title and defeat recovery. Upon the first defense, no evidence was offered in its support. No further reference need be made to that. The second defense was insisted upon, and upon that the court directed the verdict. The plaintiff and defendant claimed title from a common source. This avoids the necessity of proving title into the common propositor. Which of the two has the better title from the common propositor? The plaintiff has a deed based upon a valid consideration. The defendant has no deed, but insists that her equities are sufficient to defeat the assertion of title under the deed held by the plaintiff.

It is well settled that where a vendee makes a contract for the purchase of land, and pays all the purchase money, and nothing remains to be done by him in order to comply with his part of the contract, he thereby acquires whatever title the vendor had, even in the absence of a deed. Such title is the equivalent of a deed from the vendor. Pitts v. McWhorter, 3 Ga. 5, 46 Am. Dec. 405. See, also, in this connection, Dowdell v. Neal, 10 Ga. 148; Skinner v. Willis, 54 Ga. 195; Adams v. Brooks, 35 Ga. 63; Temples v. Temples, 70 Ga. 483; Drummond v. Hardaway, 21 Ga. 438; McCandless v. Inland Acid Co., 115 Ga. 968, 42 S. E. 449; Peterson v. Orr, 12 Ga. 464, 58 Am. Dec. 484; Howell v. Ellsberry, 79 Ga. 475, 5 S. E. 96, and cases cited; Dodge v. Spiers, 85 Ga. 585, 11 S. E. 610. In the cases just cited, and other cases in them cited, it has been held that, upon the strength of title acquired in that way, the vendee may sue or defend in ejectment, may sue for specific performance, or may assert title under a claim to property attempted to be sold under judicial process. Under the reasoning in those cases, there can be no doubt but that in ejectment, which is the remedy now under consideration, possession may be defended upon the strength of such title as against the assertion of title by the vendor, or one claiming under him. It is also well settled that actual possession of land is notice to the world of whatever interest the occupant has therein. Garbutt v. Mayo, 128 Ga. 269, 57 S. E. 495. From this it follows that if the interest be that of a purchaser, with only a part of the purchase price paid, a subsequent purchaser from the same vendor would take subject to the right of the occupant to complete his contract, and thereby acquire a superior title from the common vendor.

But, in order to pass title under the perfect equity doctrine, it is prerequisite that all the purchase money be paid, or legal tender thereof be made to the person thereto entitled. See, in this connection, Scroggins v. Hoadley, 56 Ga. 165, and cases cited; McCurry v. Robinson, 23 Ga. 324. The obligor would be under no obligation to convey until full payment according to the terms of the contract. It would remain executory, and no title would pass. In other words, no equity less than a perfect equity would be

the equivalent of a deed. If, in the present case, the defendant had a perfect equity, it would be superior to the title of the plaintiff, because the defendant had first made a contract to purchase from the common propositor, and was in actual possession at the time the plaintiff received his deed; but, if the equity was not a perfect equity, and therefore not the equivalent of title, the mere possession of the defendant would be obliged to yield to the superior strength of the legal title conveyed through instrumentality of the deed to the plaintiff.

The evidence is clear that the defendant had not paid all the purchase money. It is contended that some part of it was paid to W. J. Grace, the common propositor, and that the greater part was paid to R. L. Means, without any written order from W. J. Grace, and it is admitted in the plea that there is still due $18.90, which has never been paid to any one. The defendant insists that the part which was paid to R. L. Means was paid to the person entitled thereto, but that fact was denied by the plaintiff, and the court could not adjudicate that question unless W. J. Grace and Means were parties to the suit. No decree would bind them. The defendant does not know to whom to offer the $18.90. She contends that either W. J. Grace or Means or the plaintiff, T. H. Grace, is entitled to it, and avers a willingness to pay it to whomsoever the court, upon inquiry, should direct it should be paid. In the absence of W. J. Grace and Means, the court cannot settle their rights to this balance any more than it could have settled their rights to the other payments which it is alleged were made to Means. Under these conditions, it is manifest that the defendant's offer was coupled with conditions, which, owing to the absence of essential parties, were incapable of accomplishment, and is therefore not the equivalent of payment or legal tender. It was not the plaintiff's duty to make parties in order to help the defendant perfect her equities. The plaintiff had carried his burden by the introduction of his deed, and the crucial moment was at hand. Other parties being needed in order for the defendant to perfect her equities, it was incumbent upon the defendant to bring them into court. By failure so to do, the defendant lost the opportunity of establishing what it was necessary for her to do in order to obtain a perfect equity. Having failed in that respect, there was no effort made by her, independent of the ineffectual tender, to make payment of the unpaid part of the purchase money. The result of all of this was that she did not show a perfect equity. The court overlooked the necessity of the presence of W. J. Grace and Means as parties, and erroneously directed a verdict upon the assumption that the defendant had shown a perfect equity, and otherwise dealt with the case as if it were a proceeding in equity for the distribution of property, rather than a suit in ejectment, where the question was simply which of the contesting parties had the better title.

In the case of Grizzle v. Gaddis, 75 Ga. 350, this court said: "Where one holding a title by deed from a former owner brought ejectment against the tenant in possession of land, the latter could not, by equitable plea, claim from the plaintiff a specific performance of a parol contract alleged to have been made between the defendant and the person from whom the plaintiff bought, and of which it was averred the plaintiff had notice. Especially could not this be done without making the plaintiff's feoffor a party." As to the necessity of having W. J. Grace a party plaintiff, the case of Hamilton v. Williford, 90 Ga. 210, 15 S. E. 753, is in point and controlling. The suit was in ejectment. The defendant filed an equitable plea setting up his parol purchase from the plaintiff's grantor and actual possession at the time of the plaintiff's purchase, payment of part of the purchase money, and tender of the balance. The defendant's alleged vendor, who was the plaintiff's grantor, was not a party to the suit. In ruling upon the sufficiency of the plea, the court said: "An equitable plea, otherwise sufficient, would not be available without making the vendor a party, if anything remained to be done to complete the performance of the contract on the part of the first purchaser." The ruling made in the case of McCandless v. Inland Acid Co., supra, is not in point. That is not a case where there remains something to be done by the party seeking to set up an equity in order to comply fully with his obligation to his vendor.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 748)

## ALLEN, McINTOSH & CO. v. FARMERS' & TRADERS' NAT. BANK OF COVINGTON, KY.

(Supreme Court of Georgia. Dec. 20, 1907.)

1. DEPOSITIONS—DISMISSAL OF SUIT—USE IN SUBSEQUENT SUIT.

Interrogatories duly sued out, executed, and returned to and used as evidence in a city court in a suit therein which is afterwards voluntarily dismissed are admissible as evidence in a second suit between the same parties and upon the same cause of action afterwards brought in the superior court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, §§ 288–291.]

2. EVIDENCE — LETTERS — FOUNDATION — GENUINENESS.

Letters are not admissible in evidence to establish a defense when there is no proof that they are genuine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1648.]

3. SAME—COMPETENCY OF EXPERTS—TELEGRAM —CODE WORDS—EXPLANATION.

Under the facts of this case, there was no error in permitting a witness to explain the

code words used in a dispatch sent by the firm of which he was a member.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2353.]

4. WRIT OF ERROR—EVIDENCE—HARMLESS ERROR.

It is harmless error to permit a witness to testify to the contents of writings introduced in evidence, over objection that such testimony was secondary evidence, when it appears that the testimony of the witness corresponds with such writings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

5. CARRIERS—BILL OF LADING—INDORSEMENT—ASSIGNMENT.

Where a bill of lading issued in the usual form by a railroad company, consigning the shipment to the shipper's order, with directions to notify another, has on its back an indorsement, "Deliver to A.," signed by the consignee, such indorsement is a valid and sufficient assignment of the bill of lading to A.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 168.]

6. EVIDENCE—SECONDARY EVIDENCE—DRAFT.

It was error, under the facts of this case, to allow testimony as to the contents of a draft which was not shown to be lost or inaccessible for any reason.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 534, 555.]

7. SALES—CONTRACT—BILL OF LADING—ASSIGNMENT—ACTION FOR PRICE.

Where, in a written contract between two parties, one bought from the other at a stipulated price goods to be shipped, and the carrier issues to the seller a bill of lading therefor, consigning the shipment to his order, which the latter transfers to a third person, such transfer alone does not entitle such third person to sue the buyer on the contract for the purchase price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 186.]

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by the Farmers' & Traders' National Bank of Covington, Ky., against Allen, McIntosh & Co. From a judgment for plaintiffs, defendant brings error. Reversed.

J. A. Wilkes, for plaintiff in error. Shipp & Kline, for defendants in error.

HOLDEN, J. The Farmers' & Traders' National Bank of Covington, Ky., brought an action in Colquitt superior court against Allen, McIntosh & Co. to recover the purchase price of a lot of corn shipped by Henry Helle & Sons from Cincinnati, Ohio, to the defendants at Moultrie, Ga., and by the latter rejected on account of alleged worthless condition. The petition set forth various letters and telegrams constituting the contract between Henry Helle & Sons and the defendants, the intendment of which was that the defendants purchased from the shippers two cars of sacked corn No. 2 mixed, at 68¼ cents per bushel, cost and freight Moultrie, official board of trade certificates of grades and weights to be final, demand draft to be drawn in payment. It was alleged that the shippers had completed in good faith their part of the contract, and had transferred to the plaintiff the bill of lading for the corn, with sight draft attached, thereby transferring to the plaintiff all of the rights of the shippers under the contract; and that the refusal of the buyers to accept the corn had resulted in the total loss of its value to the plaintiffs. Defendants denied any indebtedness to plaintiffs, alleging that the corn arrived in a worthless condition; that the transfer to the plaintiff was not in good faith, but that the plaintiff and the shippers were in collusion to defraud the defendants; and that the transfer of the draft and bill of lading to the plaintiff, if made, was pursuant to this collusion, and for the purpose of making the plaintiff appear as an innocent purchaser. Interrogatories were introduced on behalf of the plaintiff to show compliance with the contract of shipment, including proper weighing and inspection of the corn, and the good faith of the alleged transfer to the plaintiff. On the back of the bill of lading, which was tendered in evidence, appeared the following indorsement: "Deliver to Farmers' & Traders' National Bank. Henry Helle & Sons." The draft given by the shippers to the plaintiff for the purchase price of the corn was not offered in evidence. Upon the conclusion of the evidence, the court directed a verdict for the plaintiff for the full amount sued for and entered judgment thereon, to which action of the court below the defendants excepted and assign error on the general grounds. Special grounds of error were also assigned on the admission and exclusion of certain testimony, which are referred to in the opinion.

1. The plaintiff brought suit in the city court of Moultrie against the defendant, which suit is dismissed. During the trial of that case interrogatories which had been sued out in that case were read. The plaintiff brought the present suit in the superior court of Colquitt county after the dismissal of the case in the city court. The suit in the superior court was between the same parties, involving the same subject-matter, and upon the trial thereof, over objection of counsel for defendant, the court permitted the plaintiff to use as evidence the interrogatories which were used in the trial of the case in the city court. Had this second suit been rebrought in the city court of Moultrie, the interrogatories could have been used under the authority of Radford v. Ga. & Ala. Ry., 113 Ga. 627, 39 S. E. 108. Does the fact that the second suit was instituted in a different forum change the rule? The principle upon which the interrogatories were allowed in the Radford Case, supra, was that the second suit was between the same parties and involved the same subject-matter; and we do not see how this principle can in any way be affected by the mere transfer of the case to a court different in

name, but having concurrent jurisdiction of the parties and the subject-matter involved. Were such change of forum to alter the rule, it would put it in the power of a plaintiff, by simply dismissing his case and bringing it in a different court having like jurisdiction thereof, to render inadmissible many sets of interrogatories which a defendant had incurred much trouble and expense in obtaining, and thus force the defendant to again incur the trouble and expense of suing out interrogatories, and having them executed and returned.

2. The defendant in the court below introduced letters from Heile & Sons in reference to reselling the corn and other matters in aid of their defense. The court allowed these letters read to the jury, but, upon further consideration, ruled them out. It does not appear upon what grounds they were ruled out. There was no proof of the signing of these letters by Heile & Sons, by their admission or otherwise. It was not even shown that they were received by due course of mail, or that they were written upon letter heads of Heile & Sons. The court did right in excluding them. The only thing appearing in the record in reference to these letters outside of the letters themselves was that they were introduced in evidence. In order for letters to be admissible as evidence, it must be shown that they are genuine; and, there being no proof that the letters tendered as evidence in this case were genuine, the court very properly excluded them. Freeman v. Brewster, 93 Ga. 648 (6), 21 S. E. 165.

3. A. L. Heile, a witness for the plaintiff, testified that he was a member of the firm of Henry Heile & Sons, and that they made a contract with the defendant for two cars of corn. He testified that this contract was made by telegrams and letters, in which, for the purpose of economy, code words were used, and explained the meaning of the cipher words thus used. Defendant objected to the witness explaining the meaning of the code words used, on the ground that it did not appear that the witness was an expert, or in any way competent to give such evidence. The witness testified that his firm were merchants and grain dealers, and that the code words used in connection with the correspondence forming the contract referred to were in general use throughout the United States, and well understood by all hay and grain men, boards of trade, and chambers of commerce. Under the evidence in this case, there was no error in allowing the testimony of this witness in reference to the meaning of the cipher words used in the dispatches constituting a portion of the contract between the defendant and his firm. See Civ. Code 1895, § 3675 (2).

4. Objection was made by the defendant in the court below to A. L. Heile testifying in reference to the bill of lading and W. E. Cremens testifying to the weight and number of the car of corn weighed by him, on the ground that there was higher evidence of these facts. It appears, however, that the bill of lading testified about by Heile was introduced in evidence, and the certificate of Cremens was introduced in evidence, showing the weights and number of the car of corn which he weighed. Since the testimony of the witnesses corresponded with the writings introduced, we do not see that the defendant sustained any injury by the introduction of the oral testimony.

5. The bill of lading introduced in evidence by the plaintiff had on it the folowing indorsement: "Deliver to Farmers' & Traders' National Bank. [Signed] Henry Heile & Sons." Objection was made to the introduction of the bill of lading, because this indorsement was without date, and was an improper transfer, not being such an assignment and transfer as would carry title to the plaintiff. We do not see any merit in the objection that the transfer was without date, since the witness Heile testified to the date on which it was made. Nor do we see any merit in the objection that it was not a proper assignment and transfer of the bill of lading. The transfer of a note or draft for money payable to order is usually and properly made by the words, "pay to the order of." A bill of lading refers to property, and we think, where there is a bill of lading like the one herein referred to, an indorsement thereon "deliver to" some named person, signed by the consignor, who is also the consignee to his order, constitutes a valid transfer of such bill of lading. The meaning of such transfer is that the carrier shall deliver to the person named the property of which the bill of lading is the representative.

6. Defendants objected to the testimony of A. L. Heile in reference to the draft which he stated was attached to the bill of lading and delivered to the plaintiff, on the grounds that the draft itself was the best evidence of its contents. It does not appear that this draft was lost or inaccessible. We think this was a good objection, and that permitting the witness to testify to its contents harmful error, because, the draft itself not having been introduced in evidence, it cannot be determined whether the testimony of Heile in regard to its contents was true or not. The amount of the draft and its other contents could not be testified about in the absence of a proper foundation for such secondary evidence.

7. The witness A. L. Heile testified by interrogatories. A part of his testimony was that he had in his possession all of the telegrams and letters showing the contract between his firm and the defendant, all of which he attached to his answers and filed as Exhibit No. 1. Copies of these telegrams and letters do not appear in the record. It is

true that in the brief of evidence it appears that this witness testified in his interrogatories as to what were the contents of these letters and telegrams; but this appears as a brief of his testimony concerning them, and not of the letters and telegrams themselves. Copies of the letters and telegrams claimed to constitute the contract do not appear in the record, nor does there appear to have been any brief made of them. Helle testified to what was the substance of one of the letters. The draft was not introduced in evidence, and, of course, does not appear in the record. We do not know what are the full recitals and contents of the draft. It nowhere appears in the record that the original contract between the shippers and the defendant, or any account or debt arising therefrom, was assigned or transferred to the plaintiff. The bill of lading which was introduced in evidence had on it the following: "Deliver to Farmers' & Traders' National Bank. Henry Helle & Sons." This bill of lading was issued to Helle & Sons, consigning the shipment to their order. A member of the firm of Helle & Sons testified that the bill of lading was delivered to the plaintiff with a draft attached, but the draft, as stated, was not introduced in evidence. It does not appear that the contract for the purchase of the corn between Henry Helle & Sons and the defendant, or any right flowing from it, was transferred to the plaintiff, and no draft was introduced in evidence, but only the bill of lading, with the indorsement of Henry Helle & Sons thereon to the plaintiff. We do not think that under the evidence appearing in the record the plaintiffs had any right to bring suit in their own names against the defendant for the purchase money of the corn. Does the transfer alone of such a bill of lading by the vendor give the transferee a right to sue for the purchase money of the property sold? We are unable to see that it carries any such right. Civ. Code 1895, § 3554, provides: "When a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither the title to the goods, nor right to the bill of lading, will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft as the case may be." And section 2956 provides that a bill of lading may be delivered in pledge, but there is no provision in our law that the transfer of a bill of lading by the vendor of goods sold and shipped will give the right to the transferee to sue for the purchase price of the goods. A bill of lading in one sense is a negotiable instrument; but it is simply a symbol or representative of the goods for which it is issued. Commercial Bank v. Armsby Co., 120 Ga. 74, 47 S. E. 589, 65 L. R. A. 443; Railroad Co. v. Lowe, 101 Ga. 320, 28 S. E. 867.

The judgment of the court below is reversed. All the Justices concur.

(129 Ga. 717)

## GLOVER v. STATE.

(Supreme Court of Georgia. Dec. 19, 1907.)

1. CRIMINAL LAW—NEW TRIAL—AFFIDAVITS OF JURORS.

"The affidavits of jurors may be taken to sustain, but not to impeach their verdict."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2392–2395.]

2. SAME—NEW TRIAL—GROUNDS.

That the trial judge after hearing a motion for a change of venue indicated his purpose to sustain it, but subsequently, upon further consideration of the matter, and without having heard any further evidence, passed an order overruling the motion, is not cause for a new trial.

3. SAME—STATEMENTS OF JUDGE.

The fact that the trial judge, during the progress of the trial, stated to counsel, in the presence of the jury, that a named witness, who had testified for the defense upon the question of the sanity of the accused at the time of the commission of the alleged crime, did not claim to be an expert in such a case, or to have any peculiar knowledge upon the subject, is not cause for a new trial, when it is not alleged that such statement of the judge was not correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2182.]

4. SAME — WITNESSES — CROSS-EXAMINATION —WEIGHT OF OPINION.

It was not error to permit counsel for the state, over objection, to ask a witness for the defense if, in his opinion, certain circumstances which he had assigned as his reason for believing the accused to be of unsound mind were in themselves sufficient to indicate that he did not know that it was wrong "to go and shoot a helpless woman down in the mill, and keep pumping lead into her until she was dead," although the witness had not testified that the accused did this, and even though the court had refused to allow counsel for the defense to propound a similar question to a state's witness.

5. SAME—EVIDENCE—SANITY—NON-EXPERT.

It is well settled that a nonexpert witness may give his opinion as to the sanity of another person, based upon his acquaintance with him, and the manner, appearance, and conduct of such person during the time that the witness has known him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1045.]

6. SAME—CONFLICTING INSTRUCTIONS.

Where the court charged the jury that if it appeared from the evidence that the accused, at the time he slew the deceased, knew the difference between right and wrong, but did not have power of mind and will sufficient to keep him from killing her, he would not be guilty of murder; and then immediately gave the general rule that the insanity which the law recognizes as an excuse for crime must be such as dethrones reason and incapacitates one for distinguishing between right and wrong, an assignment of error, in a motion for a new trial, that these instructions were conflicting, is without merit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1961–1968.]

7. SAME—CONDUCT OF JUDGE.

The ground of the motion complaining that the judge, during the progress of the trial, intimated "his opinion of the case," was without merit, as in none of his remarks, quoted in this ground, which were made in connection with various rulings, or in colloquies with counsel, did he intimate his opinion of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1731.]

8. SAME — EVIDENCE — RULINGS — REVIEW — OBJECTIONS.
It is not cause for a new trial that the judge allowed a given question to be propounded to a witness, when it does not appear what objection, if any, was made to the question, nor what answer, if any, the witness made thereto.

9. SAME — EXPERTS — QUALIFICATION — QUESTION FOR COURT.
The question whether a witness offered as an expert is qualified to give his opinion upon a given subject under investigation is one for the court, and not for the witness. Hence the mere fact that the witness in his testimony may disclaim to be an expert is no reason for refusing to allow him to testify as one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1070.]

10. SAME—STATEMENTS BY JUDGE.
The fact that the trial judge, upon objection being made to the competency of a witness offered as an expert, expressed his opinion as to the sufficiency of the preliminary testimony of the witness to show that he was one, is not cause for a new trial.

11. SAME—WRIT OF ERROR—WAIVER OF ERROR.
Grounds of a motion for a new trial not referred to in the brief of counsel for plaintiff in error are treated as abandoned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3012.]

12. HOMICIDE—MURDER—EVIDENCE.
The evidence warranted the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Richmond county; H. C. Hammond, Judge.

Arthur P. Glover was convicted of murder, and he brings error. Affirmed.

See 57 S. E. 101.

A. L. Franklin and C. A. Picquet, for plaintiff in error. J. S. Reynolds, Sol. Gen., Boykin Wright, and Jno. C. Hart, Atty. Gen., for the State.

FISH, C. J. Arthur P. Glover was convicted of murder, and, upon his motion for a new trial being overruled, he excepted.

1. Two of the grounds of the motion complained of the alleged misconduct of the jury which returned the verdict. The only evidence in support of these grounds was the affidavit of one of the jurors, which was contradicted by the affidavits of all the other jurors. It is only necessary in disposing of the grounds to quote the language of section 5338 of the Civil Code of 1895: "The affidavits of jurors may be taken to sustain, but not to impeach their verdict."

2. Another ground of the motion was that after 6 jurors had been selected to try the case, and 84 had gone off for cause, counsel for the accused renewed their motion for a change of venue, and "the court granted the same, stating to the counsel for the defendant and state to agree upon a county; if not, the court would select a county"; the judge further stating: "I will let the case go over until to-morrow morning before I take action in that matter." Counsel for the state and counsel for the accused agreed upon another county before the court convened the next morning, and counsel for the accused asked the court to grant an order changing the venue to the county thus agreed upon. The court refused the motion, and ordered the case to proceed. The assignment of error is "that the court had entertained serious doubt the afternoon before that a fair and impartial trial could be had in Richmond county, and no evidence had been introduced in the presence of defendant's counsel to remove said doubt or produce further evidence." This ground is wholly without merit. The court did not finally pass upon the motion for a change of venue until the morning after it was made, and it was certainly not erroneous to then decide the question presented without hearing evidence to remove any doubt that the court might have entertained on the subject the afternoon before. The ruling of the judge refusing to grant the motion for a change of venue, being made under the circumstances stated, clearly indicates that whatever opinion he may have at first entertained as to the merits of this motion, under the evidence submitted, he, upon a further and fuller consideration of the question, was of opinion that a case for a change of venue had not been made out. The question whether the judge was right or wrong in this conclusion does not depend upon his mental attitude in reference to this question on the afternoon before he really passed upon it, but upon a consideration of the evidence which he deemed insufficient to sustain the motion.

3. Complaint was made that the court intimated to the jury what had been proven in the case by saying in their presence that Dr. Wade, a witness for the accused, did not in his testimony claim "to be an expert on these cases [cases involving the question of insanity], or to have any peculiar knowledge on that subject, yet he was permitted to testify, not only to his opinion derived from facts within his own knowledge, but there was also propounded a very lengthy and comprehensive hypothetical question by counsel for the defendant." It is clear that the judge did not in this statement intimate to the jury what had been proven in the case. There was, however, a positive statement by the judge that the witness referred to had not, in his testimony, "claimed to be an expert in these cases, or to have any peculiar knowledge on the subject," and, unless this statement by the judge was incorrect, the accused had no cause for complaint. The matter would be different if the judge had stated that the witness had not been shown by the evidence to be an expert in insanity cases, for he would then have been expressing an opinion upon the evidence; but, when he merely stated that the witness had not claimed—that is, had not testified—that he was an expert in such cases, he simply undertook to state a fact, and, if he stated it correctly, no error was committed.

A statement by the court that a witness said a certain thing, or did not say it, is not, in a legal sense, an expression of opinion as to the evidence. Williams & Co. v. Hart, 65 Ga. 201 (5); Wiggins v. State, 80 Ga. 468, 5 S. E. 506. Of course, the statement by the court that the witness had been permitted to testify to his opinion derived from facts within his own knowledge, and that a lengthy hypothetical question had been propounded to him by counsel for the defendant, was not an expression of opinion upon the evidence.

4. There was no merit in the complaint that counsel for the state was permitted, over the objection of the accused, to ask, on cross-examination of a witness for the defense, if, in the opinion of the witness, certain circumstances which he had assigned as his reason for believing that the accused was of unsound mind were of themselves sufficient to indicate that the accused did not know it was wrong "to go and shoot a helpless woman down in the mill, and keep pumping lead into her until she was dead." The fact that the witness had said nothing about the accused so shooting the woman did not render the question inadmissible; nor was the fact that the court had refused to permit counsel for the defendant to ask a similar question on the cross-examination of a state's witness a good objection to allowing this question to be asked.

5. Another ground of the motion was that the court erred in permitting the following question to be asked a named witness for the state, and in admitting his answer thereto: "Q. From the term of your acquaintance, judging by his manner, appearance, and conduct, would you say whether he [the accused] was sane or insane? A. I would say he was sane." "Counsel for the defendant [urged] the objection that said witness had not narrated the facts upon which to base his opinion," and "that said question was an interrogation as to a fact and not as to the witness's opinion." The question was evidently framed to elicit the opinion of the witness as to the mental condition of the accused, based on his manner, appearance, and conduct during the acquaintance of the witness with him. It is well settled that a nonexpert witness may give his opinion as to the sanity of another based upon such facts as are set out in this question. Proctor v. Pointer, 127 Ga. 134, 56 S. E. 111; Herndon v. State, 111 Ga. 178, 36 S. E. 634, and cases cited.

6. It is claimed that the court erred in instructing the jury as follows: "Should it appear from the evidence that Glover, at the time he slew Maud Dean, knew the difference between right and wrong, but did not have power of mind and will sufficient to keep him from killing her, he would not be guilty of murder. The insanity which the law recognizes as an excuse for crime must be such as dethrones reason and incapacitates one from distinguishing between right and wrong." The error assigned was that "such charge was conflicting and confused the jury; but the only contention in the brief of counsel for plaintiff in error is that it was conflicting. The second clause of this excerpt from the charge correctly states the general rule as announced in Spann v. State, 47 Ga. 553, and followed in Brinkley v. State, 58 Ga. 296. See, also, Graham v. State, 102 Ga. 650, 29 S. E. 582. The exception to the general rule was broadly stated in the first clause. Allams v. State, 123 Ga. 500, 51 S. E. 506. The charge was not conflicting. The exception recognized by the authorities, and which the accused would alone have been entitled to have given in charge to the jury, if there were evidence sufficient to authorize such instruction, is: "If a man has reason sufficient to distinguish between right and wrong as to a particular act about to be committed, yet, in consequence of some delusion arising from a diseased mind, his will is overmastered, and he is impelled to do that act, there is no criminal intent, provided the act itself is connected with the particular delusion under which the prisoner is laboring." Roberts v. State, 3 Ga. 310; Flanagan v. State, 103 Ga. 619, 30 S. E. 550; Taylor v. State, 105 Ga. 776, 31 S. E. 764; Allams v. State, supra. The broad language which the court used in stating the exception was therefore favorable to the accused. Moreover, after scrutinizing the evidence, we are fully satisfied that there is nothing in it which authorized an instruction on the exception to the general rule in cases where insanity is relied upon as a defense.

7. Another ground of the motion for a new trial was that during the progress of the trial the judge intimated "his opinion of the case by the following remarks to defendant's counsel, to wit." Then follow several pages of recital, in detail, of various incidents of the trial and the remarks of the judge in making different rulings in connection therewith, and in colloquies between himself and counsel for the accused. We have carefully considered all of such remarks, and find that none of them tended to intimate an opinion as to what had or had not been proved, and that the language of the judge could not be construed as an intimation of any view which he might entertain as to the case. We are sure that no good purpose could be served by setting out even the substance of all of this very lengthy ground of the motion; but will quote two or three extracts therefrom, as fair samples of the whole: "Mr. Franklin, of counsel for defendant, said: 'If your honor please, one of the jurors wants to say something to you.' And the court replied: 'You have nothing to do with that. I will be glad to hear from the juror.' Shortly thereafter, and after two other jurors had been passed upon, Mr. Franklin arose, and said: 'If your honor please, a juror, two or three jurors preceding, who disqualified for the reason that he did not understand the questions propounded, now wants to make an ex-

planation and ask a question of the court, to see if he was legally disqualified, and I ask that he be permitted to do it.' The Court: 'I have already stated to you that you have nothing to do with that.' Mr. Franklin: 'I understand that; but I want to go on record. Now, if your honor please, I want to ask that this jury as stricken be withdrawn because of the remarks of the judge to counsel, for the reason that it prejudices his case.' The Court: 'The motion is overruled.' Mr. Picquet: 'The Sibley Manufacturing Company is also a prosecutor in this case, and I request that your honor ask the jurors on the array whether any of them are stockholders in that company.' The Court: 'I will not do so.' Mr. Picquet: 'Then we ask permission to put in proof that the Sibley Manufacturing Company has employed counsel, and is one of the real prosecutors.' The Court: 'I decline to entertain any such investigation.' Mr. Wright: 'Hold on! The only witness to whom a hypothetical question can be put is an expert, and just the contrary is the fact with reference to this witness who is not an expert. He must testify to the facts stated first from his own knowledge.' Mr. Picquet: 'He asked the very question himself yesterday.' The Court: 'Regardless of whether it was asked by that side or not, if you are asking the question upon the assumption that error has been committed on the other side, I want to state that such a hypothetical question on the direct examination put to a non-expert witness is improper, and, without the slightest disrespect to counsel, I want to have an understanding now that that question must not be put again. That kind of question stands on an entirely different footing from the same question addressed by the other side to the witness. The other side asks that kind of question to test the value of the deductions of the witness and of his testimony, seeking to discredit his testimony by showing that he has an exaggerated or foolish idea himself of what shows insanity.'"

8. Several grounds of the motion assigned error because the court allowed state's counsel to propound specified questions to witnesses, it not appearing what objections were made to the questions at the time they were propounded, nor what answers the witnesses made. As this court has frequently ruled, such assignments of error are not well made.

9. Two grounds of the motion assign error because Dr. Morgan, a witness for the state, was permitted, over objection, to testify as an expert as to insanity. In one of these grounds it is alleged that the witness, after having testified "that his only experience in mental diseases was such as came to him as a physician in general practice, and that he had made no special study of the subject, nor had any experience that would make him a specialist or expert on nervous diseases," was allowed, over objection of defendant's counsel, to answer the following question, to wit: "What is the difference between idiocy and lunacy?" the answer of the witness being given. There are two assignments of error in this ground; the first being that it was error to allow "a physician who expressly disclaimed to be an expert to differentiate and define the different forms of insanity." The other assignment is in the following language: "Because the court in his ruling on the question said that, though the physician disclaimed to be an expert, yet, if the evidence showed that the witness is capable from his experience, education, and observation to give an opinion and to be treated as an expert, it is proper that he should be so treated, notwithstanding the fact that he disclaims being an expert. 'I think the testimony is proper. Go ahead,'—the error being that the court, in effect, told the jury that, though the physician disclaimed being an expert, the evidence showed the court that he was an expert, and could answer any question that could be propounded to an expert." In the other ground complaint is made that this same witness, "who disclaimed to be an expert," was permitted, over objection, to answer a stated hypothetical question.

There was no error in either of these rulings of the court. The question whether the witness was or was not an expert was not one to be determined by him but by the court. It was rightly held in Crow v. State, by the Court of Criminal Appeals of Texas (33 Tex. Cr. R. 264, 26 S. W. 209), that, "if a witness' testimony shows him an expert, his statement that he is not an expert does not deprive his testimony of the quality of expert testimony." A witness might have such a very modest estimate of his own abilities and qualifications to give an expert opinion upon a given subject as to disclaim being an expert in reference thereto; and yet his testimony as to his education, study, experience, investigations, and the extent and scope of his practice or work in his profession or avocation might be such as to show him well qualified to give such an opinion. On the other hand, a vain or conceited person, called as an expert witness, might, in the most positive terms, declare himself to be one in reference to the subject under investigation, and yet his other testimony might disclose such woeful ignorance and want of intelligent observation and experience in the premises as to render his opinion of no value whatever. It would be a dangerous rule to allow the question whether a particular witness is or is not an expert as to the question under consideration to depend solely on the witness' opinion of his own qualifications in reference to the matter. The testimony of this physician is a good illustration of the fact that a witness may by his testimony show himself to be sufficiently qualified, within the contemplation of the law, to give an expert opinion to the jury upon a given subject under investigation, and yet at the same time himself disclaim such qualification. He testified: He was a physi-

cian and surgeon, and had practiced medicine for 21 years; received his diploma from the Medical Department of the University of Georgia, had been to other schools since his graduation, among them the Polyclinic of New York and the University of Virginia. In the line of his profession he has been president of the State Association, president of the Surgeons of the Central Railway Company, president of the Alumni Association of his school, city physician, coroner's physician, president of the board of health of Augusta, health officer of Richmond county, a member of the state board of health, and had held various minor positions. He was demonstrator of anatomy in the medical college of the University of Georgia first, and then special lecturer on various diseases at times, until he became a professor of chemistry and pharmacy, and for the last three years he had occupied the chair of anatomy and clinical surgery. He further testified: "I have had occasion to examine the mental and nervous diseases and the writings on that subject only so much as comes to a physician in general practice. I have made no special study of it, nor have I had any experience that would make me a specialist or expert in nervous diseases. As a physician with a large practice, and especially as coroner's physician and as city physician, I have had considerable experience in brain matters; about as much as the average man, probably not more. I do not know but what I have had a little more than the average man. I have been called in consultation quite a few times on brain matters and nervous diseases. Some of the leading authorities in my profession upon the subject of insanity are Starr, Berkly, Pierce, and Sacks. * * * I have had occasion to take out of the skull and study and examine the convolutions and peculiarities of more than a hundred brains. It is part of my branch in the school now to lecture on the brain—on the structure of the brain. I do not go much into the function. * * * I do not consider myself an expert. I just consider myself an ordinary practitioner. I doctor pneumonia, and I doctor typhoid fever. I am not an expert in typhoid fever, but I have seen hundreds of cases. While I say I am not an expert on the brain and brain diseases, I am just about as much an expert on that as I am on the other branches of the practice. I say I practice in cases of pneumonia and in cases of typhoid fever, and in cases of brain trouble, and I consider myself just as much an expert in the one as in the other."

We think it very clear from this testimony that the court properly held that this learned and experienced physician and surgeon could testify as an expert in response to each of the questions, the allowance of which by the court is complained of as above indicated. If the seal of silence could be placed upon his lips when these questions were propounded to him, because he disclaimed being an expert as to such matters, then by the same reasoning, if he were offered as an expert witness in a case involving opinion as to typhoid fever, he ought not to be permitted to testify as an expert. We think that the proof as to the qualifications of this witness was exceptionally full and satisfactory, more so than was absolutely necessary in order to admit his opinions in evidence before the jury. "The rule obtaining in most jurisdictions is that a general practitioner of medicine is a competent witness concerning insanity, and that a special study of that subject is not required." 12 Am. & Eng. Enc. L. 452. See, also, Lawson's Exp. & Opinion Ev. 136. This is the rule which prevails in this state. Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Taylor v. State, 83 Ga. 647, 10 S. E. 442; Macon Ry. & Light Co. v. Mason, 123 Ga. 773, 51 S. E. 569. In Faulkner v. Faulkner, 84 Ga. 73, 10 S. E. 504, plaintiff in error, who was defendant below, upon the trial of the case, had introduced as a witness a physician, who testified as to the mental capacity of a grantor, and in the motion for a new trial it was alleged that the court erred in not informing the jury in its charge who were expert witnesses. This court held that the charge "was not erroneous for not stating that the physician was an expert witness; it being presumable that this fact was insisted upon by defendant's counsel."

10. The assignment that the judge erred in expressing an opinion upon the evidence is obviously without merit. He could not decide the question raised by defendant's objection, without deciding that the witness had been shown by the testimony to be an expert. When preliminary evidence, upon the sufficiency of which other evidence is dependent, is introduced, the trial judge is bound to decide whether such preliminary evidence is sufficient for the purpose for which it is offered; for, unless he does decide this question in the affirmative, such other evidence cannot be introduced. In this case, for instance, when the competency of the witness as an expert was challenged by the objections to his testimony, the judge was bound to decide whether he was or was not so competent, and he could not decide this question without expressing or intimating his opinion as to the sufficiency of the preliminary evidence to show the witness to be an expert.

11. A number of the grounds of the motion for a new trial are not referred to in the brief of counsel for plaintiff in error, and they are therefore treated as abandoned.

12. The evidence warranted the verdict, and the court did not err in refusing to grant a new trial.

Judgment affirmed. All the Justices concur.

(3 Ga. App. 223)

## SOUTHERN EXPRESS CO. v. MADDOX et al. (No. 691.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. TRIAL—VERDICT—SUFFICIENCY.

While it is the better practice that the jury, after agreeing upon a verdict, should cause it to be written upon the initial pleading, to be dated, and to be signed by one of the jurors as foreman, still none of these details are essential to a legal verdict. (a) An unsigned verdict is not illegal. (b) The presiding judge may cause a verdict actually rendered to be signed by one of the jurors as foreman. (c) The presiding judge may, in his discretion, designate the foreman of a jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 759.]

2. COSTS—ASSESSMENT.

It is the duty of the court, and not of the jury, to assess the costs in an ordinary civil action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, §§ 752–754.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. J. and J. E. Maddox against the Southern Express Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

The suit was instituted on account of the loss of certain cigars intrusted to the express company in its capacity of common carrier. The original summons claimed as principal $12.25, as interest $1.11. The verdict of the jury, as verified by the magistrate, was in the following language: "We, the jury, find verdict for plaintiff in the amount sued for, with interest." It was unsigned when delivered into court, but by direction of the magistrate one of the jurors signed it as foreman. There is no complaint that the verdict is contrary to the evidence or is without evidence to support it; but the grounds of error are that the court refused to admit certain testimony (which, however, will not be considered in the opinion, since the assignment of error does not state enough of the particulars of the proposed testimony to show injury as well as error), that the verdict was erroneous, in that it was not signed, and the court directed a member of the jury to sign it; that the verdict does not award costs, and the court therefore had no power to include them in the judgment and execution.

Philip H. Alston and McDaniel, Alston & Black, for plaintiff in error. C. D. Maddox, for defendants in error.

POWELL, J. 1. While the better practice is that verdicts, after being agreed upon, should be written upon the initial pleading, dated, and signed by one of the jury as foreman, yet none of these details are mandatory. "It is the right of each of the parties that each juror should agree to the verdict. Without this it is no verdict. Not only so, but it is their right to know that each juryman has agreed upon the verdict. The only question is how is it to be ascertained that the jury have agreed. I reply, it is the duty of the court to see to it that each juror agrees to the verdict, and it is within his discretion [in civil cases, for a poll of the jury can be demanded as a matter of right in criminal cases] to adopt such means as the law and the usage of the courts allow to ascertain that fact." Per Nisbet, J., in Smith v. Mitchell, 6 Ga. 465. In this state the jury may legally express their agreement through an unsigned verdict. Roberts v. State, 14 Ga. 18; Harris v. Barden, 24 Ga. 72; Patterson v. Murphy, 63 Ga. 281. Even after the jury has been dispersed, the court may allow one of the jurors to sign as foreman a verdict previously rendered. Avera v. Tool, 74 Ga. 398. While the foreman is usually selected by the jury itself, there is no reason why he should not be designated by the presiding judge. There is an old story current in bar circles that a few years ago in one county in this state a jury composed of six Democrats and six Populists, after remaining out three days, came into court, and announced an absolute inability to agree. The judge inquired if they were troubled by a question of law or of fact. They replied: "Neither. We have not considered the case. We tied upon the election of a foreman." In such cases law, as well as expediency, allows the judge to direct a juror to act as foreman. An interesting description of the common-law practice as to the reception of verdicts is found in the case of Roberts v. State, supra.

2. The verdict was not illegal. The amounts of principal and interest sued for were definitely set out in the summons; and the pleadings may always be examined to give intendment to the verdict. Costs are not to be awarded in the verdict, but are assessed by the court upon the verdict. Southern Ry. Co. v. Oliver, 1 Ga. App. 784, 58 S. E. 244.

Judgment affirmed.

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(3 Ga. App. 234)

## SAPP v. PARRISH. (No. 704.)

(Court of Appeals of Georgia. Dec. 9, 1907.)

1. PROCESS — TESTE — TITLE OF JUDGE — APPEARANCE.

Process bearing teste in the name of the judge, though his official title is not also given, is not void. A general appearance waives, not only all defects in process, but even absence of process itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 32; vol. 3, Appearance, §§ 118–143.]

2. TRIAL—VERDICT—REQUISITES.

A verdict is not void because it is not written on the original petition.

3. CERTIORARI — RECORD — ALIUNDE AFFIDAVITS.

"At the hearing of a certiorari in the superior court nothing can be considered but the petition and answer." The judge cannot consider aliunde affidavits.

4. BASTARDS — ACTION FOR SERVICES — EVIDENCE.

The evidence, though weak and unsatisfactory, was legally sufficient to authorize the verdict rendered.

(Syllabus by the Court.)

Error from Superior Court, Tattnall County; B. T. Rawlings, Judge.

Action by Della Parrish against J. C. Sapp. From an order of the superior court, dismissing a writ of certiorari to review a judgment in favor of plaintiff, defendant brings error. Affirmed.

W. T. Burkhalter, for plaintiff in error. Hines & Jordan and H. H. Elders, for defendant in error.

POWELL, J. Della Parrish sued Sapp in a city court for the labor of her minor bastard son, and alleged that she had made a definite contract of hiring. The defendant asserted that, while he had control of the boy, it was by reason of the fact that the plaintiff had released her parental control to him in order to get the child supported. The jury having found for the plaintiff, the defendant took certiorari to the superior court. At the hearing the judge overruled the certiorari, and to this judgment exceptions are taken. The petition for certiorari is somewhat unique in structure. In the body it merely recites the fact that the trial occurred between the parties in the lower court, and that a verdict and judgment adverse to the petitioner was rendered, and continues: "And he [petitioner] here and now proceeds plainly, fully, and distinctly to set forth the nature of said case, what occurred on said trial, and the errors complained of. See the brief of evidence and the assignments of errors hereto attached and is a part of this petition,"—and concludes with prayer for the writ of certiorari. In the exhibit all the pleadings, a brief of the evidence, and the assignments of error are set forth. Counsel for defendant in error contend that we cannot consider the assignments of error, because of the manner in which the petition is drawn. They say that it is violative of the Civil Code of 1895, § 4637, which regulates certiorari practice and provides that "in [the] petition he [the applicant] shall plainly and distinctly set forth the errors complained of." We are not prepared to say that the point is not well taken; but since the trial judge passed upon the merits and did not dismiss the petition for this reason, and since we find an affirmance of his judgment will be the result of our full investigation into the record, we will not pass upon this technical question, but will decide the case as if the errors were assigned with unquestionable formality.

1. The first exception presented is to the refusal of the court to dismiss the petition because the process did not bear teste in the name of any judge, but simply in the name of P. W. Williams. The process was in the usual form, with the exception of the conclusion, which was as follows: "Witness the Honorable P. W. Williams of said court." Upon the point being made, the court allowed the word "judge" to be inserted, by amendment, after the name "Williams." The process was not void, and was amendable. Civ. Code 1895, § 4994; Kelly v. Fudge, 2 Ga. App. —, 59 S. E. 19, and citations. Besides, the motion was not made until after the defendant had appeared and pleaded; and, by section 4981 of the Civil Code of 1895, "appearance and pleading shall be a waiver of all irregularities of the process or of the absence of process."

2. The verdict of the jury was written upon the plea. The plaintiff in error insists that it is illegal, because it was not written on the petition. We know of no law which requires the verdict to be written upon any particular paper, and we are not cited any decision or statute to that effect. To the contrary, see Roberts v. State, 14 Ga. 19; Southern Express Co. v. Maddox, 2 Ga. App. —, 59 S. E. 821.

3. A witness made an affidavit which was attached to the petition for certiorari, in which is detailed a conversation occurring after the trial between one of the jurors and the plaintiff; the trend of the statements made by the juror, as set forth, being such as to indicate that he went into the jury box prejudiced in the plaintiff's favor, and winked at her pending the trial. The court could not lawfully consider this affidavit. Gildea v. Hill, 115 Ga. 136, 41 S. E. 492 (2).

5. The judge of the superior court could well have set aside this verdict on account of the state of the testimony; but this court has no such power. The brief of the testimony presents a remarkable spectacle. The plaintiff and the defendant were the chief witnesses as to the substantive facts of the case. By proof of general bad character, each—if the impeaching witnesses are to be believed—was overwhelmingly impeached. The plaintiff would put up a witness who would testify that the defendant's general character was bad, and that he would not believe him on oath. On cross-examination the same witness would also testify that the plaintiff's general character was bad, and he would not believe her on oath; and vice versa. After bad character was thoroughly established, both sides sought wider fields of impeachment, and several witnesses testified that they would not believe the defendant on oath because he was always in law; and, according to one witness, if he could not get a lawsuit any other way, he would buy one. After both the parties to the suit had thus been assailed at length, the other witnesses were taken up, and impeaching testimony against them was presented. One witness, according to his testimony, would not believe the defendant's wife on oath, "because she was crack-brained." It was sought to impeach another witness because he had put revenue stamps on a deed two years before

the war stamp act was passed. Finally a witness, after he had testified as to the others, is alleged to have said what must have impeached himself in the minds of every decent and honest man who heard him, that "no woman's character is worth much." Another witness, who stated that, while some "wrong things" had been said about the plaintiff, he did not consider her character bad, naively admitted that "on account of the plaintiff I have been having a lot of trouble in my own house with my wife. She is accusing me of this woman."

Upon a review of the whole record, we find no reversible error assigned.

Judgment affirmed.

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(3 Ga. App. 294)

## GIBBS v. LARSON. (No. 755.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

WRIT OF ERROR—REVIEW.

The evidence authorized the verdict. The charge of the court, taken as a whole, fairly instructed the jury as to the matters to which exception is taken. No error of law appears. The judgment, therefore, is affirmed.

(Syllabus by the Court.)

Error from City Court of Cordele; E. F. Strozier, Judge.

Action between Dwight Gibbs and L. Larson. From the judgment, Gibbs brings error. Affirmed.

Hill & Royal, for plaintiff in error. Walter F. Hall and Max E. Land, for defendant in error.

POWELL, J. Affirmed.

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(3 Ga. App. 297)

## BLACK v. STATE. (No. 803.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

TRESPASS—CUTTING TIMBER—WILLFULNESS.

In a prosecution for trespass by cutting wood or timber, under Pen. Code, 1895, § 219, par. 1, willfulness is an ingredient of the crime. The word "willful," as used in this section, means "intentionally, malevolently, with a bad purpose, an evil purpose, without ground for believing the act to be lawful."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 173.]

(Syllabus by the Court.)

Error from City Court of Fitzgerald; D. B. Jay, Judge.

Clifford Black was convicted of trespass, and brings error. Reversed.

O. H. Elkins, for plaintiff in error. A. J. McDonald, Sol., for the State.

POWELL, J. Under section 219 of the Penal Code of 1895, "the willful cutting or felling of any wood [or] timber * * * upon the land, inclosed or uninclosed, of another, without the consent of the owner," is an indictable trespass. Willfulness is an essential ingredient of the offense. The word "willful," as used in this statute, means "intentionally, malevolently, 'with a bad purpose,' 'an evil purpose,' 'without ground for believing the act to be lawful.'" Hateley v. State, 118 Ga. 81, 44 S. E. 852; King v. State, 103 Ga. 265, 30 S. E. 30. The defendant, a boy, was given permission by a Mr. Lockett to cut a load of wood and use it. Lockett had the right to cut wood anywhere on the lands of one Clare. Clare had told Lockett that all the wood north of Lockett's house and in the direction where he sent the boy to get the wood was his. The line between the lands of Clare and of the prosecutor, as a matter of fact, ran through the woods; and the trees cut by the defendant were over the line on the prosecutor's side. The wood was cut and carried away in the presence of Lockett and of the prosecutor's agent, who did not inform the defendant he was trespassing. Afterwards, when the prosecutor contended that the wood was cut on his land, Lockett and the boy offered to pay her the full value; but she demanded $12 for the load of wood, and when they refused to pay this amount she instituted the prosecution against the boy. The verdict of guilty rendered under such circumstances is unlawful. The element of willfulness had not been proved; and, to the contrary, was clearly disproved. Wiggins v. State, 119 Ga. 216, 46 S. E. 86; Murphey v. State, 115 Ga. 201, 41 S. E. 685; Hateley v. State, supra.

Judgment reversed.

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(3 Ga. App. 336)

## PARKER v. STATE. (No. 844.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. RAPE—ATTEMPT TO RAPE—CORROBORATION.

In a case of assault with intent to rape, the jury would be authorized to convict on the uncorroborated testimony of the injured female. In the case sub judice, there were "concurrent circumstances" and facts of corroboration, and the verdict was fully warranted by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 83, 84.]

2. CRIMINAL LAW—CONTINUANCE.

A judgment of the trial court refusing a continuance will not be reversed, unless it is manifest that such judgment was an abuse of sound legal discretion. No abuse of such discretion appears in the present case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3045–3049.]

3. SAME—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

New trials on the ground of newly discovered evidence are not favored by the courts, and should not be granted, unless it appears that the testimony alleged to be newly discovered could not have been secured at the trial by the exercise of reasonable diligence, and that its introduction would probably change the result on a second trial. The motion on this ground in the present case lacks the two essentials indicated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2318, 2336.]

4, 5. SAME—INSTRUCTIONS.

There is no merit in the exceptions to the charge of the court on the subject of reasonable doubt and the impeachment of witnesses.

(Syllabus by the Court.)

Error from Superior Court, Walton County; C. H. Brand, Judge.

Offie Parker was convicted of crime, and brings error. Affirmed.

A. C. Stone and A. E. Hawkins, for plaintiff in error. I. J. Tribble, Sol. Gen., for the State.

HILL, C. J. Offie Parker, a white boy 16 years old, was convicted of the crime of assault with intent to commit rape on the person of a little white girl named May Johnson, 10 years of age. He made a motion for a new trial based on the general grounds and on several special assignments of error. This being denied, he brings the case to this court.

1. As to the three general grounds of the motion, it may be stated that the verdict of the jury was amply supported by the evidence. The little girl testified that, while she was on her way to school between 7 and 8 o'clock in the morning the defendant suddenly jumped out of the bushes, grabbed, and dragged her to "a little spot of pines," where he forcibly and against her will made the felonious assault. Her testimony fully establishes the commission of the offense, and she is corroborated by facts and circumstances testified to by other witnesses. Some of these circumstances and facts of corroboration are as follows: (1) She was seen by several witnesses on the road to school near the place where she said the offense took place and about the time she said it took place. During recess, a few hours after the commission of the offense, she made complaint to a schoolmate, exhibiting to this schoolmate her drawers, which were torn and ripped, and stating to her that they were so torn and ripped by her assailant at the time of the assault. The schoolmate testified that the complaint was so made, and also testified as to the said condition of the drawers. She further made complaint, the same afternoon, so she states, to her mother and stepfather when she went home from school, and the next morning, in company with her stepfather and several of the neighbors, she went to the place where she said the crime had been committed and pointed out the place to them, and these witnesses testified that there were physical marks on the ground indicating a recent scuffle or struggle. Three witnesses—two boys on their way to school and a white woman—testified that they saw the defendant near the place and about the time of the commission of the crime as stated by the girl in her evidence. These facts and circumstances of corroboration were testified to by witnesses who were not related to the girl nor connected with the prosecution in any way. The trial judge instructed the jury that they could not convict on the uncorroborated testimony of the party assaulted, following the decision of the Supreme Court in the case of Davis v. State, 120 Ga. 435, 48 S. E. 180. That was a case of rape, and the majority of the court held that there could not be a lawful conviction of the offense of rape on the testimony of the woman alone, unless there were some "concurrent circumstances" which tended to corroborate her evidence. This court, however, held in the case of Fields v. State, 2 Ga. App. ——, 58 S. E. 327, that in a case of assault with intent to rape the jury was authorized to convict on the uncorroborated testimony of the injured female, and that the ruling of the Supreme Court, supra, did not apply, in a case of assault to commit rape, for the reasons stated in the opinion. If, therefore, the jury in this case believed the testimony of the little girl, no other evidence was necessary to support the conviction; but the record discloses "concurrent circumstances" and facts testified to by apparently disinterested witnesses, strongly corroborating her statement. The trial judge having charged the law more favorably to the accused than he was entitled to, and the question of fact being entirely for the jury, and the verdict having been approved by the trial judge, this court, even if it had the right to do so, would not be warranted in setting aside the verdict, unless in the trial of the case some material error of law, prejudicial to the rights of the defendant, was committed.

2. When the case was called for trial, a motion for continuance was made on the ground that the brother of the defendant, who was a material witness in his behalf, was absent from the court. Alibi was the defense relied upon, and the defendant claimed that he could show by this absent witness that on the morning of the alleged offense he was present with him some distance from the scene of the offense "from the time they got up that morning at daybreak until after dinner time"; that they helped their mother about some household affairs until about 8 o'clock or a little thereafter, when he and his brother went to the pasture together for the purpose of separating the cow and calf, and that after they had done this they both went back to the house, and played marbles together until dinner. The showing for a continuance was deficient in two important particulars. This absent witness was not subpœnaed, and the defendant failed to show that the witness was not absent by his permission directly or indirectly. On the point that the witness had not been subpœnaed, it was shown that counsel for the defendant had endeavored just before court convened, to have this witness subpœnaed, but had been unable to locate him after repeated efforts to do so. In reply to this, it was shown by the state that this witness (who was a brother of the defendant and who was 22 years of age) was present at the commitment trial, and was not then subpœnaed as a witness to appear at the superior court. Three weeks intervened between the commitment trial and the

trial in the superior court, and during this time no diligent effort was made to have the witness subpœnaed or to secure his attendance; and it was further shown that, notwithstanding the alleged importance of his testimony and the knowledge of the absent brother of the fact that the case would be in order for trial, he had left home and his whereabouts were unknown, and that the family of the defendant made no effort to locate the witness or to assist the officer in serving the subpœna. In addition to these defects in the showing for continuance, the evidence of the absent witness would simply have been cumulative of the testimony of the mother of the defendant, who testified that both the defendant and the absent brother were with her at the house and in the yard the whole morning when the alleged offense was said to have been committed, and that the defendant was not out of her sight during the entire morning. For the reasons above indicated, we cannot say that the trial judge abused his discretion in refusing to continue the case. Applications for continuances being addressed to the sound legal discretion of the court, a judgment refusing to continue a case will not be reversed, unless it is manifest that this discretion has been abused.

3. Another ground of the motion for a new trial is based on newly discovered testimony. One of the circumstances of corroboration as testified to by witnesses for the state was the appearance and condition of the place pointed out by the little girl where she said the assault was made. These witnesses testified that the ground and the straw at this place indicated that some scuffle or struggle had there recently taken place. An affidavit of the sister-in-law of the defendant was presented, in which the affiant stated that about a month before the alleged offense, while returning from a fish fry, she had occasion to leave the road at this point, and go to the place where the offense was said to have been committed; that then she noticed that the straw was mashed down; that, not knowing that this was the same place pointed out by the little girl as the place where the offense was committed, she said nothing about it, and did not appear as a witness on the trial; that since the trial, on learning that the place that she noticed before the trial was the place where the offense was alleged to have been committed, she visited the place, and found that it was then in the same condition as it was when she first noticed it on the occasion above mentioned. In view of the fact that there was a preliminary trial of the defendant, where it is probable that this testimony for the state was fully disclosed, it would seem that proper diligence by the defendant or his counsel could have secured the testimony of this witness at his trial. Besides, from the character of this newly discovered testimony and the relationship of the witness to the defendant, we do not think it would change the result on another trial. New trials on the ground of newly discovered evidence are not favored by the courts, and a new trial should not be granted on such grounds, unless it is shown that the testimony alleged to have been newly discovered could not have been secured at the trial by the exercise of reasonable diligence, and unless it also appears that such newly discovered testimony would be likely to produce a different result on the second trial.

4. The following extract from the charge of the court was excepted to as erroneous: "A reasonable doubt of the law is one that grows out of the testimony or from the absence of testimony, and leaves a reasonable mind wavering and unsettled, and not satisfied from the evidence. A juror cannot create for himself a doubt and act upon it. He cannot raise an artificial or captious doubt in order to acquit. The doubt should be real, and honestly and fairly entertained after all reasonable efforts to find out the facts. The proof should be such as to control and decide the conduct of men in the highest and most important affairs of life, and not a mere conjecture, a fancy, a trivial supposition, a bare possibility of innocence." That part of the above charge which states that "the proof should be such as to control and decide the conduct of men in the highest and most important affairs of life" is objected to as not containing a correct statement of the rule of law in criminal cases. We think the charge on the subject of reasonable doubt, taken together, is an accurate and correct definition of what would be a reasonable doubt. We think that, where the proof in any given case would be so strong and conclusive as to control and decide the conduct of men in the highest and most important affairs of life, it would be sufficiently clear and convincing to satisfy their understanding beyond a reasonable doubt. The charge seems to be based substantially on section 987 of the Penal Code of 1895 and several decisions of the Supreme Court, and especially the decision in Johns v. State, 33 Ga. 257.

5. It is insisted that the court erred in charging the jury as follows: "When a witness has been successfully impeached by any of the legal methods known to the law—that is, where his unworthiness of credit is absolutely established in the minds of the jury—he ought not to be believed, and it is the duty of the jury to disregard his or her entire testimony, unless it is corroborated, it being, of course, always a matter for the jury whether a witness has been in fact impeached." We do not see any error in this charge, especially when it is considered in connection with the entire charge on the same subject. On the contrary, we think the charge on the subject left the credibility of all the witnesses to be determined by the jury. The excerpt excepted to is exactly in the language approved by the Supreme

Court in Powell v. State, 122 Ga. 571, 50 S. E. 369, and substantially in that approved by the Supreme Court in Ga. R. Co. v. Andrews, 125 Ga. 87, 54 S. E. 76, and Smith v. State, 109 Ga. 479, 53 S. E. 59.

Judgment affirmed.

POWELL, J. (concurring). I concur; but I wish to say that the evidence in the record against the defendant is not to my mind very satisfactory. As a judge I must believe all the jury and the trial judge believe, and must not reverse a verdict free from legal error. Still, there are some facts not recited by the Chief Judge in his opinion, and which it is not necessary to recite, that cause these personal doubts. I, however, have neither the power nor the inclination to refuse judicial assent to a verdict thus found and approved.

RUSSELL, J., joins in this special concurrence.

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(3 Ga. App. 295)

## BRIDGES & JOINER v. S. R. JAQUES & TINSLEY CO. (No. 792.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. WRIT OF ERROR—DISMISSAL.

The failure of the plaintiff in error to file supersedeas bond or pauper affidavit is not ground for dismissal of the writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3127.]

2. GARNISHMENT—DISMISSAL.

The court did not err in refusing to dismiss the garnishment proceedings; but did err in rendering judgment against the garnishee for the reasons given in Fagan v. Jackson, 1 Ga. App. 24, 57 S. E. 1052, and citations, and in Ingram v. Jackson Mercantile Co., 2 Ga. App. —, 58 S. E. 372.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action between Bridges & Joiner and the S. R. Jaques & Tinsley Company. From the judgment, Bridges & Joiner bring error. Reversed.

Hendricks & Christian, for plaintiffs in error. Alexander Gary, for defendant in error.

POWELL, J. Judgment reversed.

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(3 Ga. App. 267)

## CENTRAL OF GEORGIA RY. CO. v. FLOYD. (No. 455.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

RAILROADS — ACCIDENT AT STATION — INJURY TO LICENSEE—EVIDENCE.

The evidence wholly fails to establish any negligence on the part of the railroad company, and the verdict was therefore unauthorized, and a new trial should have been granted.

(Syllabus by the Court.)

Error from City Court of Newnan; A. D. Freeman, Judge.

Action by O. W. Floyd against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

O. W. Floyd sued the Central of Georgia Railway Company for damages on account of injuries sustained in stepping from a depot platform. His evidence showed the following facts: On the night of October 31, 1904 (at which time he was living in the country seven miles from Senoia), he went to Senoia for the purpose of sending a telegram, in order to intercept his son, who had that day left his home. The railway company's agent at Senoia acted also as telegraph operator. The agent's office usually closed about 8 o'clock at night. When Floyd got to the station, he went in the office where the agent was, and informed him that he wanted to send a telegram about his son. The agent said he could send a telephone message quicker than a telegram, and (though not declining to accept the message) told him that it would be better to use the long distance telephone, if he wanted to stop his boy (who was on the train) at the next station. Floyd, with the intention of following this advice, walked out from the waiting room, where there was no light either at that time or when he came into the depot, and commenced feeling for the steps of the depot platform, and fell from the platform to the ground. The platform was 6 or 8 feet wide, and 30 or 40 feet long, with steps at the end that Floyd used when he went into the depot. There was no guard rail around the platform. He testified that he did not know where the steps were, and thought they were in front of where he was. He felt for them three times in trying to find them, and finally stepped a little too far, and fell over. As a result of the fall, he broke his right arm in the wrist. He had lived in Senoia 15 years, and had been in and out of the depot many times while he was living in Senoia and since he had moved into the country. There was also testimony to the effect that the depot was reasonably suited for the purposes intended and reasonably safe. It was a combination depot, used for passengers and the handling of freight. Two pairs of steps from the ground were used in going into and out of it. The platform across the eastern end of the depot, next to the waiting rooms, was some 40 feet long, 8 feet wide, and from 3 to 4 feet high. At the northeast corner were steps about 4 or 5 feet long, and at the southeast corner were other steps about 5 or 6 feet long, and between these steps there was a space of about 30 feet, with no steps and no guard rail. The last train for the night had passed, and no other train was due or expected to arrive during the night, and no one was about the depot but the agent, who was doing some office work. The trial resulted in a verdict in favor of the plaintiff. The defendant moved for a new trial, on the grounds that the verdict was contrary to evidence and without evidence to support it, and on numer-

ous other grounds. The motion was overruled, and it excepted.

W. C. Wright, J. E. Hall, and Hall & Cleveland, for plaintiff in error. W. L. Stallings and H. A. Hall, for defendant in error.

FELTON, J. (after stating the facts as above). O. W. Floyd brought suit in the city court of Newnan, alleging that he had received personal injuries by reason of stepping from the platform of the depot of the Central of Georgia Railway Company at Senoia, on the night of October 31, 1904. His right to a recovery rests upon one of two propositions: Either that the company was negligent in failing to erect guard rails on the edge of its platform, or that it was negligent in failing to have the platform lighted at the time he was injured. The evidence shows that the depot had been built many years; that it was reasonably suited for the purposes intended, and reasonably safe; that the railroad company had provided two pairs of steps for the use of people going into and coming out of the depot, of sufficient width and safety when used properly. Is it true that the railroad company is guilty of negligence in not fencing in its platform around a public depot, where both passengers and freight are loaded and unloaded, by having a guard rail around the edge of the platform? Such precaution has never been exacted of any railway, and this requirement upon this company would be practically equivalent to insuring the safety of all persons, upon all occasions, by making it impossible to fall from or walk off the platform. Under such conditions, it would be obviously impossible for the railroad company to receive and deliver its freight and transact the business of the company. The evidence shows in this case that this depot was constructed like all other depots in use by the railroad companies in Georgia of this class and type. For this reason, a proper deduction from the evidence is that there was no negligence on the part of the company in failing to provide a guard rail. Was there any negligence on the part of the railroad company in not having a light upon the platform or near it? The evidence shows that the last train for the day had passed; that, so far as receiving or delivering freight was concerned, the day's work was over, and the business of the public with the company for the day had ended. While it is true that the evidence shows that the agent of the railroad company, who was the telegraph operator, did receive and transmit messages whenever he was in his office after the departure of the last train, still it was done as a convenience to the public, through the courtesy of the operator, rather than as a compliance on the part of the railroad company with a duty owed to the public to transmit messages. The public were not invited by the railroad company to come there for that purpose, at that time, to send messages. It was not the business of the railroad company to transmit messages, but to operate a railroad.

If it is assumed that the plaintiff in this case had a right to enter the depot for the purpose of sending a telegram or of ascertaining if he could send a telegram, there was sufficient light for him to enter safely. According to his testimony, he entered by the steps, and from this fact alone was bound to know the location of the steps. In addition to entering at that time by the steps, he had lived for many years near the depot, and, according to his evidence, was familiar with the construction of the depot and the location of the steps. He was obliged to have known, when he entered, that there was no light on the outside of the building or around it, and he therefore, in entering and departing from the depot without a light, took knowingly whatever risk there was in so doing. There was no duty upon the railroad company at that time, in any business it was then engaged in, to maintain a light upon or around its premises. The duty on the part of the railroad company of maintaining a light at its station must be the result of some duty owed to the public to enable the public to transact business with the railroad company with safety. There was no reason, in this case, for the railroad company to anticipate the presence of this plaintiff upon its premises. There was no duty upon the company to provide him a light for the purpose of entering and departing from its premises. A careful consideration of all the testimony in behalf of the plaintiff shows that he knew the construction of the depot platform, the location of the steps, and also knew the fact that at the time he entered the depot there was no light. When he came out of the room where the conversation with the telegraph operator occurred, and where there was a light at the time, with knowledge of the fact that the platform was several feet above the ground, and that it was necessary to go down the steps to reach the ground safely, common prudence required that he should exercise ordinary care to preserve and protect himself from injury. Every one knows that to walk off a platform three or four feet from the ground, in the dark, is liable to result in serious injury; and while, of course, it is not to be presumed that the plaintiff intended to walk off the platform, still, when he attempted to leave the platform without a positive knowledge on his part that he would do so safely, the duty was on him to exercise diligence. The plaintiff in his testimony sought to meet this view by showing that he felt for the steps. A witness sitting in a buggy 30 feet away testified that he saw the plaintiff at that distance feeling for the steps. If this is true, there was some light to guide the plaintiff. In whatever light the evidence in the case is considered, the logical deduction is that the proximate cause of the plaintiff's injury was that he walked off the platform as a result

of his failing to exercise that care and diligence which every prudent man is bound to exercise.

Under the facts presented in the record, there was no negligence on the part of the railway company that would authorize a recovery, and the verdict is consequently contrary to law and contrary to the evidence.

The judgment is therefore reversed.

Hon. W. H. FELTON, judge of the superior court of the Macon circuit, was designated to preside in this case in the place of POWELL, J., who was disqualified.

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(3 Ga. App. 325)

## NORWOOD v. STATE. (No. 828.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. CRIMINAL LAW—PLEA—FORMER ACQUITTAL—ABANDONMENT.

Where a plea of former acquittal is filed, but the defendant goes to trial on the case in chief without further invoking any action of the court in reference thereto, such plea is properly treated as abandoned.

2. ASSAULT AND BATTERY—STABBING ANOTHER—NATURE OF WEAPON.

An accusation charging the defendant with the offense of "stabbing another," in violation of section 112 of the Penal Code of 1895, alleged that the instrument used in perpetrating the offense was a pair of scissors. *Held*, that it was within the intellectual capacity of the jury, aided by their common knowledge and experience, to determine whether a pair of "scissors" was an "instrument of the like kind" with "a sword, dirk, or knife." The jury would know without extraneous evidence that scissors were "a cutting implement, consisting of a pair of blades with handles."

3. CRIMINAL LAW—TRIAL—CITY COURTS—JURISDICTION—MISDEMEANORS.

The "act of stabbing another, except in his own defense or other circumstances of justification, with a sword, dirk, or knife or other instrument of like kind, shall be punished as for a misdemeanor." The city court of Griffin has jurisdiction of such an offense in the absence of additional allegations or proof showing the act of stabbing to be a felony. No error of law was committed, and the evidence fully warranted the verdict.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Emma Norwood was convicted of stabbing another, and she brings error. Affirmed.

Thos. W. Thurman, for plaintiff in error. Wm. H. Beck, Sol., for the State.

HILL, C. J. Judgment affirmed.

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(3 Ga. App. 294)

## FULTON LAND & IMPROVEMENT CO. v. NATIONAL INVESTMENT & SAVINGS CORP. (No. 768.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

JUSTICES OF THE PEACE—CERTIORARI.

The evidence on the trial in the justice's court was not issuable. Therefore no question of fact was involved; and the superior court had jurisdiction to set aside on certiorari the unwarranted judgment rendered by the magistrate. Toole v. Edmondson, 104 Ga. 776, 31 S. E. 25; Ansley v. Farley, 126 Ga. 425, 55 S. E. 180.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 766.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between the Fulton Land & Improvement Company and the National Investment & Savings Corporation. Judgment for the improvement company was reversed on certiorari, and it brings error. Affirmed.

Thos. L. Bishop, for plaintiff in error. Lowndes Calhoun, for defendant in error.

POWELL, J. Judgment affirmed.

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(3 Ga. App. 298)

## HOLLOMAN v. CITY OF TIFTON. (No. 748.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. WRIT OF ERROR—ASSIGNMENT OF ERROR—SUFFICIENCY.

A bill of exceptions, reciting that the trial judge sustained a general demurrer to the petition, and alleging that "to this order sustaining said demurrer plaintiff excepted, and now excepts, and assigns the same as error," is not subject to dismissal on the ground that it contains no sufficiently definite assignment of error. Huxford v. Southern Pine Co., 124 Ga. 181 (1), 52 S. E. 439; Melson v. Thornton, 113 Ga. 99 (2), 38 S. E. 342; Burns v. Horkan, 126 Ga. 161, 54 S. E. 946.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3004.]

2. PLEADING—DEMURRER.

The court did not err in sustaining the demurrer.

(Syllabus by the Court.)

Error from City Court of Tifton; R. Eve, Judge.

Action by James Holloman against the city of Tifton. Judgment for defendant, and plaintiff brings error. Affirmed.

Robley D. Smith, Jr., for plaintiff in error. W. J. Wallace, for defendant in error.

POWELL, J. The plaintiff sued the city of Tifton for $300, alleging that in 1906 he was arrested in said city, was arraigned and tried before the police court on a charge of illegally keeping intoxicating liquors, was convicted, and was sentenced to the chain gang, with the alternative of paying a fine of $300; that he was forced to pay this fine or be placed at labor on the streets, and he paid the fine against his wishes and over his protest; that the evidence on the trial disclosed that he did not have the liquor in the city of Tifton, but two miles away; but under a mistake of law (in that he believed that the city had the power and jurisdiction to punish for offenses beyond the corporate limits), he paid the fine. The warrant on which he was arrested and tried charged that the offense was committed in the city of Tifton. Under

these circumstances he prays judgment against the city for the sum of $300.

If the allegations be true, the judgment of conviction was erroneous, and subject to be set aside on certiorari; but it was not void. The court had jurisdiction to try for the offense charged, and, there being no exception regularly taken to the judgment rendered, the defendant was concluded by it as to his guilt of the offense charged. There are many other reasons why a suit of this character cannot be maintained, but in the light of the one given others would be superfluous.

Judgment affirmed.

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(3 Ga. App. 295)

## TAYLOR v. AMERICAN CLAY CO. (No. 781.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

MASTER AND SERVANT—EVIDENCE—RELATIONSHIP.

Under the evidence submitted nonsuit was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, § 953.]

(Syllabus by the Court.)

Error from City Court of Jeffersonville; L. D. Shannon, Judge.

Action by July Taylor against the American Clay Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Berner, Smith & Hastings, R. V. Hardeman, and A. W. Stokes, for plaintiff in error. S. A. Crump and Burton Smith, for defendant in error.

POWELL, J. The plaintiff's 13 year old son met his death in the hopper of a crusher at the defendant's kaolin plant. The action is based upon the theory that the relation of master and servant existed. There was no proof of any employment, except the hearsay statement of the son to the father that he had been hired, and the physical fact that he had been rolling a wheelbarrow with clay in it a short while before the fatal mishap occurred. The proof does not show how the boy happened to get into the hopper. The top of the hopper was flush with the floor on which the clay was rolled. Whether he slipped in, attempted to step over or across the hopper, and fell in, or how he otherwise came to get into the hopper, is unknown. He was already in when his screams attracted the attention of others, and he was never able to tell how it occurred. On the day before the boy had been warned separately by two persons of the danger of getting too near the hopper. The burden of proving negligence was upon the plaintiff. Evans v. Josephine Mills, 124 Ga. 818, 52 S. E. 538. The warning given in this case differentiates it from Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 S. E. 996.

Judgment affirmed.

(3 Ga. App. 298)

## COLEMAN v. STATE. (No. 807.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

DRUNKARDS—EVIDENCE.

No error of law was committed, and the verdict is fully supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; Price Edwards, Judge.

Warren Coleman was convicted of being drunk in a public place, and brings error. Affirmed.

Griffith, Weatherly & Matthews, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

HILL, C. J. The act of 1905 makes it a misdemeanor to be drunk or intoxicated on any public street or highway, or within the curtilage of any private residence not in the exclusive possession of the person so intoxicated; but to complete the offense, the drunkenness or intoxication "must be made manifest by boisterousness, or by indecent condition or acting, or by vulgar or profane or unbecoming language, or loud and violent discourse." Acts 1905, p. 114. The purpose of the statute is to protect the public streets and highways and private residences, not so much from the presence of the drunkard, as from the conduct of the drunkard as described in the act. In other words, a man while intoxicated can be on the public streets or highways, or within the curtilage of private residences, without violating the law, provided he does not then and there make manifest his drunken condition by some disorderly conduct as set out in the statute. To make him guilty while intoxicated at any of the places mentioned, he need only make manifest his condition by some one of the disorderly acts described. The extent of his disorderly and improper conduct illustrates the degree of his guilt, but not the fact of his guilt. The indictment charges the defendant with a violation of this statute by his presence, condition, and conduct within the curtilage of two private residences therein mentioned. The evidence shows that on Sunday, March 17, 1907, while drunk, he went to the residence of a widow, and while inside the house and on the outside in the yard he drank whisky, used profane language, had a difficulty with another man, refused to leave the house, although positively requested to leave, and made clearly manifest his drunken condition by boisterousness, by indecent condition and acting, and by loud and violent discourse. This was in the presence of the two young daughters and one young son of the house; their mother being absent. He remained at the residence in this condition, acting in this disorderly and unbecoming manner for nearly two hours. The girls and the boy were finally compelled to leave home on account of his condition and conduct, and seek refuge in the house of a neighbor. The defendant and

a companion followed them to the very door of the neighbor's house. The foregoing is a substantial statement of the evidence of the two girls, the young boy, and the neighbor to whose house they went for protection. It is only disputed by the defendant in his statement. The jury found a verdict of guilty, and we cannot say that it was not fully warranted by the facts.

Several special assignments of error are made on the admission of certain testimony, and on certain instructions to the jury, and the failure to instruct. It is insisted that the court erred in admitting testimony as to the condition and conduct of the defendant after leaving the house and before reaching the neighbor's house. This testimony was admitted as illustrating the condition and conduct of the defendant while in the house and as a part of the res gestæ. It was clearly competent for this purpose. This also applies to the testimony that the defendant drew his knife on one of his companions "right at the door" of the neighbor's house. This latter testimony was also admissible because the indictment charged the defendant with being drunk and manifesting his drunkenness by disorderly conduct in the curtilage of this house as well as of the other.

It is said the court erred in not explaining to the jury the legal meaning of the word "boisterousness," as used in the statute. We do not know that this word has any legal meaning. It is used in the statute in its popular and ordinary signification to characterize the conduct of the intoxicated person. The jury probably understood the meaning of the word in connection with the context of the statute fully as well as the judge. The court could not have made the significance of the word clearer by explanation or definition. The jury, after considering of their verdict, returned into court, and asked if they could make a recommendation in their verdict. The judge told them: "Yes, you can make such recommendation as you see proper, and it will be respected by the court." It is said there is no law authorizing juries in misdemeanor cases to make recommendations, and that this reply of the judge misled the jury to the injury of the defendant. The jury did recommend a light sentence, and it is not claimed that the sentence imposed indicates any deception on the part of the court.

We do not think any of the special assignments of error are meritorious; and the verdict is amply supported by the evidence.

Judgment affirmed.

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(3 Ga. App. 251)

## MEINHARD, SCHAUL & CO. v. FOLSOM BROS. (No. 362.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. PARTNERSHIP — DISSOLUTION — BANKRUPTCY—NEW FIRM—DEBTS OF OLD FIRM.

There was no error in sustaining the demurrer. The discharge in bankruptcy dissolved the copartnership, and the allegations of the petition did not set up an obligation of all the partners by name; each for himself assuming liability. It cannot be assumed from the allegations of the petition that each member of the former firm entered into a new agreement, and it would be without the scope of a new partnership, even if it can be assumed from the allegations of the petition that a new partnership was formed, to bind such partnership for the payment of debts of a former partnership which had been dissolved by operation of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 616, 634.]

2. WRIT OF ERROR — BRIEFS — DISCOURTEOUS REMARKS.

The provisions of rules 6 and 32 of the rules of this court (57 S. E. x, xiv) are applicable no less to written argument than to oral. Personal remarks discourteous to opposing counsel are strictly prohibited, and violations of this rule will not be permitted.

(Syllabus by the Court.)

Error from City Court of Moultrie; R. L. Shipp, Judge.

Action by Meinhard, Schaul & Co. against Folsom Bros. From a judgment for defendants, plaintiffs bring error. Affirmed.

T. H. Parker, for plaintiffs in error. J. A. Wilkes, for defendants in error.

RUSSELL, J. The plaintiffs in error filed a petition against Folsom Bros. as a partnership to recover the sum of $200, which they alleged was due to them on an oral promise made December 12, 1905. The defendants had been adjudged bankrupts on a voluntary petition. A composition proposed by them was confirmed by his honor, Judge Emory Spear of the Southern district of Georgia on the same day that the promise to pay the $200 is alleged to have been made. Attached to the petition, as a part thereof, is a statement of account evidencing a prior indebtedness by the defendants to the plaintiffs and the receipt of a payment thereon dated January 6, 1906. The petition contained two counts identical in their statements, except that in the first count it is alleged that the promise to pay the $200 was made prior to the withdrawal of the objections filed by plaintiffs to the confirmation of the composition, and that the plaintiffs, accepting the proposition of defendants, withdrew their objections. In the second count, the promise to pay the $200 is alleged to have been freely and voluntarily made after the plaintiffs had withdrawn their objections.

With this statement the points in issue will be plainly presented by a reference to either count of the petition. The second count is as follows: "And your petitioners further charge and allege that Folsom Bros. is a firm composed of A. H. Folsom, N. W. Folsom, and I. M. Folsom, all and each of whom are residents of said county. That on May 19, 1905, petitioners sold and delivered to the defendants merchandise amounting to $585.60, payable September 1, 1905, as shown by statement of account thereto attached. That in July, 1905, the defendants and each of them

were in the United States District Court for the Southern District of Georgia adjudicated bankrupts upon their voluntary petition for that purpose. That during the progress of said bankruptcy proceedings said bankrupts made a proposition of composition whereby they proposed to pay their creditors 20 per cent. of their indebtedness, which proposition of composition was accepted by all of the creditors of said bankrupt, except your petitioners. On December 11, 1905, petitioners filed their objections to the confirmation of said proposed composition, in the clerk's office of the United States District Court for the Southern District of Georgia. Defendants promised petitioners that, if petitioners would withdraw the objections to the confirmation of composition, which petitioners had filed, as shown, they (the defendants) would pay petitioners the sum of $200, with interest thereon at the rate of 8 per cent. per annum from that date, and this sum to be in addition to the 20 per cent. offered to all the creditors. Petitioners accepted said proposition and withdrew their objections to the confirmation of the composition, upon which being done the judge of the United States District Court for the Southern District of Georgia signed an order confirming said composition. Said proposition by the defendants to pay petitioners an additional sum of $200 with 8 per cent. interest thereon from date was made and accepted in the forenoon of the 12th day of December, 1905. The objections to the confirmation of the composition were withdrawn by petitioners in the forenoon of the 12th day of December, 1905. After said objections to said proposed composition had been withdrawn by petitioners, to wit, during the afternoon of December 12, 1905, the defendants promised to pay the petitioners the sum of $200 with interest thereon in settlement of the balance of their account. Said promise by said defendants was made freely and voluntarily without restrictions or conditions affixed or incident thereto, and after said objections to said composition had been withdrawn and said withdrawal filed in the office of the clerk of the United States District Court for the Southern District of Georgia. Defendants, and each of them, fail and refuse to pay petitioners said sum of $200 with interest thereon."

The defendants demurred generally to the petition, as setting forth no cause of action, and by amendment further demurred as follows: "(1) The said petition fails to set forth when said money was to be paid. (2) The contract was indefinite and not specific enough to be capable of enforcement. (3) The petition fails to show that the bankruptcy proceedings did not dissolve the previously existing copartnership of the defendants. (4) There is no specific allegation in said petition set forth that the said partnership is now in existence, or that the same was not lawfully dissolved by said bankruptcy proceedings." In response to the demurrer, the plaintiffs amended their petition by alleging that the $200 promised to them by the defendants was to become due, $100 on April 12, 1906, and the other $100 on August 12, 1906; and by alleging that the bankruptcy proceedings did not dissolve the partnership existing at the time of said adjudication of bankruptcy, but, on the contrary, each of said partners signed a joint contract borrowing the money with which to pay said 20 per cent. in composition and immediately and continuously thereafter continued to do business as partners under the same name and style as before. Upon the hearing on the demurrer, the court sustained the same and dismissed the petition as amended, with a proviso in the order of the court that the judgment is not to be a bar against the plaintiffs suing any of the individuals composing the firm of Folsom Bros. as may have revived the debt as to himself, if there be any.

The pivotal question in this case is whether the bankruptcy proceedings dissolved the partnership. If they did not, and the allegation that the promise was made voluntarily by all the partners after the discharge is sustained, the plaintiffs might recover, if the contract was in writing. Acts 1905, p. 101. If the proceedings in bankruptcy dissolved the partnership, then the promise made by one of the partners, after the confirmation of the composition, could, in no event, bind his copartners. We state the proposition thus because the promise to pay the $200, if made before the discharge effected by the confirmation of the composition, is worthless in any event. The promise, if made, as alleged in the petition, before the discharge, was voided because contrary to public policy and fraudulent.

When the United States court has before it the question of confirming a composition, it is presumed to have before it the only offer which has been made by the debtor, and that there are no propositions, conditions, or underground dealings hidden from the court. Were the contrary true, the court would never know when it was proper and just to confirm a composition. Justice, which is sometimes pictured as being blind, but which is always impartial, instead of being upon solid ground, would at any time be likely to topple and fall into the subterranean depths of private contrivances which would be neither just to the creditor nor reputable to the court. Great stress is laid by counsel for plaintiffs and defendants, respectively, on the point of time when the plaintiffs received the 20 per cent. from the composition. Counsel for defendants in error is in error in stating that the plaintiffs had accepted the composition and had the composition money in their pockets at the time of their objections to the composition. The record confirms the statement of the counsel for plaintiffs in error that the alleged promise was made on December 12, 1905, and the plaintiffs' por-

tion of the proceeds of the composition, as shown by the statement of account attached to the petition, was paid to them January 6, 1906, following. This point, as well as some others which are the occasion of much unseemly acrimony in the briefs, we deem wholly immaterial. Counsel for both parties, so far as results are concerned, could well have afforded to have argued the case in a manner more respectful to the dignity of this court and in accordance with its rules. We forbear at this time to take further notice of the highly improper personal allusions on the part of each counsel with reference to the other, other than to award it our severest censure. We desire it to be understood, however, that this court possesses the power to compel argument, whether oral or in writing, to be had according to the rules of orderly procedure, and that, however disagreeable it may be (for we are not concerned, except to regret animosities, with the personal relations of members of the bar), the rules upon this subject will hereafter be strictly enforced.

It does not appear that there was any consideration for the promise of Folsom Bros. to pay Meinhard, Schaul & Co. the $200. If the promise was made before the final discharge effected by the confirmation of composition, the transaction is outlawed, for the reasons we have stated, and the consideration avoided. Nor does it appear that the promise, if voluntarily made after the discharge, was in writing. An individual debt can be revived by a subsequent promise. The consideration is found in the fact that the debtor had at a time previous owed the creditor a just indebtedness. But in the present case, according to the allegations of the petition, a partnership debt is sought to be revived. That an individual partner can revive his obligation for a partnership indebtedness has been held in Wetherley v. Hardaman, 68 Ga. 592, but it is not within the power of an individual member of a partnership to place upon the firm a liability for a pre-existing debt, from which the partnership has been absolved, unless it is specifically alleged that he was specially authorized so to do. Each individual constituting the partnership is the keeper of his own conscience and can only revive debts so as to bind himself. As we have heretofore stated, then there is really only one question in the case: Whether the proceedings in bankruptcy dissolve a partnership. If they did, the judgment of the court in sustaining the demurrer was unquestionably right. If they did not, then whether the judgment of the court were right or wrong will depend upon the question whether the demurrer was specific enough to reach the point. It appears to us that the petition did not set up sufficient ground for the revival of the partnership liability by specifically setting up that all of the members of the partnership personally promised to pay the $200, or that one of them, with special, definite authority for that purpose from his copartners, revived the obligation.

The demurrer is called a general demurrer. As pointed out in Douglas, Augusta & Gulf R. Co. v. Swindle, 2 Ga. App. ——, 59 S. E. 600, a demurrer is general or special, not alone with reference to its scope, but according to its nature and quality of being general or specific in attack. The demurrer in this instance is general, because it does not put its finger on the point, so as to suggest the necessary amendment. In order to have reached the point that there was no allegation that the members of the partnership had each for himself revived his individual liability by personal promise, or had authorized some particular individual in a legal manner to revive his individual liability, the demurrer should have called special attention thereto. The demurrer therefore is not sufficiently specific to allege the point, and, if the bankruptcy proceedings do not dissolve the partnership, the judgment of the court was wrong. We think, however, that the judgment was right because the bankruptcy proceedings totally dissolve the partnership, and therefore the general demurrer was sufficient to reach the point in the case. The allegations of the petition, taken as a whole, could not resist the general demurrer, because it alleges either the obligation of a partnership to pay an indebtedness in order to procure the dismissal of objections to the confirmation of the composition (which would be fraudulent), or it alleges a promise to revive a partnership indebtedness without alleging that each and all of the partners by name and in person, or by authorized agent, for himself, assumed liability (which is insufficient). The partnership being dissolved by bankruptcy, a new promise should have been pleaded fully and in detail. 22 Am. & Eng. Enc. of Law (2d Ed.) p. 202. It cannot be assumed from the allegations of the petition that each member of the firm of Folsom Bros. entered into a new agreement, and it would be entirely without the scope of the new partnership, even if such existed, to bind the partnership for the payment of debts of another partnership which had been dissolved by operation of law.

The decision in Moore v. Trounstine, 126 Ga. 116, 54 S. E. 810, is not in point, for one reason, because the present case involves the revival of a partnership indebtedness. It is true that "a promise by a debtor to pay a previously existing debt to his creditor, made after the former's adjudication as a bankrupt, but before his discharge, will not be impaired by the subsequently acquired discharge." But it is also held in the Trounstine Case that "the effect of discharge in bankruptcy is to extinguish the debt; and a promise by the debtor to revive the discharged debt must be clear, express, distinct, unequivocal, and without qualification or condition, before it will be enforceable

against him." The promise alleged in the petition in this case, so far as the individuals composing the original partnership of Folsom Bros. is concerned (even if such promise can be legally binding on a new partnership), inasmuch as it is not alleged that each individual made the promise, is not sufficiently clear or distinct to raise liability.

There was no error in the judgment of the lower court.

Judgment affirmed.

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(3 Ga. App. 261)

SIZEMORE et al. v. WOOLARD. (No. 491.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. WRIT OF ERROR — DISMISSAL — DEFECTIVE ASSIGNMENTS OF ERROR.

A writ of error will not be dismissed when the bill of exceptions contains one sufficient assignment of error, no matter how defective other assignments of error therein contained may be.

2. SALE—DEFECTS—WAIVER.

A buyer is not presumed to waive defects of which he has no knowledge, but he is held to waive those defects which he knows to exist. Where one gives a note for the purchase of an article which is defective, after full knowledge of its defects, he will be held to have waived the defects, and cannot set up the same by plea of failure of consideration in defense to an action on the note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 817–823.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Action by H. C. Woolard against G. W. Sizemore, Sr., and G. W. Sizemore, Jr. On the death of plaintiff, Mrs. H. C. Willard, administratrix, was substituted. Judgment for plaintiff, and defendants bring error. Affirmed.

Payton & Hay, for plaintiffs in error. J. H. Tipton, for defendant in error.

RUSSELL, J. H. C. Woolard sued G. W. Sizemore, Sr., and G. W. Sizemore, Jr., on a conditional sale note and contract. Subsequently to the filing of the bill of exceptions the plaintiff Woolard died, and his administratrix has, by proper order, been made defendant in error in his place. The contract of purchase between the parties, which is attached to the declaration, was dated April 17, 1905, and provided for the payment of the Sizemores to Woolard of $1,200, in three equal payments; the last payment being due December 1, 1905. The consideration, as expressed in the contract, was the purchase price of a boiler, 3 engines, a sawmill with carriage, a shingle mill, a planer, carts and log chains, 17 rollers, and 100 acres of mill timber. Payments had been made on the note which reduced the unpaid balance to $411.83, and judgment was asked for this amount. The defendants, in their answer, denied the paragraphs of plaintiff's petition, and, in addition, pleaded total failure of consideration as to two of the engines, and asked judgment against the plaintiff for the difference between $500, which the plea alleged to be the value of the two engines, and the amount of the plaintiff's demand. On the trial the defendants admitted the execution of the contract, and abandoned the issue raised as to the attorney's fees. The defendants thus assumed the burden of and undertook to establish their plea of total failure of consideration. The testimony in behalf of the defendants was to the effect that the engines mentioned in their plea were totally worthless, of no value for the purpose of producing steam with which to operate the machinery, and of no value unless for scrap iron. The evidence, however, showed unequivocally that the defendant G. W. Sizemore, Sr., made a thorough examination of the machinery before the trade was made; that he was informed that the machinery had "been burned down on," and that he had been engaged in running sawmills and using engines and boilers for four or five years prior to the time of making the trade with Woolard. According to the evidence, the trade was made December 27, 1904. The note with reservation of title, which was the basis of the suit, was made April 17, 1905. The testimony for the defendants further showed that during all the negotiations leading up to the trade of December, 1904, the parties "talked about the whole thing as it stood; the timber and all of this machinery—everything in a lump altogether. This is the way we traded. That is the way Woolard offered it for sale, and that is the way I bought it." At the conclusion of the testimony of the defendant G. W. Sizemore, Sr., the court, upon motion of counsel for the plaintiff, directed a verdict in favor of the plaintiff for the principal, interest, and attorney's fees sued for, and judgment was entered in accordance with the verdict. It appears from the bill of exceptions that the defendants offered to amend their plea by alleging that at the time of the execution of the contract sued on Woolard offered to make the necessary reduction on account of the two defective engines. The court refused to allow the amendment. The court certified that this offer to amend was made after the verdict had been directed; and in the bill of exceptions no assignment of error is made as to the amendment. The defendants in error have filed a motion to dismiss the writ of error. The motion to dismiss cannot be sustained. While no exception is taken to the disallowance of the amendment, and while the exception to the judgment is perhaps not technically specific, the assignment of error on the ruling of the court directing the verdict is sufficient to present for our consideration the error therein alleged to have been committed.

The first assignment of error is as follows: "To which ruling of the court directing the verdict, as aforesaid, the defendants hereby except and assign the same as error. Defendants contend that the court erred es-

pecially in directing attorney's fees sued for, such verdict being wholly unwarranted by the law and evidence under the pleadings in this case." We think this presents squarely the question as to whether the court erred in directing the verdict, instead of allowing the case to go to the jury. This may be treated as a general exception to the verdict. The assignment contains also a special exception with reference to the attorney's fees, which is good in form, though it is not well taken, because it appears from the record as certified by the presiding judge that the defense as to the attorney's fees was abandoned by the defendants. A writ of error will not be dismissed when the bill of exceptions contains one sufficient assignment of error, no matter how defective other assignments of error therein contained may be.

We do not think that the ruling of the court in directing a verdict in this case was error. Under the testimony of the defendants themselves as delivered by the defendant who purchased the entire outfit, no other verdict could legally have been rendered than one in favor of the plaintiff. There was no issue as to the attorney's fees, and no question as to the amount due upon the note in case the defendants were liable at all. The issue resolved itself into the single question as to whether the defendants under their own admissions, through the one who purchased, were not estopped from pleading failure of consideration by reason of the fact that all defects in the machinery had been waived, and with it all of their rights dependent upon an implied warranty of suitableness. The defendants pleaded that there was an implied warranty that the engines were suited for running the machinery they purchased, and they proved that the engines were totally worthless for the purpose, but they also proved that the engines were subjected to as close scrutiny as the purchaser with four or five years' experience in such matters was able to give them before the trade was made.

We have already held in Kronman v. Rousch, 3 Ga. App. ——, 59 S. E. 320, that one will not be presumed to waive defects when not discoverable, nor where an inspection has not been made; but there is nothing in what was held in the Kronman Case which conflicts with what we now hold or which is applicable to this case. In that case Kronman could have inspected, but, on account of his absence from home, did not actually inspect or examine the merchandise in question. One is not presumed to waive defects of which he has no knowledge, but he is held to waive those defects which he knows to exist in an article purchased. This distinction is clearly pointed out in Means v. Subers, 115 Ga. 373, 41 S. E. 633, and Moultrie v. Hill, 120 Ga. 730 (7), 48 S. E. 143. In both of these cases it is said that the rule will not be extended beyond the holding in the previous decisions that the law will enforce a waiver of defects in case the maker of the note has, at the time of its execution, actual knowledge of the defects in the article purchased. In the Means Case, a charge that, if the defendant could have ascertained by the exercise of ordinary diligence that inferior material was used in the article purchased, the execution and delivery of a note would amount to a waiver of the defendant's right to claim damages on account of the inferior material, was held to be erroneous; but the doctrine previously asserted in numerous decisions that where one gives a note for the purchase money of an article which is defective, with full knowledge of its defects, he will be held to have waived the defects, and cannot set up the same in defense to an action on the note, was reaffirmed. Under the express statement in this case, repeated in the Moultrie Case, it was held in the Kronman Case that the defects were not waived because knowledge of its defects was not brought home to the purchaser. The present case, however, is controlled by the decisions in Edison Electric Co. v. Blount, 96 Ga. 272, 23 S. E. 306; American Car Co. v. Railway Co., 100 Ga. 254, 28 S. E. 40; Lunsford v. Malsby, 101 Ga. 39, 28 S. E. 496; Page v. Dodson Co., 106 Ga. 80, 31 S. E. 804; Montfort v. Guano Co., 108 Ga. 12, 33 S. E. 636. In Page v. Dodson Co., as in this case, the defendants had "before the making of the contract ample opportunity to inspect, and did, in fact, inspect, the machines, and knew of, or could by the exercise of ordinary diligence have discovered, the defects of which they afterwards complained." Justice Cobb, in rendering the opinion in the Means Case, says that the Page Case "is as far as this court has ever gone in holding that the giving of a note was a waiver of defense founded upon the defective condition of the article which was the consideration of the note; and it was held there simply that, where the evidence showed an actual inspection of the article and the defects were of such a character that an inspection would bring them to light, the failure of the party inspecting to see the defects would not avail him as a defense to a suit on the note."

In the present case Mr. Sizemore, Sr., purchasing the engines, not only inspected them before the trade was made, but after the trade was made he put steam in the engines, and as fully discovered their worthlessness as it was possible to do, more than three months before he gave the notes. He says in his evidence that he found out eight or ten days after his purchase on December 27th that the engines were not fit to run; and yet on April 17th thereafter the defendants voluntarily executed the paper which is the basis of this suit. Clearly under all of the decisions of the Supreme Court which we have cited the defendants were estopped from setting up an implied warranty or defects which they claimed breached this implied

warranty. Their conduct in giving the note waived the defects and the warranty. One who gives a note or makes an unconditional promise in writing for the payment of a debt after the same has been contracted waives all defenses of which he had full knowledge at the time of the execution of the contract. As was said in the Maisby Case, 101 Ga. 40, 28 S. E. 497: "The plea of failure of consideration, in so far as it rested on the alleged unsuitableness of the machine for the purposes for which it was intended, because of certain defects existing therein, could not avail the defendants under the evidence in the case. The notes were not signed by the defendants until after they had examined the machine and tested it. * * * The defects complained of and which existed in the machine were clearly discoverable by testing the same; for, as shown by the evidence, the defendants, when the machine was tested, did, in fact, discover the defects complained of and the lack of capacity in the machine to perform the service which it was represented it would perform, and with knowledge of these facts they executed and delivered the notes now sued on. The law of implied warranty will not avail against patent defects, nor against latent defects which are either disclosed, or are discoverable by the exercise of caution on the part of the purchaser."

The defendants in the case at bar had actual knowledge in January, if not sooner, of all defects in the engines which they attempt to set up on the trial before they executed the contract in April; and therefore, as to that, there could be no failure of consideration. The knowledge of the defendants lost them the right to invoke the law of implied warranty, and they will be presumed to have contracted for the engines just as they stood. If any evidence were needed to corroborate this presumption of law, or could be properly used for that purpose, the evidence of the defendant that all the outfit, engines, boilers, shingle mill, etc., were purchased in a lump would offer ample corroboration. See, also, Harder v. Carter, 97 Ga. 273, 23 S. E. 82; Williams v. Wylly, 45 Ga. 580; Byrd v. Campbell Printing Press & Mfg. Co., 90 Ga. 547, 16 S. E. 267; Hoffman v. Oates, 77 Ga. 701. There was no error in directing a verdict for the plaintiff.

Judgment affirmed.

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(3 Ga. App. 342)

FRANKLIN v. STATE. (No. 847.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

LARCENY—EVIDENCE.

The presumption arising from the recent possession of goods alleged to have been stolen being fully rebutted by the uncontradicted testimony of the owner of the missing property that he authorized the possession of the defendant, and there being no proof of the corpus delicti, the refusal of a new trial was error. The decision is controlled by Williams v. State, 57 Ga. 478.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 149–158.]

(Syllabus by the Court.)

Error from City Court of Eastman County; C. W. Griffin, Judge.

Jim Franklin was convicted of larceny, and brings error. Reversed.

J. A. Neese and C. W. Atwill, for plaintiff in error. W. M. Morrison, Sol., for the State.

RUSSELL, J. The defendant was accused, presumably, with the offense of larceny, though the accusation alleged that his intent in taking a certain hammer was to "shaso" the same. In the brief, some point is made on the use of the term "shaso." The use of this word in place of the word "steal" in the original accusation would have presented good ground for demurrer, but it is too late to raise the objection now. We think, however, that the court erred in overruling the motion for new trial. The evidence does not show the guilt of the defendant, because the taking is not shown, and the defendant's possession of the hammer is shown by the uncontradicted testimony of the owner of the hammer to have been acquired by his authority. Where recent possession of goods stolen or feloniously taken is shown, a presumption arises that the possessor is the thief, and the burden is upon him to show, not that his possession is honest, but that it was acquired otherwise than by theft. No theft was shown in this case because no one saw the defendant get the hammer alleged to have been stolen (neither of the hammers thrown to him from the chimney top being identified as Mr. Wilkes' hammer), and the only circumstance tending to show that he had gotten the hammer was his possession of it. This possession was subsequent to express authority and request of the owner of the hammer to the defendant to get his hammer for him. There was no flight, no concealment of the hammer, and as the defendant, so far as the evidence shows, was arrested at the instance of one Brown after Mr. Wilkes, the owner of the hammer, had the second time requested the defendant to find his hammer for him, and as there was no denial of the defendant's statement that the hammer was sticking up on top of some columns on a porch where he got it not more than five minutes before he was arrested (in compliance with the request, which the owner of the hammer admitted), the possession of the defendant was fully explained. The defendant's taking was the taking of the owner himself, so that the corpus delicti was not made out. The owner in this case is not subject to the criticism, uttered by Judge Bleckley, as to the prosecutor in the case of Williams v. State, 57 Ga. 478, for he did not prosecute the case, nor pretend to know anything material about it, except the loss of

his hammer and the identity of the hammer found in the possession of the defendant. The case was prosecuted by another, who may perhaps have been in ignorance of the owner's second request of the defendant to find his hammer for him, and who, knowing of the first request, may have thought that the defendant was dilatory in not finding the hammer, and suspected for that reason, after having himself looked for it and failed to find it, that the defendant had stolen it. Perhaps having heard the defendant tell Mr. Wilkes that he had not found the hammer, but would get it, and going shortly afterwards to the sack in which the defendant kept his tools and there finding the hammer, he jumped to the conclusion that the defendant had made a false statement to Wilkes and had stolen the hammer. This may be the truth of the case, but the evidence falls far short of proving a theft. In taking the hammer, the defendant was only acting under the orders of the owner, no matter when he got it, whether at his first request or at his second. If he was innocent of the intention to steal, there was no duty resting upon him to hunt up Mr. Wilkes' hammer for him. No matter what his intention, unless more evidence than appears in the present record is produced, possession is no evidence of guilt, for that was authorized by the owner.

Judgment reversed.

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(2 Ga. App. 583)

## CITY OF CEDARTOWN v. BROOKS. (No. 106.)

(Court of Appeals of Georgia. Dec. 24, 1907.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—INJURY TO TRAVELERS—DUTY OF CITY—EVIDENCE.

A municipal corporation is bound to keep its streets and bridges in a reasonably safe condition for travel, and there is no error in so charging the jury. There was no error in the admission of evidence or in the instructions to the jury alleged to be erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1612–1615.]

2. DISCOVERY—PHYSICAL EXAMINATION—DISCRETION—REVIEW.

It is within the discretion of the trial judge, upon a proper showing made therefor and at the instance and expense of the defendant in the action, to require a plaintiff, suing for physical injuries, to submit to an examination by competent physicians in order to ascertain the nature and extent and probable duration of the injury, and to afford means of proving the same at the trial of the cause. Richmond & Danville R. Co. v. Childress, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189. It follows that it is likewise within the discretion of the judge to refuse to require such examination, and this discretion will not be controlled unless abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 531.]

3. WRIT OF ERROR—REVIEW—NECESSITY OF EXCEPTION.

Proper exception must be taken to such refusal on the part of the trial judge before it can be considered by this court.

(Syllabus by the Court.)

4. DISCOVERY—PHYSICAL EXAMINATION — REFUSAL—EVIDENCE.

(Per Hill, C. J., and Powell, J.) It is error for the court to refuse to permit the defendant, in a suit for alleged permanent personal injuries, to prove that the plaintiff had refused to allow a committee of competent, disinterested physicians to make a reasonable physical examination, upon a timely request therefor, in order that the extent of the injury might be ascertained.

(Per Russell, J., dissenting.) (a) It is not assigned as error that the court abused its discretion in declining to compel a physical examination of the plaintiff in this case. In the absence of exception thereto, the exercise of a sound judicial discretion, by a trial judge, will be presumed. The discretion of the trial judge having been properly exercised in the case, the reasons of a plaintiff for refusing to allow a physical examination of her person (said refusal being in accordance with the order of the court) become immaterial and irrelevant. A physical examination should not be ordered, except upon a showing of its necessity, and, when the showing made to the trial judge is insufficient to warrant judicial interference in furtherance of justice, the fact that a plaintiff does not waive her right of personal inviolability raises no presumption prejudicial to her good faith in her claim for damages. The exercise of judicial discretion is not reviewable by jury trial.

(b) Unless the exercise of judicial discretion can be questioned in a trial of the main case before a jury, evidence that the plaintiff refused to submit to a physical examination tends only to prejudice unfairly a plaintiff's case where the judge has declined to order such examination; and thereby is subversive, rather than in furtherance, of justice. Unless an examination has been ordered by the judge and compliance with the order has been refused by the plaintiff, the subject is irrelevant and immaterial. The whole matter of such examination, including the grant or refusal of an order for an examination, and the effect of the refusal of a plaintiff to comply with such order, as well as the penalty to be inflicted for such refusal, is within the discretion of the trial judge, and of no concern to the jury.

(c) Regardless of the rejection of testimony, the verdict is authorized by the evidence, and a new trial should not be granted.

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by M. J. Brooks against the city of Cedartown. From a judgment for plaintiff, defendant brings error. Reversed.

W. C. Bunn, Jas. K. Davis, and W. H. Trawick, for plaintiff in error. Seaborn & Barry, Wright, Jones & Hutchens, and W. W. Mundy, for defendant in error.

RUSSELL, J. It is my peculiar fortune, in the division of our labor, to deliver the opinion of the court in this case, while I dissent from its judgment. My colleagues and myself are agreed as to all of the grounds of the motion for new trial except one. The majority think the lower court erred in one respect, and that a new trial should result. With all deference to my associates, it is my opinion that the trial judge did not err in repelling the testimony as to the refusal of the plaintiff to submit to a physical examination at the request of the defendant. Furthermore, I think, even if the court did err in this respect, that the verdict for the

sum of $1,250 is so amply supported by the evidence that the error is not sufficiently grave to require another trial. From the respect I feel for the opinion of my colleagues, I would cheerfully forego the expression of my views, were I not convinced that the decision of the majority upon the subject on which we differ is likely to be injurious to that dignity and respect which is essential to the usefulness of a judicial tribunal, and may cause the introduction into many trials of personal issues, which are always prejudicial and ofttimes entirely incompatible with an impartial trial. Any door opened to passion affords an easy exit for the spirit of judicial poise which should characterize and control the functions of a jury. Those grounds of the motion upon which we are all agreed will first be dealt with, and I shall then present the reasons for my nonconcurrence in the judgment of reversal.

Mrs. M. J. Brooks brought an action against the city of Cedartown for personal injuries sustained by her in jumping from a buggy in which she was being driven across a bridge on Main street, in said city. Upon the trial of the case, the jury rendered a verdict in favor of plaintiff for $1,250. The defendant made a motion for new trial. The motion was overruled, and thereupon defendant excepted, and brings this writ of error. In her petition the plaintiff alleges that on the 10th day of March, 1904, she was riding along the streets of Cedartown in a buggy drawn by two horses. As said buggy was crossing a bridge, known as "Main Street Bridge," the foot of one of the horses passed through and caught in the flooring of said bridge, and thereupon both horses became frightened, and unmanagable. Fearing she would be thrown from the buggy, the plaintiff jumped therefrom to protect herself, and in so doing sustained injuries which she alleges are permanent. She alleged that on account of said injuries she has endured great pain and suffering, and asks damages against the city for $20,000. The defendant filed its answer, denying liability, and also demurred. Subsequently to the return term of the court (the record failing to reveal whether in term time or vacation) the defendant presented a petition to the judge of the city court of Polk county praying that the court appoint a committee of competent physicians to act in conjunction with the plaintiff's physician to examine into the physical condition of plaintiff. Upon said petition, the judge of said court passed an order naming three physicians in accordance with the prayers of said petition, and the other provided that said committee should act in case plaintiff consented to be examined. At the January term, 1906, the defendant presented an additional petition, partially in the form of an amendment, substantially the same as the one heretofore mentioned, stating that the plaintiff had refused to consent to being examined by the committee appointed. In this latter petition the defendant offered to pay the cost of such examination, etc. The record does not disclose any order by the court refusing to require the plaintiff examined by said committee, as provided for in said supplemental petition.

The evidence for plaintiff was substantially as follows: On Sunday, July 10, 1904, she was riding in a buggy with her husband, accompanied by two small children and a baby. On their drive they safely crossed Main Street Bridge, in the city of Cedartown. Returning home, however, when they had driven upon this bridge, one of the horses hitched to the buggy became frightened at a patch on the bridge floor, shied to the right, and the right foot of the left horse went through the bridge floor. The bridge had recently been repaired by an employé of the city; but the planks used for doing the patching were old and partially rotten at the time they were placed over the hole. It was when the horse stepped upon one of these rotten patches that its foot went through the bridge floor. The plaintiff and her husband jumped from the buggy, the former to avoid being thrown from the buggy, and the latter to lift out the children, and loose the horses from the buggy. After they had alighted, assistance came, the harness was cut, the horses taken loose from the vehicle, and after a considerable struggle the horse extricated its foot from the hole. The piece of plank used to make the patch was about 12 inches wide and about 2 feet long. The patching was done by nailing it over the floor where a hole had worn into it. The flooring used had originally been about two inches thick, but had worn down to about one-fourth of an inch in thickness. The husband of the plaintiff crossed the bridge four times a day, being a rural mail carrier. Both testified that ever since the date of the injury she had suffered pain. She was pregnant at the time, some three months advanced. On the night of the injury she came near having a miscarriage. A physician was called in next morning. He gave her internal treatment for prevention of the miscarriage. She continued to pass blood until the 20th or 21st of August following, at which time she had a miscarriage. She had suffered continuously from the date of the injury, and her health had been so bad that she was scarcely able to do anything after that date. The physician was advised of her condition daily, but did not see her but a few times.

The defendant offered no evidence. In addition to the original motion, containing the usual general grounds, there are two amended motions, specifying numerous assignments of error, numbered consecutively from 1 to 17. We will take these up in their order saving the ninth, which will be treated last.

1. Because the court erred in charging the jury as follows: "I charge you gentlemen that it is the duty of the city of Cedartown to keep its streets and bridges in a reasonably

safe condition for travel. The law does not require that the roads and bridges be kept in an absolutely safe condition, but in a reasonably safe condition. Now, gentlemen, you look to the condition of the bridge, and determine from the evidence whether or not it was in a reasonably safe condition at the time of the alleged injuries." We think there is no error in this charge when measured by the standard laid down in the case of Atlanta v. Buchanan, 76 Ga. 589, where it was held: "We are clear that the city is bound to keep its streets, sidewalks, and bridges in a reasonably safe condition; and there is no error in so charging." It is further held that "to keep," when applied to streets, sidewalks, and bridges, might well include "to construct, to make." In the case at bar the undisputed evidence is that the patches were rotten, and hence the bridge could not, from the time it was thus patched, have been kept in a reasonably safe condition for travel. Applying this law to the facts in this case it appears that the work was not going on, but had been completed, and ordinary care had not been exercised in keeping the bridge in reasonably safe condition.

2. Because the court erred in charging the jury as follows: "In determining whether the plaintiff, Mrs. Brooks, was justified in jumping from the buggy, you will apply the rule of ordinary diligence. Ordinary diligence is that care which every prudent person takes of his own property of a similar character, such care as every prudent person would exercise under similar circumstances." While the first part of the charge is not applicable to this case, the last clause sets out a correct definition of the terms employed, and the allusion to property in the first clause could not have misled the jury so as to impair the rights of the plaintiff in error or be an error of sufficient importance to cause the grant of a new trial.

3, 4. The third and fourth grounds of the motion are to the effect that in these portions of the charge the court expressed an opinion of the evidence. We fail to see any merit in these contentions.

5. We think the charge of the court that the knowledge of the husband could not affect the wife's right to recover was proper.

6. The sixth ground of the motion for new trial avers that the court erred in charging the jury on the subject of permanent injuries, for the reason, as stated, that the only allegation with respect thereto was stricken on demurrer. The defendant's demurrer, it is true, was sustained, but it was only addressed to certain words in the fifteenth paragraph of the petition. The demurrer did not reach the eighteenth and nineteenth paragraphs. The record negatives the contention that all allegations as to permanent injuries were stricken. Paragraphs 18 and 19 of the original petition and the evidence adduced thereunder fully authorize the charge to which objection is made.

7. We think the principle that, if the plaintiff's injury was caused by her own negligence she could not recover, is sufficiently explained to the jury in the charge of the court.

8. There is no merit in the assignment of error of the eighth ground of the motion, for the jury was, in another portion of the charge, instructed that there could not be a recovery unless there was an injury.

10. The tenth ground contains an objection to the admission of testimony to the effect that defendant in error complained to her husband. The complaints objected to seem to be a part of the res gestæ of the pain and suffering, and to be admissible under the ruling in Atlanta Ry. Co. v. Gardner, 122 Ga. 97, 49 S. E. 818, citing Nor. Pac. R. Co. v. Urlin, 158 U. S. 271–275, 15 Sup. Ct. 840, 39 L. Ed. 977. For this reason, the objection that such evidence was incompetent is not well taken.

11. While the evidence objected to in the eleventh ground might at the first glance appear to be a conclusion of the witness, it is evident, when taken in connection with his other testimony on the same point, that, after having stated the facts, he is giving his reasons for the statement made in his testimony. Any witness may give his opinion as adduced from facts already fully stated by him; the value of the opinion being for the jury.

12. We do not think this testimony of the husband was incompetent. He certainly could know of his own knowledge what was the condition of his wife's health. He could well know whether she was weak or strong, and from seeing her make an effort to perform certain duties whether she was able to perform them or not.

13. In the thirteenth ground of the motion complaint is made that the plaintiff and her husband were permitted to testify that her menstrual periods had become irregular since her injury, and that she suffered great pain in consequence of this irregularity. There was no error in allowing this evidence to go to the jury under the pleadings. Paragraphs 18 and 19 of the original declaration, which alleged permanent injury to plaintiff's health, and which were not demurred to, were broad enough in their terms to admit of the testimony referred to. A proper objection to the testimony of the husband might have been sustained, but the objection offered was without merit.

14, 15. The testimony complained of in these two grounds of objection was properly admitted for the reason stated immediately above. The term "health" includes appetite. Under the pleadings, the range of testimony was necessarily very broad. No demurrer was filed to paragraphs 18 and 19.

16. The statement of the witness that she did nothing to cause the miscarriage that

she knew of, and that she was as quiet as could be prior to the miscarriage (objected to in the sixteenth ground of the motion as being conclusions of the witness) are not, in our opinion, objectionable upon that ground. Each is the statement of a fact. We are of the same opinion as his honor, who admitted the testimony with the remark: "If she had not done anything, we don't know what else she could state."

17. In the seventeenth ground of the motion error is assigned as follows, upon the following instruction delivered to the jury: "The burden is upon the plaintiff to show that her injuries are permanent, and that her pain and suffering would likely continue through life. The burden is on her to show that. If she has failed to show that her injuries are permanent, and that her injuries will continue through life, then you will be authorized, if you find the city liable under the rules I have given you in charge, to find for such time she has proven she has suffered." "Movant says this charge was error because it expressed the opinion of the court as to the facts of the case, because it excluded from the jury the question of whether or not the plaintiff had suffered. Movant says that the sentence, 'You will be authorized, if you find the city liable under the rules I have given you in charge, too find for such time she has proven she has suffered,'—excludes from the jury entirely the question as to whether or not plaintiff has suffered, and directs them to find for her accordingly." While the court could, by repetition at a prior instruction, perhaps have been a little more full and definite in this instruction, it is not subject to the objections urged that it expresses an opinion on the evidence or excludes from the jury the question "of whether or not plaintiff had suffered." A jury of ordinary intelligence must have known from this charge that the defendant in error could only recover for the pain she had proven she suffered. Hence, if no suffering had been proved, she could not recover for any.

9. Complaint is made in the ninth ground of the amended motion that the court erred in withholding from the jury testimony (which the plaintiff in error says it could have adduced from the plaintiff and her husband on cross-examination) that the plaintiff refused to permit a physical examination of her person by physicians (suggested by the defendant some weeks before the trial) for the purpose of determining whether such injuries could not be remedied. It is further alleged that plaintiff in error also offered at the trial to have plaintiff examined at the city's expense, and she declined. Solely upon this ground the majority of the court hold (in the opinion hereto attached) that a new trial must be granted. In my opinion there is no such assignment of error as requires the court to consider this ground of the motion. But, waiving this point entirely, I am firmly of the opinion that the ruling of the court in declining to allow such testimony to be introduced is no ground for reversing the judgment of the trial judge in refusing to set aside the verdict of the jury on motion. The only point settled by the decisions in R. & D. R. Co. v. Childress, 82 Ga. 719, 722, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189, S. F. & W. Ry. Co. v. Wainwright, 99 Ga. 255, 25 S. E. 622, Bagwell v. Atlanta Ry. Co., 109 Ga. 612, 34 S. E. 1018, 47 L. R. A. 486, and Macon Ry. Co. v. Vining, 120 Ga. 514, 48 S. E. 232, is that it is within the power of the trial court in the exercise of its discretion to compel the plaintiff to submit to a physical examination. At the time of the ruling in the Childress Case, the courts of other jurisdictions were in sharp conflict upon the question whether a physical examination of a plaintiff in an action for personal injuries could be ordered without his consent, or acquiescence. The common law had known nothing of such a practice, unless the writ de ventre inspeciendo be taken as a precedent; but a superior court of New York had asserted the power (in Walsh v. Sayre, 52 How. Prac. [N. Y.] 834, which has since been overruled) and the Supreme Court of Iowa in Schroeder v. Chicago Ry. Co., 47 Iowa, 375, had affirmed its existence. But some of the courts whose opinions are generally regarded as most weighty are opposed to the exercise of the power. See Union P. R. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734; Ill. Cent. R. Co. v. Griffin, 80 Fed. 278, 25 C. C. A. 413 (holding that such an examination cannot be compelled either before or during the trial); Stack v. New York, N. H. & H. R. Co., 177 Mass. 155, 58 N. E. 686, 52 L. R. A. 328, 83 Am. St. Rep. 269; McQuigan v. Delaware, 129 N. Y. 50, 29 N. E. 235, 14 L. R. A. 466, 26 Am. St. Rep. 507; Newman v. 3d Ave. Ry. Co., 50 N. Y. Super. Ct. 412; Cole v. Fall Co., 159 N. Y. 59, 53 N. E. 670 (affirming 87 Hun, 584, 34 N. Y. Supp. 572); McSwyny v. Broadway Co., 54 Hun, 637, 7 N. Y. Supp. 456; Roberts v. Ogdenburgh R. Co., 29 Hun, 154; Pittsburgh, C., C. & St. L. R. Co. v. Story, 104 Ill. App. 132; Peoria R. Co. v. Rice, 144 Ill. 227, 33 N. E. 951; Joliet St. Ry. v. Call, 143 Ill. 177, 32 N. E. 389 (affirming 42 Ill. App. 41); Mills v. Wilmington R. Co., 1 Marv. (Del.) 269, 40 Atl. 1114. See, also, May v. Northern P. R. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111, and Kingfisher v. Altizer, 13 Okl., 121, 74 Pac. 107.

Our individual opinion follows that of the Supreme Court of the United States in U. P. R. R. v. Botsford, supra, in which Judge Gray, delivering the opinion of the court, says: "No right is held more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley: 'The right to one's person may be said to be a

right of complete immunity—to be let alone.' Cooley on Torts, 29. The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country. So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law at any period of their history." The Childress Case, however, did not place Georgia "in line" with Iowa, Kansas, Nebraska, Wisconsin, Arkansas, and Missouri, whose courts had asserted the right to dismiss a plaintiff's action where an order for a physical examination was not complied with. The decision in the Childress Case was expressly based upon the provisions of Civ. Code 1895, § 4047, par. 4, conferring upon every court power "to control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it in every matter appertaining thereto," and was supported by 1 Thompson on Trials, § 859, as authority. I am unable to find any case, however, where the penalty of a dismissal of the action has been affirmed in this state. In Bagwell v. Atlanta Ry. Co., 109 Ga. 611, 34 S. E. 1018, 47 L. R. A. 486, the judgment dismissing the action because the plaintiff did not compel his daughter to be examined was reversed. In rendering the opinion, Judge Lumpkin, after ruling that all that had ever been held in Georgia was that it was within the power of the court in the exercise of its discretion to compel the plaintiff to submit to an examination, clearly intimates that a dismissal of the action is not the proper penalty in Georgia where a female is sought to be subjected to the pain of an examination of her person. He repeats with approval the statement of Chief Justice Bleckley that there should be no danger in this country of an examination being ordered needlessly or where an improper shock to womanly modesty or feelings of delicacy would be likely. In both the Wainwright Case and the Vining Case orders for a physical examination of the plaintiffs were refused, and the judgment of the trial judges were affirmed. After a careful examination of the original record in the Wainwright Case, it is clear to my mind from the language employed in the first headnote in 99 Ga. 255, 25 S. E. 622, that the court did not err in this case, or abuse his discretion in not ordering the examination. Indeed, there seems to be no contention, for the record does not disclose any exception complaining that the court abused his discretion in refusing to compel the plaintiff to undergo a medical examination. The discretion to order a physical examination existing, any abuse of that discretion can be reviewed as matter of course. But that is not the question here. The only objection presented is that the court refused to allow testimony, to the effect that plaintiff had refused to undergo such examination, to go to the jury. I think that the judge properly refused to allow the plaintiff in error to put in evidence in this case the fact that the defendant in error had refused to undergo an examination of her person by the committee. This evidence would have been immaterial and irrelevant, and there are many good reasons why it should not have been allowed to go to the jury. Among them is the reason that the only purpose for which such evidence is admissible is to discredit the witness, and prejudice the case in the eyes of the jury. To allow the jury to have evidence that the plaintiff has refused to submit to examination must be for the purpose of showing that she had some improper motive for refusing, and the intention is thereby to lessen her credit. I do not think this would have been proper in the case at bar, for the reason that the court had declined to use his discretion in favor of the defendant's request, though application had been made. The plaintiff had never been ordered to submit to an examination. The court being clothed with a discretion in the matter, the conduct of the party, except as such party might oppose the proper orders of the court, became immaterial. The plaintiff had the right to conduct her case as she saw fit, and certainly no presumption of bad faith as to her claim of injury could justly arise against her for consenting or refusing to submit to an examination, which the court in its discretion declined to order, without attaching inevitably the conclusion that the court erred in not ordering it, which, under all of our decisions, means an abuse of discretion.

If I am correct in my view that the compulsory examination of a plaintiff suing for personal injuries is a power to be exercised by the lower court in its sound legal discretion, what is to be the effect of evidence of a refusal to be examined? Such evidence is admissible in courts such as those of the United States, where the power of the court to compel a physical examination is denied, and the reason is manifest. In such forums the jury is the only tribunal before whom the issue of good faith (taking willingness to be examined as the test) can be taken; whereas, in our state the whole question is submitted to the judge. The reason for the rule admitting testimony of refusal ceases, because in a proper case there must either be an examination or the case will be dismissed. The whole question is addressed to the judge. It is pre-

sumed that, upon a proper showing, he will order an examination. If he fails in such a case to order the proper examination, his abuse of discretion can be the subject-matter of review by writ of error. If, as my colleagues insist, the principle on which this testimony is admissible is that the refusal of a plaintiff to submit to an examination is akin in principle and similar in effect to the failure to produce evidence under the terms of Pen. Code 1895, § 989, then the judge who has exercised his discretion, and held that there is no necessity for an examination, can, by proper request, be required to charge the jury, in effect, that such action on the part of the plaintiff is suspicious, to say the least of it, and, if the jury believe the refusal is evidence of bad faith, then the jury can find that fact, and will also find at the same time that the judge erred in not forcing an examination. Our Code section (Civ. Code 1895, p. 1475, § 5163) is nothing but the incorporation of a familiar rule of evidence in practically the language employed by the Supreme Court in decisions in the seventy-first and seventy-seventh and eighty-third Georgia Reports. This rule similarly expressed in Starkie on Evidence has reference to such evidence as is universally recognized. It does not refer to such evidence as that deduced from an explanation of the plaintiff's body in this case, which cannot be presented to the jury, must depend upon the opinion of experts, is not obtainable by subpœna or usual processes, and can only be ascertained and brought to court after the judge, in the exercise of a wise discretion, had had discovery made. Section 5163 is the subject-matter of instruction to the jury upon request. If the refusal by a plaintiff to have the sanctity of her person invaded, after the court has declined to require it to be done, rests upon the same principle of lack of good faith as the intentional concealment of material evidence referred to in section 5163 of the Code, then the defendant would have the right to have the jury given such a rule to guide them in considering the testimony of refusal. In my opinion this would be a palpable invasion of the rights of the judiciary by the jury. I so thoroughly trust and respect the findings of juries generally that I might be willing to go to the extent of conceding the position, except for the fact that I believe such review would be subversive of that authority and respect which must necessarily attach to the office of the judge in order to insure the orderly administration of the law. If the judge has the discretion to order a physical examination, as held in Childress v. R. & D. R. Co., and exercises it by a refusal, that is an end of the matter, except upon review of his discretion.

In my opinion the decision in the Wainright Case fully sustained the trial judge in his ruling. In the first application there was no attempt to follow the formula suggested by Chief Justice Bleckley in the Childress Case. The proper request was made on the second effort; but it came too late according to the holding in the Vining and Wainright Cases. The only proper motion for physical examination was at the trial. According to the ruling in these cases it was untimely. If, however, the judge erred, as before stated, I think his action should be reviewed by a court for the correction of such errors, and not by a jury; and therefore the judge did not err in repelling the evidence. The presiding judge should not be put on trial before a jury in his own court for an abuse of his discretion. This would have been the inevitable result of admitting the evidence that the plaintiff declined to submit to a physical examination. The defendant having proved this, the plaintiff would have the right to give her reasons for declining, and it would be idle to suppose that she would fail to give her best one—the fact that the judge had declined to order her to be examined. This would certainly satisfy the jury that the judge was not convinced that there was bad faith in her claim of injury; and afford the jury reason for resenting a mere innuendo. For this reason, it would be incumbent upon the defendant, not only to insist in argument before the jury, but also to prove, if possible (by showing that the plaintiff's injury was a sham), that the judge had abused his discretion, and that, if he had exercised his discretion otherwise, the fraud would have been more fully disclosed. And thus would be exposed the spectacle of the judge (whose usefulness is undermined whenever confidence, not only in his impartiality, but also in his wisdom, is gone) on trial in his own court. My associates say that it is the conduct of the plaintiff, and not of the court, which is and should be reviewed by the jury. I judge from observation and experience that, where the discretion has been invoked and exercised, a separation of the discretion from the conduct of the plaintiff sheltered by it is practically impossible. There is no assignment here that the judge abused his discretion. How he exercised it is of no concern of the jury. If it was properly exercised, and the case was not one of an enforced physical examination, the fact that the plaintiff at her option refused one was as immaterial as if she had declined a proposition to continue the case. Even if the evidence should have been admitted, the error is not such a one as calls for another trial at the expense of the county. The evidence sought by the defendant is worth nothing, unless it satisfies the jury that the plaintiff's claim of permanent injury is so suspicious as most likely to be false. With the knowledge which the jury would obtain, that the presiding judge had twice declined to use his power, because the showing of the defendant was so defective, for some reason that the court had not thought the examination necessary or proper in furtherance of

justice, it is hardly probable that the evidence of refusal, accompanied as a natural sequence by its explanation, would have been of any practicable benefit to the defendant. If the testimony of the plaintiff is credible unless poisoned by the doubt raised by her refusal to be examined, viewed as a practical proposition, it is more than likely that her explanation will remove the doubt.

The defendant introduced no evidence whatever to dispute the evidence of culpable negligence in its care of the bridge. It offered no witnesses to question, and perhaps could offer none to deny, the pain and suffering endured by the plaintiff, even if she has recovered. It did not ask and could not hope to disprove more than the plaintiff's claim of permanent injury. The jury may have given a verdict of $1,250 for pain and suffering alone, and, in view of our past rulings, it cannot be held that the standard of their enlightened conscience is too high. I go further. In my experience of 26 years at the bar and on the bench I have observed that juries are hard to deceive. The jury which tried this case well understood that the plaintiff was asking damages for permanent injuries. So far as appears from the record, the request for the examination was made in open court, and the offer to prove the refusal to be examined, which the court declined to allow by declining to permit the questions answered, was, no doubt, in the presence of the jury. As a matter of fact, though not of law, it was inevitable that attention of the jury was fixed on the physical appearance of the plaintiff. We have no means of knowing or guessing what her appearance was, but the jury saw it, and had the right to weigh it in considering the probability of the plaintiff's story. If she did not show some of the tell-tale signs which mark such suffering as she claimed to have endured, it is safe to assume that the jury were satisfied that the plaintiff might yet be restored to health. If they were convinced that the plaintiff's injuries are permanent, then the verdict is so much smaller than the plaintiff was entitled to recover that the defendant has no right to complain. In my humble opinion the judgment should be affirmed, and I am the more firmly convinced by reason of the fact that the authorities quoted by my Brethren in support of their judgment, with the exception of that from Watson on Damages, are, to my mind, obiter dicta used arguendo.

POWELL, J. The court is unanimous in the opinion that for the most part the trial is free from error; but a majority of us cannot agree with our Brother RUSSELL, who has written the opinion in chief, that the court did not err in refusing to permit the defendant to prove, for consideration by the jury, the fact that a timely request had been made of the plaintiff to allow the committee of competent and disinterested physicians to examine her person privately, and under circumstances of least embarrassment to her, with a view of ascertaining whether the injury was as serious as she claimed, and whether the effects were really to be permanent. The almost uniform current of authority is to the effect that such a refusal may be shown. "Whether the trial court is denied the power to compel a party to submit to a physical examination, or, having the power and having made an order therefor, does not resort to extreme means to enforce it, evidence, as a rule, is undoubtedly competent for the consideration of the jury that the plaintiff was requested or ordered to submit to an examination of his person and refused to do so." Watson on Damages for Personal Injuries, § 675. Such evidence is competent because it tends to illustrate the faith, good or bad, in which the plaintiff's demand is asserted. It stands upon cognate principle to that presented in Civ. Code 1895, § 5163, that "where a party has evidence in his power and within his reach by which he may repel a claim or charge against him, and omits to produce it, or, having more certain and satisfactory evidence in his power, relies on that which is of a weaker and inferior nature, the presumption arises that the charge or claim is well founded; but this presumption may be rebutted." The federal courts have no power to order such physical examination; and yet even in these courts the defendant may prove that the plaintiff has refused a request for such examination, if the request be reasonably made. Union Pacific Ry. Co. v. Botsford, 141 U. S. 255, 11 Sup. Ct. 1000, 35 L. Ed. 734, citing Clifton v. United States, 4 How. (U. S.) 242, 11 L. Ed. 957, and Turquand v. Strand Union, 8 Dow. 201, 4 Jurist, 74. The right to prove the plaintiff's refusal is entirely independent of the court's power to enforce an order for an examination, as well as of the court's refusal to compel one where the power does exist. It is the plaintiff's conduct, not the court's, that is to be submitted to the consideration of the jury. They should consider it, together with any explanation by the plaintiff in regard thereto, and give to it just such weight as they deem proper. The doctrine announced is unequivocally asserted as a matter of general law in the following cases: Beckwith v. N. Y. C. & H. R. R. Co., 64 Barb. (N. Y.) 397; Elfers v. Wooley, 116 N. Y. 294, 22 N. E. 548; Schroeder v. C. R. I. & P. Co., 47 Iowa, 375; M. & M. Turnpike Co. v. Bailey, 37 Ohio St. 104; Stack v. N. Y., N. H. & H. R. Co., 177 Mass. 155, 58 N. E. 686, 52 L. R. A. 328, 83 Am. St. Rep. 269. In the case last cited the Supreme Court of Massachusetts, through Justice Holmes, denies the power of the court to compel an examination, but says: "No doubt, in general, a refusal to be examined by a doctor sent by the other side would be admissible in evidence." In that case it also held, as in Wainwright's

Case, 99 Ga. 255, 25 S. E. 622, that if the plaintiff does not refuse to submit to an examination, but merely makes the objection to the one proposed that it is not timely or impartial, and the court sustains the objection, the defendant should not be allowed to prove such an objection as a refusal. In this, Wainwright's Case is perfectly distinguished from the case at bar; for here the offer was timely and safely guarded against objectionable features.

HILL, C. J., concurs in this view, and, in our opinion, the judgment must be reversed for the error herein noticed.

(3 Ga. App. 332)

## CHESTER v. STATE. (No. 834.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. ASSAULT—SHOOTING AT ANOTHER.
While a conviction of the offense of shooting at another is not legal where the evidence as a whole shows that the defendant deliberately shot the prosecutor either maliciously or else justifiably, yet this is not true where under any phase of the evidence a shooting unlawful, but not malicious, can be inferred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 82.]

2. SAME—EVIDENCE.
Where, under the defendant's statement taken as a whole, the shooting was justifiable, but where, discarding it in part and taking it in part, the shooting was not justifiable, and yet not malicious, the jury were authorized to find him guilty of shooting at another.

3. SAME.
A part of the defendant's statement rendered a conviction of the offense of shooting at another lawful under the rule in the case of Hill v. State, 64 Ga. 454.

(Syllabus by the Court.)

Error from Superior Court, Washington County; B. T. Rawlings, Judge.

Boyer Chester was convicted of shooting at another, and brings error. Affirmed.

Evans & Evans, for plaintiff in error. Alfred Herrington, Sol. Gen., and Hines & Jordan, for the State.

POWELL, J. Judgment affirmed.

(3 Ga. App. 286)

## CENTRAL OF GEORGIA RY. CO. v. CLAY. (No. 740.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

CARRIERS—INJURY TO PASSENGER.
The trial judge fairly presented the case to the jury, and the evidence fully justified the verdict.

(Syllabus by the Court.)

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by Barton Clay against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Joel Branham, Jno. K. Davis, and G. E. Maddox, for plaintiff in error. Bunn & Bunn and W. H. Trawick, for defendant in error.

POWELL, J. We shall not attempt to report the facts at length. The record is voluminous, but the contentions easily narrow themselves down to one or two points. Indeed, we might, by an application of section 5488 of the Civil Code of 1895, refuse to consider the assignments of error, for the brief of the evidence is violative of the spirit, if not the letter, of that section. Still, we have waded through it, material parts as well as the immaterial, have examined the charge and the exceptions thereto, and nowhere find reason for reversing the judgment. The plaintiff was a passenger on a freight train and was thrown from the seat he was occupying in the cupola of the caboose, as he contended, by a jerk, or by the collision of the cars on the forward part of the train with those in the rear. His arm was broken. The defendant pleaded that the fall was occasioned by no negligence on its part, but by reason of the fact that the plaintiff being drunk, fell; also, that the defendant was out of his proper place as a passenger; that he should have seated himself in the lower part of the cab, and not in the cupola; that by the exercise of ordinary care he could have avoided the injury. The trial judge plainly instructed the jury that the plaintiff could not recover if negligenec of the defendant was not the proximate cause of the injury, or if by ordinary care he himself could have avoided the injury. As to the defense that the plaintiff was out of his proper place by being in the cupola, the evidence was conflicting. The plaintiff's testimony indicated that, while on the lower floor of the car were certain boxes or tool chests, the tops of which were covered with oilcloth or something of that kind so as to make seats there, yet on the occasion in question these were covered with rubbish; that he and another pasenger with the acquiescence of the conductor occupied seats in the cupola. The defendant's testimony tended to show that the seats in the lower part of the car were available, and that those in the cupola were intended for the trainmen, and not for passengers. At the defendant's request, the court charged the jury: "If you should find that there was no necessity for the plaintiff to go into the cupola, and that his injury was caused on account of his being there, and would not have occurred if he had been on a seat in the cabobse, he is not entitled to recover, and you should find for the defendant:" But added the following: "I will put a condition to that request, gentlemen: If you should find that his being in the cupola was the cause of his injury, and that it was negligence on his part to be in the cupola, then you will find for the defendant, if you should find that there were seats provided in the caboose for him." The qualification was proper. Under the circumstances, the judge properly left to the jury the question whether it was negligent for the plaintiff to be in the cupola. Mere absence of necessity for his

going there did not per se make it negligent for him to do so. The evidence, though conflicting, fully justified the small recovery which the plaintiff obtained.

Judgment affirmed.

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(3 Ga. App. 296)

## MONROE v. CITIZENS' BANK OF ABBEVILLE. (No. 796.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

ATTORNEY AND CLIENT—RECOVERY OF ATTORNEY'S FEES—NOTICE.

The petition showing that the notice given the defendant to hold him liable for attorney's fees was not in compliance with the statute, the court erred in including in the judgment by default, which was otherwise properly rendered, the amount of attorney's fees claimed. The judgment is therefore affirmed, with direction that the sum adjudged against the defendant on account of attorney's fees be written off.

(Syllabus by the Court.)

Error from City Court of Abbeville; D. B. Nicholson, Judge.

Action by the Citizens' Bank of Abbeville against J. R. Monroe. Judgment for plaintiff, and defendant brings error. Affirmed, with directions.

Martin Cannon, for plaintiff in error. Hal Lawson, for defendant in error.

POWELL, J. Judgment affirmed, with direction.

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(3 Ga. App. 287)

## TAYLOR v. FELDER. (No. 742.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. CORPORATIONS — CONTRACTS — KNOWLEDGE OF AGENT—NOTICE TO CORPORATION.

If a person who is at the same time agent for a corporation and member of a partnership, makes, in his dual capacity, a contract between the parties, knowledge possessed by him, though not actually disclosed, will be imputed to both parties. However, if one, though an agent of the corporation, makes a contract with the corporation on behalf of the partnership of which he is a member, dealing in the transaction with other officers of the corporation and not through himself alone, his undisclosed knowledge will not be imputed to the corporation as notice. The law will not presume that the person occupying such a dual relation dealt with himself alone in making a contract between the partnership and the corporation, and the burden of proving that he did so act is upon the person so asserting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1748–1760.]

2. PARTNERSHIP—POWERS OF PARTNER.

Although one partner exceeds his power as a member of the firm, the other partner will nevertheless be bound by the act if he ratifies it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 289–291.]

3. SAME—NOTE OF FIRM.

"Where a man doeth that which he is authorized to do and more, there it is good for that which is warranted and void for the rest." If a partner, having authority to bind the partnership only for liabilities not exceeding a certain sum, do nevertheless borrow money in excess of that sum in behalf of the firm and give note for it, the note is binding on the partnership and the members thereof to the extent of the authority the partner had.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 242–247.]

4. TRIAL—DIRECTING VERDICT.

Refusal to direct a verdict is not ground of error; but, if the evidence as a whole demands a verdict in a plaintiff's favor for a certain sum, the trial judge should upon timely written request charge the jury that, if they believe the evidence, they should find for the plaintiff in that sum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 500.]

(Syllabus by the Court.)

Error from City Court of Americus; Chas. R. Crisp, Judge.

Action by R. G. Taylor against T. J. Felder. Judgment for defendant, and plaintiff brings error. Reversed.

See 59 S. E. 328.

Taylor sued Felder as the surviving partner of the firm of W. A. Mathews & Co. upon a note executed by Mathews, the deceased partner, in the firm name to the Piedmont Loan & Banking Company and duly transferred to the plaintiff. The jury returned a verdict for the defendant. In overruling a motion for a new trial filed by the plaintiff, the trial judge states the case as follows:

"On or about 1st day of August, 1897, W. A. Mathews and Thomas J. Felder entered into a copartnership in parol, which partnership continued in parol until July 25, 1898, at which time the partnership agreement was reduced to writing. The written agreement of the copartnership embodied only the exact conditions of the original verbal contract. The copartnership was formed for the purpose of carrying on in Atlanta the business of buying and selling bonds, negotiating loans, lending money, and conducting a private banking, investing, and brokerage business of a general character for five years, unless previously discontinued. Under the partnership agreement, neither partner was to incur any partnership liability in excess of $1,000 without the consent of the other partner. The evidence discloses that W. A. Mathews, the senior partner, was cashier, director, and the controlling or managing officer of the Piedmont Loan & Banking Company. That the partnership of Mathews & Co. and the Piedmont Loan & Banking Company occupied the same office. That on the 25th day of June, 1898, W. A. Mathews made and executed a note in the name of W. A. Mathews & Co. for the sum of $1,010, and discounted the note to the Piedmont Loan & Banking Company. The testimony of this defendant is that he knew nothing of the execution of the partnership note for $1,010, did not know that it was in existence, until five or six years after its execution or until after the Piedmont Loan & Banking Company had gone into the hands of a receiver, and he was notified by counsel for the receiver that he held such note. Felder's testimony is that he never ratified or consented to the execution

of the note for $1,010, and received no benefit therefrom. That on the 3d day of November, 1898, the partnership of W. A. Mathews & Co. was dissolved, and the dissolution agreement purported to contain a list of the liabilities of the partnership (furnished by Mathews), and it fails to include the note sued on. John W. Mathews testified that the defendant, Felder, knew of the execution of the note sued on, and received the benefit from the proceeds of said note; the proceeds being used in purchasing certain stock of the Piedmont Loan & Banking Company, for the partnership of W. A. Mathews & Co. The record discloses that W. A. Mathews was indicted by the grand jury of Fulton county, Ga., charged with embezzling the funds of the Piedmont Loan & Banking Company, and that W. A. Mathews was never tried on said indictment, but died with the case still pending against him.

"The defendant contends in this case that the note sued on was in violation of the partnership agreement, and that the payee of the note knew this fact, and therefore that he is not bound by the note; that he never authorized it or received any benefit from it. The defendant contends that W. A. Mathews, being the cashier and controlling officer of the Piedmont Loan & Banking Company, had knowledge of the violation of the partnership agreement, and that his knowledge was chargeable to the Piedmont Loan & Banking Company. The plaintiff contends that W. A. Mathews, being an officer of the bank and a member of the partnership, had a conflicting interest, and any knowledge that he might have would not be chargeable to the bank, and that the bank would be an innocent holder. Plaintiff further contends that in any event the plaintiff would be entitled to recover to the amount of $1,000 and interest, and that the defendant would not be entitled to have any relief, except as to the excess over the $1,000 of the principal of the note.

"The court has carefully considered the matter, and there is no conflict in the testimony that, under the partnership agreement, neither partner was to incur any liability in excess of $1,000. The testimony would authorize the jury to believe that W. A. Mathews was cashier, director, and controlling officer of the Piedmont Loan & Banking Company, and that Felder never ratified the execution of the note or received any benefit from same. The court is of the opinion that any knowledge Mathews might have of the note being in violation of the partnership agreement is chargeable to the banking institution. See McCord v. Callaway, 109 Ga. 796, 35 S. E. 171; Morris v. Ga. L. S. & B. Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506; Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350. The court is of the opinion that one partner is bound by the acts of another partner, whether he receives the benefits thereof or not, if he acts within the scope of the partnership business, but that a partner is not bound by the act of his copartners, beyond the scope of the partnership. The court is of the opinion that the note sued on was in violation of the partnership agreement, and that this defendant would have a right to repudiate the obligation, and not to be bound by it. See Sargent v. Henderson, 79 Ga. 268, 5 S. E. 122; Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350; Radcliffe v. Varner, 55 Ga. 427; Alexander v. State, 56 Ga. 478. The court is also of the opinion that the note sued on, being in violation of the partnership agreement, the payee of the note being chargeable with notice of this fact, and the contract being an entire contract, the defendant would have a right to repudiate the entire note, and not to be bound on the same to the amount of $1,000; and, the jury having found in favor of the defendant, the court does not feel authorized to set aside the verdict. Therefore it is ordered, considered, and adjudged by the court that a new trial be, and the same is hereby, refused and denied movant."

Geo. Gordon and Ellis, Webb & Ellis, for plaintiff in error. Williams & Harper, for defendant in error.

POWELL, J. 1. The soundness of the proposition that notice to Mathews would be notice to the bank depends upon whether Mathews represented the bank in making the particular transaction. Primarily it will be presumed that, although he had general authority to make loans and to discount commercial paper in behalf of the bank, he did not act in making a loan to or discounting a note for a partnership in which he was interested, for, however great an agent's authority to make such negotiations with other persons may be, it is prima facie a violation of duty that he should serve his master and himself at the same time. Capital City Brick Co. v. Jackson, 2 Ga. App. —, 59 S. E. 92; Todd v. German American Ins. Co., 2 Ga. App. —, 59 S. E. 94. Since to have dealt with himself (no permission for such a dealing being shown) would have been unlawful, the court will presume, until the contrary appears, that he dealt with some other agent of the corporation or with its board of directors. The burden of proving that Mathews dealt with himself in the transaction at bar was upon the defendant, who asserted notice to the corporation of the secret stipulation contained in the contract of partnership. If partner Mathews dealt in the transaction with cashier Mathews, the bank would be imputable with such knowledge as the common agent possessed; but if partner Mathews, though also agent of the bank, did not in this transaction deal with himself, but with some other officer of the bank, he is to be treated as if he were an adverse party and no agent of the bank at all. Such is the rule in this state. Fouché v. Merchants' National Bank, 110 Ga. 827 (3), 845, 36 S. E. 256; Morris v. Banking Co., 109 Ga. 12, 34

S. E. 378, 46 L. R. A. 506; Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350; Savannah Bank & Trust Co. v. Hartridge, 73 Ga. 223; People's Bank v. Exchange Bank, 116 Ga. 820 (3), 43 S. E. 269, 94 Am. St. Rep. 144; English-American Co. v. Hiers, 112 Ga. 823, 38 S. E. 103; National Bank v. Demere, 92 Ga. 735, 19 S. E. 38.

2. There was strong, if not absolute, proof that Felder used as collateral security for an indebtedness, the stock for the purchase price of which the note in question was given. Even if Mathews' overstepping of his authority under the articles of partnership was unauthorized originally, such a ratification would have estopped Felder from denying liability on the note. Sibley v. American National Bank, 97 Ga. 126, 25 S. E. 470; Sparks v. Flannery, 104 Ga. 323, 30 S. E. 823; Am. Exchange Bank v. Ga. Construction Co., 87 Ga. 651, 13 S. E. 505; Durden v. Dekle, 2 Ga. App. ——, 59 S. E. 315; Campbell v. Bowen, 49 Ga. 417.

3. It was undisputed that Mathews had authority to bind the partnership to a liability not exceeding $1,000. The law governing the power of a partner to contract in behalf of the firm is very cognate to the law governing the authority of a general agent. "Where a man doeth that which he is authorized to do and more, there it is good for that which is warranted and void for the rest." Co. Litt. 258a. Unless the contract be entire and indivisible, it will be upheld so far as the authority extended, and is subject to repudiation only so far as the authority was exceeded. Nothing is more divisible than a contract for the repayment of money. It is divisible with absolute mathematical precision. For example, a partner has no implied authority to bind his associates to the payment of usury, and, if he does so, the usurious part of the contract is not only prima facie a violation of the partnership agreement, but is absolutely unlawful. However, neither the partnership nor the individual partners can escape the whole contract because it is so illegal in part, but will be held liable to the extent of principal and lawful interest. Dillon v. McRae, 40 Ga. 107 (2), 114. So, also, a partner cannot waive homestead for his partners; but, if he gives a note for money in which he attempts to make such waiver, the contract will be upheld as a promise to pay, but the waivers will be ineffectual. Giles v. Vandiver, 91 Ga. 192, 17 S. E. 115; Drumright v. Philpot, 16 Ga. 431, 60 Am. Dec. 738, and citations; Williams v. Seale, 103 Ga. 801, 30 S. E. 644. It should be observed that in the case at bar the contract whereby the banking company sold Mathews & Co. the stock and took the note in payment was fully executed on both sides, and the stock had passed out of the hands of the partnership. The contract of sale, which was an entire contract, is therefore no longer to be considered in determining the divisibility of the note as a promise to pay.

4. The plaintiff offered to waive any right to recovery beyond the $1,000 and interest, and moved the court to direct a verdict in his favor for that sum. It has been held repeatedly that the refusal of a trial judge to direct a verdict will not be reversed. However, under the evidence the plaintiff might have offered the court a timely written request to charge the jury that, if they believed the evidence, they should return a verdict in the plaintiff's favor for $1,000 and interest, and, if he had refused this request, it would have been error.

The court erred in admitting in evidence the indictment against W. A. Mathews; also, in admitting testimony of what representations Mathews made to Felder at the time of the dissolution of the partnership.

Judgment reversed.

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(3 Ga. App. 332)

## DUGGAN v. STATE. (No. 835.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

CRIMINAL LAW—INSTRUCTIONS—ALIBI.

The defense of alibi being the main defense, under the evidence the court should have instructed the jury upon that subject without a request.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1996.]

(Syllabus by the Court.)

Error from City Court of Sandersville; E. W. Jordan, Judge.

S. B. Duggan was convicted of crime, and brings error. Reversed.

Evans & Evans, for plaintiff in error. J. E. Hyman, Sol., for the State.

HILL, C. J. Judgment reversed.

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(3 Ga. App. 272)

## GEORGIA R. & BANKING CO. v. WILLIAMS. (No. 545.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. RAILROADS—INJURIES TO PERSON ON TRACK—SIGNALS.

The failure to observe the statutory requirements as to checking the speed of trains and ringing the bell at street crossings is not negligence as to a person on the track of a railroad who is not at the crossing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1266, 1270.]

2. SAME—PLEADING—PETITION.

The petition, failing to set out any specific acts of negligence which would authorize a recovery, should, on proper timely demurrer, have been dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1331–1336.]

(Syllabus by the Court.)

Error from City Court, Richmond County; W. F. Eve, Judge.

Action by M. A. Williams against the Georgia Railroad & Banking Company. Judgment for plaintiff, and defendant brings error. Reversed.

Jos. B. & Bryan Cumming, for plaintiff in error. Austin Branch, for defendant in error.

RUSSELL, J. The defendant in error brought an action against the Georgia Railroad & Banking Company for damages accruing to her by reason of the homicide of her husband. The defendant (now plaintiff in error) demurred to the plaintiff's petition, and excepts to the judgment overruling the demurrer. We think the court erred in overruling the demurrer. Under the allegations of the petition, the deceased husband of the plaintiff was using the defendant's right of way longitudinally at a place which was much used by the public in this way. According to the allegations of the petition, he was struck by the defendant's train as he stooped down to tie his shoe. He was in full possession of his faculties at the time he was struck. The only negligence charged against the defendant was the failure to observe the statutory requirements in reference to checking the speed of the train and tolling the bell in approaching the public crossing where Gwinnett street intersected the defendant's track. The petition alleges that the deceased was about 30 feet beyond the crossing at the time of the casualty. It is not alleged that he was intending to use the crossing, or that he was about to use or had reached the well-frequented path which crossed the defendant's track, and which it allowed the public to use. As to a person on the track, and not at the crossing, the failure to observe the requirements of section 2222 of the Code of 1895 is not per se negligence. The railway company owes such a person no duty except the use of diligence to prevent an accident after the danger is apparent. A. & C. Air Line Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145; E. T., V. & G. R. Co. v. Smith, 94 Ga. 580, 20 S. E. 127; Southern Ry. Co. v. Flynt, 2 Ga. App. —, 58 S. E. 374.

It is not alleged that the plaintiff's husband intended to cross the track. He appears to have been walking on a path on the defendant's right of way, which ran very near the track. According to the allegations of the petition, he stooped down to tie his shoe, and was struck by the train. It necessarily follows that he must have had his head extended over some portion of the track, and apparently he exercised no diligence in his own behalf to avoid the injury which overtook him. Under the holding in Central R. Co. v. Raiford, 82 Ga. 405, 9 S. E. 169, the obligation of a railroad company towards one using a path running along the track on the right of way is no greater than that of one using any other portion of the right of way. While it seems to be anomalous that a plaintiff can recover by showing the injury, if the presumption of negligence arising against the railroad company is not rebutted, without proving the specific allegations of negligence contained in his petition, still, specific acts of negligence upon which he expects to recover must be alleged. As held by the Supreme Court in South. Ga. Ry. Co. v. Ryals, 123 Ga. 330, 51 S. E. 428, the presumption of negligence which arises under section 2321 of the Civil Code of 1895 is only a rule of evidence, and does not dispense with the proper pleading of necessary facts. And while a plaintiff may recover, so far as the evidence is concerned, on the presumption of negligence, he can only recover on the specific acts of negligence alleged as the cause of his injury. Augusta Ry. & Elec. Co. v. Weekly, 124 Ga. 384, 52 S. E. 444; Cent. R. Co. v. Tucker, 79 Ga. 128, 4 S. E. 5; Central R. Co. v. Avant, 80 Ga. 195, 5 S. E. 78; Cent. R. Co. v. Nash, 81 Ga. 580, 7 S. E. 808. The petition therefore did not set out failure of diligence on the part of the defendant company.

Furthermore, it appears from the allegations of the petition that there was a public street parallel with the railroad right of way, which the deceased could have used, and thus have avoided the injury. Or, even if he had chosen to use the pathway where he was killed, the allegations of the petition, so far from negativing the idea that the deceased, by the exercise of ordinary care, could have avoided the injury, make it apparent that, if he had used his senses of sight and hearing in his own behalf in an ordinarily diligent way, the casualty could have been prevented. Central R. Co. v. Smith, 78 Ga. 694, 3 S. E. 397; Wilds v. B. & W. R. Co., 82 Ga. 667, 9 S. E. 595; Smith v. Central R. Co., 82 Ga. 804, 10 S. E. 111; W. & A. R. Co. v. Ferguson, 113 Ga. 713, 39 S. E. 306, 54 L. R. A. 802. As said by the Supreme Court in Lloyd v. Ry. Co., 110 Ga. 167, 35 S. E. 170, the track itself is an intimation of danger to one walking upon a railroad track, and he should exercise ordinary care in looking and listening for the approach of a train or locomotive. If he fails to do this and is injured, he cannot recover. No reason is alleged in the petition why the husband of the plaintiff did not or could not see and hear the approaching train, except that the bell was not rung. It is not alleged that those in charge of the train saw the deceased and failed, after seeing him, to use all necessary precautions for his safety. Under the decision in the Gravitt Case, and others cited above, the company owed the deceased no duty of checking the train or tolling the bell. While the writer personally does not sympathize with the principle announced in these decisions, still, as a matter of law, we are bound thereby. This case would seem to be controlled by the principle, announced in W. & A. R. Co. v. Ferguson, 113 Ga. 713, 39 S. E. 308, 54 L. R. A. 802, that: "If there is anything present at the time and place of the injury which would cause an ordinarily prudent person to reasonably apprehend the probability, even if not the possibility, of danger to him in doing an act which he is

about to perform, then he must take such steps as an ordinarily prudent person would take to ascertain whether such danger exists, as well as to avoid the consequences of the same after its existence is ascertained. * * * A railroad track is a place of danger, and one who goes thereon is bound to know that he is going into a place where he is subject to the dangers incident to the operation of trains upon that track."

For these reasons, the demurrer should have been sustained, and the petition dismissed.

Judgment reversed.

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(3 Ga. App. 300)

## HUTCHINGS v. STATE. (No. 808.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. BURGLARY — INDICTMENT — OUTHOUSE DESCRIPTION.

An indictment charging a burglary to have been committed in an outhouse, contiguous to or within the curtilage, need not describe the same as having been committed in the dwelling house, or that the outhouse is a part of the dwelling house. The words "All outhouses contiguous to or within the curtilage or protection of the mansion or dwelling house shall be considered as parts of the same," as well as the words, "A hired room or apartment in a public tavern, inn, or boarding-house shall be considered as the dwelling-house of the person or persons occupying and hiring the same," being included in the statute, are sufficiently descriptive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, § 52.]

2. LARCENY — INCLUDED OFFENSE — INDICTMENT.

An indictment for burglary may charge a larceny after the breaking and entering as illustrative of the intent with which the burglary was committed. In such cases the defendant may be convicted of the larceny, though not guilty of the burglary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 608.]

3. BURGLARY — SUBJECT OF BURGLARY — "DWELLING HOUSE."

A barn and corncrib in which corn was stored is not the subject-matter of burglary, unless it be proved that it is within the curtilage of a dwelling house, or unless it is alleged and proved that it is a place of business. A barn inclosed by a fence disconnected with the dwelling, and no portion of which is applied to the purposes of a dwelling house, is not a dwelling house within the terms of the statute against burglary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, § 52.]

(Syllabus by the Court.)

Error from Superior Court, Polk County; Price Edwards, Judge.

Joe Hutchings was convicted of burglary, and he brings error. Reversed.

Janes & Hutchens and J. A. Wright, for plaintiff in error. W. K. Fielder, Sol. Gen., for the State.

RUSSELL, J. The defendant was convicted of burglary, and excepts to the judgment of the court overruling his motion for new trial. The evidence may show that the defendant stole two bushels of corn, but does not show that he is guilty of the offense of burglary.

The special exceptions to the judge's charge, contained in the amended motion for new trial, are also involved in the demurrer to the indictment, and in the general ground that the verdict is contrary to the evidence; so that we shall consider the questions raised in the record, first by determing whether the verdict of guilty is authorized under the allegations of the indictment or by the evidence. "Burglary," as defined in Cobb's Digest of Laws, p. 790, § 92, "is the breaking and entering into the dwelling or mansion house of another with intent to commit a felony. All outhouses contiguous to and within the curtilage or protection of the mansion house shall be considered as parts of the mansion or dwelling house. A hired room or apartments in a public tavern, inn, or boarding house shall be considered as the dwelling house of the person or persons occupying and hiring the same." By the act of 1866 (Acts, 1866, pp. 151, 152) the statute was amended. By these amendments houses other than the dwelling were added, and became the subject-matter of burglary. These, however, were limited to storehouses or other places of business where valuable goods, wares, products, or any other article of value were contained or stored. By these amendments, the statute was brought to its present proportions as it appears in section 149, Pen. Code 1895. A specific objection to the indictment raised by the demurrer and preserved by the exceptions pendente lite is that the indictment charged the defendant with breaking and entering a barn within the curtilage and protection of the dwelling house contiguous to the same, the same being an outhouse, and stole the corn from said barn, when it should have charged that the burglary was done in the dwelling house itself, or should have alleged that the barn was part of the dwelling house. It is well settled by a number of cases that, where a party is indicted for breaking or entering an outhouse within the curtilage or protection of a mansion or dwelling, the burglary should have been laid as having been done in the dwelling house. See Daniels v. State, 78 Ga. 101, 6 Am. St. Rep. 238. But this method is not exclusive. It must be remembered that burglary was originally an offense against the habitation of the citizen. Burglary may be committed, in the terms of the statute, where there is no intention to steal. A breaking followed by a proved theft establishes the intention of that particular breaking; but, if nothing were stolen, it would not follow that a burglary had not been committed. The offense, then, being originally one against the habitation of the citizen, the effect of the amendment of 1866 was to ingraft upon the common-law offense a statutory amendment by which burglary could be committed with the intent to commit larceny, whereas before the breaking was burglary when the intent was

to commit a felony, and a new class of houses was added, where previously only the dwelling or mansion was the subject-matter of burglary. The original definition in Cobb's Digest followed the common law and, the language in reference to outhouses contiguous to or within the curtilage, as well as the provision in regard to the hired room, were adaptations of decisions construing the common-law definition. When more kinds of houses were added by the statute, there resulted a modification of the rule of pleading as to burglary, so as to bring the necessary and proper allegation of an indictment for burglary within the perview of the more general provisions of section 929 of the Penal Code of 1895. The indictment is sufficiently technical if in the words of the statute; thus rendering inapplicable the rule laid down by Wharton (Whart. Criminal Law, § 815) that "where burglary is in any outhouse, which, by law, is considered part of the dwelling house, it must still be laid to be done in the dwelling house."

2. Another ground of the demurrer is that the indictment charged both burglary and larceny from the house. There was no error in overruling this demurrer. The indictment does not join the charge of burglary in a count with larceny from the house. It alleges larceny from the house as an incident of the burglary. It is permissible either to charge a burglary and larceny in the same count, or to add a count for larceny from the house to an indictment for burglary. The provision with reference to larceny was one of the additions made by the act of 1866.

3. We do not think the evidence was sufficient to authorize a conviction of the defendant of the offense of burglary. The evidence did not show the house to be a dwelling house or a part of the dwelling house, or contiguous to the dwelling house, or within the curtilage or protection of the dwelling house. All that the evidence circumstantially showed was that the defendant broke open a corncrib, and stole a little more than a bushel of corn. A corncrib, unless it be within the curtilage, is not the subject-matter of burglary. The breaking and entering of such a house is larceny from the house. It is only when the corncrib is part of the dwelling house under the common law, or when, as explained by our statute, it becomes an outhouse contiguous to or within the curtilage or protection of the mansion or dwelling house, that a barn or corncrib can become subject-matter of burglary. In Bearden v. State, 95 Ga. 459, 20 S. E. 212 (which we find, upon examination of the original record, was a case very similar to the case at bar), it was held that "where the house broken and entered was not a dwelling nor within the curtilage, and was neither alleged nor proved to be a place of business, but was, in fact, a corncrib or barn in which corn was stored, there was no burglary. The offense proved was larceny from the house only." In the Bearden Case there was direct evidence of the breaking and theft; while in the present case the evidence was circumstantial. In the Bearden Case 100 bushels of corn were alleged to have been taken. In the present case the indictment alleges 2 bushels.

The evidence in this case shows that the barn is about 50 yards from the dwelling house of the prosecutor, and the yard of the prosecutor is not inclosed. The barn and corncrib is inclosed in a separate inclosure by a high plank fence, which is not connected in any way with the dwelling house. The barn, therefore, according to the evidence, relies for its protection, not upon the inclosure marking the curtilage of the dwelling house, but upon a distinct inclosure of its own. "Curtilage," as defined by Burrill in his Law Dictionary, "is a yard, courtyard, or piece of ground lying around or near to a dwelling house included within the same fence." State v. Taylor, 45 Me. 322. "Curtilage in law means a fence or inclosure of a small piece of land around a dwelling house, usually including the buildings occupied in connection with the house, which inclosure may consist wholly of a fence, or partly of a fence and partly of the exterior side of buildings so within the inclosure." Commonwealth v. Barney, 64 Mass. 482; Commonwealth v. Intoxicating Liquors, 140 Mass. 287, 3 N. E. 4. "Curtilage means the yard or court for the protection and security of the mansion house; an inclosure belonging to the dwelling house. When used in a penal statute, it must be construed according to the strict signification of the term." State v. Shaw, 31 Me. 523, 525. "Curtilage includes the yard, garden, or field which is near to and usually in connection with the dwelling." Cook v. State, 83 Ala. 64, 3 South. 849, 3 Am. St. Rep. 688. At the common law the word "curtilage" was very nearly synonymous with "courtyard." As we have explained above, the portion of the definition of burglary, contained in section 149 of the Penal Code of 1895, which is to some extent explanatory of the nature of the houses which may be subject to burglary, is an adaptation of decisions of the English courts in cases of burglary under the common law. As the word "curtilage" is thus used it always denotes an inclosure, including the dwelling house. It is true that changed conditions in this country and the absence of fences in many instances may necessarily affect our definition, so as not to render the presence of an inclosure indispensable. But to supply the place of an inclosure there must be apparent a necessity for the use of the outhouse alleged to be within the curtilage, either as a part of the dwelling house or that the use of such outhouse is indispensably necessary to the domestic comfort of the household in the occupancy of the dwelling. This barn cannot by any rule be construed as part of the dwelling house, and it cannot come under the rule laid down in

Bryant v. State, 60 Ga. 358, where a gearhouse was held to be within the protection of the dwelling house. In the Bryant Case the yard of the dwelling house was inclosed by a fence and by the same fence as the gearhouse; and, though there was a cross-fence between the dwelling and the gearhouse, there was a gate between, and the evidence shows that it was always left open at night so as to constitute one yard, and to be under the protection of the yard dog. In that case a conviction upon the ground that the proof was that the gearhouse was within the inclosure of the yard, and that, though separate from the remainder of the yard by a fence, the gate opening into the particular inclosure containing the gearhouse was always kept open at night so as to have the protection of the yard dog like the dwelling and rest of the yard.

We think, therefore, that the verdict of guilty of burglary was not supported by the evidence, and for that reason the judge erred in not granting a new trial. The circumstances proved may establish the guilt of the defendant of the theft of the corn, but there is such a wide difference between the penalty which may be inflicted in a case of burglary and that allowable in cases of larceny that the defendant's right to be tried for the offense of which he is really guilty affords an unanswerable reason for the grant of a new trial.

Judgment reversed.

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(3 Ga. App. 233)

## WALKER v. SWIFT FERTILIZER WORKS. (No. 703.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. WRIT OF ERROR—COURT OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

By the constitutional amendment creating this court, certification to the Supreme Court is required only when "a question is raised as to the construction of a provision of the Constitution of this state or of the United States, or as to the constitutionality of an act of the General Assembly of this state and a decision of the question is necessary to a determination of the case." A contention that the Supreme Court, in a line of decisions, has violated the constitutional inhibition against the judiciary exercising legislative functions, or that the effect of such decisions is to deprive the complaining party of constitutional guaranties, does not raise such a question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1770.]

2. SAME—DISCRETION.

While, by the same constitutional amendment, "the Court of Appeals may at any time certify to the Supreme Court any other question of law concerning which it desires the instruction of the Supreme Court for proper decision," this court will not abuse this privilege, but, in recognition of the vast amount of labor now imposed upon that tribunal, will exercise this right sparingly.

3. SAME—RULES.

The decisions of the Supreme Court are binding on this court as precedents. This court has no power to overrule or modify them, and, under rule 31 (57 S. E. xiii), will not make certification to the Supreme Court for the purpose of having any decision modified or overruled, unless, upon a consideration of the question, this court is "of opinion that the decision should be modified or overruled, or that the question is one of so much doubt that it should be referred to the Supreme Court for decision."

4. GARNISHMENT — PROPERTY SUBJECT — DEFENSES OF GARNISHEE—EXEMPTIONS—WAIVER.

Those decisions of the Supreme Court which hold that the garnishee may set up that the funds in his hands belonging to the defendant are not subject to garnishment, and those which hold that a day laborer cannot waive or contract to waive the exemption of his wages from process of garnishment, are too sound in principle to be questioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, § 260.]

5. EXEMPTIONS—WAIVER.

The debtor cannot, even by an independent contract based on a valuable consideration, make his wages earned as a day laborer subject to garnishment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Exemptions, § 115.]

6. GARNISHMENT — ANSWER OF GARNISHEE — VERIFICATION BY AGENT.

An answer in behalf of a corporation to a summons of garnishment may be verified by any agent who can and will depose positively to the facts stated therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Garnishment, § 266.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by John G. Walker against the Swift Fertilizer Works, garnishee. From a judgment for the latter, the former brings error. Affirmed.

Jno. G. Walker, for plaintiff in error. Tye, Peeples, Bryan & Jordan, for defendant in error.

POWELL, J. While the record is voluminous, two points are controlling. The defendant gave the plaintiff a note, wherein he expressly waived his right of exemption from garnishment as to the wages earned by him while in the employment of the garnishee. Afterwards, in order to get a garnishment proceeding then pending dismissed, he contracted that his wages now in question should not be exempt, but should be subject to garnishment. If either of these agreements is enforceable, the judgment in the garnishee's favor is erroneous. The other point is that the answer of the garnishee was not properly verified. The timekeeper of the garnishee (a corporation) verified the answer positively. It appeared from the evidence that he was cognizant of the facts. The immediate exception before us is the overruling in the superior court of a certiorari brought to reverse a judgment in the justice's court in favor of the garnishee who admitted funds, but set up that they were not subject.

1. The plaintiff in error vigorously assails a long line of decisions of the Supreme Court holding that the garnishee may set up that the wages in his hands are not subject to

garnishment, and also the decisions that hold or tend to hold that the debtor cannot make them subject by a waiver. These decisions and the effect of them, it is contended, seriously impair many of the plaintiff's constitutional rights. The attack is multiform. Among other things, it is said that these decisions are violative of the Constitution because they amount to legislation by the judicial department. Asserting that a constitutional question is thus raised, it is suggested that this court certify it to the Supreme Court. No such constitutional question is presented as to require certification. See constitutional amendment establishing the Court of Appeals (Acts 1906, p. 26); Fews v. State, 1 Ga. App. 122, 58 S. E. 64; Hammock v. State, 1 Ga. App. 126, 28 S. E. 66; Anderson v. State, 2 Ga. App. 1, 58 S. E. 401.

2, 3. Request is also made to review some half dozen Supreme Court decisions announcing rulings of the nature indicated above, to the end that they may be modified or overruled. It is recognized by able counsel for the plaintiff in error that the decisions of the Supreme Court are binding on this court as precedents, and that we have no power to overrule or modify them, and we are therefore requested to certify the question of their review and overruling to the Supreme Court. We have this power. However, in the light of the fact that the Supreme Court of this state, with the quota of work coming to it through the ordinary channels, is required to perform a volume of labor unequaled by any other similar tribunal in this world, save only this court, we are hesitant in transferring additional burdens to it. Rule 31 of this court (57 S. E. xiii) provides: "Whenever counsel in a case in this court desires to question or to review one or more decisions of the Supreme Court for the purpose of having the same modified or overruled, a written request to that effect shall be expressly presented in the brief of counsel. If, upon consideration of the question, this court is of opinion that the decision should be modified or overruled, or that the question is one of so much doubt that it should be referred to the Supreme Court for consideration, this court will certify such question to the Supreme Court."

4. The argument of counsel against these precedents of the Supreme Court, while vehement, is gracious. His expressions of veneration for the judges who made these rulings are abundant; his attack upon the decisions themselves unsparing. For example, he says: "With profoundest respect for Georgia's chief judiciary, and with veneration and fond recollections of having known and loved some of the former chief judiciary (than whom no state can boast of abler jurists or better men), the plaintiff questions their former rulings; also observing that nature lent them, as us, lame reason's lamp, instead of unerring intuition, to light the way of truth in theirs, now our, little nursery." Somehow, this brings to our mind an episode narrated of the memorable Jack Falstaff: "Falstaff: Sirrah, what says the doctor to my water. Page: He said, sir, the water itself was a good, healthy water; but, for the party that owed it, he might have more diseases than he knew for." In this case, however, counsel condemns the water and praises the men who "owed" it. We can condemn neither. To our minds the decisions are absolutely sound in law and in reason.

5. Instead of limiting the Supreme Court decisions upon the inability of laborers to waive exemptions from garnishment, this court has, in the recent case of Traders' Investment Company v. Macon Ry. & Light Co., No. 616, 3 Ga. App. ——, 59 S. E. 454, extended them. Such contracts, whether general or special, whether made in connection with the incurring of the original indebtedness or made subsequently upon new consideration, are contrary to public policy. Contracts contrary to public policy, no matter how solemnly or explicitly made, are void. Civ. Code 1895, § 3668. The exemption from process of garnishment is a limitation upon the scope of the processes of the court. The "so far shalt thou go, and no further," of the law, cannot be repealed even by those to whose benefit the prohibition may in individual cases inure. The arm of the court, made short by the law itself, cannot be extended by the act of the parties.

6. The verification of the answer of the garnishee by the timekeeper was sufficient. Plant v. Mutual Life Ins. Co., 92 Ga. 636, 19 S. E. 719.

Judgment affirmed.

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(78 S. C. 184)

## STATE v. PERRY.

(Supreme Court of South Carolina. Aug. 5, 1907. On Rehearing, Sept. 17, 1907.)

1. HOMICIDE—EVIDENCE.

Where, on trial for murder, the evidence showed that the fence of deceased was down, and his stock trespassed on defendant's crop, it was not competent to show that he did not try to rebuild the fence, unless it appeared that the reason he did not was to permit his stock to trespass on defendant's corn.

2. SAME—INSTRUCTIONS.

It is the duty of the judge to define the different degrees of homicide, and of the jury to determine of which the accused was guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 639.]

3. SAME—APPEAL.

Where the evidence tends to show defendant guilty of murder, he cannot complain of a conviction of manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 722.]

Appeal from General Sessions Circuit Court of Saluda County; Dantzler, Judge.

John C. Perry was convicted of manslaughter, and appeals. Affirmed.

Johnstone & Cromer and Able & Blease, for appellant. R. A. Cooper and Thurmond & Ramage, for the State.

GARY, A. J. The defendant was tried on an indictment for murder, convicted of manslaughter, with a recommendation to the mercy of the court, and sentenced to a term of five years in the penitentiary. He appealed upon numerous exceptions, but abandoned all except the seventh, ninth, tenth and eleventh.

1. The seventh exception is as follows: "Because the court erred in the following ruling, examination of Mose Farrow, testifying as to his knowledge as to cause of Wills' stock trespassing on Perry: 'Q. The Court: Why? A. Because the old fence was down, and they would just go right on in the corn. Q. Mr. Blease: He didn't try to build any, did he? A. No, sir. The Court: I don't know about that. Just strike that out, Mr. Stenographer. The fence was down; let that go'—the error being that the evidence shows willful and malicious trespass, and was competent for the consideration of the jury, under the circumstances of this homicide." It seems that the difficulty arose out of the fact that live stock of the deceased trespassed upon the lands of the defendant. It will be observed that his honor, the presiding judge, permitted that portion of the testimony to remain in the record, where the witness testified that the fence was down. The further fact that the deceased did not attempt to build the fence was not material, unless it had also been made to appear that the reason he did not attempt to build was in order that his stock might trespass upon Perry's lands. This exception is overruled.

2. The remaining exceptions will be considered together, and are as follows: "(9) The court erred in charging that a verdict of manslaughter might be rendered in this case, because there was absolutely no evidence of any cause for a sudden heat and passion, and the only verdict responsive to the testimony in this case should have been guilty, with or without recommendation to mercy, or not guilty. (10) Because the jury erred in reaching a verdict of guilty of manslaughter, with a recommendation to mercy, because such verdict was not responsive to the testimony, and there is no testimony to substantiate the same. The defendant is either guilty of murder, or he is guilty of no offense. (11) Because the court erred in overruling the motion of the defendant for a new trial, when it appeared that the verdict of the jury was not responsive to the testimony in the case, and there was positively no testimony whatever upon which to rest the verdict found." In the case of State v. Turner, 29 S. C. 34, 43, 6 S. E. 891, 893 (13 Am. St. Rep. 706), the court uses this language: "The degree of a homicide in any special case depends upon the motive which prompted the killing, and this is a matter entirely for the jury. The judge should define and explain these different degrees, and the jury must be governed by the definition and explanations given. But whether any particular crime as defined by the judge has been committed, or whether the case is one of self-defense, as explained by the judge, is a question of fact, and is alone for the jury." There was testimony tending to show that the defendant was guilty of murder. Therefore he has no just cause to complain that the jury took a merciful view of his case, and simply found him guilty of manslaughter. These exceptions are also overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

On Rehearing.

PER CURIAM. After careful consideration of the petition herein, the court fails to discover wherein any material question of law or fact has either been overlooked or disregarded. It is therefore ordered that the petition for a rehearing be dismissed, and that the order heretofore granted staying the remittitur be revoked.

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(78 S. C. 187)

## WINDHAM et al. v. HOWELL et al.

(Supreme Court of South Carolina. July 10, 1907. On Rehearing, Sept. 17, 1907.)

1. DEED—CONSTRUCTION—NATURE OF ESTATE.
A deed conveying land to the grantee and at her death to her children named, to have and to hold "in warranty to E. and her heirs," carries a life estate to the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 360–365.]

2. APPEAL—HARMLESS ERROR.
Where, in partition, the court should have directed a verdict against defendants, and does not, but withdraws from the jury the general issue of title set up by defendants, and submits a special issue, the error is harmless, and the special issue may be sustained on the ground that the chancellor has a right to submit a special issue to a jury.

3. PARTITION—ISSUES.
Where, in partition, defendants set up paramount title, whether one tenant in common has transferred his interest to another is not in issue.

4. ALTERATION OF INSTRUMENTS—EVIDENCE.
On the question whether alterations in a deed were made after its execution, where a witness testifies that they were made by a particular person, he should not state the reasons given by such person for the act.

5. EVIDENCE—DECLARATIONS OF CO-TENANT.
Declarations of one co-tenant against interest are inadmissible against his co-tenants.

6. PARTITION—REFERENCE.
In partition, where the question of transfer of one interest and of an accounting are involved, the court may refer all issues without consent; the party denying the transfer not objecting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 192.]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Darlington County; Gage, Judge.

Action by H. H. Windham and others against George C. Howell and others. Judgment for plaintiffs, and defendants George C. Howell and Louisiana Howell appeal. Affirmed.

E. O. Woods and Stevenson & Matheson, for appellants. Geo. W. Brown and R. W. Shand, for respondents.

JONES, J. This action was commenced for the partition of certain lands in Darlington county. The defendants, George C. Howell and Louisiana Howell, answered, denying the allegations of the complaint and setting up title to the land described. The first trial of this issue of title was before Judge Townsend and a jury, and resulted in a verdict for the defendants, under the direction of the court. On appeal this court reversed said judgment and remanded the case "for trial of the issue of title as made by the pleadings." 68 S. C. 478, 47 S. E. 715. Thereafter the case came on for trial before Judge Gage and a jury. After considerable testimony was introduced for plaintiffs and defendants, Judge Gage, stating what he conceived to be the issue in the case, submitted in his charge the following special issue to the jury: "Were the names of John W. Windham, C. M. Windham, Mary L. Wadford, and Eliza Troublefield in the deed in issue there written before James Windham signed and delivered the deed, or after he signed and delivered the deed?" Upon this issue the jury found that the names were written in the deed "before" its execution, judgment was entered accordingly, and order granted by Judge Gage referring all the equitable issues to the master, from which this appeal is taken. In his order Judge Gage, among other things, said: "Both parties claimed under the deed of James Windham to Eliza Windham and others. That deed created only a life estate, and it has been so held by the Supreme Court on appeal in this case in a former judgment herein. That being so, and the uncontradicted testimony showing that some of the plaintiffs and defendant Louisiana Howell have interests in the property that is subject to partition, the plaintiffs are entitled to proceed on the equity side of this court for such further proceedings as may be necessary and proper to effectuate the partition."

1. We first consider the exceptions to Judge Gage's construction of the deed of James Windham to Eliza J. Windham and others, dated December 14, 1857, under which both parties claim. The deed conveyed the land "unto the said Eliza J. Windham forever, and at her death to her children [and also to John W. Windham, C. M. Windham, Mary E. Wadford, Eliza Troublefield, wife of Thomas Troublefield] * * * to have and to hold * * * said premises, * * *" with clause of warranty "unto the said Eliza J. Windham and her heirs." The question submitted to the jury was whether the words we have placed in brackets above were in the deed when executed. In disposing of the former appeal, this court assumed as the proper construction of this deed that Eliza J. Windham did not take in fee simple, but a life estate, and that on her death in 1900 her children, Lula Windham, plaintiff, and Louisiana Howell, defendant, became tenants in common for life with Eliza Troublefield; hence there were tenants in common for life before the court entitled to partition. The appellants contend that the construction of the deed was not necessarily involved in the former appeal, and that a proper construction would give Eliza J. Windham the fee. We do not so hold. This being a deed as distinguished from a will, and involving no element of trust, it is to be construed under the strict rules of common law. The word "forever" after the name of Eliza Windham, not being a word of inheritance, cannot operate to enlarge her estate beyond a life estate. Varn v. Varn, 32 S. C. 77, 10 S. E. 829; Harrelson v. Sarvis, 39 S. C. 18, 17 S. E. 368; Jones v. Swearingen, 42 S. C. 65, 19 S. E. 947. There is nothing in the habendum clause to enlarge the estate conveyed in the granting clause so as to bring the case within the rule in Chavis v. Chavis, 57 S. C. 173, 35 S. E. 507. There being no words of inheritance in the granting clause, the life estate therein conveyed cannot be enlarged into a fee by the warranty clause. Jordan v. Neece, 36 S. C. 295, 15 S. E. 202, 31 Am. St. Rep. 869; McMichael v. McMichael, 51 S. C. 558, 29 S. E. 403. Cases construing wills and deeds involving trusts are not in point.

2. We next consider the exceptions alleging error in submitting to the jury the special issue instead of the general issue of title. It is settled by many cases in this state that this is an equity cause. When defendant's answer raises an issue of paramount title to land, such as would, if established, defeat plaintiff's action, it is the duty of the court to submit to a jury the issue of title as raised by the pleadings. McGee v. Hall, 23 S. C. 392; Sale v. Meggett, 25 S. C. 72; Reams v. Spann, 28 S. C. 533, 6 S. E. 325; Carrigan v. Evans, 31 S. C. 265, 9 S. E. 852; Capell v. Moses, 36 S. C. 561, 15 S. E. 711; Bank v. Peterkin, 52 S. C. 236, 29 S. E. 546, 68 Am. St. Rep. 900; Tyler v. Williams, 53 S. C. 375, 31 S. E. 298; Barnes v. Rodgers, 54 S. C. 123, 31 S. E. 885. In such cases, when each of two or more defendants sets up as against the plaintiff and the other codefendant independent title in himself, it should be submitted to the jury to determine the issue, not only as between plaintiff and defendants, but also as between the codefendants, if this is essential to an effective partition. Sumner v. Harrison, 54 S. C. 359, 32 S. E. 572. The appellants invoke these rules to overthrow the action of the circuit court, and it is necessary to inquire whether the case made falls within these rules. Is there anything tending to show such independent, exclusive, paramount title in themselves as would defeat plaintiff's right of partition? It was undisputed that both sides claimed under the deed which we have construed above. It is true appellants were in possession of the land claiming exclusive title in fee under said deed and the

conveyance to them by Eliza J. Windham; but, as Eliza J. Windham could only convey her life estate and died in 1900, her deed, as matter of law was of no avail against those having right of partition as tenants in common for her life under the deed of James Windham. On this issue, depending alone upon the construction of a written instrument and undisputed facts leaving room for but one conclusion, the court had the power to direct a verdict finding against defendant's claim of independent title. Barnes v. Rodgers, 54 S. C. 123, 31 S. E. 885; Gilreath v. Furman, 57 S. C. 289, 35 S. E. 516; Sudduth v. Sumeral, 61 S. C. 287, 39 S. E. 534, 85 Am. St. Rep. 883. This may have been, strictly speaking, the most regular procedure, but the appellant having utterly failed to show any evidence of independent, paramount title, but, on the contrary, showing reliance on the same title under which partition is sought, the court would be stickling for mere form to remand the case for resubmission to the jury when the inevitable result would be a direction of verdict against appellant on the general issue of paramount title. In such circumstances the appellant received no prejudice by the withdrawal of the general issue from the jury.

3. At this point we will consider the exception alleging error in refusing the motion to direct a verdict against the plaintiff A. H. Windham. The complaint alleged that Eliza Troublefield has conveyed her estate in the premises to A. H. Windham, and this was denied by the answer of Eliza Troublefield and the appellants. No evidence was offered to prove this allegation. But it was not material to any interest of the appellant to determine by jury whether A. H. Windham had acquired the interest of Eliza Troublefield claimed to be tenant in common with appellants. Eliza Troublefield has not excepted to the action of the court, and therefore acquiesces in the reservation of the matter for determination by the court of equity. Moreover, the question whether Eliza Troublefield as a tenant in common has transferred her interest to A. H. Windham has no reference whatever to the question whether appellants had such paramount title as would defeat the action for partition. With reference to the special issue submitted to the jury, the action of the circuit court may be sustained on the ground that in an equity case the chancellor may refer issues to a jury for the enlightenment of his conscience. Hammond v. Foreman, 43 S. C. 264, 21 S. E. 3; Mortgage Co. v. Gilliam, 49 S. C. 355, 26 S. E. 990, 29 S. E. 203. Judge Gage having affirmed the special finding of the jury, this finding of fact must stand, unless the exceptions to the rulings as to the admissibility of testimony show such material error as should work a reversal.

4. It is excepted that it was error to refuse to allow Mrs. Howell to state what reason her father, Eli Windham, gave to Mr. Atkinson for inserting the names in the deed made by James Windham; she having testified that Eli Windham accomplished the interlineation through Atkinson. The ruling was correct. The witness having testified that the interlineation was made by Eli Windham, his declarations as to his reasons therefor were not material, when the issue was whether the interlineation was, in fact, made subsequent to the execution of the deed.

5. It is further excepted that there was error in refusing to permit Mrs. Odem to state a conversation between Eliza Troublefield and Mrs. Howell, as Eliza Troublefield is a party to the action and her declarations against interest should be admissible. On the death of Eliza J. Windham in 1900 Eliza Troublefield became a tenant in common for life of the premises conveyed in the deed of James Windham, if the interlineation containing her name as grantee was made at the time of the execution of the deed. The object of the proposed testimony was to corroborate the testimony of Mrs. Howell to the effect that in a conversation with Eliza Troublefield, about four years before the trial in 1906, Eliza Troublefield declared to Mrs. Howell, in the presence of Mrs. Odem, that she saw Mr. Atkinson make the interlineation in the deed. As this was alleged to have been done after the execution of the deed, it was against the interest of Eliza Troublefield to make such declaration. She is a party to the action, and there was no evidence that she had conveyed her interest in the premises. How far are her declarations or admissions competent in this case? Whatever interest she took under the deed was not a joint interest, but a tenancy in common. The declarations of one tenant in common of real property are not admissible against the others. 2 Wigmore on Ev. § 1081. There was no evidence whatever tending to show that the parties whose names appeared in the interlined words had anything to do with their insertion, or that there was such a conspiracy among them to procure the interlineation as would make the declaration of one during the joint enterprise admissible against the others. If the name of Eliza Troublefield alone had appeared in the interlineation, her declaration would have been admissible as against herself, but, as the interlineation under all testimony was done at one time and there is no ground upon which her name alone may be stricken from the deed, her declaration was properly excluded. The general rule undoubtedly is that the declarations or admissions of a party to a suit may be given in evidence by the adverse party as against all associated with the declarant by joint interest or privity of design or combination. It is also true, as a general rule, that the admission of a party may be given in evidence by the adverse party as against the declarant. But this latter rule does not apply when the effect of the declarations or admissions must necessarily

be to prejudice the several and independent interest of those against whom such declarations are not directly admissible, and the case is such as will not permit the admissions to operate to the prejudice of the declarant alone.

The following cases support the view that the testimony was not admissible: Dale's Appeal, 57 Conn. 127, 17 Atl. 757; McMillan v. McDill, 110 Ill. 47; Hayes v. Burkam, 67 Ind. 359; In re Will of Mary Ames, 51 Iowa, 596, 2 N. W. 408; O'Connor v. Madison, 98 Mich. 183, 57 N. W. 105; Prewett v. Coopwood, 30 Miss. 369; Clark v. Morrison, 25 Pa. 453; Forney v. Ferrell, 4 W. Va. 729; Shaller v. Bumstead, 99 Mass. 127; In re Kennedy's Will, 167 N. Y. 163, 60 N. E. 446. The rule announced accords with Dillard v. Dillard, 2 Strob. 94 and does not conflict with Peeples v. Stevens, 8 Rich. Law, 198, 64 Am. Dec. 750. In the last-mentioned case, the court held that the declarations of executors, who are also legatees, propounding a will for probate may be given in evidence by the next of kin. Judges O'Neale, Whitner, and Munro were of the opinion that the declarants had a joint interest, and jointly represented all claiming under the will, and, further, that the evidence showed a combination to obtain a common end. Judges Wardlaw, Withers, and Glover placed their concurrence on the latter ground, viz., that a confederacy had been shown, and the admission of one confederate would bind the other. The view that the rule stated in this opinion would exclude the declarations of all the adverse parties in interest separately made and offered to be proven does not necessarily follow for the reason that a court, advised that it is proposed to offer declarations affecting all the parties, might admit the declarations of one, subject to be stricken out if not followed up as proposed, and subject, further, to instructions to the jury that the declarations as to one shall affect only that one, and, if the testimony as to the declarations of any one is disbelieved, the jury must also disregard the testimony as to the declarations of the other; the issue being single, whether all the interlined words were in or out of the deed at execution precisely as in the case when the issue is will or no will. Otherwise you permit the rule allowing the declarations of a party against interest to destroy the rule disallowing the declarations of one party to affect the interest of another party not associated by joint interest or privity.

The suggestion that the plaintiffs, by this form of action, have voluntarily deprived themselves of the right of objecting to the declaration of a tenant in common to affect their interest, ought not to prevail, for the reason that plaintiffs had the right to bring action for partition and in such action were compelled to make all tenants in common parties, and had the right to believe, if their minds adverted to the subject at all, that the declarations of a defendant co-tenant were not admissible against them.

6. The remaining question is whether the circuit court erred in referring all the other issues of law and fact to the master without consent of appellants. It has been determined that appellants are not entitled to a trial by jury as matter of right, since it now appears conclusively that the title claimed by them is not paramount to, but entirely consistent with, the right of partition sought to be enforced. Hence the order of reference cannot be impeached on the ground that it denies appellant's mode of trial to which they are entitled by law. The issues now remaining are purely equitable. Section 293 of the Code of Procedure of 1902 authorizes the court in such cases to order a reference without consent (1) Where the trial of an issue of fact shall require a long account on either side; (2) where the taking of an account shall be necessary for the information of the court before judgment, etc.; (3) where a question of fact other than upon the pleadings shall arise. The pleading in this case involved an accounting for rents and profits for a series of years. We cannot say that the case presented is so clearly without provisions of section 293 as to deny the chancellor power to refer the equitable issues without consent. Ferguson v. Harrison, 34 S. C. 169, 13 S. E. 332; Green v. McCarter, 64 S. C. 293, 42 S. E. 157.

The judgment of the circuit court is affirmed.

WOODS, J. (dissenting). I dissent on the grounds that the circuit judge erred in excluding the evidence of Mrs. Odem as to the declarations of Mrs. Eliza Troublefield to the effect that she had seen the names interlined in the deed after its execution and after the death of the grantor. Eliza Troublefield was one of the grandchildren of the grantor whose names were interlined. There is no proof that she had parted with her claim at the time the declarations were alleged to have been made. These declarations against her interests and the interests of the plaintiff A. H. Windham, who claimed to be her grantee, were therefore admissible. Ellen v. Ellen, 18 S. C. 489; Westbury v. Simmons, 57 S. C. 471, 35 S. E. 764; Hobbs v. Beard, 43 S. C. 370, 21 S. E. 305. It may be true that the declarations or admissions of one tenant in common are not as a general rule admissible against the others, but the admissions or declarations of Eliza Troublefield were competent against herself and her grantee, and, as I think, should not have been excluded, because they incidentally affected her co-tenants. Under the rule announced in the leading opinion, if each one of the plaintiffs had separately declared in the most explicit manner that they had seen the names inserted after the execution of the deed, none of the declarations would have been admissible, because they had united

in the action as tenants in common. The weight of authority in other jurisdictions is to the effect that, in a proceeding to prove a will, the declaration of an executor, or a devisee, or a legatee, tending to defeat a will, are not admissible, because it is impossible to have a judgment against the party making such declarations which would not be decisive of the interests of all. But there is strong reason, as well as high authority, against the exclusion. It is regarded by Wigmore as unsound (2 Wigmore, 1081), and the argument against it is forcibly stated in Beall v. Cunningham, 1 B. Mon. (Ky.) 399. See, also, 1 Greenleaf on Ev. § 174. In Durant v. Ashmore, 2 Rich. Law, 184, which was a case of a contested will, the declarations of two of the devisees that deceased had left no will were held to be admissible. This case was cited, and its doctrine on this point reaffirmed in the opinion of Judge O'Neale in Peeples v. Stevens, 8 Rich. Law, 198, 64 Am. Dec. 750, where the declarations of the executors named in the will against its validity were held admissible. The case of Dillard v. Dillard, 2 Strob. 89, is distinguished and held not to conflict, because there the declarations offered and excluded were those of a legatee not a party to the cause. The very same condition of combination for the attainment of a common end, relied upon by Judge O'Neale to give additional support to his conclusion in Peeples v. Stevens that the declarations were competent, are found in this case. There the fact referred to as furnishing plenary evidence of combination to a common end was the presenting together the same paper as a will, and contending together for its probate. Here the parties were presenting the deed and contending together that the interlineation on which the cause depends was made before the deed was executed. It is true, in the opinion of Judge Wardlaw, concurred in by Judges Withers and Glover, concurrence was placed on the ground that a confederacy had been shown, but there is no dissent from the opinion of Judge O'Neale on the point here under consideration.

But there is much stronger reason in this case for admitting declarations of one of the co-tenants than for admitting such declarations in a proceeding to establish a will. The devisees and legatees cannot have their rights under a will separately adjudicated. They are tied to each other by the statute law, and the will must stand or fall as to all. Here the plaintiffs in the complaint allege that the defendants G. C. Howell and Louisiana Howell were claiming the whole of the land under the deed in which the interlineations were found. They, therefore, knew the contest would be over the deed, and by bringing this action for partition they voluntarily connected themselves in the proceeding with Eliza Troublefield and all whom they alleged to be co-tenants. Each of the co-tenants had the right to bring a separate action against the defendants, who were in possession, for his separate share of the land, and, of course, in such separate action, the declarations of the other co-tenants as to the interlineation would not have been admissible. But, having elected to test the deed in one action for partition, thus uniting themselves with the other persons whose names were mentioned in the interlineation, they should not be allowed to deprive the defendants G. C. Howell and Louisiana Howell of the benefit of the declarations against her interests of Eliza Troublefield, one of the co-tenants.

On Rehearing.

PER CURIAM. After careful consideration of the petition herein, this court is satisfied that no material question of law or of fact has been overlooked or disregarded.

It is therefore ordered that the petition for a rehearing be dismissed, and that the order heretofore granted staying the remittitur be revoked.

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(78 S. C. 157)

## V. P. RANDOLPH & CO. v. WALKER.

(Supreme Court of South Carolina. Sept. 11, 1907.)

1. ACTION—CONTRACT OR TORT.
A complaint alleging that money was deposited with defendant in trust for plaintiff, subject to his order, and that defendant refused to pay the same, states a cause of action in contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 160–195.]

2. LIMITATION OF ACTIONS—MONEY TO ANOTHER'S USE.
Under Civ. Code 1902, § 2312, an action to recover money paid to another to be used in paying margins on contracts for future delivery of grain is barred in six years.

3. COUNTERCLAIM—WHEN MAINTAINABLE.
Where defendant had received money on deposit for another under an agreement to pay it out on his order, he cannot set off as a counterclaim against such obligation a debt due before he accepted the fund in trust.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-Off and Counterclaim, § 52.]

Appeal from Common Pleas Circuit Court of Fairfield County; Dantzler, Judge.

Action by V. P. Randolph & Co. against D. V. Walker. Judgment for plaintiff, and defendant appeals. Affirmed.

A. S. & W. D. Douglass, for appellant. Nelson & Nelson and Buchanan & Hanahan, for respondent.

WOODS, J. The complaint alleges plaintiff's deposit with defendant of the sum of $1,498.03 during the months of January, February, and March, 1905, defendant's agreement to hold the money as plaintiff's agent subject all times to his order, the tortious conversion of $1,076.03 by defendant to his own use, and his refusal to return to plaintiff the money so converted.

The first defense is a general denial. As

a second defense, the defendant alleges the receipt by him of several different sums of money from the plaintiff between May 23, 1905, and June 14, 1905, disbursements by him at the direction of the plaintiff, leaving a balance in his hands on June 13, 1905, of $1,421.31, and notice to the plaintiff that on that day he had "retained and applied $1,076.03 thereof to amount due defendant by plaintiff on account of certain transactions and contracts by plaintiff for him, in buying and selling for future delivery cotton, corn, wheat, stocks and shares of stock, and other commodities and produce, said contracts having been made during the months of January, February and March, 1905, said amount of $1,076.03 having been paid by plaintiff or its duly authorized agent as margins to cover any loss that might be sustained by plaintiff in the buying and selling by plaintiff for defendant, and being without any intention on the part of either to make an actual delivery in kind, but being nothing more nor less than gambling on the future prices of said cotton, corn, wheat, stocks or shares of stocks, and other commodities and produce." The defendant further alleges payment to the plaintiff of $421.49, plaintiff's failure to respond to his notice of the appropriation of the remainder, $1,076.03, now claimed, or to make any demand on him until September 2, 1905, and he alleges the plaintiff is estopped from claiming the fund, because, relying upon plaintiff's acquiescence, he had used it as his own and for his own purposes. As the case turns upon a certain question of pleading involving the precise language of the counterclaim, it is necessary to set it out in full: "(1) That plaintiff being a corporation under the laws of the state of Pennsylvania, the defendant, at various times between 8th day of January, 1905, and the 14th day of March, 1905, delivered to and deposited sundry sums of money, aggregating $1,076.03, with one R. J. McCarley, one J. R. Thompson, and one J. Boyd Stevens, who did business in the town of Winnsboro, in the county and state aforesaid, at the times of such deposits, as the Winnsboro Cotton Exchange, commonly called a bucket shop, and were the duly authorized agents of plaintiff. (2) That said deposits or payments, aggregating $1,076.03, were made for the purpose of contracts with the plaintiff to buy and sell cotton, wheat, corn, stocks or shares of stocks, or other commodities and produce for future delivery, and the same was held by the plaintiff as margins to cover the loss that might be sustained in such buying and selling by plaintiff for defendant. That said contracts were made between plaintiff and defendant without any intention on the part of either that said cotton, corn, wheat, stocks or shares of stocks, or other commodities and produce should be actually delivered in kind; said contracts being, in fact, acts of gambling on the future prices of cotton, corn, wheat, stocks or shares of stocks, and other commodities and produce. (3) That plaintiff has refused to carry out its contracts as aforesaid with defendant and refuses to pay him the said sum of $1,076.03, although plaintiff gave defendant notice that he released all profits that might arise on said contracts. Wherefore said defendant demands judgment against the plaintiff for said sum of $1,076.03, with interest thereon from the 13th day of June, 1905, and for costs."

The second defense of the answer was struck out as irrelevant and redundant because not set up within the limit of three months prescribed by section 2312 of the Civil Code of 1902, for the recovery of losses on contracts in futures, where actual delivery is not contemplated. A demurrer to the counterclaim was sustained on the ground that the complaint states a cause of action for tort and not ex contractu; and as the cause of action alleged in the counterclaim did not arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, and was not connected with the subject of the action, it was held not available as a counterclaim. The case then went to trial, and the defendant, being sworn as a witness on the plaintiff's behalf, proved deposits by the plaintiff in the form of several drafts, payable to defendant's order, and of cash turned over to him by one Morris, aggregating in all $1,572.51 received, and testified to his disbursement of part of the fund as agent for the plaintiff. All evidence as to cotton speculation was excluded, and the circuit judge directed a verdict for the plaintiff for the amount claimed. If the circuit judge was right in striking out the second defense, and sustaining the demurrer to the counterclaim, it follows he was right in excluding the evidence as to the counterclaim and second defense, and in directing a verdict.

1. We consider first the demurrer to the counterclaim. Code Civ. Proc. 1902, § 171, requires that a counterclaim must arise "out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's action or connected with the subject of the action. (2) In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action." The first subdivision may be left immediately out of view, for the cause of action set up as a counterclaim obviously does not arise out of anything alleged in the complaint, nor is it in any way connected with the subject of the plaintiff's action. As the second subdivision allows any other cause of action, arising on contract existing at the commencement of the action, to be set up as a counterclaim in an action arising on contract, the demurrer was properly sustained, unless the plaintiff stated a cause of action on contract. The definitions of tort and contract are familiar, but

there is no certain test by which the court can be guided in determining whether a particular action is ex delicto or ex contractu. Under the old practice, the pleader could prevent any doubt by the use of certain formulæ, but the Code lays down no rule. It may be well to refer to some of our own cases on the subject, though in none of them was just such a complaint as is here presented passed on. In Abrahams v. Bank, 1 S. C. 441, 7 Am. Rep. 33, plaintiff left with defendant bank, as security for a loan of $4,000 in Confederate money, $4,000 of the bank's own bills, which it was agreed should be laid aside and returned to the plaintiff upon his repayment of the Confederate money. The bills were kept in a separate package and not placed to the credit of the plaintiff on his bank book, and he never intended to deposit them. Tender by the plaintiff of Confederate money and demand for the surrender of the bank notes were refused by the bank. The court decided the action was not for the recovery of a debt, but for the conversion for specific choses in action. In Welborn v. Dixon, 70 S. C. 108, 49 S. E. 232, there were allegations in the statement of the second cause of action, which seemed to indicate the plaintiff meant violation of the trust by the defendant in selling to another a specific parcel of land conveyed to the defendant as security for a debt, yet the court treated the entire complaint as an action for breach of a contract to reconvey the land. In Bryce v. Parker, 11 S. C. 337, a counterclaim based on the allegation that the defendant had paid plaintiff $25 for an ox, which the plaintiff had warranted as fit for the purpose for which it was bought, and that the warranty had been broken, was held to state a cause of action on contract and not for a tort. In Lorick v. Bank, 76 S. C. 500, 57 S. E. 527, the plaintiff died during the pendency of an action against the bank for damages for refusing to pay her check, when there was a balance to her credit sufficient for the purpose. The court held that while there were expressions in the complaint which seemed to indicate an intention to rely on an alleged tort founded on contract rather than on a breach of the contract itself, it would be too technical not to have regard to the actual facts alleged, which constituted a breach of contract as well as a tort. Accordingly, it was adjudged the action survived as an action ex contractu. The averment of a promise, or consideration, or other element or usual incident of contract, has been held significant in giving character to the action as ex contractu. 21 Enc. P. & P. 659. The generally accepted rule is that, in doubtful cases, every intendent is in favor of regarding the action ex contractu. Id. 650; Bliss on Code Pleading, § 153, note.

In this case the complaint alleges a deposit of money with defendant, his agreement to hold it at all times as the agent of the plaintiff subject to his order, and defendant's refusal to pay over the money. It is true the complaint also alleges that "while the defendant was holding the said sum of money as agent and in trust for the plaintiff, unmindful of his duty in that regard, the said D. V. Walker tortiously converted the money to his own use and unlawfully refused, and still refuses, to return the said money." But it is to be observed the allegation is that a certain amount of money was "deposited" with defendant to be held subject to the order of the plaintiff, not that a particular package or particular bills of money were left with defendant to be kept in trust. The implication from the language is not that the identical bills were to be held by the defendant, but that the amount deposited was to be at all times in his hands subject to the order of the plaintiff. This distinguishes the case from the case of Abrahams v. Bank, supra, and other like cases, where the allegation was made of the conversion of a particular article of property, as, for example, a particular package or piece of money. Where the trust funds were not to be kept in their original form as the identical property of the principal, the action against the agent for misappropriation can be maintained only as an action ex contractu. An allegation of the tortious conversion of money which retained its identity in the hands of the agent is necessary to an action ex delicto. Larson v. Dawson, 24 R. I. 317, 53 Atl. 93, 96 Am. St. Rep. 716; Cooke v. Bryant, 103 Ga. 727, 30 S. E. 435; Shrimpton v. Culver, 109 Mich. 577, 67 N. W. 907; Davis v. Thompson (Pa.) 14 Atl. 169; Bolling v. Kirby (Ala.) 24 Am. St. Rep. 818, note; Royce v. Oakes, 20 R. I. 418, 39 Atl. 758, 39 L. R. A. 845; 28 Am. & Eng. Enc. 652. Cases like Baker v. Bank, 100 N. Y. 31, 2 N. E. 452, 53 Am. Rep. 150, and Britton v. Ferrin, 171 N. Y. 235, 63 N. E. 954, are not opposed to this view. For in those cases it was held the money received by a factor as proceeds of sale of principal's property was a specific property of the principal which he could follow wherever it could be identified.

The point is close, but on the whole we have no hesitation in holding the complaint to state a cause of action ex contractu. Even as regarding the case as doubtful, it should be held to be an action ex contractu, not ex delicto. If the theory that the complaint is ex delicto could be accepted, then the motion for nonsuit should have been granted for failure of proof. The plaintiff, so far from offering evidence that the money sent to defendant was to be held intact, affirmatively proved defendant received it as plaintiff's banker, put it to his own account, and paid it out to one Morris, whenever authorized by telegrams from the plaintiff. Part of the money was remitted to the defendant by check from plaintiff and part paid to him by Morris for plaintiff. There is nothing whatever

in the evidence to indicate an intention by plaintiff that the checks or money should be so kept as to be capable of identification. Evidently the plaintiff should not be allowed to shut off all counterclaims on the theory that his complaint makes an action ex delicto, and recover on evidence tending to support only an action ex contractu. Such a result would be not only totally illogical, but clearly unjust in depriving the plaintiff of the benefit of proper counterclaim. The fact that the plaintiff is a nonresident not subject to the jurisdiction of the courts of defendant's domicile makes the injustice more manifest. But as we have held the action to be ex contractu, and the evidence sustained the complaint viewed in that light, the motion for a nonsuit was properly refused. It does not follow, however, from holding that the action was ex contractu and subject to a proper counterclaim, that the circuit judge was in error in sustaining a demurrer to such a counterclaim as is here set up, refusing to admit evidence in support of it and directing a verdict for plaintiff.

2. The defendant's allegation is that he had deposited money as margins on contracts for pretensive future deliveries with certain persons conducting a bucket shop for plaintiff, and that plaintiff had failed to carry out the contracts and refused to repay him the margin. There is no allegation that defendant paid over the sum mentioned in the counterclaim to the plaintiff, on account of a loss sustained by reason of such contracts, and the limitation of three months provided by section 2312 of Civil Code of 1902 therefore has no application. The claim falls manifestly under the second subdivision of the section, being made against the plaintiff as a middleman who had accepted the plaintiff's money for the purpose of making such contracts. The two provisions of the statute are distinguished in Saunders v. Phelps, 53 S. C. 173, 31 S. E. 54. To an action to recover such margin there is no statutory limitation except that of six years provided by the Code of Procedure.

3. Had the plaintiff become indebted to the defendant by reason of the deposit of these margins, or on an ordinary note for borrowed money, or in any other way after receiving the trust deposit from the plaintiff, we think he would be entitled to require the plaintiff to pay at the same time that he exacted the payment, and a counterclaim setting out these facts would be good. This would be no repudiation of the trust contract, but merely requiring the plaintiff to do justice according to the changed conditions, brought about by his own act in becoming indebted to defendant. But, according to the answer, the alleged debt set up as a counterclaim was due to defendant when he received the trust fund, and he promised to disburse this fund on plaintiff's order, as his agent, in full view of the alleged debt to him. The promise to so disburse it included a promise not to set up any existing debt against it. In the absence of fraud or mistake, the defendant cannot be allowed to make a contract and avail himself of its repudiation. To sustain a counterclaim would be to sanction repudiation of a trust contract, amounting to fraud. Denying the right of counterclaim in such a case is nothing more than requiring fidelity of the agent to his trust.

The judgment of the court is that the judgment of the circuit court be affirmed.

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(78 S. C. 134)

## TUCKER v. ATLANTIC COAST LUMBER CO.

(Supreme Court of South Carolina. July 11, 1907. On Rehearing, Sept. 10, 1907.)

SPECIFIC PERFORMANCE — PERSONS ENTITLED TO ENFORCE.

The resident assignee of an alien may enforce the specific performance of a contract to convey more than 500 acres of land, though under Civ. Code 1902, § 1795, no alien can own or control within the limits of the state more than 500 acres.

Appeal from Common Pleas Circuit Court of Berkeley County; Hydrick, Judge.

Action by R. P. Tucker against the Atlantic Coast Lumber Company. Decree for plaintiff, and defendant appeals. Affirmed.

The circuit decree is:

"This is an action for the specific performance of a contract for the sale of real estate. The defense is rested mainly upon two grounds: First. That the contract was without consideration, except the mutual covenants therein contained, and that it was abandoned by Jantunen, with whom it was made, who, it is alleged, refused, soon after its execution, to comply with its terms. Second. That it is void because it is in contravention of the statute limiting the amount of land which an alien may own or control. The contract is under seal, which imports a consideration. Besides, the mutual covenants therein contained are sufficient to support it. The testimony fails to support the defense that the contract was abandoned by Jantunen. He could not have done so without the consent of the defendant, and there is no testimony that the defendant consented to his doing so.

"The second ground raises a very interesting and novel point. Jantunen was an alien, and the contract was for the conveyance of more than 500 acres of land. It has been the policy of this state, as, indeed, of all the states, to deal liberally with aliens in regard to their ownership of land. The statutes on the subject have always been liberally construed in their favor. At the common law an alien's title was good against the world until 'office found.' The state has the exclusive right to question the alien's birth, and right to the possession of land to which he had acquired title. I know of no instance in the history of judicial proceedings in this

state, where a direct proceeding was instituted on the part of the state to escheat the lands of an alien owner in possession. It was only when an alien had to appeal to the law to acquire title, or get possession, that he was denied the aid of the courts. That doctrine rests upon the principle that the law will not with one hand invest him with property and with the other divest him of it. Nil frustra agit lex. Hence the rule that an alien can acquire title to, and possession of, real property in any of the modes by which a citizen can, except by act and operation of law. While he cannot go into court and invoke the aid of the law to get title or possession, he can, if brought into court, defend them against all claimants, except the state. Jenny v. Laurens, 1 Speer, 365. The effect of the act of 1872 was to abrogate the common law, as to the ownership of property by aliens, and the effect of the act of 1896 was practically to restore the common law as to the ownership or control of more than 500 acres of land by an alien. Therefore I do not agree with plaintiff that Jantunen himself could have gone into court and enforced this contract. That being so, does his assignee occupy a better position than he did?

"While the general rule is that contracts in contravention of a public statute are void, yet there are numerous exceptions, and the courts will look to the statute itself, the objects and purposes for which it was enacted, in order to ascertain, in the language of Lord Ellenborough, 'the true sense and intention of the Legislature.' Harris v. Runnels, 12 How. (U. S.) 80, 13 L. Ed. 901. In Richards v. McDaniels, 2 Mill's Const. 22, Judge Johnson quotes Noy with approval in saying, general laws and special laws, the old law and the new law, the laws of God and the laws of man, are oftentimes all joined together for the purposes of helping a man to his rights. The policy of the law is clearly to prohibit the ownership or control of more than 500 acres of land by an alien. The contract here under consideration is executory or somewhat in the nature of an option. It does not give the alien ownership of the land, not even the equitable title, nor does it give him control of it. By its terms he has only the right, but for his alienage, to acquire the ownership and control of it, and to do so, notwithstanding his alienage by the voluntary act of the defendant. He not only had those rights, but, by the express terms of the contract, the right also to substitute another in his place by assignment, which he has done. As the contract itself does not give him the ownership or control of the land, it was not in contravention of the statute. I think therefore Jantunen had the right to make and assign the contract, and that his assignee can enforce it. The contract was made in good faith, and, if defendant had voluntarily performed it, Jantunen's title would have been good against the world, until 'office found,' and he could have made valid conveyance of it, or any part of it, and the title of his grantee would have been good. A conveyance from an alien is not a defective link in a chain of title. Groves v. Gordon, 3 Brev. 245. If he could have made a valid conveyance of the land, a fortiori he could of a contract for the purchase of the land.

"The case of Meeks v. Richbourgh, 1 Mill's Const. 412, is relied on by defendant in support of a contrary view. The conclusion in that case is sustained by the rule that an alien cannot invoke the aid of the court to acquire title or get possession of land, but the doctrine announced in the opinion that a grant to an alien is absolutely void is contrary to the great weight of authority elsewhere, and at variance with later cases in this state, and must be considered as overruled by them. The same learned judge who wrote the opinion in Meeks v. Richbourgh holds a different view in the later case of Groves v. Gordon, 3 Brev. 245. It also appears from the review of the authorities, cited by the learned judge in Meeks v. Richbourgh, by Mr. Justice Johnson, in Governeur v. Robertson, 11 Wheat. (U. S.) 332, 6 L. Ed. 488, that the citation from Blackstone was misinterpreted, or that Blackstone himself was not sustained by the authorities which he cited.

"There are other reasons why the court would be slow to hold the rights of an alien under the contract in question, or his title to more than 500 acres of land, or his conveyance thereof to another, absolutely void. Suppose an alien should purchase a tract, supposed to contain 500 acres, pay his money for it, take titles, and thereafter convey to another; would the purchaser's deed be void, if it should afterwards be ascertained that the tract actually contained 600 acres? Again, it is well known that we have amongst us many persons of foreign birth who have been naturalized, while many others, though having lived in the state for many years, have not been naturalized. Are the citizens of the state to deal with the latter class, as to real estate, or interests therein acquired by them, at their peril? It seems to me that such a rule would be too dangerous to rights acquired for value and in good faith. This contract is sought to be enforced by one who took it in good faith, and whose right to enforce it does not conflict with any law or policy of the state. The question is whether the court will withhold its aid from one who, at the time a contract is sought to be enforced, is the owner of it and capable by law of taking under it, when the contract itself is neither immoral nor illegal, nor contrary to public policy. If Jantunen himself had become naturalized after making the contract, he could have invoked the aid of the court to enforce it. In Jenny v. Laurens, Robert Jenny, who had acquired title to real estate while an alien, was al-

lowed after his naturalization to bring suit and recover it. The court says: 'The plaintiff, Robert Jenny, is now a naturalized citizen, and is under no impediment to sue.' While it is true that naturalization will not have relation back or retroactive effect to divert vested rights (as held in Vaux v. Nesbit, 1 McCord, Eq. 352, and other cases), still it may have such relation back to confirm rights acquired as an alien. Asterman v. Baldwin, 6 Wall. (U. S.) 122, 18 L. Ed. 730; Governeur v. Robertson, 11 Wheat. (U. S.) 322, 6 L. Ed. 488. These authorities sustain the view that the question is one of ability to enforce the contract at the time it is sought to be enforced by the person who seeks to enforce it.

"I do not think there is any force in the point made by the defendant that the contract was made subject to the approval of the board of directors, as it has not been shown that it was ever approved by them. The answer of the defendant admits the execution of the contract by the defendant. This would be sufficient, but there are circumstances to warrant the inference that it was approved by the directors. When the plaintiff made formal demand on the defendant that it perform the contract, the defendant refused on the sole ground that Jantunen had abandoned it.

"The plaintiff contends that the defendant is estopped from pleading the alienage of Jantunen. I do not think the doctrine of estoppel would prevent the defendant from setting up the defense that the contract was void, because in contravention of law or public policy.

"It is therefore ordered, adjudged, and decreed that the plaintiff is entitled to the specific performance by the defendant of the contract made and entered into by and between the defendant and Antii Jantunen, of date January 27, 1904, set out as an exhibit to the complaint, and that the defendant do specifically perform the same, upon the compliance of the plaintiff on his part with the terms thereof, and, further, that both parties have the right to apply at the foot of this decree for such further orders as may be necessary or proper in the premises."

From this decree, defendant appeals.

Wilcox & Wilcox, Le Grand G. Walker, and Henry E. Davis, for appellant. B. A. Hagood, W. A. Holman, and Mitchell & Smith, for respondent.

POPE, C. J. The facts of this case are set out in the decree of his honor, the circuit judge, which is affirmed for the reasons therein stated. We, however, desire to correct an error (which does not affect the result) wherein the circuit judge states that the case of Groves v. Gordon, 3 Brev. 245, is later than the case of Meeks v. Richbourgh, 1 Mill's Const. 412. The decision in the former was rendered in 1812, while the latter was not filed till 1817.

WOODS, J. I concur. Whatever possible doubt the courts of this state may have left as to the validity of titles to land or contracts concerning land derived by citizens from aliens before office found is settled by the statute law of the state. The Constitution (article 3, § 35) provides: "It shall be the duty of the General Assembly to enact laws limiting the number of acres of land which any alien or corporation controlled by aliens may own in this state." In carrying out this mandate of the Constitution, the General Assembly passed the following statute as section 1795 of Civil Code of 1902: "No alien or corporation controlled by aliens, either in his or its own right, or as trustees, cestui que trust or agent, shall own or control, within the limits of this state, more than five hundred acres of land: Provided, this section shall not apply to land purchased under proceedings either by action or power of sale, to foreclose any mortgage hereafter acquired by any alien or corporation controlled by aliens, purchasing the same, but in such case such alien or corporation controlled by aliens, shall not be entitled to hold such excess of land more than five years, without sale of same, unless the Comptroller General shall certify that a sale during that time would be detrimental to the interest of such alien or corporation controlled by aliens, in which case the said alien or corporation controlled by aliens may hold the land for five years longer upon the same condition. Nothing in this section shall apply to lands already owned or controlled by the persons or corporations referred to in this section nor to lands already mortgaged to such persons or corporations." Before the adoption of the constitutional provision of 1895, and before the enactment of the statute just quoted, the law of the state on this subject was embodied in the statute enacted in 1872, which provided: "That real and personal property, of every description, may be taken, acquired, held and disposed of by an alien, in the same manner, and in all respects, as by a natural born citizen; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner, in all respects as through, from, or in succession to a natural born citizen." In the Code of 1902, containing section 1795, above quoted, the act of 1872 was re-enacted as section 2360, in the following words, the only change from the original statute being the insertion of the words we have placed in brackets: "Real and personal property of every description may be taken, acquired, held, and disposed of by an alien, [subject to the provisions of section 1795] in the same manner, in all respects, as by a natural born citizen; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner, in all respects, as through, from or in succession to

a natural born citizen." Unless in conflict with the Constitution, both sections 1795 and 2360 must be given full effect.

The Constitution and section 1795 of Civil Code of 1902, taken together, cannot be held to mean anything more than that the state may take from an alien any land held by him in excess of 500 acres, and that the courts will not aid an alien to recover more than 500 acres. The provision of section 2360 that title to real and personal property of any description may be derived from or though an alien therefore is not inconsistent with the Constitution, or with section 1795, and must be given full effect. For this reason, in addition to those stated in the circuit decree, the judgment should be affirmed.

On Rehearing.

PER CURIAM. After a careful consideration of the petition herein, the court is satisfied that no material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered that the petition for rehearing be dismissed, and that the order heretofore granted staying the remittitur be revoked.

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(78 S. C. 253)

## STATE v. COOK et al.

(Supreme Court of South Carolina. May 27, 1906. On Rehearing, Sept. 28, 1907.)

1. CRIMINAL LAW—TRIAL—OBJECTIONS.
An objection to a criminal trial on a legal holiday, based on a statement of the judge made the day before that he knew of no law preventing the trial of cases on that day, on a question by defendant's counsel as to whether court would be held on that day, is insufficient, as it should have been made when the cause was called for trial.

2. HOMICIDE—KILLING IN AID OF RELATIVE.
Where a person is in danger of death or serious bodily harm from one in combat with him, and a near relative undertakes to assist him and slays the combatant in protecting his relative, he can only set up such defense as his protected relative could have set up had he slain the combatant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 177.]

Gary, A. J., dissenting.

Appeal from General Sessions Circuit Court of Hampton County.

Vincent Cook and others were convicted of murder, and appeal. Affirmed.

W. S. Tillinghast, for appellants. James E. Davis, Sol., for the State.

WOODS, J. The defendants, Vincent Cook, Bose Cook, Daisy Cook, and Henry Cook, were tried at February, 1906, term of the court of general sessions for Hampton county, under an indictment charging them with the murder of Hampton Smith. Vincent Cook, Bose Cook, and Daisy Cook were convicted of manslaughter, and Vincent Cook and Bose Cook were convicted also under the second count of the indictment, charging them with carrying concealed weapons. The following statement appears in the record: "On the trial of the cause the state offered testimony tending to show that at the time of the alleged homicide there was a carnival in the town of Hampton, and that deceased was one of a number of special policemen, duly appointed by the town council to preserve order, and that while attempting to arrest Daisy Cook for an alleged breach of the ordinances of the said town of Hampton he was set upon by the brothers of the said Daisy Cook and shot to death with pistols. The defendants offered testimony tending to prove that the defendants Bose Cook and Vincent Cook came up suddenly and, finding their brother assaulted, interfered in his defense, and, under an impending necessity to save their brother from death or serious bodily harm, they took the life of the deceased. They further offered testimony tending to prove that they were all without fault in bringing on the difficulty. The state replied to the defense and offered testimony tending to show that Daisy Cook was cutting up the tents belonging to the parties who owned the show or carnival, and, furthermore, that his codefendants had, on the afternoon previous to the killing in the evening, made threats against the life of the deceased. The issue was submitted to the jury on the charge of the court."

The first exception charges the circuit judge committed error in ordering the defendant to go to trial on the 22d day of February, a legal holiday. The facts bearing on this point are thus stated in the record: "On the 21st day of the said month, Mr. Tillinghast, one of the attorneys for the defendants, inquired of the judge whether he would hold court on the 22d of February, as he thought he could not do so; that being a holiday. The judge ruled that he knew of no law to prevent the court being held on the succeeding day. The case was then called on the 22d of February, and, no further objection being raised, the case proceeded to trial with the result above stated." The point is purely technical, and defendants suffered no detriment. It will be observed that Mr. Tillinghast does not appear to have had reference to this or any other case, and the response of the circuit judge cannot be regarded as an adjudication made in this cause. To make the objection available on this appeal, it should have been distinctly made against proceeding with this cause when it was called for trial. Not having been made, it must be considered objection to the trial on the 22d day of February was waived. Mitchell v. Bates, 57 S. C. 52, 35 S. E. 420; 21 Cyc. 444.

2. The second ground of appeal is as follows: "That his honor, the presiding judge, erred in charging the jury, in reference to the right to kill in defense of another, as follows: 'But if your brother or one near and dear to you provokes a difficulty, or puts him-

self in the wrong and bring it on, the law does not allow you to go there, take his place, and kill that man, and say you are guilty neither of murder nor manslaughter. * * * The law does not give the person who is near and dear to you the right to provoke a difficulty, and then let you come in and kill some one, when he has brought it on himself, and get out of it by your saying he was near and dear to you, and you did the killing on that account. But if he was without fault in bringing on the difficulty, and the law would justify him in defending himself, you have a right to go in and defend him. But if he brings on the difficulty, and you take part, you do it at your own risk, and if he took life under similar circumstances, and would have been guilty of murder or manslaughter, and you go in, take his place, and take life under those circumstances, then you are guilty of murder or manslaughter.' The error being that the said charge held one striking in defense of a brother bound and affected by a fault on the part of the brother defended, in bringing on the difficulty, although he may have acted without knowledge of such fault or may have had no opportunity to ascertain who was at fault in bringing on the difficulty, before being compelled by the pressing necessity to act in defense of his brother, and he may be without fault himself; whereas, it is respectfully submitted, that in order for one to be affected by the fault of another he must at least have some knowledge or opportunity to know it."

This exception raises the important question whether one who undertakes to assist a near relative, who is in danger of death or great bodily harm at the hands of an antagonist, acts at his peril if the person assisted was actually in fault in provoking the difficulty. There is some authority for the view that the assistant is guilty who takes life in aiding a relative in apparent danger of death or great bodily harm, if he knew his relative to be the aggressor, or as a reasonable man should have known it, but not otherwise. Chambers v. State, 46 Tex. Cr. R. 61, 79 S. W. 572; State v. Harper, 149 Mo. 514, 51 S. W. 89; Little v. State, 87 Miss. 512, 40 South. 165. There are a number of other cases decided by the Supreme Court of Texas to the same effect, but in that state, as in Missouri, the law as to homicide has been greatly modified by statute. Even if it be assumed, however, the criminal codes of those states have not affected the consideration to be given these decisions by courts of other states, they are opposed to the great weight of authority from the earliest times to the present. In Hale's Pleas of the Crown (volume 1, p. 484), the rule is thus stated: "The like law had been for a master killing in the necessary defense of his servant, the husband in defense of the wife, the wife of the husband, the child of the parent, or the parent of the child, for the act of the assistant shall have the same construction in such cases as the act of the party assisted should have had, if it had been done by himself, for they are in mutual relationship the one to the other." See, also, 1 Bishop on Criminal Law, § 877, and 21 Cyc. 826 et seq. The doctrine is thus comprehensively stated in Wharton on Homicide (3d Ed.) § 332: "The doctrine of freedom from fault in bringing on a difficulty as a condition precedent to a plea of self-defense applies with equal force to a case in which one person interferes in a difficulty between two others in behalf of, or to protect one of them; and generally speaking a person who does this will not be allowed the benefit of the plea of self-defense, unless such plea would have been available to the person whose part he took in case he himself had done the killing, since the person interfering is affected by the principle that the party bringing on the difficulty cannot take advantage of his own wrong. If the person sought to be protected provoked or brought on the difficulty, he must have clearly manifested a desire and intention to retire from the conflict; and even then the person interfering would not be justifiable if he struck the fatal blow in pursuance of a previous design to assist his friend in the event of a personal difficulty. And where one person interferes in behalf of another who was the aggressor, and there is opportunity to retreat after the interference, and advantage is not taken of it, the person interfering can claim no greater right than the other, and neither of them can invoke the doctrine of self-defense. Thus, if a son fight in defense of his father, his act in doing so will receive the same construction as that of the father, and if the latter was the aggressor in bringing on the difficulty, and could not plead self-defense, the same rule applies to the son. And the son cannot rely on his own freedom from fault in bringing on the difficulty, as a defense, where he knew the father had provoked the attack. Both must have been without fault in bringing it on. Nor is a father justified in killing the adversary of his son, where the son had provoked and brought on the conflict in which he was placed in imminent danger. And the plea of self-defense cannot be interposed by a father who kills an officer rightfully seeking to arrest his son, to prevent such arrest. Nor can one strike to relieve a brother from peril unless the brother was free from fault in bringing on the difficulty which placed him in peril. And if a person in whose defense a brother engaged was in fault, and had not retreated or attempted to retreat, the interference is not justifiable or excusable." The following cases support the same view: Wood v. State (Ala.) 29 South. 557, 86 Am. St. Rep. 71, and note; Utterback v. Commonwealth (Ky.) 49 S. W. 479, 88 Am. St. Rep. 329, and note; People v. Travis, 56 Cal. 251; Louisiana v. Giroux, 26 La. Ann. 582; Sharp v. State, 19 Ohio, 389; State v. Johnson, 75 N. C. 174, 74 Am. St. Rep. 736,

note. There are some expressions in Wharton on Homicide and other text-books which seem to be at variance with the text above quoted, but they will be found to be merely a statement of the rule as laid down in the Texas and Missouri cases to which we have referred.

The precise question has never been decided in this state, so far as we can discover, but the same principle was involved in State v. Anderson, 1 Hill, 340. There the right to arrest a felon was under discussion, and the court held, in order for the party who killed in the effort to arrest one charged with the felony of murder to excuse himself, he must show that a voluntary homicide, presumed by the law to be felonious, had been committed, and the party charged had perpetrated it. The court uses this language: "The homicide actually committed constitutes the authority to arrest; it is a felony until matter in excuse is shown; it authorizes the grand jury to find a true bill, and thus put the prisoner on his trial for life and death. Like the finding of stolen goods in the possession of one, he is legally regarded as the thief until he accounts for his possession; so he who of his own will, and not by command of law, commits a homicide, is legally guilty of murder until he shows that it was excusable in self-defense, or manslaughter by reason of sudden heat and passion from reasonable provocation given. The party arresting is supposed to act with knowledge of the law. He is bound therefore to show that the prisoner has committed the act from which the law raises the presumption of guilt. This is what I understand by being bound to show the prisoner's guilt in order to justify his arrest by a private person. A mere suspicion that he has done the act will not justify the arrest. The proof must show that prima facie a legal felony was committed, and that the prisoner was the perpetrator. The prisoner's excuse, although it might shield him from condemnation, does not enter into the question." It was here distinctly held that reasonable and honest belief that a felony had been committed would be no justification. In commenting on the case of State v. Anderson, supra, this court said, in State v. Griffin, 74 S. C. 414, 54 S. E. 604: "It will thus be seen that it was incumbent on the person making the arrest to show the actual fact from which the law raised the presumption that a felony had been committed. He was not permitted to act merely upon information, although it might strongly tend to establish the fact from which the law inferred a felony." The law on the subject of arrest has been changed in this respect by section 1 of the Criminal Code of 1902, as will be seen by reference to the case last cited, but the statute has no application to one who kills in assisting another. The case of State v. Myers (MSS. opinion), which is supposed to support the appellant's view, seems to be not at all clear and we discern in it no adjudication of the point here under discussion.

We have endeavored to show the law as laid down by the circuit judge is firmly established. It is true the rule may in exceptional cases work hardship; but the opposite rule would allow the innocent man who had been forced to strike in self-defense to be killed with impunity, merely because appearances happened to be against him at the moment a partisan of his antagonist reached the scene of conflict. The duty seems urgent to enforce rather than relax the rule which admits of no excuse for taking human life except necessity.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, A. J. (dissenting). The facts are fully stated in the opinion of Mr. Justice WOODS. I concur in so much of said opinion as overrules the first exception, but dissent upon the question presented by the other exception. It seems to me that Mr. Justice WOODS has not given full force to that principle of the law which not only justifies a third party in taking human life to prevent a felony from being committed, but likewise imposes upon him the duty of acting under such circumstances. The right of a third party to take life in order to prevent a felony is thus stated in section 532 of Wharton on Homicide: "Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force, and even his servant attendant on him, or any other person present, may interpose for preventing mischief; and, if death ensues, the party so interposing will be justified. If A., B., and C. are in company together and walking in a field, and C. assaults B., who flies, and C. pursues him, and is in danger to kill him, unless there be help, and A. thereupon kills C. in defense of the life of B., it seems that in this case there is such an inevitable danger of the life of B. that the killing of C. by A. is in the nature of se defendo. But then it must appear plainly by the circumstances of the case—as the manner of the assault, the weapon with which C. made the assault—that the imminent danger of the life of B. is bona fide apparent to A." In section 533, it is said: "Bona fide belief by the defendant that a felony is in process of commission, which can only be averted by the death of the supposed felon, makes the killing excusable homicide, though, if such belief be negligently adopted by the defendant, then the killing is manslaughter. * * * If A. honestly and without negligence on his part believes that B. is in the process of committing a felony which can only be arrested by B.'s death, A. is excused in killing B." See, also, sections 537 and 539. "It is the duty of every man, whether an officer of justice or private citizen, who sees a felony attempted by violence, to prevent it if possible, and in the perform-

ance of his duty such person has the legal right to use all means which appear to him as a reasonable man to be necessary to make the resistance and interference effectual, and, if the felony cannot be prevented by other means, he is justified in taking life." 21 Enc. of Law, 207. "A homicide is justifiable when committed by necessity and in good faith in order to prevent a felony attempted by force or surprise, such as murder. * * * To justify the killing, however, it must be done in good faith and under an honest and reasonable belief that such felony is about to be committed, and that the killing is necessary in order to prevent its accomplishment, and must be done while the person is in the act of committing the offense, or after some act done by him showing an evident intent to commit such an offense." 21 Cyc. 798, 799.

These authorities show that, if it appears that a person is about to commit a felony upon another, a third party has the right to take the life of the one about to commit the felony, if he believes it is necessary, in order to prevent the felony, and a man of ordinary firmness and intelligence would have reached the same conclusion. In the case of State v. McGreer, 18 S. C. 464, the doctrine is announced that a person may set up the plea of self-defense if he actually believes he is in imminent danger of losing his life or of suffering serious bodily harm, and under all the circumstances as they existed at the time the violence was inflicted the jury thinks he had just ground for forming such belief; yet, in the leading opinion, a rule more severe is applied when a person takes the life of another in order to prevent a felony upon a third party, although the law imposes upon him the duty of preventing such felony. It seems to me that there is even stronger reason for permitting the party taking the life of another to act upon a bona fide and well founded belief in the latter than in the former case. There is no doubt a well settled and clearly defined principle that if a person becomes a participant in a difficulty between others to the extent of espousing the cause of one of them, his acts make him guilty, if the person whom he aids would have been guilty, in case the latter had committed them. This rests upon the ground that the parties thereby become confederates.

The distinction for which we contend is fully sustained by the case of State v. Myers (not reported). The facts in that case were as follows: Henry Myers and his son, Robert Myers, a boy under 14 years of age, were indicted for murder. It became material, upon the trial, to connect the father and son as confederates in the transaction out of which the homicide arose. Evidence had been introduced tending to show that, in the altercation that preceded the killing, Henry Myers first resorted to violence, though without the use of a deadly weapon; that the deceased first resorted to a deadly weapon (a pistol); and that the fatal blow was struck by Robert Myers, the son, after his father had been overpowered by the deceased, using for that purpose a knife. The circuit judge charged: "That if the knife in the hands of Henry Myers would have made him guilty of murder by striking Truitt, he is still guilty of murder if Truitt was at that time struck with the knife in the hands of Robert Myers, and that Robert Myers would also be guilty of murder; also, that if Henry Myers would have been guilty of manslaughter in striking Truitt with the knife, he is still guilty if his son struck the blow with the knife, and his son would also be guilty of manslaughter; that if Henry Myers, in the prosecution of the fuss with Truitt, would only have been guilty of a misdemeanor, still Robert Myers would be guilty of manslaughter." In commenting on this charge, the court said: "This charge would appear to have assumed the confederacy between Henry and Robert Myers as a fact established. If that is the proper construction of the charge, then it was clearly erroneous in assuming to determine a question of fact in issue, and material to that issue. * * * If the statement of the charge is full on the point to which it relates, which must be assumed, then it is clear that the jury may have been misled. * * * It is contended that this construction of the charge is precluded by the fact that in another place the circuit judge charged 'that if the minds of Henry Myers and Robert Myers united for a single moment before the killing to take the life of Truitt, they are equally guilty.' * * * Taking the two fragments of the charge together, the jury may have understood that evidence tending to show that during the greater part of the time consumed by the controversy no community of motive or concert of action existed would be ineffectual if a single moment of time was unaccounted for, in which that motive might have existed. * * * We are compelled to conclude that it was erroneous in respect of matters material to the defense of the accused. * * * The charge as to the duration of the motive previous to the act of killing would be unobjectionable in itself if the single moment during which it existed immediately preceded the act of killing as it regarded the guilt of Robert. If it did not exist at that moment, its previous existence, whether near or remote in point of time, would be altogether immaterial. It is not clear that a momentary motive could connect the origin of the difficulty with its consequences, but that question is unimportant."

It does not appear from the foregoing facts set out in the case under consideration that Daisy Cook was attempting to injure the deceased at the time the fatal shot was fired. The testimony as to the motive that prompted Bose and Vincent Cook to take the life of Hampton Smith was conflicting. While there was testimony tending to show that the de-

ceased was killed in pursuance of threats made on the previous afternoon, there was testimony also to the effect that Bose and Vincent Cook killed the deceased solely for the purpose of saving the life of their brother. It depended upon the view which the jury might take as to these facts whether the guilt of one of the defendants was to determine that of the others. It seems to us that the distinction is overlooked, in the leading opinion, between the case where there is merely an intention to prevent a felony, and that in which a third party espouses the cause of one of the participants. In the latter case, the parties are held equally guilty for the reason that they have by their acts become confederates; while, in the former, a third party is justified or excused, even in taking human life, if the sole motive by which he was actuated was to prevent the perpetration of a felony, and the jury thinks the facts as they appeared to him were such as might reasonably have been expected to induce such belief in a man of ordinary firmness and intelligence.

On Rehearing.

PER CURIAM. Upon careful consideration, we find no question of law or fact was overlooked in the opinion of the court.

The petition for a rehearing is therefore dismissed, and the order staying the remittitur is revoked.

(145 N. C. 581)

## STATE v. HOOKER.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. CRIMINAL LAW—APPEAL—HARMLESS ERROR—EVIDENCE—SURPLUSAGE.

Under Revisal 1905, § 3333, making it an indictable offense to break and enter "a storehouse * * * where any merchandise * * * shall be," the allegations of an indictment in a prosecution under such statute containing, in addition, the words "with intent to commit larceny," is surplusage, and evidence offered of intent to steal is irrelevant and harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137-3143.]

2. SAME—FORMER JEOPARDY—IDENTITY OF OFFENSES.

The acquittal of an accused on the charge of larceny of certain articles is not an estoppel of the state to prove, in a prosecution for breaking and entering with intent to steal the same articles, that accused took such articles.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 386-409.]

3. SAME.

An aquittal on prosecution for larceny will not bar a subsequent prosecution for breaking and entering with intent to commit larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 386, 387.]

4. SAME — ARGUMENT OF COUNSEL — FAILURE OF ACCUSED TO TESTIFY—ACTION OF COURT.

In a criminal prosecution, the comment of counsel that "none of the evidence testified to by the state witnesses had been contradicted, and no one has said that it was not true," is not a comment on failure of accused to testify, especially where the jury were instructed to disregard such comment as bearing on his failure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1672, 1693.]

Appeal from Superior Court, Moore County; Webb, Judge.

Ira Hooker was convicted of breaking and entering a store with intent to steal, and appeals. Affirmed.

R. L. Burns, for appellant. Assistant Attorney General Clement, for the State.

CLARK, C. J. The defendant was acquitted of a charge of stealing certain articles. He was later tried and convicted under Revisal 1905, § 3333, of breaking and entering a store where those articles were kept with intent to steal the same. The defendant's first three exceptions are to evidence as to those articles being in the store, and to any evidence tending to show that the defendant took them; this being offered, not to show the larceny, but to show that the breaking and entering the storehouse, which was proven, was with intent to commit larceny.

Revisal 1905, § 3333, makes it indictable to "break and enter a storehouse, shop, &c., where any merchandise, chattel, etc., or other personal property shall be." The addition in the indictment of the words "with intent to commit larceny" was surplusage; hence unnecessary to be proven, and any proof offered of intent to steal was merely irrelevant and harmless. But, if it were otherwise, the exceptions could not be sustained. The charge of larceny of the articles of which the defendant had been acquitted, and that of "breaking and entering with intent to steal," are distinct offenses; but it was competent, in order to show the intent to steal, to prove that the defendant took the articles. Ruffin, C. J., in State v. Jesse, 20 N. C. 108, citing Hale, P. C., 560; Arch. Cr. Pl. 260. The previous conviction protects him from being tried again for the same offense, but it is not an estoppel on the state to show the same facts, if, in connection with other facts, they are part of the proof of another and distinct offense. This has been often held. State v. Jesse, 20 N. C. 98; State v. Birmingham, 44 N. C. 120; State v. Revels, 44 N. C. 200; State v. Nash, 86 N. C. 650, 41 Am. Rep. 472. The evidence in the trial for larceny would not have supported a verdict on this charge of breaking and entering; and, though some of the facts in that case must be used in this case, they are different offenses. In State v. Nash, supra, Ruffin, J., says: "To support the plea of former acquittal, it is not sufficient that the two prosecutions should grow out of the same transaction, but they must be for the same offense—the same both in fact and in law." In State v. Lytle, 138 N. C. 740, 51 S. E. 66, the court showed that it was possible that selling the same glass of liquor in an un-

usual combination of circumstances might be put in evidence as one of the essential facts in proving five separate and distinct offenses. (1) It might be put in proof on a trial for a violation of the federal statute in selling without United States license. (2) It might also be proven in a trial for a sale without payment of the state tax and state license. (3) And for selling without payment of town tax and license. (4) For selling on Sunday. (5) For selling to a minor. The court there says: "Though there is a single act, it may thus be a violation of five statutes, and when in such case, as Burwell, J., says in State v. Stevens, 114 N. C. 877, 19 S. E. 862, 'each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution under the other.'" The fact of the sale of the glass of liquor must be proven in each of these cases. While failure to prove that the sale was on Sunday would acquit on one indictment, or that the sale was to a minor would acquit on another, none the less the defendant could be convicted on the other indictments if the sale was made without a United States license, or without paying state tax and getting a county license, or without paying the town tax and getting the town license, where required. This is an extreme case, and not likely ever to occur, but it illustrates the point. Burwell, J., in State v. Stevens, 114 N. C. 878, 19 S. E. 861, just quoted, cites Arrington v. Commonwealth, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242, Ruble v. State, 51 Ark. 170, 10 S. W. 262, Black, Intox. Liquor, § 555, and has himself been cited and followed State v. Reid, 115 N. C. 741, 20 S. E. 468; State v. Robinson, 116 N. C. 1048, 21 S. E. 701 (which was the case of conviction of an assault with a deadly weapon and a subsequent indictment for carrying the weapon concealed on the same occasion, the conviction for the first offense being held not a bar to a conviction for the second); State v. Downs, 116 N. C. 1067, 21 S. E. 689; State v. Lawson, 123 N. C. 742, 31 S. E. 667, 68 Am. St. Rep. 844; State v. Smith, 126 N. C. 1059, 35 S. E. 615; State v. Lytle, 138 N. C. 740, 51 S. E. 66. The principle stated in all the authorities is: "Though the same act may be necessary to be shown in the trial of each indictment, if each offense requires proof of an additional fact which the other does not, an acquittal or conviction for one offense is not a bar to a trial for the other." One cannot be put twice in jeopardy for the same offense. When some indispensable element in one charge is not required to be shown in the other, they are not the same offense. Prosecution for larceny will not bar a subsequent prosecution for breaking and entering with intent to commit larceny; the larceny being necessarily distinct from the breaking and entering. State v. Ridley, 48 Iowa, 370; Fisher v. State, 46 Ala. 717; State v. Ford, 30 La. Ann. (part 1) 311; People v. Curtis, 76 Cal. 57, 17 Pac. 941; Smith v. State, 22 Tex. App. 350, 3 S. W. 238; Copenhaven v. State, 15 Ga. 264.

The last exception is to the solicitor's comment that "none of the evidence as testified to by the state witnesses had been contradicted, and no one had said that it was not true." This could not be taken as a criticism upon the failure of the defendant to put himself upon the stand. The court refused to stop the solicitor, but, out of abundant caution, when the judge charged the jury, he told them that the fact that the defendant did not go upon the stand could not be considered by the jury to his prejudice, and that, if they had understood the solicitor as meaning to comment on that fact, they should disregard it, and directed them not to consider it in making up their verdict.

No error.

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(145 N. C. 408)

## STATE v. HARRISON.

(Supreme Court of North Carolina. Sept. 17, 1907.)

1. CRIMINAL LAW—APPEAL—OBJECTION AND EXCEPTION.

Allowing the state, on defendant's moving to remove the case to another county for trial, to select any county for trial, other than one objected to by defendant when the duty of making the selection rests on the court, cannot be complained of by defendant; he not having objected and taken exception at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2630.]

2. WITNESSES—USING MAPS TO EXPLAIN TESTIMONY.

A witness may be allowed to use a map to explain his testimony; the map not being admitted in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 866.]

3. CRIMINAL LAW — EVIDENCE — CONDUCT OF ACCUSED.

Evidence that defendant, who was a neighbor of the parents of the boy alleged to have been kidnapped by him, took no part in the general search instituted by the neighborhood, in which hundreds took part, is admissible; the state relying on circumstantial evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 778.]

4. SAME.

On a trial for kidnapping, the state relying on circumstances to prove that the boy was carried away, and there being evidence that the woods for miles around had been scoured in vain by hundreds of searchers, the state may, as tending to prove that he could not have been lost in the sound, not far away, introduce evidence that many people frequent the sound, that it is a harbor for boats, and that there are usually plenty of fishermen and gunners on the sound, and that the fishermen usually fish near the wharf.

5. SAME—EVIDENCE EXPLANATORY OF MATTERS IN EVIDENCE.

Testimony introduced by the state, on a prosecution for kidnapping a boy, of a conversation between defendant and the boy's father, consisting chiefly of declarations of defendant, in which defendant introduced the subject of an article in a newspaper suspecting defendant of taking the boy, and asked the father to

write to the paper and criticise the article as untrue, may not be met by evidence that the next day the paper retracted the article.

6. SAME—ARGUMENT OF COUNSEL—INSTRUCTION AS TO DUTY OF JURY.

Complaint may not be made of the fact that the state's counsel in argument commented on the fact that trial of the case had been removed from the county where the indictment was found, and that defendant did not testify; the court having promptly interrupted counsel, and stated that it was not proper to comment on these subjects, and that the jury could not consider the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1693.]

7. SAME—APPEAL—OBJECTIONS AND EXCEPTIONS.

Complaint may not be made of remarks of the state's counsel in argument; objections and exceptions thereto being noted for the first time in the case on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2645.]

8. SAME—TRIAL—CONDUCT OF AUDIENCE—INSTRUCTIONS AS TO DUTY OF JURY.

Complaint may not be made of the fact that, on a sharp retort being made by the state's counsel when defendant's counsel interrupted his argument to correct a statement, a large part of the crowd in the courtroom applauded; the court having in strong terms rebuked the audience, and imprisoned one man for the disturbance and in the charge stated to the jury that they would be unworthy to sit in the jury box if they permitted the applause or any sentiment of the audience to sway them in the least from their duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1460.]

9. SAME—QUESTIONS FOR JURY.

The evidence in a criminal prosecution having raised much more than a mere suspicion or conjecture of defendant's guilt, the case was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1713.]

10. KIDNAPPING—ELEMENTS OF OFFENSE.

Transportation to another state of the person taken is not an essential part of the offense of kidnapping.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Kidnapping, § 1.]

11. INDICTMENT AND INFORMATION — ACTS CONSTITUTING OFFENSE.

The indictment for kidnapping need not set out the circumstances attending the commission of the offense; but it is enough that it pursue the language of the statute creating the offense and prescribing its essential elements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 267.]

Appeal from Superior Court, Pasquotank County; W. R. Allen, Judge.

Joshua Harrison was convicted of kidnapping Kenneth Beasley, a boy eight years old, and appeals. Affirmed.

Aycock & Daniels, Aydlett & Ehringhaus, and I. M. Meekins, for appellant. Assistant Attorney General Clement, H. S. Ward, and W. M. Bond, for the State.

BROWN, J. The indictment was returned in Currituck county, where the offense is charged to have been committed. The court granted the defendant's motion to remove the case for trial to another county. The counsel for defendant made no objection to any county except Camden. The court then stated that counsel for the state could name any county in the district except Camden. Pasquotank county was then named by counsel for the state and adopted by the court. No objection was made by counsel for defendant, and no exception taken at the time. As the defendant took no exception, he acquiesced in the action of the court, and cannot now be heard to complain. Had the defendant objected at the time, his honor doubtless would have corrected the error and selected the county himself. The practice of allowing either party to select the county when a cause is removed for trial is not to be commended, and, if excepted to at the time, might possibly be regarded as reversible error, necessitating a new trial. The law imposes upon the court the duty of selecting the county, and this duty cannot be delegated to others.

There are eight exceptions in the record to the rulings of the court upon evidence offered, all of which we have examined with that care which the importance of this case demands. We find no error pointed out by the exceptions of such a character as would justify us in awarding a new trial, and all of the exceptions need not be commented upon in this opinion.

The witness Beasley was permitted to take up a map and show the location of his residence. The court permitted the witness to use the map to explain his evidence. The defendant's exception thereto cannot be sustained. The map was not admitted in evidence; but it was competent for the purpose of enabling the witness to explain his testimony and enable the jury to understand it. Diagrams, plats, and the like are of frequent use for this purpose in the trial of causes, and for such purpose the use of the map was admissible. Dobson v. Whisenhant, 101 N. C. 645, 8 S. E. 126; Riddle v. Germantown, 117 N. C. 387, 23 S. E. 332; State v. Whiteacre, 98 N. C. 753, 3 S. E. 488; State v. Wilcox, 132 N. C. 1135, 44 S. E. 625.

It was in evidence that defendant was a neighbor of the boy's parents, and defendant excepts because a witness was permitted to state that defendant took no part in the general search instituted by the neighborhood, in which several hundred persons participated. We see no objection to this, and his honor's ruling is supported by State v. Wilcox, 132 N. C. 1128, 44 S. E. 625. It is only a very slight circumstance, it is true; but facts, which are but slight evidence, standing alone, should be admitted when the state relies upon circumstantial evidence, if they, with the other facts proved, bear upon the offense charged. State v. Rhodes, 111 N. C. 647, 15 S. E. 1038.

Exceptions 4, 5, 6, and 7 relate to the introduction of evidence tending to prove that the boy could not have been lost in the sound, not far from his residence; that "many people frequent the sound"; that "it is a harbor for boats"; that "there are usually plenty

of fishermen and gunners on the sound, and fishermen usually fish near the wharf." The state was endeavoring to prove by circumstances that the boy had been carried away. To that end evidence was offered that the woods for miles around had been scoured in vain by hundreds of searchers. The state then undertook to demonstrate the great improbability that the boy was lost in the nearby water. We see no objection to this proof. Its value was for the jury. It was a circumstance, slight though it may be, tending, with other evidence, to establish the contention that the boy had not been lost in the woods or drowned along the shore of the sound. It was incumbent upon the state to establish the fact that the boy had been actually carried away, as well as to prove that the defendant did it. In this connection the language of Mr. Justice Connor in State v. Wilcox, 132 N. C. 1143, 44 S. E. 633, is very pertinent; "In a criminal case, where all the circumstances of time, place, motive, means, opportunity, and conduct concur in pointing out the accused as the perpetrator of an act of violence, the force of such circumstantial evidence is materially strengthened by the total absence of any trace or vestige of any other agent."

Upon the examination of S. M. Beasley, a state's witness, and the father of Kenneth Beasley, the following conversation with defendant was received in evidence on behalf of the state without objection: "Harrison asked me if I had seen the article in the News and Observer, and what I thought of it. I said: 'I don't know what to think of it.' He said: 'Don't you think it is a batch of lies?' I said: 'I don't know whether it is or not.' Then he asked me if I would not write an article to the News and Observer and criticise this article referred to, as untrue. I told him I was very particular as to what I said, especially what I wrote for the public, as I wanted to get my boy back if possible. He said: 'It is perfectly absurd to entertain the kidnapping idea.' I said: 'It does not seem to me absurd to entertain any idea, in view of the fact that we have had so diligent a search for two weeks and have failed to find any trace of him whatever.' He said: 'If your son was kidnapped, some of your neighbors did it.' I said: 'I don't know who did it, but I would like to get him back if possible, and I would not write anything to the News and Observer.' Then he drove on. I presume he was referring to the article in the News and Observer which suspected him as being the party who took the child. Such an article was published some time, I think, during the week before this conversation. I did not go back to Raleigh. I did not publish the article, and do not know who did." Upon cross-examination by defendant's counsel the witness was handed a newspaper containing an article headed "Kidnapped," and requested to say if it was the article referred to. Witness answered that it was; and defendant's counsel then asked, "Did the paper next day contradict it?" The state objected to the last question, and it was excluded. We see no error in this ruling. The evidence in chief to which this was intended as a response was not only not objected to by defendant, but consisted almost entirely of the declarations of the defendant in a conversation with Beasley. The subject of the newspaper article was introduced during that conversation by the defendant himself, and his statements are competent evidence against him. The state did not offer the declarations of the News and Observer, but the declarations of the defendant. These were competent evidence, and it was plainly incompetent to undertake to reply to them by the subsequent declarations of the newspaper. Whatever value the general public may or may not set upon the statements of the News and Observer, we know of no law as yet which constitutes them evidence of a fact on the trial of an indictment in a court of justice.

The defendant took several exceptions to the conduct of the argument upon the part of counsel for the state. During the argument the solicitor asserted that the defendant was a bad man, as shown by the evidence, and said the indictment was found in Currituck county and he was being tried in Pasquotank. The court, without objection by defendant, stopped him, and stated that it was not proper to comment on the removal of the cause, and that the jury could not consider it. The solicitor made no further reference to the removal. In view of the very prompt action of the court in correcting the error of the solicitor, we see no ground for complaint so far as the court is concerned. The same can be said to the exception to comments of counsel that defendant failed to testify. The court corrected this error of counsel in a very effective and impressive manner. We undertake to correct the errors of the judge, and not those committed by attorneys. Their errors are to be corrected by the trial judge, and when he fails in his duty it becomes a ground of exception.

The other exceptions to the conduct of the argument must likewise be overruled, for the reason that counsel for defendant failed to call the court's attention to the alleged objectionable language and failed to note an exception thereto. It is too late, after the trial is over, to note such objections and exceptions for the first time in the case on appeal. It is but fair to the judge and in the interest of the proper administration of justice that he should have the opportunity to admonish counsel if they depart in the argument from the proper measure of an advocate's duty. State v. Sugg, 89 N. C. 527; State v. Brown, 100 N. C. 519, 6 S. E. 568; State v. Tyson, 133 N. C. 695, 45 S. E. 838.

The defendant excepts because, during the argument of the solicitor, the defendant's counsel interrupted him to correct a state-

ment. The solicitor made a sharp retort, whereupon a large part of the crowd in the courtroom broke into applause, which lasted several minutes. We find that the court reproved the audience in strong terms for the misconduct, required the solicitor to suspend his speech until it could be investigated, and called the officers before the court and inquired of them as to who engaged in the applause. One man was arrested and sentenced to five days in jail. We do not think this demonstration warrants us in granting a new trial. It is far from being such a public manifestation of hostility to the defendant as occurred upon the trial of Wilcox, 131 N. C. 707, 42 S. E. 536. In that case a new trial was ordered because it appeared that about 100 people left the courtroom in a body and rang a fire bell with the fixed intention to destroy the force of the remarks of the defendant's counsel and distracting the attention of the jury; but that case differed from the one at bar, inasmuch as the judge there found as a fact that the demonstrations were made for the purpose of breaking the force of counsel's argument and to prejudice the defendant's case. In this case there is no finding that there was a preconceived design and intention to prejudice the jury against defendant, and no sufficient evidence to support any such allegation. The applause seems to have been evoked by the tilt between counsel. It is sometimes the case that in hotly contested cases the sharp repartee and cross-firing of counsel bring laughter or applause from the audience, which is promptly checked by the judge. It has been held in other states that where a disturbance is made in a courtroom for the purpose of prejudicing the jury, and where the presiding judge pays no attention to the interruption, a new trial will generally be granted. Cartwright v. State, 16 Tex. App. 473, 49 Am. Rep. 826; Raines v. State, 81 Miss. 489, 33 South. 19. The new trial was granted in those cases, not solely because of the disturbance, but because the trial judge failed to do his duty in correcting its effect. In this case, however, the court rebuked the audience in strong terms for their misconduct and imprisoned one man, and in addition thereto, in his charge to the jury, uses these words: "You would be unworthy to sit in the jury box if you permitted the applause of the crowd or any sentiment of the audience to sway you the breadth of a hair from the path of duty." We have no doubt that these impressive words from an upright and fearless judge, preceded as they were by summary punishment upon an offender, had far more influence upon the minds of the jury than the impulsive conduct of some of the audience.

The defendant handed up a number of prayers for instruction, many of which were practically given by the court, and those which were refused the defendant was not entitled to. The defendant requested the court to instruct the jury that there is no sufficient evidence to justify a conviction. The state relies upon a chain of circumstances proven by different witnesses, no one of which, standing alone, would be sufficient to convict; but, when taken together, the state contends they point strongly to the defendant's guilt. It must be admitted that the circumstances in evidence point to the guilt of the defendant, and that there is not a circumstance which points to any other person. To set them out would be of no value as a precedent, and would unduly lengthen this opinion. It is not for us to say that the defendant should or should not have been convicted upon this evidence, as the jurors are the triors of the fact, and not the court. They have rendered their verdict of guilty, and, measured by the standard prescribed by law, his honor committed no error in not withdrawing the case from their consideration. This evidence is not so slight and inconclusive as that in no reasonable view of it ought the jury to convict. State v. Atkinson, 93 N. C. 519. The evidence as a whole raises much more than a mere conjecture or suspicion, and the case comes within the general rule that, if there be any evidence tending to prove the guilt of the accused, the weight of it must be left to the jury. State v. Vinson, 63 N. C. 335; State v. Rhodes, 111 N. C. 650, 15 S. E. 1038; State v. Wilcox, supra.

Defendant excepts to the refusal of the court to give the following instruction: "The word 'kidnap' has a technical meaning. It is derived from the common law, and must be interpreted according to its technical meaning at common law; and its meaning at the common law and under our statute is to take and carry away any person, forcibly or fraudulently, beyond the boundaries of the state." The court instructed the jury that "by kidnapping is meant the taking and carrying away of a person forcibly or fraudulently." The characteristics and limits of this offense are somewhat differently drawn by legal writers. Blackstone and some other English authorities define kidnapping to be the "forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another." In East, Pleas of the Crown, vol. 1, p. 429, it is described as "the most aggravated species of false imprisonment," and defined to be "the stealing and carrying away or secreting of any person." "The Supreme Court of New Hampshire," says Bishop, "more reasonably, and apparently not in conflict with actual decisions, held that transportation to a foreign country is not a necessary part of this offense." Bish. New Crim. Law, vol. 2, § 750. The case referred to is State v. Rollins, 8 N. H. 550, and sustains the author's text. Bishop states the better definition of kidnapping to be "false imprisonment, aggravated by conveying the imprisoned per-

son to some other place." Id. See, also, Eberling v. State, 136 Ind. 117, 35 N. E. 1023; State v. Leuth, 128 Iowa, 189; Haddon v. People, 25 N. Y. 373; 5 Words & Phrases, p. 3928, and cases cited. We think that the exception cannot be sustained.

It is further objected that the bill is defective, in that it fails to set out "facts and circumstances stating the offense." The bill need not set out the circumstances attending the commission of the offense. It is sufficient if its allegations pursue the language of the statute creating the offense and prescribing its essential elements. State v. George, 93 N. C. 567. In State v. Stanton, 23 N. C. 424, Chief Justice Ruffin says: "When a statute makes a particular act an offense, and sufficiently describes it by terms having a definite and specific meaning, without specifying the means of doing the act, it is sufficient to charge the act itself without its attendant circumstances." A careful review of the whole record convinces us that no reversible error has been committed.

No error.

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(146 N. C. 276)

## KESTERSON v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. ABATEMENT—PENDENCY OF ACTION IN FEDERAL COURT.

Pendency in a federal court of an action in personam, which has not proceeded to judgment is not ground for abatement of an action in the state court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 87–91.]

2. SAME—DISMISSAL OF PRIOR ACTION.

It is not ground for abatement that another action was pending when the summons in the second action was issued; it having been dismissed before the complaint, and therefore before the plea was filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 111–117.]

3. RAILROADS—NEGLIGENCE—PERSONS WORKING ABOUT CARS.

Where plaintiff worked for C. quarrying stone, and defendant railway company furnished cars to C. with which to remove the stone placing them, as required by C., on a side track having a steep grade, and it was the custom of defendant, known to plaintiff, to set the brakes on each car when placing them on the side track, and plaintiff in letting down the front car to the quarry was injured by the other cars rushing after it, such custom, without his knowledge, not having been observed as to such other cars, defendant was liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 873–877.]

Appeal from Superior Court, Buncombe County; Cooke, Judge.

Action by H. A. Kesterson against the Southern Railway Company for personal injuries. From a judgment on a finding by the jury for plaintiff on all the issues submitted to them of negligence, contributory negligence, and damages, defendant appeals. Affirmed.

Moore & Rollins, for appellant. Geo. A. Shuford, Frank Carter, and H. C. Chedester, for appellee.

BROWN, J. 1. The defendant set up in its answer the pendency of an action between the plaintiff and defendant for the same cause of action set up in the plaintiff's complaint in this action, which action was begun before this action was commenced, in the superior court of Buncombe county, and was thence removed to the Circuit Court of the United States. It is found as a fact that at the time of the issuing of the summons in this action the other action was pending in the Circuit Court of the United States, but that a judgment of nonsuit had been entered therein before the complaint in this action had been filed. The plea in abatement to this suit was properly overruled upon the facts. The pendency of a suit, in personam in a state court, which has not proceeded to judgment, cannot be successfully pleaded in abatement of a suit between the same parties for the same cause of action in a federal court. So, too, and for like reasons, an action of a similar nature which is pending, but has not proceeded to judgment, in a federal court, cannot be pleaded in abatement of a like suit in a state court. The point is decided in Sloan v. McDowell, 75 N. C. 29, where the reasons are given by Mr. Justice Read for the distinction, in this respect, between suits for the same cause and between the same parties, pending in the courts of the same state, and where the causes are pending in courts of different sovereigns or jurisdictions. For this reason the case of Curtis v. Piedmont, 109 N. C. 401, 13 S. E. 944, is not in point. There the former action was pending in the same court. Had the action in the Circuit Court of the United States been prosecuted to judgment, it would have, upon proper plea, barred further prosecution in the state courts. Gordon v. Gilfoit, 99 U. S. 168, 25 L. Ed. 383; 1 Cyc. 38; City of North Muskegon v. Clark, 62 Fed. 694, 10 C. C. A. 591. The plea in abatement must also aver and the proof affirmatively show that the former action is still pending at the time of the filing of the plea. 1 Encyc. Pl. & Pr., 754; Phelps v. Railroad, 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867. The effective part of the plea is that the former action is still pending. Here the jury find that a nonsuit was entered in the former action before the filing of the complaint, and therefore necessarily before the filing of the plea.

2. The only question remaining for consideration is the exception to the ruling of the court denying the defendant's motion to nonsuit. The plaintiff's evidence tended to prove that one Collins was engaged in quarrying rock, and, to facilitate operations and the handling of the output, the defendant constructed a side track alongside the quarry. Collins had control of the loading of cars.

These cars, as required by Collins for the purposes of his business, were placed upon his side track by the defendant. The side track was built upon a heavy grade, estimated at 3½ to 5 feet in 100, and on defendant's right of way. The bins, or hoppers, from which the crushed stone was discharged into the cars, were built directly over said side track at the bottom of said grade. The elevation of said bins or hoppers was such as to allow the passage underneath of the defendant's gondola cars, with a space of 12 or 14 inches between the bottom of the bin and the top of the car. The evidence tends further to prove that it was customary for the defendant to place empty cars upon this side track in the morning, and to secure them so that they would stand upon the incline, and Collins' employés would let them down by gravity, one at a time, as needed for the purpose of being loaded, regulating and controlling their movements and stopping them at the proper place by the use of the hand brakes on said cars, and the defendant's freight trains would take out the loaded cars the following night or morning. The empty cars would stand upon the grade if the brakes were set on each, but, for greater security, it was customary to block or scotch the front car with a piece of wood, and when this car was moved to scotch the next car, and so on. Collins' employés had nothing to do with placing the empty cars on the quarry siding. In the language of the witness Allred: "It was customary for them [the railroad people] to put them in there and hold them." At the time of the injury the plaintiff was in the employ of Collins, working in said quarry. Upon the occasion in question, he was required by his employer to assist in letting down the empty cars for the purpose of being loaded. He loosed the brakes, and brought down the front car to the bin, and, as he passed under it, the remaining cars, which had been left by defendant on the side track as usual, not having brakes on or not being checked, rushed down on the front car, and knocked plaintiff off, and seriously injured him. They had been held in place by the front car, and, when the brakes on it were released and the car moved forward, the others, the brakes not being on, smashed into the front car when plaintiff stopped it under the bin.

It is true that the plaintiff was the servant of Collins, and not of defendant, and that there were no contractual relations existing between the plaintiff and the defendant company. Yet there was that connection between Collins and the defendant, in respect to the operations of the quarry, which gave the employés of Collins the right to rely upon the established usage of fastening all the cars by brakes being carefully observed by defendant. The testimony of plaintiff's witnesses tends strongly to prove that, when defendant's agents delivered the cars on the greatly inclined siding, they always set the brakes on each car, and that on this occasion they set the brakes on the front car only, and did not check or set the brakes on the others. This custom was known to plaintiff; and that he relied on it when he moved the front car is evident from his own testimony, for he says he "would not for the world have taken that car out" had he known those behind it had been left with brakes off. There is a class of cases in which one has been held liable to another, in the absence of any contractual or other relation between them. This belongs to that class. The act of negligence in leaving the cars with brakes off or not checked, under such circumstances and conditions, in violation of defendant's custom and usage, known to plaintiff and the other employés of Collins, was highly dangerous to them, and renders the defendant liable for the injury sustained in consequence. Roddy v. Railway Co., 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; 2 Sutherland on Damages, 435. While no contractual relation existed between plaintiff and defendant, yet Collins and the defendant had such business relations that each owed the duty to the other and his employés of properly discharging his part of the joint undertaking in respect to any matter exclusively devolving upon him. Plaintiff had nothing to do with checking or fastening the cars properly with brakes when they were delivered on the side track. That was a part of defendant's obligation, and in its discharge a certain usage had been established. Without plaintiff's knowledge, this usage was not observed on one occasion, resulting in injury to him. The defendant is therefore liable for the consequent result.

In respect to defendant's contention in regard to contributory negligence, we think his honor might well have charged that there is no evidence of that.

No error.

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(145 N. C. 560)

## STATE v. KEEBLER et al.

(Supreme Court of North Carolina. Dec. 11, 1907.)

CRIMINAL LAW — APPEAL — DISMISSAL — GROUNDS—ESCAPE.

Where one pending appeal, from his conviction of crime breaks jail, and is beyond the process of the court at the time his case is called, the appeal will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2975.]

Connor and Walker, JJ., dissenting.

Appeal from Superior Court, McDowell County; Peebles, Judge.

Haws Keebler and another were convicted of larceny, and they appeal. Dismissed.

J. L. C. Bird, for appellants. Assistant Attorney General Clement, for the State.

CLARK, C. J. When this case was called, the counsel of record for the defendants stated that his clients, who had been convicted of larceny, had broken jail, and were beyond the process of the court. This admission was entered on our records, and the Assistant Attorney General, in behalf of the state, has filed his motion to dismiss the appeal upon the authority of State v. Jacobs, 107 N. C. 772, 11 S. E. 962, 22 Am. St. Rep. 912, and State v. Anderson, 111 N. C. 689, 16 S. E. 816.

In State v. Jacobs, supra, which was a conviction for murder, the court held—Avery, J.—that, "where one convicted of a crime appeals from the judgment and escapes, the appellate court may in its discretion proceed with the hearing or dismiss the appeal, or continue it, and either of these judgments will be valid, though the defendant may not be in custody or not represented by counsel." Avery, J., quotes a wealth of authority holding that if, when the case is regularly reached for hearing on appeal, the defendant "has escaped and is not in actual custody, it is clearly within the sound discretion of the court to determine whether the exceptions shall be argued and passed upon, the appeal dismissed, or the hearing postponed to await the recapture of the alleged offender. Smith v. U. S., 94 U. S. 97, 24 L. Ed. 32; Bonahan v. Nebraska, 125 U. S. 692, 8 Sup. Ct. 1390, 31 L. Ed. 854; Leftwich's Case, 20 Grat. (Va.) 722; Sherman v. Commissioners, 14 Grat. (Va.) 677; McGowan v. People, 104 Ill. 100, 44 Am. Rep. 87; Wilson v. Commissioners, 10 Bush (Ky.) 526, 19 Am. Rep. 76; State v. Sites, 20 W. Va. 16"; and further says that the general, if not universal, rule, is that, when a defendant has absconded and thus put himself in contempt of court, to refuse to dispose of his appeal, or to make any order in it, at his instance or for his benefit, but, on the motion of the prosecuting officer, the case will be continued, dismissed, or heard—citing Anonymous Case, 31 Me. 592; Commonwealth v. Andrews, 97 Mass. 544; People v. Genet, 59 N. Y. 81, 17 Am. Rep. 315; Warwick v. State, 73 Ala. 486, 49 Am. Rep. 59. Judge Avery, supra, at page 775 of 107 N. C., page 963 of 11 S. E. (22 Am. St. Rep. 912), also quotes Waite, C. J., in Smith v. United States, 94 U. S. 97, 24 L. Ed. 32, as follows: "It is clearly within our discretion to refuse to hear a criminal case in error unless the convicted party suing out the writ is where he can be made to respond to any judgment we may render. * * * If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest." No court will ordinarily decide a moot point, a mere abstraction, and to cumber the docket by continuing the case would ordinarily be useless, leading merely to a dismissal of the appeal at some future term as in State v. Cody, 119 N. C. 908, 26 S. E. 252, 56 Am. St. Rep. 692. The opinion in State v. Jacobs, supra, further says: "The courts of Georgia, Indiana, and Kentucky also concur in the holding that it is the proper practice to dismiss, on motion of the prosecution, an appeal by one charged with felony, when it is made to appear satisfactorily that he has escaped custody pending the appeal, and is still at large. Madden v. State, 70 Ga. 383; Sargeant v. State, 96 Ind. 63; Wilson v. Commonwealth, 10 Bush (Ky.) 526, 19 Am. Rep. 76." In State v. Anderson, 111 N. C. 689, 16 S. E. 316, which was also a conviction for murder, the court quotes State v. Jacobs, 107 N. C. 772, 11 S. E. 962, 22 Am. St. Rep. 912, and "on motion of the Attorney General" dismissed the appeal. In State v. Cody, 119 N. C. 908, 26 S. E. 252, 56 Am. St. Rep. 692, conviction for burglary of three men, the appeal was also dismissed on authority of State v. Jacobs and State v. Anderson. All three were cited and approved in State v. Dixon, 131 N. C. 813, 42 S. E. 944, where it is said: "One who thus dismisses himself abandons his appeal, and has no ground to invoke a review of the trial by the appellate court." That also was a conviction of murder; but, there being doubt whether the prisoner had escaped, the court considered the exceptions, and, finding no error, affirmed the judgment below.

The trial and judgment below is presumed to be correct. If not reviewed by an appeal, this presumption is conclusive. In England there has never been any appeal in criminal cases. In many states of the Union there is no appeal in such cases, unless upon certificate of probable error by the judge. In this state an appeal is a right, but not an absolute right. If the appeal bond is not given or the proper certificate in lieu thereof, the appeal is dismissed. State v. Bramble, 121 N. C. 603, 28 S. E. 269, and cases cited. Likewise for failure to print the record (unless a pauper appeal). For a stronger reason, apart from our precedents, an appeal should be dismissed when the prisoner himself abandons it by breaking jail, and fleeing the jurisdiction of the court.

We will not look into the record or review the exceptions; but, on motion of the Attorney General, will dismiss the appeal. We will not deal with a defendant, who is in the woods.

Appeal dismissed.

WALKER and CONNOR, JJ., dissent.

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(146 N. C. 329)

## HENDERSON v. McLAIN.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. APPEAL—REVIEW—FINDINGS OF REFEREE—CONCLUSIVENESS.

The findings of facts by a referee are conclusive on appeal if there is evidence to support them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 3996–4005.]

2. SAME—DECISIONS REVIEWABLE — REFUSAL TO SET ASIDE—REFEREE'S REPORT—NEWLY DISCOVERED EVIDENCE.

The refusal of a superior court to set aside the report of a referee on the ground of newly discovered evidence is not reviewable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 736–739.]

3. WITNESSES—COMPETENCY—INTEREST.

Unless a witness bears such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action, he is not disqualified to testify, and the interest in the result to disqualify a witness must be legal, and not merely sentimental. Hence, in an action by a son-in-law of defendant's intestate on a claim against the estate, plaintiff's daughter, an heir at law and distributee, and a guardian of heirs and distributees, are competent witnesses for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 598–618.]

4. EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATE — IMPLIED CONTRACTS — BOARD — MOTHER-IN-LAW AS MEMBER OF FAMILY.

Where a mother-in-law entered a family and became one of them, supervising the children in place of her deceased daughter, acting as a grandmother would in a house where there were children, and the relation exists for over 20 years without any agreement as to board or any payment thereon, the law raises no implied contract to pay for board, but such a contract is impliedly negatived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 730–733; vol. 50, Work and Labor, §§ 15–18.]

5. SAME—CARE IN SICKNESS.

When she became helpless, and was an absolute charge for 18 months after she reached the age of 80 years, her son-in-law was entitled to reasonable pay for her support and care, for under such circumstances there was no presumption that the services were gratuitous, but there was an implied contract to pay for them, and the necessary expense is a proper charge against her estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 730–733; vol. 50, Work and Labor, §§ 15–18.]

Appeal from Superior Court, Iredell County; Moore, Judge.

Action by I. S. Henderson against J. C. McLain, administrator, etc. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

Action for recovery for services rendered defendant's intestate. The cause was referred by consent to Dorman Thompson, Esq., as referee, who found as facts: That prior to 1886 the defendant's intestate, Mrs. E. J. Wilson, was living with her daughter, Mrs. J. F. McLain, in Mooresville, N. C. In that year Mr. McLain failed in business, and removed to the mountains of North Carolina, and Mrs. Wilson moved, with her trunk, bureau, and personal property to the home of her son-in-law, the plaintiff, and resided there continuously till her death in January, 1905. Her daughter, the plaintiff's wife, was then living, but in poor health, and died soon after, leaving several small children. Mrs. Wilson continued to live at the home of the plaintiff after the death of her daughter, engaged, until the last 18 months of her life, with such care of the children "as a grandmother would in a house where there was children." She sat in the room with the family, and ate at the table with them. She said "they are kind and good to me, and I want to help them all I can, and do as much for them as I can, and help manage the children." At the time Mrs. Wilson went to live in the home of the plaintiff, she was over 60 years of age, and she died at the age of 82. For the last 18 months prior to the death of the said Mrs. E. J. Wilson she was practically helpless, being confined to her chair. It was necessary to provide her with a rolling chair, and by reason of this her only means of locomotion was to have her chair rolled around the house by some one. She had to be helped from her chair to the bed. Her feet and arms were much swollen, causing her much pain; and, by reason of her condition, it was necessary for the plaintiff, or some member of his family, during a great part of this time, to sit up at night with her. The plaintiff slept in an adjoining room to that occupied by the defendant's intestate, with door open, so that "all she would have to do was to call him, and she would have no trouble to get him up." During the time preceding the last 18 months of her life, the condition of the defendant's intestate was better than at any time during said 18 months. During a part of said time she was in very good health, considering her advanced age in life. For the last 18 months prior to the death of the defendant's intestate, the food, lodging, care, and attention rendered her by the plaintiff and the members of his family was reasonably worth the sum of $1 per day. For the time preceding the last 18 months of the life of the defendant's intestate, the board, lodging, and care furnished and provided for her by the plaintiff and the members of his family was reareasonably worth the sum of $10 per month. The house in the town of Mooresville, N. C., in which the said I. S. Henderson resided with his family, and in which he was residing at the time of this hearing, was given to the wife of the said I. S. Henderson by Mrs. E. J. Wilson. The said Mrs. E. J. Wilson at the same time gave a house and lot in the town of Mooresville, N. C., to her daughter, Mrs. J. E. McLean, stating that she wanted "both daughters to have an equal share." As to whether these gifts were made before or after the time that the said Mrs. E. J. Wilson went to live in the home of I. S. Henderson is not shown in the evidence. At the time the said Mrs. E. J. Wilson went to live in the home of her son-in-law, I. S. Henderson, there was no express contract entered into between the plaintiff and the defendant's intestate under which the plaintiff was to be compensated for board, lodging, and services rendered to the said Mrs. E. J. Wilson by the said I. S. Henderson and his family, nor was there ever at any time any such contract made and entered into with the plaintiff. The defendant's intestate never paid the

plaintiff anything during her life for board, lodging, care, and attention; but on one occasion some corn and hay which was worth $25 was turned over to plaintiff by Mrs. Wilson's tenant in 1903. The plaintiff's counsel upon the hearing admitted that that part of the claim of the plaintiff for board, lodging, care, and attention provided and furnished for the said Mrs. Wilson, arising prior to April 1, 1903, was barred by the statute of limitations as contended in the answer of the defendant, and announced that such claim was waived by the plaintiff. Upon the foregoing finding of facts, the following were his conclusions of law: That, upon the facts above found, the law implies a contract between the plaintiff and the defendant's intestate, by reason of which the plaintiff is entitled to charge the defendant, as administrator of Mrs. E. J. Wilson, the reasonable value of the board, lodging, care, and attention furnished by said plaintiff to the defendant's intestate. That the plaintiff is entitled to charge the defendant as administrator of Mrs. E. J. Wilson the sum of $572, and the referee allowed such charge, subject to a credit of $25; the account being stated as follows: "Debits: To 18 months' board, lodging, care, and attention, at $1 per day, $547; to board, lodging, care, etc., from April 1, 1903, to June 15, 1903, at $10 per month, $25—total $572. Credits: Three loads of hay and 16 bushels of corn, $25; balance due, $547." The court overruled all exceptions to the referee's report, and rendered judgment for $547 and costs. The defendant appealed.

McLaughlin & Nicholson and Z. V. Turlington, for appellant. Armfield & Turner, for appellee.

CLARK, C. J. The rulings of the judge below upon the exceptions to findings of facts are conclusive; there being evidence upon such findings. Dunavant v. Railroad, 122 N. C. 1001, 29 S. E. 837, and cases there cited. The refusal of the superior court to set aside the report of a referee, on the ground of newly discovered evidence, is not reviewable. Vest v. Cooper, 68 N. C. 131; Faison v. Williams, 121 N. C. 153, 28 S. E. 188.

The exceptions to the overruling by the judge of the exceptions of law present two main questions.

First. The competency of the evidence of the daughter of the plaintiff and granddaughter of the defendant's intestate, under Revisal 1905, 1631 (Code, § 590). She is not interested in a legal sense in the event of the verdict in behalf of her father, and was competent as a witness for him. She was testifying against, not in behalf of, her own interest, which was as heir at law and distributee of the estate of her grandmother, the defendant's intestate, that it should not be diminished. Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043, where this section is analyzed. As was said in Jones v. Emory, 115 N. C. 158, 20 S. E. 206: "Unless the witness bear such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action, he is not disqualified to testify." The interest in the result of an action to disqualify a witness must be legal, and not merely sentimental. Sutton v. Walters, 118 N. C. 495, 24 S. E. 357. The same principle applies to the exception to the testimony of R. H. Neely, also witness for plaintiff, who was guardian of plaintiff's other children, who are distributees and heirs at law of defendant's intestate.

The other point presented by several exceptions is as to the law applicable to the state of facts found by the referee and confirmed by the court. As it is found that there was no contract for compensation for board and lodging, but that Mrs. Wilson entered the family, became one of them, supervising the children in the place of her deceased daughter, and acting "as a grandmother would in a house where there was children," the law raises no implied contract that she should pay board. Indeed, it is impliedly negatived, as the relation existed for over 20 years, during all which time there was no agreement nor any payment. The $25 credited in 1903 seems to have been merely for some produce turned over by Mrs. Wilson's tenant to the plaintiff, for which he is accountable, but there is no evidence that it was paid in consideration of board. Most of the claim for board during the time Mrs. Wilson was acting in supervision of the children was conceded by plaintiff to be barred by the statute of limitations, which is pleaded, and the claim was disallowed by the referee, but he has erroneously allowed $25 for board from April 1, 1903, to June 15, 1905, which is not barred by the statute. This must be struck out of the account.

As to the board, lodging, and attention during the last 18 months of her life, during which time Mrs. Wilson was practically helpless, and in the condition, and requiring the attention, found by the referee, there is nothing in the relation of the parties from which it can be justly inferred that such services and attention were to be rendered gratuitously where the party had an estate out of which the plaintiff could reasonably have expected compensation. As long as she was residing in the family as one of them, rendering such services as a grandmother would naturally render to the children of her deceased daughter, the implication, in the absence of contract, is that she was pro hac vice a member of the family, and that, as her company and counsel were not to be charged for, neither was she chargeable with board. But when she becomes helpless, unable to render any service, and altogether a charge, it is the policy of the law that she shall be provided for and properly taken care of, and for this reason the necessary cost thereof is properly a charge against her estate if she have one.

There is no presumption that it was gratuitous, but there is an implied contract to pay for them. The burden of her last sickness should not fall upon her son-in-law at whose house she happened to be, to the total exoneration of the other members of her family, who as her heirs at law and next of kin will share in her estate. This is a claim for expense incurred for benefit of the decedent, not for labor and services rendered by her; and hence the authorities cited, most of which are reviewed in Winkler v. Killiam, 141 N. C. 575, 54 S. E. 540, are not in point. The $25 charged for board from April 1 to June 15, 1903, will be struck out.

The judgment will be thus modified and affirmed.

Modified and affirmed.

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(146 N. C. 361)

## LEE et al. v. BAIRD et al.

(Supreme Court of North Carolina. Dec. 14, 1907.)

1. APPEAL—RULES OF COURT—PRACTICE—DISMISSAL.

Where appellant's exceptions are not briefly and clearly stated and numbered as required by the statute (Revisal 1905, § 591, and Supreme Court rule 27 [53 S. E. vii]), the errors alleged are not stated "separately in articles numbered" as required by said section 591, the exceptions relied on are not grouped and numbered immediately after the end of the case on appeal as required by Supreme Court rules 19 (2) and 21 (53 S. E. vii), and the exceptions were not filed in the office of the clerk of the court below within 10 days after the end of the term at which the judgment appealed from was rendered, the appeal will be dismissed.

2. COURTS—SUPREME COURT—POWER TO REGULATE PROCEDURE.

The Supreme Court had power to establish rule 19, subd. 2 (53 S. E. vii), providing that the pages of the record on appeal shall be numbered, and that there shall be written on the margin of each a brief statement of the subject-matter contained therein; rule 21, providing that a case will not be heard until there shall be put in the margin of the record, as required in rule 19 (2), brief references to such parts of the text as are necessary to be considered in a decision of a case; and rule 27, requiring exceptions to be briefly and clearly stated and numbered.

Appeal from Superior Court, Buncombe County; Cooke, Judge.

Action by James B. Lee and others against John R. Baird and others. Judgment for defendants, and plaintiffs appeal. Appeal dismissed.

There was a large number of exceptions to the report and to the rulings on question of evidence by both parties, and on the hearing some of them are sustained, some overruled, and others modified, and thereupon the court gave judgment that defendants go without day, and recover costs, and plaintiffs appealed. In apt time and proper form, defendants moved to dismiss plaintiffs' appeal, assigning causes, among others, as follows: "(1) The exceptions are not 'briefly and clearly stated and numbered,' as required by the statute (Revisal 1905, § 591), and rule 27 of this court (53 S. E. vii). (2) The errors alleged are not stated 'separately in articles numbered' as required by the statute (Revisal 1905, § 591). (3) The exceptions relied on are not grouped and numbered immediately after the end of the case on appeal, as required by rules 19 (2) and 21. 140 N. C. 660, 53 S. E. vii. (4) Appellants did not file their exceptions in the office of the clerk of the court below within 10 days after the end of the term at which the judgment appealed from was rendered."

Merrimon & Merrimon, for appellants. Merrick & Barnard, F. A. Soudley, and D. R. Millard, for appellees.

HOKE, J. For the reasons above stated, the court is of opinion that the plaintiffs' appeal should be dismissed, and it is so ordered.

These rules, published in 140 N. C. 660, 53 S. E. vii, have been adopted after extended and careful reflection, and because they were found necessary to a proper performance of the public business of the court, not alone with reference to its reasonable dispatch, but in giving the court a more accurate understanding of causes on appeal, thereby greatly aiding us to an intelligent consideration of the questions presented, and to a determination of controversy on their real merits. Furthermore, a proper compliance with the rules here in question (rule 19, subd. 2, and rule 21) is fair and just to opposing counsel, giving them, as it does, an opportunity to know the positions they will be required to discuss, to the end that they will be better prepared to aid the court in making true deliverance on the rights of parties, the purpose which we all have most earnestly at heart. And it may be well here to note that in many instances it would be no fair observance of rule 19, subd. 2, simply to make excerpts from a stenographer's notes of any and every exception taken in the hurry and excitement of a nisi prius trial, the counsel for appellant, in "grouping and stating" the exceptions relied on by him, should give the matter his earnest consideration, that the court may also have the benefit of his judgment and fuller information as to the real questions involved in the controversy. It is not our desire or purpose to be unreasonable or exacting in respect to this last suggestion. It is made rather with the view of impressing upon counsel our deep sense of the importance and value of their giving to the court, in its decisions of these causes on appeal, the benefit of their reflection and careful preparation.

There is no doubt of the power of the court to establish the rules in question, and in numbers of decisions we have expressed an opinion both of their necessity and binding force. Thus, in Walker v. Scott, 102 N. C. 490, 9 S. E. 489, Merrimon, J., for the court, said: "The impression seems to prevail, to some extent, that the rules of practice prescribed by this court are merely directory—

that they may be ignored, disregarded, and suspended almost as of course. This is a serious mistake. The court has ample authority to make them. Const. art. 4, § 12; Code 1883, § 961; Rencher v. Anderson, 93 N. C. 105; Barnes v. Easton, 98 N. C. 116, 3 S. E. 744. They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the court will certainly see that they have effect and are duly observed, whenever they properly apply." And in Horton v. Green, 104 N. C. 403, 10 S. E. 471, the present Chief Justice, in speaking of one of our rules of practice, said: "We have stated this much to show the reasonableness and necessity of the rule, for the power of the court to make it is as clear as that it is our duty to rigidly adhere to it after it is adopted and enforce it impartially as to all cases coming under its operation. The late Chief Justice Pearson was accustomed to say of the rules of court: 'There is no use in having a scribe unless you cut up to it.'" And the same judge, in Calvert v. Carstarphen, 133 N. C. 27, 28, 45 S. E. 353, 354, on this subject, said: "The rules of this court are mandatory, not directory. Walker v. Scott, 102 N. C. 487, 9 S. E. 488; Wiseman v. Commissioners, 104 N. C. 330, 10 S. E. 481; Edwards v. Henderson, 109 N. C. 83, 13 S. E. 779. As the Constitution (article 1, § 8) provides that 'the legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from one another,' the General Assembly can enact no rules of practice and procedure for this court, which are prescribed solely by our rules of court. Herndon v. Ins. Co., 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547; Horton v. Green, 104 N. C. 400, 10 S. E. 470; Rencher v. Anderson, 93 N. C. 105. The practice and procedure in the courts below the Supreme Court are prescribed by the Legislature, as authorized by Const. art. 4, § 12 (State v. Edwards, 110 N. C. 511, 14 S. E. 741), except that as to such lower courts, when the Legislature fails to provide the practice and procedure in any particular, this court can do so. Code, § 961; Barnes v. Easton, 98 N. C. 116, 3 S. E. 744; Cheek v. Watson, 90 N. C. 302. In England, when Parliament abolished the forms of action and the entire former system of pleading, practice, and procedure, it did not itself enact a Code of Procedure and Practice, but empowered the judges of the higher courts to do this for all the courts. Consequently, the entire practice and procedure, civil and criminal (including all forms), in the mother country, are formulated in "Rules of Practice" prescribed by the judges, and England has the simplest and most advanced system of practice of all English speaking countries. In this state, the rules of court are the sole Code of Practice of this court, and are to be observed as strictly as the legislative provisions as to practice in the lower courts."

The rules, as they now stand, have been formulated for more than 2 years. For more than 18 months they have been published in our Reports (140 N. C. and 53 S. E.) and in several decisions, notably in Davis v. Wall, 142 N. C. 451, 55 S. E. 350, and Marable v. Railroad, 142 N. C. 564, 55 S. E. 355. The court has given decided intimation that if they were not complied with the appeal would be dismissed, except in rare instances, and unless cogent excuse were shown. There could not well be a case that better illustrates the necessity of the rule we are discussing than the one now before us. The action was commenced in 1898, and the record, including the case on appeal, contains 177 pages of printed matter. In 1902 a reference was had, and after an appeal to the Supreme Court the order was proceeded with, and an account was taken and report made. The report, containing 42 findings of fact and 44 conclusions of law, was heard by the judge, on numerous exceptions filed by both of the parties; and on the hearing, as stated, many of these exceptions were overruled, some sustained, and others modified, and final judgment was entered that defendant go without day. In the case on appeal, containing 79 pages, the court, at the instance of plaintiffs, and as required to present their objections, embodies a large amount of the testimony taken before the referee, and throughout this testimony appear many objections to the rulings of the referee on questions of evidence. It is well nigh impossible to gather from the record and case on appeal the questions which the parties regarded as material or important. Certainly it could only be done, if at all, as the result of much labor, and an amount of time that would seriously interfere with the proper consideration of other causes that demand, and are entitled to, consideration.

We are of opinion, as stated, that the motion to dismiss should be allowed, and it is so ordered.

Appeal dismissed.

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(146 N. C. 597)

BURNETT v. LYMAN et al.

(Supreme Court of North Carolina. Dec. 14, 1907.)

Appeal from Superior Court, Buncombe County; Cooke, Judge.

Action by one Burnett against one Lyman and others. Judgment for plaintiff, and defendants appeal. Dismissed.

Motion in apt time by appellants to dismiss appeal for noncompliance with rules 19 (subd. 2), 20, and 21 (53 S. E. vii). Dismissed.

Tucker & Murphy, for appellants. Frank Carter, for appellee.

PER CURIAM. On authority of decision of Lee v. Baird, 59 S. E. 876, and for reasons there given, appeal is dismissed for noncompliance with rule.

(145 N. C. 567)

## STATE v. WALKER.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. JURY—CHALLENGE TO ARRAY—WHAT CONSTITUTES.

In a criminal case the solicitor for the state said: "If any member of the jury had formed and expressed the opinion that the prisoner was not guilty, to let it be known. No juror answering thereto, the prisoner thereupon admits the cause as a challenge to the array." *Held*, not a challenge to the array.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 545.]

2. HOMICIDE—PRESUMPTIONS—MALICE.

Where a killing with a deadly weapon is shown, the law presumes malice, and the burden of proving matter in mitigation is on accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 265–271.]

3. CRIMINAL LAW—APPEAL—QUESTIONS REVIEWABLE.

Under the statute the state could not except, where, in a prosecution for homicide, the court held that the presumption of malice was rebutted.

4. HOMICIDE—SELF-DEFENSE.

In a prosecution for homicide, the burden of showing self-defense is on the accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 276–278.]

5. SAME—SUBMISSION TO JURY.

In a prosecution for homicide, evidence examined, and *held* insufficient to go to the jury as tending to show self-defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 569.]

Walker and Hoke, JJ., dissenting.

Appeal from Superior Court, Polk County; Guion, Judge.

N. G. Walker was convicted of manslaughter, and appeals. No error.

J. E. Shipman, for appellant. Assistant Attorney General Clement, for the State.

CLARK, C. J. The solicitor asked that: "If any member of the jury had formed and expressed the opinion that the prisoner was not guilty, to let it be known. No juror answering thereto, the prisoner thereupon admits the cause as a challenge to the array." The court properly held that this was not a challenge to the array by the solicitor.

The other exceptions may be disposed of by considering the fifth exception, which embraces all that is presented by the others. This exception is to the following charge: "The court, after reading the evidence charged the jury that from the entire evidence the defendant had rebutted the presumption of malice and was not guilty of murder in the second degree; that in no aspect of the case does the evidence justify a verdict of not guilty, and upon the whole evidence offered by the state, if believed by you, and if the facts are found to be true and believed, you will return a verdict of guilty of manslaughter." There was no conflict of evidence, which, omitting unessential details, is that the deceased and prisoner were at a disorderly house, which the prisoner had entered first. The deceased asked prisoner why he had not opened the door for him to come in. The prisoner replied it was not his door. The deceased was standing by the fireplace with his hands in his pockets. The prisoner was facing him six feet away, and with an open door two or three feet away at his back. There had been no quarrel between the men, and the deceased was making no movement towards the prisoner, when the latter said to the deceased: "Don't you come on me. If you do, I'll kill you." He said this a second time, whereupon the deceased pulled a penknife out of his pocket and half opened it, and said "D——n you, you will have it to do, for I am coming." The deceased did not advance his body, but put forward one of his feet. The prisoner at the instant drew his pistol and fired, killing the deceased instantly.

The killing with a deadly weapon being shown, the law presumes malice and the burden of proving matter in mitigation is upon the prisoner. The court having held that the presumption of malice was rebutted, the state, under our present statute, cannot except, and that matter is not before us. The witnesses testified that there was no offer to strike made by the deceased, and that he was not near enough to reach the prisoner if he had done so. As the only two witnesses who give the distance between the men place it at six feet, this is apparent. A third witness states, without giving an estimate of distance, that they were close together; but she says one was at the fireplace, and the other was at the door, and the house was 12 by 14 feet, and shows no offer to strike by deceased. There was an open door immediately behind the prisoner. The burden to show self-defense was on the prisoner. There was here no evidence sufficient to go to the jury tending to show self-defense. The prisoner, without previous provocation, challenges deceased to "come on him." He repeats the challenge; the deceased still standing by the fire with his hands in his pockets. When the deceased draws a penknife and expresses his intention to accept the challenge, the prisoner, before the deceased moves his body forward (and it is not shown that he would have moved, though he said "I am coming"), and when the deceased had made no motion or offer to strike and was six feet away, indeed too far away to strike with his penknife if he had so wished, the prisoner fires his pistol and kills. There was an open door behind through which the prisoner might have retreated. He was not pushed to the wall. He provoked the drawing of the penknife. He used excessive force, a pistol against a penknife six feet away. He did not kill to save himself from imminent bodily peril. He fought willingly. He was at least guilty of manslaughter. The court could properly have left it to the jury to find whether the prisoner was not guilty of a greater offense. State v. Gentry, 125 N. C.

733, 34 S. E. 706; State v. Hunt, 128 N. C. 587, 38 S. E. 473. Certainly it was not error to charge that the evidence, if believed, did not show a killing in self-defense. In State v. Kennedy, 91 N. C. 572, the deceased was 10 feet away with a brickbat, about to throw it (which was in striking distance), and the prisoner told him not to come on, the deceased advanced, and the prisoner fired. This court held: "If, so situated that he could escape, he preferred to shoot rather than escape, then he would be at least guilty of manslaughter." "If two persons, upon a sudden quarrel, fight, and one kills the other, it is voluntary manslaughter." State v. Floyd, 51 N. C. 392. The prisoner certainly cannot claim more than that. Indeed, the deceased did no fighting, made no offer to strike, and was not even in striking distance, and there was a disparity of force, a pistol against a half-opened penknife six feet away.

There is no error of which the prisoner can complain.

No error.

WALKER and HOKE, JJ., dissent, for the reason that in their opinion there is evidence which should be submitted to the jury under the plea of self-defense.

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(145 N. C. 579)

## STATE v. BOSSEE.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. ANIMALS—CRUELTY — STATUTORY REGULATIONS.

Revisal 1905, § 3299, relating to cruelty to animals, enumerates as subjects protected from cruelty any useful beast, fowl, or animal, and provides that the words "torture," "torment," or "cruelty" shall include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is permitted. *Held*, that poisoning chickens is within the purview of the statute.

2. CRIMINAL LAW — CRUELTY TO ANIMALS — PROSECUTION—JURISDICTION OF COURT.

Under Revisal 1905, § 3299, fixing the punishment for cruelty to animals at not more than $50 fine or 30 days imprisonment, the justice of the peace, and not the superior court, has jurisdiction of such offense.

3. SAME — APPEAL — RAISING OBJECTION BELOW—OBJECTION TO JURISDICTION.

Under the express provisions of court rule 27 (53 S. E. viii), a defect of jurisdiction of the trial court in a criminal case may be raised for the first time on appeal, and may be considered though not called to the Appellate Court's attention.

Appeal from Superior Court, Transylvania County; Guion, Judge.

W. T. Bossee was charged with cruelty to animals. From a ruling adverse to the state, it appeals. Action dismissed.

Assistant Attorney General Clement, for the State.

CLARK, C. J. The charge against the defendant is set out in proper form, under Revisal 1905, § 3299, for cruelty to animals, in poisoning a chicken the property of the prosecutor. That section enumerates as subjects protected from cruelty "any useful beast, fowl, or animal." It also provides that the words "torture," "torment," or "cruelty" shall "include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted." It is clear therefore that poisoning chickens comes within the purview of the statute, as is held in State v. Neal, 120 N. C. 618–620, 27 S. E. 81, 84 (58 Am. St. Rep. 810) citing State v. Butts, 92 N. C. 784; Johnson v. Patterson, 14 Conn. 1, 35 Am. Dec. 96, where a neighbor's chickens were killed by strewing poisoned meal on one's own premises; and Clark v. Keliher, 107 Mass. 406, where the defendant killed a neighbor's chickens while trespassing, and many other cases.

But we are precluded from going beyond the form of the indictment and passing upon the question whether the defendant is guilty upon the facts found in the special verdict in this case, because Mr. Clement, the Assistant Attorney General, has frankly and most properly called our attention to the fact that this action originated in the superior court, which, under the statute as it now reads, has no original jurisdiction of this offense. Laws 1891, p. 71, c. 65, amending Code 1883, §§ 2482, 2489, fixed the punishment at "not more than $50 fine or 30 days' imprisonment or both." As this might exceed the jurisdiction of a justice of the peace as prescribed by Const. art. 4, § 27, the jurisdiction was vested in the superior court. But in Revisal 1905, § 3299, the words "or both" are stricken out, so that now the punishment cannot exceed "$50 fine or 30 days' imprisonment." Original jurisdiction of the offense is therefore in the court of a justice of the peace. Whether this omission of the words "or both" in the Revisal, and the consequent transfer of jurisdiction, was inadvertently or intentionally made, the law is so worded. The punishment prescribed determines the jurisdiction. State v. Lewis, 142 N. C. 630, 55 S. E. 600, 7 L. R. A. (N. S.) 669; State v. Fesperman, 108 N. C. 772, 13 S. E. 14.

There is no exception on this ground in the record, but a defect of jurisdiction is one of the matters which may be taken advantage of for the first time in this court, though not raised below (rule 27 of this court [53 S. E. viii]); indeed the court should take notice thereof ex mero motu. Fowler v. Fowler, 131 N. C. 171, 42 S. E. 563, 59 L. R. A. 317, and cases there cited.

Action dismissed.

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(146 N. C. 345)

## HALL v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. DEATH—PERSONS ENTITLED TO SUE — FOREIGN ADMINISTRATOR.

A foreign administrator may not bring an action in the state under the provisions of Revisal 1905, § 59, authorizing a suit for wrongful death of a decedent to be brought by an admin-

istrator of the estate; the provisions of the statute being construed to limit the right to a domestic administrator in view of the direct provisions of Revisal 1905, § 5, subsec. 2, prohibiting the granting of letters of administration to a nonresident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 39.]

2. SAME.

Revisal 1905, § 59, authorizing a suit for wrongful death of a decedent to be brought by an administrator of the estate, and providing that the amount recovered in such action should be distributed according to the law relating to the descent of personal property in case of intestacy, cannot be construed to authorize a foreign administrator to sue on the theory that he sues, not as administrator, but as a trustee of an express trust in the amount recovered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 39.]

3. EVIDENCE — JUDICIAL NOTICE — FOREIGN STATUTES.

Courts will not take judicial notice of the statutes of another state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 51.]

4. SAME — PRESUMPTIONS — COMMON LAW — FOREIGN STATE.

It is presumed that the common law of a foreign state is the same as the common law of the domestic state, if not pleaded and proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 101; vol. 10, Common Law, § 14.]

5. APPEAL—APPEALABLE ORDERS — DEMURRER ORE TENUS.

A demurrer ore tenus at the trial of a cause is equivalent to a motion to dismiss, and a motion overruling such a demurrer is unappealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 688, 720.]

6. DEATH—AMOUNT OF RECOVERY—DISTRIBUTION.

Under Revisal 1905, § 59, authorizing an action for negligence for wrongful death, and providing that the amount recovered shall be disposed of as provided in the chapter relative to the distribution of personal property in case of intestacy, the laws of the state of the recovery alone will control as to the distribution of the amount recovered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 133.]

Appeal from Superior Court, Person County; Councill, Judge.

Action for wrongful death by R. J. Hall, administrator, against the Southern Railway Company. From an order overruling a motion to dismiss, defendant appeals. Appeal dismissed.

The plaintiff alleges in his complaint that his intestate, who was a flagman in the defendant's employ, was killed by the negligence of the defendant on November 11, 1905, in the county of Caswell, which is in this state, and that, at the time of his death, he was resident and domiciled in Danville, state of Virginia. That he was appointed administrator of the intestate in Virginia. This action was brought in the superior court of the county of Person. The plaintiff is now, and was at time of his appointment as administrator, resident and domiciled in the state of Virginia. The defendant in its answer denied the material allegations of the complaint. At the trial, the defendant moved to dismiss the action and demurred ore tenus, upon the grounds: (1) That the plaintiff could not sue in the courts of this state; (2) that he had no right to maintain this action. The court upon consideration overruled the motion and demurrer ore tenus, and the defendant appealed.

F. H. Busbee, W. D. Merrit, and P. H. Busbee, for appellant. B. S. Royster and E. P. Buford, for appellee.

WALKER, J. (after stating the facts as above). The statute of this state (Revisal 1905, § 5, subsec. 2) positively forbids letters of administration to be issued to a nonresident of the state, and it is to be inferred from this enactment, as well as from the course of decision in this court, that the policy of the law is well established to the effect that a nonresident administrator cannot sue in the courts of this state. Butts' Adm'rs v. Price, 1 N. C. 289; Anonymous, 2 N. C. 355; Helme v. Sanders, 10 N. C. 563; Leake v. Gilchrist, 13 N. C. 73; Smith v. Munroe, 23 N. C. 345; Morefield v. Harris, 126 N. C. 626, 36 S. E. 125; Scott v. Lumber Co., 144 N. C. 44, 56 S. E. 548. A nonresident, who happens also to be an administrator appointed by a court in the state of his and his intestate's residence and domicile, may sometimes maintain an action in his own name in another state, as, for instance, to recover property, possession of which he had acquired as administrator, and which had afterwards been taken from him; but he sues, not as administrator, but in his individual capacity upon his own right of possession. Leake v. Gilchrist, supra. There are, perhaps, other examples of a like kind. We have held, for instance, that, when services are rendered by an attorney at law to an administrator or executor, the latter is liable, upon a quantum meruit, in his individual, and not in his official, capacity. McKay v. Royal, 52 N. C. 426. See, also, Tyson v. Walston, 83 N. C. 90; Halley v. Wheeler, 49 N. C. 159; Beaty v. Gingles, 53 N. C. 302; Kessler v. Hall, 64 N. C. 60; Kerchner v. McRae, 80 N. C. 219. Where he must sue in his representative capacity and recover only by virtue of his office, a foreign administrator cannot sue in our courts. Original or ancillary letters of administration must be taken out here. The distinction between his right to sue as administrator, when the cause of action belongs to him only in his representative capacity, and his right to sue when it belongs to him as his own, though acquired originally by reason of his being administrator, runs clearly through all the authorities.

The plaintiff contends that he has the right to sue here upon the cause of action alleged in his complaint, because, while he qualified as administrator in Virginia, he is, under our statute, but a trustee of an express trust, and must hold the proceeds of his recovery

in trust for those designated in the statute as the beneficiaries of the fund. We cannot agree with the learned counsel, who so ably and ingeniously argued for the plaintiff, in this view of our statute. We think it was manifestly intended by the statute that the administrator designated by it to sue for the damages, in case of a death caused by negligence or other wrongful act, should be one appointed by a court of this state in the proper county. The act provides as follows: "Whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amount in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy." Revisal 1905, § 59. Can any one read that section and conclude that the Legislature intended that the action which is authorized by it could be brought by a foreign administrator? The fair presumption would be that, when the act refers to an administrator, it means, nothing else appearing, a domestic administrator, especially when the decisions of the highest court of the state had uniformly established that a nonresident administrator cannot sue in the courts of this state. The statute requires the suit to be brought by the administrator in his official, and not in his private or individual, capacity. He must sue as administrator. Can words convey that idea any more distinctly and clearly than those used in the section quoted? We have virtually held, in two cases, that this is the true construction of the act. Hartness v. Pharr, 133 N. C. 566, 45 S. E. 901, 98 Am. St. Rep. 725, and Vance v. Railway, 138 N. C. 460, 50 S. E. 860. In the case last cited we said: "When it was provided that the action should be brought by the administrator, it was intended that he should be appointed by the clerk of the county where the death occurred, if the decedent was a nonresident domiciled in another state and without assets situated here." But in Vance v. Railway, supra, we also cited with approval the case of Brown's Adm'r v. Railroad, 97 Ky. 228, 30 S. W. 640, as follows: "Within the line of the general statutes on this subject, defining when, under what circumstances, and what courts shall have power to appoint an administrator for a nonresident decedent, it may be that the matter sued for in this action is not a debt or demand belonging to or owned by the decedent at the time of his death. Neither is it strictly personal estate of the decedent. But beyond these general statutes, we think the particular statute applicable to cases of this kind, wherein the right of action is expressly given to an administrator, necessarily implies the right to have an administrator appointed by the local courts for this purpose alone, if there be no other necessity or right or authority for such an appointment. And we deem the court of the county where the injury was done and where the man died the proper court to entertain such jurisdiction." The case of In re Estate of Mayo, 60 S. C. 415, 38 S. E. 634, 54 L. R. A. 660, was cited with approval, as follows: "The statute is remedial and should be liberally construed so as to accomplish its object. We therefore hold that the statute creating a right of action which cannot be enforced except by an administrator, and providing for a special distribution by said administrator of the proceeds, will warrant the probate court of the county where the intestate was killed in granting administration for the purpose of enforcing such right of action. This view is well supported by authority in other jurisdictions." But we think that the decision in Hartness v. Pharr, supra, is more to the point. We held in that case that an administrator appointed in this state should bring the action and distribute the funds according to the laws of this state, where the death occurred, although there had been a prior administration in South Carolina, where the intestate was domiciled at the time of his death. The contest there was distinctly between the administrator appointed in South Carolina and the plaintiff in the suit, who was afterwards appointed administrator in this state. The case of McDonald v. McDonald's Adm'r, 96 Ky. 209, 28 S. W. 482, 49 Am. St. Rep. 289, was cited and approved as an authority supporting our decision. Further considering the question, at page 573 of 133 N. C., page 904 of 45 S. E. (98 Am. St. Rep. 725), we said: "In no possible view, as we have said, can this fund be regarded as a part of the assets of the estate of the deceased. The cause of action never accrued to him and never came into existence until his death, and the recovery thereon cannot be considered or treated as any part of his estate. The doctrine that the succession to personal property is determined by the law of the intestate's domicile, as laid down in Leake v. Gilchrist, 13 N. C. 75, which was cited in the brief of the defendant's counsel in support of his position, has no application to this case. The personal representative in South Carolina, in right of the next of kin, succeeded to no property, because his intestate died leaving none, unless he had effects other than money now claimed as a part of his estate. To require the defendant Pharr (the administrator appointed in this state) to

pay the money to the South Carolina administrator would be in direct contravention of our statute."

This suit is of the first impression in our courts. We were cited to several cases decided in other jurisdictions which apparently give some color to the plaintiff's contention. We have examined them carefully and find none which is supported by any reasoning or argument cogent enough to induce us to depart from the principle established by this court for many years, and we think that one of the cases cited (Boulden v. Railroad, 205 Pa. 264, 54 Atl. 906) would seem, in principle at least, to conflict with the plaintiff's contention. In that case, the court held that as the administrator was appointed in New Jersey, and the cause of action, to wit, the negligent killing, occurred in that state, the action might well be brought in Pennsylvania, without an ancillary administrator. But the decision is expressly based upon the fact that the administrator had qualified in the state where the cause of action arose. That is not the fact in this case, and the reasoning of the court, which is predicated solely upon the existence of the fact in that case, would seem to be direct authority against the plaintiff. This court, as we have shown, has for many years held, contrary to the last proposition mentioned in that case, that ancillary administration in this state is necessary. We find that the authorities in the other states are very conflicting, and those in favor of the defendant's contention are much better reasoned than those seeming to hold a contrary doctrine. In the case of Railway v. Brantley's Adm'r, 96 Ky. 297, 28 S. W. 477, 49 Am. St. Rep. 291, a court of exceptional ability and learning has considered the question at length, and presented convincing reasons for the conclusion reached, that an administrator appointed in one state cannot sue in another to recover damages for a death caused by negligence, unless specially authorized by statute so to do—that the plaintiff not only has no capacity to sue in such a case, but has no cause or right of action. The opinion in that case is not only well considered, but is in perfect harmony with what this court has held to be the law for many years in regard to the right of an administrator appointed in one state to sue in the courts of another.

It was said by counsel for the plaintiff that the law of Virginia was similar in its provisions to our statute, but there is nothing in the record to show what the law of that state is. We do not take judicial notice of the statutes of another state. They must be pleaded and proven. Hooper v. Moore, 50 N. C. 130; Knight v. Wall, 19 N. C. 125; Moore v. Gwynn, 27 N. C. 187; State v. Jackson, 13 N. C. 564; Hilliard v. Outlaw, 92 N. C. 266. "If not pleaded and proven, the presumption, under the authorities, is that the unwritten or common law of another state is the same as the unwritten or common law in this state." Lassiter v. Railroad, 136 N. C. 89, 48 S. E. 642; Griffin v. Carter, 40 N. C. 413; Brown v. Pratt, 56 N. C. 202. But not so as to a statute. This suit, though, is brought upon our statute, and the statement that the statutes of the two states upon the same subject are alike was made in order to show that the distribution of the fund recovered would necessarily be made according to our law. Our statute would control the distribution of the fund, whether the statutes of the two states are alike or not (Hartness v. Pharr, supra), so that it is immaterial to consider the similarity of the two enactments, even if there were evidence of it. We have held in the last-cited case that the fund must not only be distributed according to the law of this state, but by an administrator appointed here, and that is conclusively against the plaintiff's right to recover in this action. Would it be right to permit the plaintiff to recover and take the fund out of the state and compel the distributees resident in the state, or the University, if there are no distributees, to go to Virginia to litigate their rights with the foreign administrator, if he should refuse to pay over the fund upon demand? The state looks after and safeguards the interests of its own citizens in such cases and will retain property here in custodia legis in order that they may be protected in the assertion of their rights. This is but simple justice to them, and a duty therefore that rests upon the state. Holshouser v. Copper Co., 138 N. C. 248, 50 S. E. 650, 70 L. R. A. 183; Hartness v. Pharr, supra; Vance v. Railway, supra.

Every argument based upon right and justice, as well as the best-considered authorities, are opposed alike to the plaintiff's contention that he can sue or recover in the courts of this state. We have discussed the plaintiff's right to sue, as we were asked to do so by counsel, in order to put an end to the litigation, if he has no such right; but as the ruling of the court upon the motion to dismiss was not appealable, and in the then state of the case the demurrer ore tenus was equivalent to such a motion, we must dismiss the appeal. Clark's Code (3d Ed.) p. 738, and cases cited.

Appeal dismissed.

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(146 N. C. 316)

## McCULLOCH et al. v. NORTH CAROLINA R. CO. et al.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. JUDGMENT — RELIEF — ALLEGATIONS AND PROOF CONTROLLING PRAYER.

A plaintiff is entitled to any remedy to which the facts alleged and proved entitle him, irrespective of the prayer for relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 441, 442.]

2. EMINENT DOMAIN — INJURY TO PROPERTY NOT TAKEN—ADDITIONAL USE.

A railroad company, owning an easement for trackage and similar purposes over plain-

tiff's lot, leased its entire road to defendant. Defendant had four other roads meeting at G., the town where plaintiff's lot was located. *Held*, that defendant was not entitled to use its easement for trackage or warehouse purposes for any traffic in which the lessor road had no part or interest without making compensation to plaintiff as for an additional burden on his land, but that the additional traffic over the lessor road, through originating on defendant's other roads, was not a subject of compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 319.]

3. APPEAL — REVERSAL — REMAND — AMENDMENT OF PLEADING.

Under Revisal 1905, § 507, providing that the judge or court may before and after judgment, in furtherance of justice, etc., amend any pleading, etc., a pleading may be amended by the prevailing party after reversal on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4677–4679.]

4. EMINENT DOMAIN—PROPERTY NOT TAKEN — INJURY — COMPENSATION — ADDITIONAL USE.

Where plaintiff owns a lot subject to a right of way conveyed to a railroad company by plaintiff's grantor, the railroad company holds only a right to use so much of the right of way as is necessary for its purpose, and, though the company or its lessee cannot be barred by the statute of limitations in case it should become necessary to occupy more of the right of way for purposes incident to the use of the road, the statute is no protection in occupying more land, though within the limits of the right of way, for trackage, etc., for other purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 315–319.]

5. SAME — COMPENSATION — RECOVERY — ISSUES—SUBMISSION.

In an action against a railroad company, which was a lessee of a company owning a right of way across plaintiff's lot, for taking additional land for trackage purposes, etc., foreign to the use of the leased road, the following issues were tendered by plaintiff: "Was the land taken necessary for the proper handling of the exclusive business of the leased road? Has the land in controversy, since it was taken by the lessee, been used by it to handle freights belonging to other than the leased road, and which would not directly pass over it or any part thereof in transmission from the point of shipment to that of destination? What damages has the plaintiff sustained by reason of the alleged trespass?" *Held*, that the issues were essential to the decision of the controversy, and their refusal was error.

6. APPEAL—APPEAL BY PREVAILING PARTY.

If a judgment is only partly in favor of a party, or is less favorable than he thinks it should be, he may appeal to correct the judgment or to obtain a more favorable verdict and judgment on a new trial; but where the judgment is entirely in his favor, so that he does not desire a new trial, his appeal must be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 949, 950.]

7. SAME—REVIEW—APPEAL BY BOTH PARTIES.

Where both parties appealed, the record in the appeal by the prevailing party could not be utilized in considering the appeal of the other party, and only the exceptions of the losing party could be considered in determining whether there should be a new trial.

Appeal from Superior Court, Guilford County; Justice, Judge.

Action by J. F. McCulloch and others against the North Carolina Railroad Company and others. From a judgment both parties appeal. Reversed on plaintiffs' appeal. Defendants' appeal dismissed.

Scott & McLean, R. D. Douglas, R. M. Douglas, and E. J. Justice, for plaintiffs. King & Kimball, for defendants.

### Plaintiffs' Appeal.

CLARK, C. J. The action of the plaintiffs is in the nature of an action of ejectment, and also for wrongful entry and trespass. But they are entitled, irrespective of the prayer for relief, to any remedy to which the facts alleged and proven entitle them. Gillam v. Insurance Co., 121 N. C. 372, 28 S. E. 470, and numerous cases there cited. Succinctly stated, those facts are: The North Carolina Railroad Company acquired in 1850 by deed an easement in the lot in question which is now used by the Southern Railroad Company for trackage and similar purposes. The Southern Railroad Company, the defendant, as lessee of the North Carolina Railroad Company, is entitled to use said lot as fully as its lessor could have done (so far as this action is concerned) including any increased burden on the lot by reason of the increased business of said North Carolina Railroad Company's part of the business of the "Southern," whether the said business originates along the line of the North Carolina Railroad Company or originating elsewhere is shipped to any point over the line of the North Carolina Railroad. But at Greensboro, where the lot is located, the Southern Railroad Company has four railroad lines other than the North Carolina Railroad Company, to wit: One coming in from Danville, another from Mt. Airy, another from Wilkesboro and Winston, another still from the direction of Sanford. So far as business coming in those four lines is concerned which stops at Greensboro, or which at that point is carried further, not upon the North Carolina Railroad, but upon these other four lines, there is no warrant for the use of said lot for trackage or warehouse purposes for the convenience of the Southern Railroad Company as to this business in which the North Carolina Railroad has no part or interest. The North Carolina Railroad Company would have had no right to use the lot for such purely alien purposes, if it had not been leased, and it could not confer upon its lessee greater rights than it held itself.

The plaintiffs are entitled in this action to have permanent damages assessed, in the nature of condemnation, for the additional burden placed upon the lot, for its use, for purposes other than those for which it uses the lot purely as lessee of the North Carolina Railroad Company. Hodges v. Tel. Co., 133 N. C. 225, 45 S. E. 572, in which case this proposition is so clearly and fully reasoned out by Connor, J, with full citation of authorities, that further discussion here would be idle repetition. The plaintiffs in their brief submit that this is all they wish, i. e.,

compensation for the alien and additional burden, and tersely say: "Take and pay." If this cause of action is defectively stated, when the case goes back the pleadings can be amended, indeed, if the case had gone in favor of plaintiffs, they could have amended, even after judgment, to conform to the proof. Revisal 1905, § 507. The use of the roadbed and up to the ditches on each side thereof, at that point, by the defendant or its lessor for more than 21 years, was admitted by the plaintiffs; but, on the other hand, it was admitted by the defendant that the land outside of the ditches, but within the 100 feet on each side of the center of the track, was first taken by it for trackage purposes in 1903. So far as that trackage is used by the defendant for other purposes than to accommodate its business as lessor of the North Carolina Railroad Company, it is an additional servitude. Whether the Southern Railroad Company, not being a North Carolina corporation, can take the property for this additional servitude, under the right of eminent domain, except in so far as it may do so as lessee of those of its other lines which possess that right conferred by a charter from this state, is a matter not now before us.

It is a fact agreed in the case that the plaintiffs are owners of the 45-acre tract of land described in the complaint, subject to the right of way through the same conveyed to the North Carolina Railroad Company by deed from Hiatt, under whom plaintiffs claim, which deed was executed in 1850. The said North Carolina Railroad Company held only an easement, a right to use so much of the right of way as was necessary for its purposes. Railroad v. Sturgeon, 120 N. C. 225, 26 S. E. 779. But when it became necessary for the North Carolina Railroad Company itself or through its lessee to occupy more of the right of way, it cannot be barred by the statute of limitations. Railroad v. Olive, 142 N. C. 257, 55 S. E. 263. The taking possession of the right of way beyond the roadbed and ditches by the Southern Railroad Company was only a few days before this action was begun, and so far as it was taken to be used for trackage or other uses, alien to its rights as lessor of the North Carolina Railroad Company, it was wrongful and is not protected by any statute of limitations.

The plaintiffs tendered, among others, the following issues and excepted to their refusal: "Was the land so taken by the Southern Railway Company necessary for the proper handling of the exclusive business of the North Carolina Railroad Company? Has the land in controversy since it was taken by the Southern Railway Company been used by said Company to handle freights belonging to roads other than the North Carolina Railroad and which would not directly pass over said North Carolina Railroad or any part thereof, in transmission from the point of shipment to that of destination? What damages have the plaintiffs sustained by reason of the alleged trespass?" These issues arose upon the pleadings and were essential to the decision of this controversy. Their refusal was error, necessitating a new trial.

Error.

Defendant's Appeal.

The judgment below was in favor of the defendant, and the case has been discussed in the opinion in the plaintiffs' appeal. During the course of the trial, the defendant excepted to the submission of the issue, to overruling the motion for nonsuit, and to the instruction to answer the issue, "Yes." There are cases in which the judgment is only partly in favor of the party obtaining it, or less favorable than he thinks that he is entitled to. In such cases he can appeal if he wishes to correct the judgment or to obtain a more favorable verdict and judgment on a new trial. But here the judgment is entirely in favor of the defendant. He does not desire a new trial or any modification of the judgment. Therefore the sole question is whether there was error committed in any of the matters excepted to in the plaintiff's appeal. If there was, there must be a new trial. If there was not, then the judgment in favor of defendant must be affirmed.

The record in the defendant's appeal cannot be looked into in considering the plaintiff's appeal, and the decision of the court in that appeal must determine whether there shall be a new trial or not. The defendant's appeal was therefore improvidently taken, and must be dismissed.

Appeal dismissed.

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(62 W. Va. 230)

## STATE ex rel. WHITE, Tax Com'r, et al. v. WIRT COUNTY COURT et al.*

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907. On Rehearing, Dec. 17, 1907.)

1. COUNTIES—TAXATION—DISTRICT ROAD PURPOSES.

The clause in section 29 of chapter 39 of the Code of 1899 [Code 1906, § 1231], as amended by chapter 63, p. 256, of the Acts of the Legislature of 1907, saying "the said county court shall thereupon levy so many cents on every hundred dollars of the valuation of the property taxable in the county according to the last assessment thereof, as will cover the estimated amount necessary to be raised for county purposes and as aforesaid approved during the fiscal year; but such levy shall in no case exceed thirty-five cents on the one hundred dollars valuation of property"—does not limit the powers of the county courts respecting the amounts to be raised by taxation for district road purposes.

2. STATUTES—IN PARI MATERIA.

Laws relating to different subjects are not in pari materia.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 230–243.]

3. SAME — REPEAL — REPEAL OF QUALIFYING ACT AS REVIVAL OF ACT QUALIFIED.

The repeal of a statute merely qualifying or limiting another, or excepting something from it, leaves the original statute in full force and vigor. Such qualifying or limiting statute does not effect a repeal within the meaning of sec-

* For dissenting opinion, see 59 S. E. 981.

tion 10 of chapter 13 of the Code of 1899 [Code 1906, § 286].

(Syllabus by the Court.)

Mandamus by Albert B. White, state tax commissioner, and others; as relators, to compel Wirt county court to lay levies for county and road purposes in conformity with law. Writ denied.

W. H. Wolfe, Jr., and Geo. J. McComas, for petitioners. Wm. Beard, J. W. Martin, and Willie Fought, for respondents.

POFFENBARGER, J. The county court of Wirt county on the 31st day of July, 1907, levied, for county purposes proper, 35 cents on every $100 valuation of property in said county, and, in addition thereto, 10 cents on the valuation of property in one district, for road purposes, 30 cents in another, 25 cents in three others, 33⅓ cents in another, and 20 cents in another. Conceiving this levy to be in violation of law, Albert B. White, state tax commissioner, and F. T. Lockhart and S. H. Mitchell, citizens, residents and taxpayers of said county, as relators, have asked, in the name of the state, a writ of mandamus to compel said county court to lay levies for county and road purposes in conformity with the law. Their contention is that the court has exceeded the statutory limit upon its power of taxation for county and road purposes.

Section 29 of chapter 39 of the Code of 1899 [Code 1906, § 1231], as amended by chapter 63, p. 256, of the Acts of 1907, requires the county court to make up an estimate, in each year, of the amount necessary to be levied for the current fiscal year, to cover all county debts and liabilities payable during the year, including the probable expenditures for county purposes and a proper allowance for delinquent taxes, discount allowed on taxes paid on or before the 30th day of November, expenses of collection and contingencies. Following this requirement and certain directions concerning it is found the clause relating to the levy, on the construction of which this case turns. It reads as follows: "The said county court shall thereupon levy so many cents on every hundred dollars of the valuation of the property taxable in the county, according to the last assessment thereof, as will cover the estimated amount necessary to be raised for county purposes and as aforesaid approved during the fiscal year; but such levy shall in no case exceed thirty-five cents on the one hundred dollars valuation of property." In connection with it, the former laws relating to the same subject and the statutes concerning levies for road purposes must likewise be considered. Section 29 of chapter 39 of the Code of 1899 contained no limitation as to the amount to be raised. After requiring the estimate, it said: "The said court shall thereupon levy so many cents on every hundred dollars of the valuation of the property taxable in the county according to the last assessment thereof for state taxation, as will cover the estimated amount necessary to be raised for county purposes during the fiscal year." As amended by chapter 9, p. 121, of the Acts of 1904 [Code 1906, § 1231], the following limitation was added thereto: "But such levy shall in no case, after the year 1905, exceed sixty cents on the one hundred dollars valuation of property, except for the purposes mentioned in section seven of article ten of the Constitution, unless such levy shall have been submitted to a vote of the people of the county and have received three-fifths of the votes cast for and against the same." It was again amended by chapter 48, p. 446, of the Acts of 1905 [Code 1906, § 1231], and the limitation changed so as to read as follows: "No county court shall in the year nineteen hundred and five assess or levy taxes, including district road taxes, which shall exceed by more than five per cent. the aggregate amount of taxes levied by it in the year nineteen hundred and four; nor in the year nineteen hundred and six assess or levy taxes which shall exceed by more than seven per cent. the aggregate amount of taxes levied by it in the year nineteen hundred and four; nor in the year nineteen hundred and seven assess or levy taxes which shall exceed by more than nine per cent the aggregate amount of taxes levied by it in the year nineteen hundred and four. The word 'taxes' shall be construed to include district road taxes, as well as all other taxes for county purposes. * * * Provided, second, that after the year nineteen hundred and seven no county court shall in any year assess or levy taxes for any and all purposes, including district road taxes, the aggregate of which shall exceed sixty cents on the hundred dollars valuation of property, except for the support of free schools and the payment of indebtedness as provided in section 7 of article 10 of the Constitution, unless such levy shall have been submitted to a vote of the people of the county and have received three-fifths of the votes cast for and against the same." While all these changes in chapter 39 were made, there remained and still remains unchanged sections 12 and 22 of chapter 43 of the Code of 1899 [Code 1906, §§ 1400, 1411], relating to the power and duty of the county court to assess and levy taxes for road purposes, which read as follows:

"* * * And the county court of every county in which the said two days' work shall be insufficient to open, construct and keep in good repair, the roads and bridges thereof, shall, at a session of said court held prior to the first day of May in each year, prescribe by order of the court the manner in which the same shall be done, after expending thereon the two days' work aforesaid, whether entirely by a tax on property, entirely by labor, or partly by tax and partly by labor; and it shall prescribe, provide for and lay a sufficient amount of tax, or labor, or both, as the

case may be, to open, construct and keep in good repair the roads and bridges in their county during each year."

"Sec. 22. When the county court of any county shall decide to levy a tax in pursuance to the provisions of this chapter, it shall ascertain, as nearly as possible, the amount of money which will be necessary in each magisterial district in their county, together with the labor required to be performed therein, to construct, put and keep in good repair the roads and bridges in such district, and shall by an order entered of record, direct the assessor of the assessment district in which such district may be, to extend on the land and property books, required to be made by said assessor, a road tax on the real and personal property taxable in said district, at such rate as may be specified in such order, which levy shall be made upon the latest assessment thereof for state taxation."

While these statutes contained no limitation upon the powers of the court to raise money for county and road purposes, prior to the legislation of 1904, 1905, and 1907, there was a limitation in section 7 of article 10 of the Constitution to which they were necessarily subject, and which reads, in part, as follows: "County authorities shall never assess taxes, in any one year, the aggregate of which shall exceed ninety-five cents per one hundred dollars valuation, except for the support of free schools. * * *" That this clause governs the court in respect to both county and road levies was determined by this court in the case of Brannon v. County Court, 33 W. Va. 789, 11 S. E. 34, 8 L. R. A. 304, and Neale v. County Court, 43 W. Va. 90, 27 S. E. 370.

It is insisted that the construction given by the court to the constitutional clause quoted applies to the statutes now under consideration. We are unable to adopt this view. The Constitution is one thing and the statute quite another. The language of the Constitution differs very materially from the language of these statutes, and the decisions above referred to rest largely upon the peculiar terms of the constitutional clause. That clause says county authorities shall not levy taxes in one year in excess of 95 cents on every $100 of valuation. Both county levies and road levies are laid by the county authorities. This general language was followed by an exception as to taxes for the support of free schools, and the court said: "The fact that certain exceptions from this limitation are specified tends to show that all other taxes are meant to be included within the limitation." The use of the word "aggregate" in the clause was also regarded as significant. The court said: "Another feature of this section 7 strikes me as significant of its meaning, and that is the presence of the word 'aggregate,' the provision being that county authorities shall never assess taxes, 'the aggregate of which shall exceed ninety five cents per one hundred dollars valuation,' evidently meaning that more than one kind or species of taxes must be added together for the purposes of the limit of taxation here prescribed. What shall be added? Not charges for the many objects of expenditure which a county may incur, but classes or kinds of taxes. Take all this language, and the prohibition is broad." The court then proceeds to show that road taxes, as such, are levied and disbursed by the county authorities, but not as county levies or county funds eo nomine. This brought the road taxes directly within the express terms of the constitutional clause, and, adding them to the county levies proper, brought them also within the word "aggregate," used in that clause. There was a basis in the express terms of the clause for all the reasoning and argument of the court in reaching its conclusion that the constitutional limitation extended to road levies, as well as county levies. The limitation in section 29 of chapter 39 is clothed in different terms. It does not say taxes levied by county authorities shall not exceed 35 cents, nor is the word "aggregate" used in it, indicating that more than one class of taxes was intended to be included.

Neale v. County Court, 43 W. Va. 90, 27 S. E. 370, involved a number of questions, all of which differed very materially from this and turned on clauses of the Constitution. One was whether magisterial districts can incur bonded indebtedness, and another, whether district indebtedness shall be added to strict county indebtedness in determining whether the limit on indebtedness, imposed by section 8 of article 10 of the Constitution, has been exceeded. In respect to the latter, it was held that, for the purposes of said clause of the Constitution, such district indebtedness "is to be regarded as county indebtedness, and included with other county indebtedness in determining whether the total county indebtedness will exceed that limitation." But this conclusion was also based largely on the peculiar language of the limitation clause, which, not recognizing, in terms, any right or power in magisterial districts to make contracts, they being in no sense corporations, but only territorial divisions of the county, said no county court, city, school district, or municipal corporation should, after the adoption of the Constitution, incur indebtedness in excess of 5 per cent. of the valuation of the property therein for purposes of taxation. The court thus found its conclusion in the terms of the clause in the form of an implication. The reasoning by which it was reached does not apply to a statute, dealing with a different matter and clothed in different terms. Chapter 39 of the Code is entitled, "An act concerning the county courts; their jurisdiction and powers." It relates to many things other than the mere levying and disbursing of the county levies; but it deals specially with the subject of county levies, and fails to make any special provision for the construc-

tion and maintenance of roads, bridges, landings, wharves, etc. Section 23 of that chapter makes it the duty of the county court to cause any road, bridge, or public landing belonging to, or under the care or control of, the county, to be kept in good repair and condition, but does not prescribe the mode or manner of doing so. It says nothing about how they shall be kept in good repair and condition. It makes no provision for a levy for that purpose. All this is postponed, or omitted, for provision in another place. Chapter 43 of the Code of 1899 [Code 1906, §§ 1389–1515]. The levy, authorized and provided for in section 29, is called, in section 30 and others of chapter 39, a county levy. Nothing is said about including in it any provision for the maintenance of roads. On the other hand, in chapter 43 provision is made for what is therein termed a road levy and road taxes. The statute seems to contemplate that this levy shall be made not later than the 1st day of May in each year, while the other levy, authorized by section 29 of chapter 39, called in that chapter a county levy, may be laid after the 1st day of May, but not later than the month of July. Section 22 of chapter 43 says the tax levied thereunder shall constitute a road fund to be expended, on the order of the county court, in the district in which it may be collected, in the construction and repair of the roads and bridges therein. Special provision is made for the extending of the road levy on the land and personal property books by the assessor, and for collection thereof by the sheriff. It further says the tax shall be collected and accounted for in the same manner as county taxes are collected and accounted for, thereby expressly distinguishing between road taxes or road levies and county taxes or county levies. The same distinction was marked in the amendment of section 29 of chapter 39, made by the act of 1905, which expressly declared that the limitation should extend to road taxes as well as county taxes. In the opinion of the Legislature, these two funds or levies were so clearly and essentially separate and distinct that a clause expressly bringing road levies within the limitation was deemed necessary, and accordingly inserted. This clause having been omitted in the re-enactment of section 29 of chapter 39, made in 1907, the language of that section is now confined to whatever is contemplated in the provisions thereof relating to the estimate. After requiring the estimate, it says the county court shall thereupon levy so many cents on every $100 of the valuation as will cover the estimated amount, and that such levy, the levy to cover the estimate, shall in no case exceed 35 cents on the $100 valuation of property. This estimate, tested by the strict letter of the statute, is the estimate for general county purposes. It is required to be made not later than the month of July. The estimate for road purposes might be made at the same time, provided the estimate for county purposes should be made before the 1st day of May, but the estimate for county purposes may be made after that time, while the direction, as to the estimate for road purposes, is that it be made before the 1st day of May, so that, in legislative contemplation, the two estimates need not, and would not, be made at the same time, though we are not to be understood as holding or intimating that the terms of the statute showing intention to have the road levies laid before the 1st day of May is mandatory. Nor is there any direction in the statute that the estimate for road purposes be put upon the order book of the court. The statute simply says that, when the county court shall decide to levy a tax for road purposes, it shall ascertain as nearly as possible the amount of money which will be necessary in each magisterial district in their county, together with the labor required to be performed therein, to construct and put and keep in good repair the roads and bridges in each district, and shall, by an order entered of record, direct the assessor of the assessment district, in which such district may be, to extend, on the land and property books, required to be made by said assessor, a road tax on the real and personal property taxable in said district, at such rate as may be specified in such order. The levy required, and limited in amount, by section 29 of chapter 39, is a levy laid on all the property in the county, while the levy, authorized by chapter 43, is placed only on the property of a district. But one levy seems to be contemplated by section 29 of chapter 39 of the Code, and, if we say it includes the road levy, it might be thereby stretched to cover a dozen. The words "county purposes" in the section as amended by the act of 1907 are the exact words of that section in the Code of 1899. Hence they indicate no intent to make the provisions of that section cover road taxes. It is suggested in one of the briefs that the terms, "all county debts and liabilities payable during each year, including the probable expenditures for county purposes," indicates legislative intent to require the expenditures for district road purposes to be included in the estimate, and so covered by the limitation; but not a word of this is new language. It was all in the old statute, as found in the Code of 1899, and as amended by the act of 1905, when, in the opinion of the Legislature, it was deemed necessary to extend the limitation to district road levies by the insertion of express terms for the purpose. The phrase, "including the probable expenditure for county purposes," was no doubt put in under the impression that the preceding phrase, "all county debts and liabilities," might not be regarded as covering such future expenditures.

The intention on the part of the Legislature to limit the power of the county courts in respect to the road levies might be ar-

gued from the fact that it limited their powers respecting the county levy, the powers of the school boards respecting school levies, and the powers of municipal corporations respecting their levies, and cut down the state tax; but, seeing there was such an intent, and also that it was not carried into execution, by the use in the statute of any word or clause, that can possibly be construed as an expression of such intention, we have what the courts term a "casus omissus," which it is beyond our power to supply. 26 Am. & Eng. Ency. Law, 601, citing a long list of cases, which fully sustain the text. But, if it could be supplied, there is no means by which we can know what limit the Legislature would have imposed. The existence of intention to limit road levies being granted, it does not follow by any means that anybody intended to put the aggregate of county and road levies under a 35-cent limitation. Had this intention crystallized into the form of a legislative bill, the limit of the road levy might have been 10, 15, 20 or 25 cents for road purposes in addition to 35 cents for county purposes. It being beyond the power of mortal man to tell what limit would have been fixed, if action had been taken on the matter, how can the court read it in by construction? We must know what limit was intended before we can insert it, though thoroughly convinced that the Legislature intended to provide a limit. This principle is well illustrated in the law of amendments. A judgment or decree can sometimes be amended, if there is anything in the record by which the court can safely determine how to amend it, but not otherwise. It will never grope in the darkness of uncertainty. McClain v. Davis, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634; Bent v. Patten, 1 Rand. (Va.) 25; Powell v. Commonwealth, 11 Grat. (Va.) 822; Richardson v. Jones, 12 Grat. (Va.) 53. Lost papers may be supplied, if their contents are proven; but not otherwise. Courts will not allow a party to replace a lost paper with something not shown to contain the substance of the lost instrument. The evidence must show that there was a paper, that it has been lost, and what its contents are, before it can be set up or supplied. Board of Education v. Callihan, 33 W. Va. 209; Exchange Bank v. Morrall, 16 W. Va. 546. Human experience of centuries has demonstrated the necessity of these rules for the protection of personal and property rights, and set them up against him who comes to the courts demanding amendments and restoration of lost instruments. How emphatically reason and fairness unite in demanding their application here by analogy! I think authority also enforces them. A legislative purpose, enacted into law, includes the incidents and consequences strictly resulting from the enactment. When powers, privileges, or property are granted by statute, everything indispensable to their exercise or enjoyment are impliedly granted. An act conferring jurisdiction impliedly grants the power of doing all such acts as are essentially necessary to its execution. These are some of the principal rules relating to implications arising by the construction of statutes. Endlich, Stat. Con. 417, 418, 419. Must the court not be able to see that the thing it so reads in is an incident or consequence, or essentially necessary to the exercise or enjoyment of the thing granted, or essentially necessary to the exercise of the jurisdiction, as the case may be; and is not the thing put in thus made certain, not only as to the intention to put something in, but also as to the indentity of the thing intended? It is the same principle in operation in altered form and under changed conditions. Identification, by whatever means effected, is still nothing more nor less than identification. Nor does the rule, requiring statutes in pari materia, relating to the same thing, to be construed together, obviate this difficulty. Chapter 39 governs one of the subjects and chapter 43 the other. County and road levies are treated by the lawmakers as two distinct things, and so essentially distinct that, when in legislating so as to cover both in one clause, it was necessary to insert a phrase expressly linking them together. The limitation of taxation might be regarded as a single subject, covering all levies as elements, factors, or divisions thereof, or limitation of the powers of the county court as to all levies laid by it might be treated as a single subject, and one statute on that subject preceded by others, relating to it, or a number of contemporaneous statutes, respecting it, would be read and considered together, upon the inquiry for legislative intent. But no statute having such generality of scope and purpose disclosed by any language in it is now in existence. The clause in section 29 of chapter 39, as amended by the Acts of 1905, is the only one we ever had, and it has been dropped out of the section as amended by the act of 1907. Not a word of it remains that imports an intention to include road levies. It did not define county levy as covering road levy, and the county levy is all the present limitation reaches by any express terms. It said taxes in the limitation clause should be deemed to include district road levies, but that clause has been dropped out. We had in the act of 1905 a general limitation upon the powers of the county court respecting the amount of taxes it could raise in any one year. Now we have none. Tested by its terms, it is a mere special limitation, affecting the county levy only. If the act of 1907, in recasting the limitation clause, had used any terms indicating in the slightest degree an intention not to change its character from a general to a special limitation, and thus left room or laid ground for two constructions, based upon ambiguous terms, we might well apply the rule pari materia, and say that road levies are still included. Then both acts would relate to the same thing. "The word 'par' is not

to be confounded with the word 'similes.' It is used in opposition to it, as the expression, 'Magis pares sunt quam similes,' implying not likeness merely, but identity." 26 Am. & Eng. Ency. Law, 622.

The rule forbidding a construction that will lead to an absurd result or defeat the clear intention of the Legislature has been invoked; but we are unable to bring the case within it. When language found in a statute will bear two constructions, one of which is consistent with, and the other contrary to, the general or manifest legislative intention, gathered from other statutes, the context or facts and circumstances, relating to the subject-matter, within the judicial knowledge of the court, the former will prevail; and mere clerical mistakes will be corrected, if necessary, to effect its adoption. But in such case there must be terms susceptible of two or more interpretations; or, at least, the terms of the statute must cover the subject-matter of both constructions. A good illustration of an accidental omission of a word which the court could supply is found in Kennedy v. Gibson, 8 Wall. (U. S.) 498, 19 L. Ed. 476. A certain statute provided "that suits, actions and proceedings against any association under this act may be had," etc. A previous act on the same subject had provided that "all suits, actions and proceedings by or against any association may be had," etc. The court said: "Such suits may still be brought by the association in the courts of the United States. If this be not the proper construction, while there is provision for suits against the associations, there is none for suits by them in any court." Both statutes, it must be observed, related to the powers of associations, respecting suits in the federal courts, so that the terms of the later act included the subject-matter of the former more specific act, and the omission of the word "by" was shown to have been inadvertent by the violent and flagrant injury which its intentional omission would have involved. In our case no terms in the statute under consideration extend to road levies. Moreover, it cannot be assumed that Congress could have intended to deny an association the right to sue at all for vindication of its rights or redress of its wrongs, or to sue in the same courts in which others might sue it. The alleged absurdity resulting in our case is by no means so apparent, but, if it were, we have no terms in the act touching the subject to which it is proposed to extend the limitation. Other cases, illustrating the operation of the rule, applicable when two constructions may be predicated on ambiguous terms, are Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; Gustavel v. State, 153 Ind. 613, 54 N. E. 123; Landrum v. Flannigan, 60 Kan. 436, 56 Pac. 753; Big Black Co. v. Commonwealth, 94 Pa. 450; Philadelphia v. Ridge Ave., etc., Co., 102 Pa. 190; State v. Mayor, etc., of Perryburg, 14 Ohio St. 472. The rule applicable here, for reasons given, and apparent from the terms of the rule itself, was stated in Slingluff v. Weaver, 66 Ohio St. 621, 64 N. E. 574, as follows: "The object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the lawmaking body which enacted it. And where its provisions are ambiguous, and its meaning doubtful, the history of legislation on the subject, and the consequences of a literal interpretation of the language may be considered. Punctuation may be changed or disregarded, words transposed, or those necessary to a clear understanding, and, as shown by the context manifestly intended, inserted. But the intent of the lawmakers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the lawmaking body, there is no occasion to resort to other means of interpretation. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction."

The limitation, respecting road levies, put upon county courts by the act of 1905, and removed by the act of 1907, did not, while in force, partially repeal the provision of chapter 43, authorizing the raising of such sum for road purposes as the court may deem necessary, so that only an express revival by a subsequent act could give it its original vigor and scope. The act of 1905 wrought a mere qualification, or limitation of, or exception from, the statute, and its subsequent removal left the original act in full force. McConiha v. Guthrie, 21 W. Va. 134, Syl. point 4. It did not effect a repeal within the meaning of section 10 of chapter 13 of the Code, providing that, "when a law which has repealed another is itself repealed, the former law shall not be revived without express words for the purpose."

For the reasons herein stated, the writ prayed for will be refused.

On Reargument.

Having carefully reconsidered this case on a rehearing, we are unable to reach a conclusion different from that which is embodied in the opinion originally filed. Our construction of the clause under consideration does not make it unconstitutional in any sense. We do not make road levies and road funds, district levies and funds in all senses. They are collectible and disbursable by districts only, and uncollected road taxes are liens on property within the district for which they were levied, and no other. Although levied by the county court, and therefore a tax levied by "county authorities," and so within the constitutional limitation, as held in Brannon v. County Court, district road levies, taxes and funds are, in every practical sense, dis-

tinct from the ordinary county levies. By the enactment of sections 12 and 22 of chapter 43 of the Code of 1899 [Code 1906, §§ 1400, 1411], the Legislature has not only given them a separate and distinct existence and impressed upon them certain distinctive qualities and characteristics, but also given them a designation by which they are to be known and dealt with by the county court, and then prescribed the manner of determining their amount, as well as that in which the are to be raised and disbursed. In this way the road tax became known, many years ago, as an entity, a thing different from the ordinary county levy, extending throughout the county, and made a lien on all property in it, and the fund arising from which is to be expended without reference to territorial subdivisions. Ever since 1872 the statutes have provided for, and contemplated, road maintenance by district levies, as the usual and general plan of opening and keeping them in repair. Having made this separation and dealt with county levies in section 29 of chapter 39 of the Code of 1899 [Code 1906, § 1231] and road levies in sections 12 and 22 and others of chapter 43, it is to be presumed that any amendment of section 29 of chapter 39, not applicable in terms or by some reference to the provisions of the other chapter applies only to the subject-matter of said section. For decades it has been the practice of the Legislature itself to speak of, and deal with, the one as the county levy and the other as the road levy. We have before us a mere question of legislative intention. No constitutional question is involved. There is not a suggestion of violation of the constitutional clauses limiting local taxation and indebtedness. Nor can it be said that our disposition of this case even suggests the creation or existence of a taxing body or tribunal not authorized by the Constitution. It does not, in any sense, place the power to levy road taxes elsewhere than in the county court. Although a district fund, it is raised and disbursed by the county court, a tribunal confessedly established or sanctioned by the Constitution. Nor does our failure to give this statute a meaning different from that given the constitutional limitations in Brannon v. County Court and Neale v. County Court make it unconstitutional. A constitutional clause, having certain peculiar phraseology and terms, is one thing, and a statute, using entirely different language, is another. The true definition or exposition of the one need not fit the other and in this instance does not.

That county courts, long years ago, maintained all roads as county roads, and had no authority to deal with them as district roads, and still has discretionary power to assume the maintenance of any road by county taxation, affords no ground for denying the existence of district road levies or power to lay and collect them. When maintenance of roads was a county charge, the tax for that purpose was a county tax in the full and strict sense of the term, and the amount to be raised for that purpose was included in the estate for county purposes, and, when a county court now makes a road a county charge, the tax levied for that purpose is strictly a county tax, and the amount to be raised for the purpose is included in the estimate. That the county court may open and keep roads in repair as county roads, or district roads, according to their election, does not make the levying of district road taxes a mere apportionment of a county tax or charge among the several districts. It involves no such operation as the raising of a county fund and then dividing it. A county fund is never apportioned. It is expended without reference to district lines, and a district levy cannot be expended elsewhere than in the district. Although road maintenance, whether by county taxation or district taxation, relates to roads, county taxation for that purpose and district taxation for that purpose are different things, and, when the Legislature uses language applicable in terms to only one of them, it cannot be extended to the other merely because both relate to roads. Both leases and deeds relate to land, but we apprehend no one would say a statute relating to deeds only would be construed as relating to leases also. Dozens of similar illustrations might be given, but this fully suffices.

The amendment of 1905 (Laws 1905, p. 445, c. 48 [Code 1906, § 1231]) did not define county estimate as including district expenditures for road purposes. The phrase "including district road taxes," and the clause, "the word 'taxes' shall be construed to include district road taxes, as well as other taxes for county purposes," are found in the limitation clause only. Tested by their immediate context and the spirit and meaning of the whole section, read in connection with the provisions of chapter 43, relating to road levies, it means that, for the purposes of the limitation thereby imposed, district road taxes should be included. These clauses having been omitted in the amendment and re-enactment of the section in 1907 (Laws 1907, p. 256, c. 63), they are no longer operative. Had they defined the estimate, required by section 29, as well as the limitation, it might be that the omission from subsequent legislation of the terms defining it would be immaterial, but they did not.

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(63 W. Va. 80)

## WHITE v. SOHN.

(Supreme Court of Appeals of West Virginia. Dec. 3, 1907.)

1. LANDLORD AND TENANT — RENEWAL OF LEASE—EVIDENCE.

A written offer made by a landlord to his tenant to renew a lease for two years, couched in the following terms: "At the expiration of the lease you now hold on my property, I will be glad to renew at the present rental and conditions. Yours truly, M. Z. White. P. S. If

satisfactory, kindly advise me by return mail. M. Z. W."—is ambiguous as to intention to make acceptance by return mail a condition of the offer, precluding a verbal acceptance or acceptance by conduct, and it appearing that the tenant, after having received such offer, continued in possession, paying rent as before, which the landlord accepted, it is for the jury to determine, from the facts and circumstances, not only what mode of acceptance was intended, but also whether, if acceptance by return mail was intended as a condition of the offer, the mode of acceptance was waived.

2. TRIAL—MISLEADING INSTRUCTIONS.

An instruction susceptible of two different constructions, one of which is prejudicial to a party, is calculated to mislead the jury, and is therefore improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 564–569.]

(Syllabus by the Court.)

Error to Circuit Court, Mingo County.

Action by M. Z. White against Eli Sohn. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

Stokes & Bronson, for plaintiff in error. Brown & Wiles, for defendant in error.

POFFENBARGER, J. Eli Sohn, a tenant of M. Z. White as to certain property in the town of Williamson, Mingo county, under a written contract of lease for one month from April 1, 1904, to be continued for a term of 24 months, should the tenant so elect, did so continue the same, and, after the expiration of the 24-month term, held over until April 3, 1907, claiming a renewal of the contract by acceptance of a written offer of renewal made by White. On said last-mentioned date White commenced an action against him in a justice's court for recovery of possession of the premises, and later obtained a judgment therefor, from which an appeal was taken to the circuit court. There, on the trial de novo, judgment for both possession and $184 damages was obtained June 25, 1907, and Sohn has brought the same to this court for review, assigning as grounds of error refusal of the court to set aside the verdict for insufficiency of evidence, to allow the introduction of certain evidence, and to give a certain instruction, tendered by the defendant, as well as its action in giving a certain instruction at the request of the plaintiff.

About two months before the expiration of the term, White sent by mail the following proposal to renew: "Williamson, W. Va., Feby 2nd, 1906. Mr. Eli Sohn, Williamson, W. Va.—Dear Sir: At the expiration of the lease you now hold on my property, I will be glad to renew at the present rental and conditions. Yours truly, M. Z. White. P. S. If satisfactory, kindly advise me by return mail. M. Z. White." Sohn testified that he had received this letter on February 2, 1906, and immediately wrote and posted a letter, directed to White, accepting his proposition and inclosing a check for the rent for that month; but White denies having received such a letter though he admits the receipt of the check by mail. After that rent was regularly paid until February, 1907, when a written notice to terminate the tenancy on April 1, 1907, and demand for surrender of the possession thereof on that date, was served on Sohn. Thereafter White accepted the rent until April 1, 1907.

Defendant's instruction, refusal whereof is assigned as error, reads as follows: "The court instructs the jury that if they believe from the evidence in this case that the plaintiff, M. Z. White, leased the premises sued for to the defendant, Eli Sohn, for a definite term, and that afterwards, and before said term expired, the said M. Z. White gave the said Sohn the privilege of extending said term under the same terms and conditions as provided for in said lease, and if they further believe from the evidence that said Sohn remained in possession of said premises after the expiration of the time provided for in said lease, and paid to the said White rental therefor in accordance with the terms of said lease for the time occupied by him after the expiration thereof, then they must find for the defendant." Plaintiff's instruction, to the giving of which an exception was taken, is as follows: "The court instructs the jury that if they believe from the evidence in this case that the plaintiff, M. Z. White, made to the defendant, Eli Sohn, a proposition to renew his lease upon the property described in the summons and that the defendant did not accept the said proposal, then that the fact of such proposal being made constitutes no defense to this action." No fault can be found with the action of the court in refusing the instruction tendered by the defendant. It is condemned by the wholesome and well-settled rule inhibiting the giving of instructions bearing on the weight of the evidence, as amounting to an invasion of the province of the jury. The tenant's retention of possession, and the landlord's acceptance of rent for nearly a year, after the offer of renewal, and expiration of the lease, are circumstances tending to prove acceptance of the proposal to renew, but their probative value is to be determined by the jury, not the court. The giving of this instruction would have made them conclusive. But the other instruction was improperly given, for it falls within the same rule, as well as others equally well settled. Its tendency is to convey to the jury the impression that a renewal was not effected if they should find the offer was not accepted in writing by return mail as requested. It virtually says the want of a written acceptance is a circumstance of great weight, when in fact and in law, it is only one of several circumstances bearing on the issue of acceptance. Acceptance in writing was not in terms made a condition of the offer. The clause of the letter relating thereto was a mere request for immediate advice as to whether it would be accepted or rejected, and afterwards the year expired and the tenant remained in possession and paid rent for almost an additional year, which was accepted

without question. This conduct of the parties was proper for consideration of the jury in determining whether acceptance by return mail was a condition of the offer or a mere request, and, if a condition, whether compliance therewith had been waived. Uncertainty and indefiniteness of the offer, in this respect, lets in parol evidence for ascertainment of the intention of the parties here as in other analogous cases; and the doctrine of waiver obviously applies to such contracts or negotiations for contracts, if, in the opinion of the jury, acceptance by return mail was a condition of the offer. The case is unlike that in which there is no subsequent conduct or relationship perfectly consistent with the theory of acceptance and waiver, and tending strongly to prove both. These considerations make the instruction manifestly and flagrantly bad under the rule declared in Crockett v. Maddy Bros., 57 W. Va. 66, 49 S. E. 1009, for it is equivocal and susceptible of two constructions, one of which would absolutely preclude defense, if there was no acceptance by return mail, and the other allow defense on the theory of acceptance by retention of possession and payment and acceptance of rent. "The giving of an instruction which by reason of its susceptibility of such interpretation as will make it express a proposition at variance with the law applicable to the evidence which forms its subject-matter is erroneous and prejudicial, although another interpretation of it in harmony with the law is not precluded by its terms. The weight to be accorded to evidence is matter of determination by the jury, and an instruction which wholly or partially withdraws it from their control, by limiting or defining it, is generally cause for reversal." Crockett v. Maddy Bros., 57 W. Va. 66, 49 S. E. 1009, Syl. points 3, 4. The direct and inevitable tendency of the instruction was to confuse and mislead the jury. They, no doubt, took it to mean that the acceptance had to be by letter sent by return mail and found against such acceptance, and so reached a conclusion without considering the important evidence tending to prove waiver of such condition, if, in fact, it was a condition, as well as acceptance in another mode.

The exception for refusal to admit evidence is not well taken. The apparent object of the offer was to prove a verbal acceptance of the offer to renew the lease by the testimony of Sohn, but no disclosure was made as to what he would say in response to the questions his attorneys attempted to propound to him. See State v. Clifford, 59 W. Va. 1, 52 S. E. 981, citing numerous other cases to the effect that such disclosure must be made to the trial court in order to make an exception of this kind available in the appellate court.

For the error aforesaid, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(62 W. Va. 99)

## NETTER-OPPENHEIMER & CO. v. ELFANT.

(Supreme Court of Appeals of West Virginia. Dec. 3, 1907.)

1. PLEADING — AFFIDAVIT — PLEA IN ABATEMENT.

Though a plaintiff in an action of assumpsit has filed with his declaration an affidavit of the amount due him, the defendant may file a plea in abatement to the jurisdiction of the court without filing the counter affidavit required of a defendant by Code 1899, c. 125, § 46 [Code 1906, § 3866].

2. SAME.

Where, in an action brought in Taylor county against a single defendant and the summons is directed to Wetzel county, and there served, and there is a plea in abatement to the jurisdiction averring that the defendant resides in Wetzel, it is not bad for failing to aver that the cause of action did not arise in Taylor county.

3. ABATEMENT AND REVIVAL—OBJECTIONS TO JURISDICTION.

Where an action is brought in one county and the summons is directed to the sheriff of another, the summons will be quashed and the action dismissed either on plea in abatement or motion to quash the summons and dismiss the action; no defendant residing in the county of the action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, § 13.]

(Syllabus by the Court.)

Error to Circuit Court, Taylor County.

Action by Netter-Oppenheimer & Company against Anna Elfant. Judgment for defendant, and plaintiff brings error. Affirmed.

Hugh Warder, for plaintiff in error. Dent & Dent, for defendant in error.

BRANNON, J. Netter-Oppenheimer & Co. brought an action of assumpsit against Anna Elfant in the circuit court of Taylor county upon an open account, the declaration containing the common counts. The plaintiffs filed an affidavit of the amount due them as provided in section 46 of chapter 125 of the Code of 1899 [Code 1906, § 3866]. At the first rules, as it seems probable, conditional judgment was rendered. The record shows that at the second rules "defendant appeared by counsel and filed a plea in abatement, and conditional judgment affirmed." In the court the plaintiffs moved the court to strike out the plea in abatement; but the court refused to do so. Then the defendant craved oyer of the summons and the officer's return thereon, and the same were read to her, and then the defendant moved the court to quash the summons issued in the case and strike the cause from the docket, and, the court having done so, the plaintiffs sued out a writ of error.

As to the refusal of the court to strike out the plea in abatement: The first ground given as a reason why the court ought to have rejected that plea is that, as the plaintiffs filed with their declaration an affidavit as to the amount due them under Code 1899, c. 125, § 46, the defendant could not file a plea in abatement without her affidavit required of a de-

fendant under that clause of section 46, saying that no plea shall be filed in the case unless the defendant file with the plea his affidavit that there is not any sum due to the plaintiff. Here we have a proposition that under section 46, by its force, a defendant cannot except to the jurisdiction of the court without filing that affidavit. In Citizens' Bank v. Burdett, 61 W. Va. 636, 57 S. E. 53, we said that those affidavits, bearing on the amount due, accompanied pleas in bar of the merits of the case. By a plea in abatement, denying the jurisdiction of the court, the defendant asserts that no judgment can be rendered against him, no matter what amount is due, though ever so uncontestable. The affidavits bear upon the amount, presupposing the court to have jurisdiction to render judgment; but a plea in abatement going to the jurisdiction of the court denies the power of the court to render any judgment of recovery. In the Bank Case we held that a demurrer to a declaration goes to the law of the declaration, and has no relation to the facts of the amount due. So I ask what has a plea in abatement, asserting no jurisdiction of the case, to do with the merits as to the amount due? Nothing. The plea could not be excluded for the want of such affidavit by the defendant.

Another reason given for the claim that the court should have rejected the plea in abatement is that it failed to state that the cause of action did not arise in Taylor county. That plea said that before and at the commencement of the action and thence hitherto the defendant was a resident of the county of Wetzel, and not of Taylor county, and that she was not served with process in the action in Taylor county, but was found and served with process in said action in said county of Wetzel. The summons issued from the circuit court of Taylor county, and was directed to the sheriff of Wetzel against a single defendant. Code 1899, in chapter 123, § 1 [Code 1906, § 3794], gives jurisdiction for an action in the county in which any of the defendants may reside, and section 2 says that it may be brought in any county wherein the cause of action, or any part thereof, arose, though none of the defendants may reside therein. This gives jurisdiction in either of those counties. Counsel says that the plea should have denied that the cause of action arose in Taylor county, and, as we understand, counsel would thus assert that, if the cause of action had arisen in that county, there would be jurisdiction there, and the writ could be sent to any county; but that is not so. Code 1899, c. 124, § 2 [Code 1906, § 3798], says that process may be directed to any county, but makes a notable exception, and that is that, if the action is brought under section 2 of chapter 123, the process shall not be directed to any other county than that wherein the action is brought; thus saying that, if the only ground of jurisdiction in a county is that the cause of action arose there, the process must be directed to the sheriff of that county, and served in that county. Say that the plea had averred that the cause of action did not originate in Taylor county, it would thus deprive Taylor county of jurisdiction under that head, and it could not have jurisdiction on account of the defendant's residence there, for the plea, standing without replication, and stating that the defendant resided in Wetzel county; would deny jurisdiction on the basis of residence in Taylor county. So there can be no objection to that plea on the theory that it failed to state that the cause of action did not arise in Taylor county. We are cited some authority to the effect that a plea in abatement must give a defendant a better writ. This plea did so. It gave the defendant's residence in Wetzel county. Shall we require a plea also to state where the cause of action arose? We think not. But it is not always the case that such plea must give a better writ as is explained in Warren v. Saunders, 27 Grat. p. 265. We think the plea was good. If the writ had been directed to Taylor county's sheriff, an averment that the cause of action, or any part thereof, did not arise there, would have been essential, because the law gives jurisdiction in such a case as this in either the county of residence or the county of the cause of action, and the plea should negative both. I have some doubt whether this plea should not incorporate a demand of oyer in its opening, and then put its averment. Technically I think so. Form 203 in 4 Minor. Oyer is a demand to have read what is not a part of the record, and thus present it, and thus enable one to plead. Stephen on Plead. 88. The rule book should show oyer, and then the plea in abatement. But this is technical, as the record shows both plea and oyer, and they go together. Besides, the motion to quash is enough. The court must have quashed the writ according to the Warren-Saunders Case, as below shown. But suppose the plea was bad. Then we have the defendant's motion to quash the writ. As held in Warren v. Saunders, cited, the plea is not essential. There was no replication to it. It stood for true and constituted a bar to the suit, because it showed a want of jurisdiction. But, as I have said, the motion to quash would end the suit for want of jurisdiction; for the reason that the statute says that, where a writ issues in one county against a single defendant, it cannot be directed to another county. In other words, the statute means that it shall be directed to and served in the county of the action. This is pointedly held in Warren v. Saunders, above cited. Therefore, the motion to quash the writ was properly sustained.

It is asserted that it was error to grant oyer of the writ and its return. The original writ is not a part of the record, except in judgments by default. Wainright v. Harper, 3 Leigh, 270; 4 Minor's Inst. 940; Barton's Law Prac. 335. And to make it a part

of the record oyer may be resorted to. Snyder v. Philadelphia Co., 54 W. Va. 149, 151, 46 S. E. 366, 63 L. R. A. 896, 102 Am. St. Rep. 941; Hogg's Plead. & Forms, 166. It is a proper way to make it a part of the record.

For these reasons, we affirm the judgment.

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(63 W. Va. 92)

## McSWEGIN v. HOWARD et al.

(Supreme Court of Appeals of West Virginia. Dec. 3, 1907.)

1. JUDGMENT—RES JUDICATA.

A case of res judicata under the facts and circumstances stated in the opinion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

2. EXECUTORS — ACCOUNTING — FAILURE TO SELL LAND.

A will directs the executors to sell land, and give its proceeds, after payment of debts, to eight children, and directs that out of the share of one child $2,000 shall be paid to trustees to pay its interest to that child during life, and at her death the principal to be paid to her children. In a suit to settle the estate, marshal its assets, and distribute them for the benefit of creditors and legatees, it is error to charge the executors with that $2,000 by absolute personal decree, by reason of their failure to sell the land, in advance of a sale of the land by the court's decree; the land being the primary means of raising the money.

(Syllabus by the Court.)

Appeal from Circuit Court, Hancock County.

Bill by James D. McSwegin, administrator, Adolphus P. Howard, and others. Decree for plaintiff, and Adolphus P. Howard and William Hewitt appeal. Reversed in part and remanded.

G. B. Caldwell and John A. Campbell, for appellants. John R. Donehoo and E. A. Hart, for appellee.

BRANNON, J. Robert Hewitt died in 1869, owning personal property and two tracts of land. By his will he directed his executors, within three years after his death, "at the discretion of my executors," to sell that portion of his real estate east of W. O. run, and the residue of his real estate. That portion lying west of W. O. run he devised to his wife for life, and at her death the land to be sold. He charged his land with the payment of his debts, which amounted to a large sum, about $11,000. He gave all of his personal and real estate left after payment of debts to his eight children equally, with the provision that out of the portion of his daughter Elizabeth McSwegin $2,000 should be by his executors paid to Adolphus P. Howard and R. Brown Hewitt to be held in trust, the interest to be paid for the use and support of Elizabeth McSwegin during her life, and at her death the principal to be paid to her children. The will directed the executors to sell the land east of W. O. run "within three years after my death at the discretion of my executors"; but the codicil struck from the will the words "within three years," and substituted in their place the words "at any time." The will, by directing a sale of the lands, converted them into personalty under a familiar rule; but the children, including Elizabeth McSwegin, reconverted them into realty by an agreement that three of Hewitt's sons should remain on the land and cultivate and manage it, and pay off the debts of their father and keep the land in the family. All except two of the children remained on the farm. And, under this agreement, the sons did take possession and manage the farm, and pay off thousands of dollars of debts. Elizabeth McSwegin was a party to this arrangement. This arrangement continued for many years, until, at least, 1905. James D. McSwegin, husband and administrator of Elizabeth McSwegin, who died March 20, 1890, filed a bill in April, 1890, in the circuit court of Hancock county against the executors and all interested under the will to ascertain and state an account of all the estate of Robert Hewitt and its value, and of all receipts and disbursements by the executors, and of the rents and profits of said real estate, and to settle the accounts of the executors, and to compel a sale of the real estate according to the directions of the will, and to make payment and distribution of the estate among those entitled. The bill charged that no sale had been made by the executors. The bill charged that it was the duty of the executors to have sold the realty within reasonable time, but they did not do so, and charged the executors with negligence of their duty, and that they had not paid to the said trustees said $2,000, and sought to charge them with it. Elizabeth McSwegin left two children, Edwin G. McSwegin and Alice H. McSwegin; the latter being an infant. The court made a reference to a commissioner to report the value of the real estate at the death of Hewitt, and for three years thereafter, its rental value, and the persons who had occupied and received its rents and profits, and the amount chargeable to them, and the amount due to each of the devisees, and the debts of said testator, and what had been paid to Elizabeth McSwegin as interest on the $2,000 fund provided for her use and the use of her children by the will, and what, if anything, had been paid to her children on account of the principal of said fund. The commissioner made a report. The executors A. P. Howard and William H. Hewitt filed an answer, stating that their possession was under the agreement aforesaid, and not under the will as executors, and denied having received the rents and profits under the will, and contesting, in short, their liability to Mrs. McSwegin or her children for the said $2,000 on facts stated at large in their answer. To the commissioner's report various exceptions were filed by the plaintiff in the case, finding various faults in the report; among them, that the commissioner failed to charge the executors with rents and profits of the land, and failed to charge them with the valu-

of the land east of W. O. run as it was one year after Hewitt's death, and the value of the other tract at the death of his widow, and claiming that the executors were liable for failure to sell the land as demanded by the will. A decree was pronounced on the bill, former orders, the said report and the exceptions aforesaid, and depositions taken before the commissioner. This decree says that the court "doth accordingly, to the end that the principles involved in this cause may be settled, decide, and it is so adjudged, ordered, and decreed that, as the executors of Robert Hewitt, deceased, defendants are not chargeable with the value of real estate of which the said Robert Hewitt died seised, or with the rents and profits thereof, the exceptions are accordingly overruled." The decree further declared that, "as to the exception No. 11, the said commissioner did not err in failing to charge said executors with the value of the said land as claimed in this exception." That exception was for the failure of the report to charge them with such value. The cause was recommitted to the commissioner to make further settlement of the executorial accounts by annual rests, which was an omission in the report, and the decree further declared that, in view of the exceptions 8, 11, and 13, the commissioner should "retake and restate the said account in accordance with the principles hereinbefore laid down." After this decree, the case was dropped from the docket for over 10 years, from April, 1893. On the 8th of July, 1904, the cause was reinstated upon the docket of the court. On the 19th day of November, 1904, an order was made stating that as Edwin McSwegin and Alice McSwegin, the only heirs of Elizabeth McSwegin, were over the age of 21 years, they were made defendants, with leave to file their answers within 30 days, and, the court stating that two former reports of commissioners were lost, the cause was referred to another commissioner of the court with the same instructions given to former commissioners. On the 23d day of January, 1905, Edwin G. McSwegin and Alice H. McSwegin filed their answer, setting up the will of their grandfather, and seeking to make the executors liable for the said sum of $2,000. The executors filed exceptions to the answer. One ground of exception was that the matter of the liability of the executors therefor had been adjudicated by the former decree. Frank L. Bradley, commissioner, filed a report under the recommittal order of the 19th of November, 1904. On the 18th of July, 1906, the court entered a decree, contrary to the decree of the 14th July, 1892, holding the executors, Adolphus P. Howard and William Hewitt, liable, and giving personal decree against them in favor of the administrator of Edwin G. McSwegin (who had in the meantime died) and Alice H. McSwegin each for $764.32. This decree is on account of the fund of $2,000 which under the will was to be raised out of the sale of the land and placed in the hands of trustees, to be held, as above stated, in trust to pay the interest to Elizabeth McSwegin, and the principal, at her death, to her two children. From this decree the executors have appealed. The decree held valid the agreement above spoken of, by which the children of Hewitt kept the land instead of having it sold, but held it not binding upon the children of Elizabeth McSwegin. It held them not liable to other legatees on account of the land by reason of such agreement. The decree directed the sale of the land to pay some debts unpaid, and for the benefit of the children under the will.

The only question which is to be passed upon by this court upon the appeal of the executors is whether the decree against them for the said sum of $764.32 to each of the McSwegin children is correct. We hold that it is not. First, the decree of the 14th day of July, 1892, upon this matter under issue and controversy made by the bill, answer, commissioner's report, and exceptions thereto, was pointedly decided by the clauses of the decree above quoted. The question was as to the liability of the executors for their omission to sell the land, and whether they were chargeable with its value to Mrs. McSwegin and her children, and whether the executors should be held accountable for failure to sell the land and raise the $2,000 for deposit in the hands of the said trustees. That controversy was pointedly decided by the decree, and a full exoneration of the executors from the alleged liability declared by the decree. It is res judicata upon that question. The decree decided the principles of the cause between the executors and Elizabeth McSwegin and her children; they all being parties to the cause and the matter being involved in the cause. In plain intent and words it adjudged that no liability rested on the executors in favor of any one on account of the land. Right or wrong, it settled that matter. That decree was an appealable decree, and no appeal was ever taken from it, but it lay unassailed at least more than 12 years up to the time when the children of Elizabeth McSwegin filed their answer. Appeal from that decree was then barred six times over, even if interlocutory; but, as to this matter, it was in nature final. Alice McSwegin failed to show cause against the decree for many times six months after reaching majority. That decree stood firm for more than 13 years, when the court entered the decree now appealed from. The former decree stands valid, not only because the time for appeal from it is gone, but the parties slept upon their rights, and are guilty of laches. Both these children of Mrs. McSwegin were defendants to the cause from the first. The bill says that one was an adult when it was filed, and the other an infant over 14. It has been suggested, as an argument against allowing this decree the force of res judicata, that Alice H. McSwegin was

an infant. In considering whether a decree against an infant, without guardian ad litem, is res judicata, the fact of infancy is immaterial; the decree being res judicata notwithstanding infancy. If infancy would render the decree utterly void, the decree would not be res judicata; but a perfect multitude of authorities hold that a judgment or decree against an infant is voidable only, and not void, and cannot be attacked collaterally, but only by writ of error or appeal. 10 Ency. Pl. & Prac. 630; 22 Cyc. 704; 1 Black on Judgments, § 193; Freeman on Judgments, § 151; Porter v. Robinson, 3 A. K. Marsh. (Ky.) 253, 13 Am. Dec. 153, and note 159. For this reason the said decree against A. P. Howard and William R. Hewitt is erroneous.

Another reason why that decree is erroneous is this: The decree must rest on the theory that the land from which that trust fund was to be raised had been wasted and lost, or that its value should be charged to the executors for their negligence, as if lost. It is not needful to say whether the discretion as to the sale given the executors by the will would justify the delay in selling, or whether the change from three years to "at any time," as provided in the codicil, as above stated, would give them discretion covering so much time for the sale. However, we say that it was error to render a personal decree against the executors in advance of the sale. If the executors could be made liable at all (they could not because of such former decree), it would only be after a sale of the land and its failure to bring enough to pay the debts and raise the $2,000 fund. The land was yet existent, immovable, and imperishable, and constituted the primary means of raising that trust fund. The decree allowed reimbursement to the executors out of the proceeds of the land of the sum so decreed against them; but there stands the absolute personal decree against them, and, if the land should not bring enough to pay debts and leave a surplus, there would be nothing out of which the reimbursement of the executors could be made.

Another reason why the personal decree against A. P. Howard and William Hewitt is wrong is this: That, giving the land the value fixed by two reports of commissioners and shown clearly by the evidence, there would, in all apparent probability, if not certainty, be nothing left from the personal and real estate to go to the children of Hewitt. The decree complained of fixed the value of one of the tracts at $65 per acre, whereas two reports of commissioners and the clear weight of evidence showed the tract to be worth only $40 per acre at the death of the testator. We think that the case shows that no harm resulted to Elizabeth McSwegin or her children from the failure to sell the land, because there would be nothing going to them after payment of debts. They have lost nothing. If blame could be attributed to the executors for failure to sell, still equity would not charge them when it fairly appears that nothing was going to the children of Mrs. McSwegin. The case, in a moral point of view, does not show cause for blame to these executors. The call upon the conscience of a court of equity is very weak. By consent of all the devisees, by their solemn agreement, that certain of the children should take possession of the land and manage it to pay the debts, so as to save the home for the children, nearly all of whom resided upon the land and there made their home, the executors did omit to sell and allowed children named in the agreement to take possession, and they paid large sums on the debts, by consent of the creditors, and would likely have succeeded in discharging them had not the children of Elizabeth McSwegin arrested their steps and demanded a sale after the passage of 13 years. One of these children was adult when the bill was filed, and let that decree stand for nearly 13 years. The other, after arriving at age, made no assault upon the decree, made no complaint of the state of things, demanded no sale, until after the lapse of many years after attaining majority; and to come in at so late a day to reverse everything that had been done seems inequitable.

We therefore reverse so much of the decree of the 18th day of July, 1906, as decrees that James A. McKenzie, administrator of Edwin G. McSwegin, and Alice H. McSwegin, do each recover from A. P. Howard and William Hewitt, executors of the will of Robert Hewitt, deceased, the sum of $764.32; and we remand the case to the circuit court for further proper proceedings not inconsistent with principles above stated.

(129 Ga. 785)

## WILLIAMS et al. v. HICKS.

(Supreme Court of Georgia. Dec. 21, 1907.)

INJUNCTION—TRESPASS—VARIANCE.

Where plaintiffs seek to enjoin a defendant from interfering with growing trees, alleging title thereto as sole heirs at law of a common grantor, but prove, without objection, ownership of the land as sole heirs at law of the only heir at law of such grantor and his deceased wife, and the entire evidence does not disclose any title or right of possession to the timber in any person other than the plaintiffs, it is error to direct a verdict in favor of the defendant because plaintiffs failed to prove title in the manner alleged.

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action by J. W. Williams and others against J. W. Hicks. Judgment for defendant, and plaintiffs bring error. Reversed.

Wilson, Bennett & Lambdin, for plaintiffs in error. R. G. Dickerson, for defendant in error.

HOLDEN, J. This was an equitable petition to enjoin defendant from interfering with the timber on a certain lot of land. Plaintiffs claimed title as the sole heirs at law of De Lamar Clayton, and alleged as their abstract of title a grant from the state of Georgia to said Clayton dated the 6th of January, 1845. De Lamar Clayton died in the year 1835, and his wife died either before or shortly thereafter, leaving as their sole heir an infant daughter, who, in 1858, married J. W. Williams, one of the plaintiffs, and thereafter died, leaving two children, and they, with the husband, constitute the plaintiffs in the present case. Evidence was introduced to show that De Lamar Clayton, his wife, and the daughter above referred to, all died intestate, and that no administration was had on their respective estates. The defendant introduced a deed from De Lamar Clayton to James Thomas dated in 1852, and five other deeds, to none of which, as abstracted in the brief of evidence, was the defendant a party; nor was there any evidence of any possession by the defendant, or by any of the parties to the deeds introduced by him, of the lot in controversy. The defendant in his answer admitted having entered on the land and having cut 200 or 300 turpentine boxes, and averred that it was his intention to work said boxes for turpentine purposes. One ground of the application for injunction was that the trespasses being committed were continuous ones and should be stopped to prevent a multiplicity of suits.

As far as shown by the record in this case, the plaintiffs and the defendant claim under a common grantor, De Lamar Clayton. Plaintiffs in their petition claim to have a perfect title to the land. It appears in the abstract embraced in the amendment to the petition that De Lamar Clayton obtained the land by a grant from the state in 1845, and in the amendment the plaintiffs claim to be his sole heirs at law. De Lamar Clayton left only one child, who is now dead. In 1858 she married one of the plaintiffs, who, with her two children who are the other two plaintiffs, are her sole heirs at law. Hence the proof disclosed the fact that the plaintiffs were not directly the heirs at law of De Lamar Clayton, but of his only child who survived him and his wife. The proof offered by the plaintiffs did not therefore correspond with the allegations made by them. But no objections were made by the defendant to this proof. The abstract of title added by the amendment was simply the grant from the state. The allegation in the amendment that the plaintiffs were the sole heirs at law of De Lamar Clayton was not added as a part of the abstract of title, but was a distinct allegation of fact in the petition. Plaintiffs proved their abstract of title as it appeared in their amendment without objection, by showing a certified copy of the grant from the state to Clayton. They did not prove that they were the sole heirs at law of Clayton, but proved, without objection, that they were the sole heirs at law of the sole heir at law of Clayton and his wife, and therefore showed title to the land. While this evidence did not correspond with the allegations in the petition that they were the sole heirs at law of Clayton, the defendant made no objection to title being proved in this way. Had he made objection, the plaintiffs may have amended their petition so as to claim title as it was proven. The defendant could not sit silently by and permit this proof of title, though made in a way different from that alleged in the petition, and claim that he was entitled to a verdict because plaintiffs did not prove their title as alleged. When it appeared that they had proved title in a different way from that alleged, if the testimony by which it was thus proven had been objected to, it would have been ruled out, unless an amendment was offered making allegations to correspond with the proof. But if no amendment had been made alleging facts to correspond with the proof, the evidence would have been ruled out, and the plaintiffs would have been nonsuited because of their failure to prove their case as laid.

It was unnecessary for the plaintiffs to allege in their petition for injunction how they acquired title to the land, or to attach an abstract of title thereto. Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164; Dixon v. Monroe, 112 Ga. 158, 37 S. E. 180. In this case, regardless of the troubles with which the plaintiffs' case was afflicted, the defendant was not entitled to a verdict by reason of any evidence offered by him.

The defendant showed no title in himself to either the land or the timber thereon, nor did he show any right to the possession thereof. The deeds tendered in evidence by the defendant, as abstracted in the record, show a connected chain of title from De Lamar Clayton, through several parties, into J. A.

Dasher & Co.; but there is no deed, or other evidence, in the record showing any title whatever in the defendant. It was alleged in the petition, and admitted by the defendant, that he had entered upon the land to box the timber and cut the trees; but, outside of this allegation and admission in the pleadings, there was no proof that the defendant was ever in possession of the land, and the statements in the pleadings referred to did not show how long it had been since defendant entered upon the land for the purposes stated. It also appears that the defendant claims under a deed purporting to have been executed by De Lamar Clayton, and the record discloses uncontradicted evidence of this deed being a forgery, if the grantor therein was the same person by that name referred to in the evidence of the plaintiffs. In addition to the facts stated, it appears that the deed from De Lamar Clayton was executed in 1852; whereas, the uncontroverted evidence shows that De Lamar Clayton died in the year 1835. There may have been two persons by the name of De Lamar Clayton, although there is nothing in the record to affirmatively show such fact.

The court below committed error in directing a verdict for the defendant, and the judgment is reversed. All the Justices concur.

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(129 Ga. 668)

## ATLANTIC COAST LINE R. CO. v. WHITE.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. RAILROADS — KILLING STOCK — DILIGENCE REQUIRED.

In a suit against a railroad company to recover damages for the negligent killing of live stock, a charge of the court which imposed upon the railroad company the exercise of all possible care to avoid the killing of such stock by the running of its trains, although the charge be in other parts of it correct on the measure of diligence required of such company, is cause for a new trial, especially in a case where the evidence is close. E. T., V. & G. Ry. Co. v. Daniel, 91 Ga. 768, 18 S. E. 22; A. C. L. R. R. Co. v. Electric Light & Power Co., 123 Ga. 613, 51 S. E. 621; G. S. & F. Ry. Co. v. Jones, 121 Ga. 822, 49 S. E. 729.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1642–1649.]

2. WRIT OF ERROR—HARMLESS ERROR.

The other grounds of the motion for a new trial do not show the commission of any error sufficiently material to require a reversal of the judgment of the court below.

(Syllabus by the Court.)

Error from Superior Court, Wayne County; T. A. Parker, Judge.

Action by Frank White against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Bennet & Conyers, S. R. Harris, and Littlefield & Poppell, for plaintiff in error. Jas. R. Conners, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

(129 Ga. 780)

## McGRAW v. CROSBY.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. WRIT OF ERROR — DISMISSAL — DEFECTIVE RECORD.

Under the facts of this case the motion to dismiss the writ of error is overruled.

2. EJECTMENT — EVIDENCE — DIRECTING VERDICT.

Under the evidence introduced it was error to direct a verdict for the defendant.

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by J. P. McGraw against D. A. Crosby. Judgment for defendant, and plaintiff brings error. Reversed.

Edwin L. Bryan, for plaintiff in error. T. H. Parker, for defendant in error.

HOLDEN, J. J. P. McGraw brought a suit in ejectment in Colquitt superior court to recover 50 acres of land. The defendant filed his answer denying that the plaintiff had any title to the land sued for, and claiming title in himself. He further answered that he had a good prescriptive title by reason of seven years' possession under color of title. Upon the conclusion of the evidence for the plaintiff the court directed a verdict in favor of the defendant, to which the plaintiff excepted, and brings to this court for review the judgment of the court below directing a verdict in favor of the defendant.

The documentary evidence material to a decision of the case consists of the following deeds: J. P. McGraw to R. A. McGraw, dated December 23, 1889, conveying 200 acres, more or less, of lot of land No. 490 in the Eighth district of Colquitt county, Ga., "being the land in dispute and other lands"; R. A. McGraw to J. P. McGraw, dated November 17, 1891, recorded September 19, 1895, conveying 100 acres of said lot, "including the land in dispute"; R. A. McGraw to T. V. Clark, dated January 9, 1892, conveying 50 acres of said lot, described as follows: "Lying and being in the Eighth district of Colquitt county, bounded on the east by original line, south by lands of Mrs. S. C. Crosby, west by branch, and north by lands of J. P. McGraw, containing 50 acres more or less"; T. V. Clark to D. C. Clark, dated April 15, 1898; D. C. Clark to R. A. Murphy, dated October 22, 1903; and R. A. Murphy to D. A. Crosby, the defendant in this case, dated October 22, 1904, recorded October 24, 1904—the last three mentioned deeds conveying the same land as described in the deed from R. A. McGraw to T. V. Clark, "all of which give the northern boundary as the land of J. P. McGraw."

The oral evidence introduced was substantially as follows: The 50 acres of land in dispute was a part of land lot 490 in the Eighth district of Colquitt county, and lay north of a certain line. This line was de-

scribed by the witnesses as running east and west across the 200-acre tract of land hereinabove referred to as conveyed by J. P. McGraw to R. A. McGraw. Along this line were the usual evidences of land lines, consisting of blazed trees, etc. The timber north of this line was boxed down to the line. About the time of the sale of the 100 acres by R. A. McGraw to J. P. McGraw, the former contracted to sell to Plymeal the other 100 acres, which were, about 1891 or 1892, surveyed off and a dividing line established between this 100 acres and the 100 acres sold to J. P. McGraw. The land sold to J. P. McGraw lay north of the line referred to, and the 100 acres sold to Plymeal lay south of said line. Plymeal went into possession of the 100-acre tract sold to him, and built a house on it. R. A. McGraw and Plymeal recognized the line thus established between the two tracts, and Plymeal held and claimed up to the same on the south, and J. P. McGraw held and claimed up to said line on the north. R. A. McGraw, J. P. McGraw, and Plymeal recognized this line. D. A. Crosby, the defendant, was in possession of the 50 acres. The land claimed by J. P. McGraw north of this line contained 135 acres. After Plymeal contracted to buy the 100 acres from R. A. McGraw, he transferred his rights to T. V. Clark and Mrs. S. C. Crosby, and had R. A. McGraw to execute deeds to these parties. T. V. Clark got 50 acres on the north side of Plymeal's 100-acre tract. After T. V. Clark bought the 50 acres of land, he refused to recognize the line hereinbefore referred to as being the line between his land and that of the plaintiff, and crossed over and took possession of some of the plaintiff's land, and he and those claiming under him have continuously held possession of same with buildings, fencing, and cultivation down to the present time. D. A. Crosby is now in possession of this 50 acres of land in dispute north of said line. Plymeal lived on the 100 acres purchased by him from R. A. McGraw for about 10 months before it was sold to Clark and Crosby. J. P. McGraw had never been on or cultivated any part of his 100 acres bought from R. A. McGraw. The defendant and those under whom he holds have been in possession of the 50 acres north of said line for more than 7 years. While Plymeal was in possession of the 100 acres which he contracted to buy from R. A. McGraw, D. A. Autrey purchased from J. P. McGraw the turpentine privileges on the 100 acres of land north of said line. About 12 years prior to the trial of the case, T. V. Clark employed D. D. McDonald to build a house on the land north of the line above referred to; but when he began work upon the house J. P. McGraw objected to his building, pointing out the line referred to as being the line between plaintiff's land and Clark's land. A plat was introduced in evidence, on which appeared a red line which the witnesses testified was the line hereinabove referred to. The testimony of the witnesses in connection with this plat was mainly in reference to the red line appearing thereon. This plat was not incorporated in the bill of exceptions, but was referred to therein as being attached as an exhibit. It was not identified by the trial judge, and appeared attached to the bill of exceptions after his certificate.

1. A motion was made by the defendant in error to dismiss the writ of error because the plat attached to the bill of exceptions could not be considered by this court, and because the issues involved could not be understood, or passed on, unless the plat could be considered by this court. Under the special facts related in the succeeding paragraph of this opinion, it would be improper to dismiss the writ of error, and the motion to do so is overruled.

2. The oral testimony showed that the land in controversy lay north of a line described by the witnesses. Both parties claim under a common grantor, R. A. McGraw. This common grantor on November 17, 1891, conveyed to the plaintiff 100 acres of lot 490 in the Eighth district of Colquitt county, "including the land in dispute." The same grantor on January 9, 1892, conveyed to T. V. Clark, a predecessor in title of the defendant, 50 acres of the same land lot, described as "lying and being in the Eighth district of Colquitt county, bounded on the east by original line, south by lands of Mrs. S. C. Crosby, west by branch, and north by lands of J. P. McGraw, containing 50 acres, more or less." And this same description was contained in each of the deeds in the chain of title under which the defendant claims. According to the deeds, the lands of the defendant, therefore, only adjoin those of the plaintiff on the north, and this northern boundary, by the terms of the defendant's grant, is the "lands of J. P. McGraw," previously conveyed to him by the common grantor by deed antedating the deed to the defendant. Since the common grantor, prior to the deed executed to T. V. Clark above referred to, had conveyed to J. P. McGraw lands, "including the lands in dispute," and had afterwards conveyed to T. V. Clark land bounded north by "lands of J. P. McGraw," all of the lands of J. P. McGraw previously conveyed to him by this same grantor, and which, according to the deeds referred to in the record before us, included the land in dispute, must, as far as shown by the deeds, lie north of the northern boundary of Clark's land, established in his deed by the common grantor as the "lands of J. P. McGraw." This fact must of necessity exclude from the deed to T. V. Clark any of the "land in dispute," all of which, as we have just pointed out, lay north of the northern boundary called for by his deed. This same description being contained in the deed to the defendant and all prior deeds in his chain of title, there is nothing in the

deeds to show any written title, or color thereof, in the defendant to any of the land in dispute.

The fact that the defendant's deed was of record prior to the deed under which the plaintiff claims has no bearing on the case. As the defendant's deed covered none of the land in dispute, it could not, of course, create any rights therein, whether recorded or not. Nor could seven years' adverse possession by the defendant, under his deed, give him a good title, because he was without color of title, under this deed, upon which to base it. We do not know what description of the land conveyed to the plaintiff the deed itself contains; but the statements in the record in reference to this deed show that it includes the land in dispute. The statements in the record in reference to the deed to the defendant and the deeds to his predecessors in title show, under the legal construction we are compelled to give them, that they do not include the land in dispute.

It is stated that a plat of the land of J. P. McGraw, prepared by the county surveyor and another party and representing a survey made by them, with the assistance of the processioners of the district in which the land was located, was introduced in evidence. The bill of exceptions further states that this survey was made on the 16th and 17th of June, 1904. It is stated in the bill of exceptions that the plat is attached to the bill of exceptions and marked "Exhibit A." This plat is not identified by the court, and nowhere appears as a part of the record. It is not in the bill of exceptions, but is attached thereto, following the certificate of the judge. This plat, therefore, cannot be considered in determining whether or not the court erred in directing a verdict for the defendant. As this was a plat made under the supervision of processioners in running land lines, where no protest was filed and a trial had thereon, it could only be prima facie correct as to the lines run by the processioners appearing on the plat. Howland v. Brown, 92 Ga. 513, 17 S. E. 806. Even if the plat were to show that the line between the plaintiff and the defendant was where the defendant claims it to be, it could only be prima facie correct. As the deeds introduced in evidence and the oral testimony show that the land in dispute belongs to the plaintiff, even if this plat established a line thereon between the plaintiff and the defendant in such way as to indicate that the land in dispute belonged to the defendant, it would only be prima facie correct, thereby creating a conflict in the evidence. Hence, giving to this plat the greatest possible effect it could have in favor of the defendant, it could only make a prima facie showing that the land in dispute belonged to the defendant, and in view of the deeds and oral testimony showing that the land in dispute belonged to the plaintiff there would be a conflict in the evidence which would make it error for the court to direct a verdict in favor of the defendant.

The judgment of the court below is therefore reversed. All the Justices concur.

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(129 Ga. 777)

## OLIVER v. STATE.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. HOMICIDE—DYING DECLARATIONS—ADMISSIBILITY.

The facts necessary to be shown before declarations are admissible as dying declarations under Pen. Code 1895, § 1000, may be proven by circumstances and by witnesses other than the witnesses testifying to such declarations; and, under the evidence in this case, there was no error in admitting the testimony objected to as dying declarations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 457.]

2. SAME—INSTRUCTIONS—INVOLUNTARY MANSLAUGHTER.

Under the facts in this case, there was no error in failing to charge the law of involuntary manslaughter.

3. SAME.

The evidence authorized the verdict, and the judgment of the court refusing a new trial will not be disturbed.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Junior Oliver was convicted of murder, and brings error. Affirmed.

H. F. Lawson, for plaintiff in error. E. D. Graham, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

HOLDEN, J. The accused was convicted of murder, and sentenced to life imprisonment, and brings error to this court on the refusal of the judge below to grant a motion for a new trial. Henry Ryan, a witness for the state, testified that on Saturday night, between 10 and 11 o'clock, he and the deceased, who was the wife of the defendant, were on their way to a supper at a negro's house about 85 yards distant from the scene of the killing, when they met the defendant in the road, and he insisted on his wife returning home with him, which she declined to do. While they were quarreling about the matter, the defendant said to the deceased: "If you don't go home with me from here, I will kill you." Whereupon the witness said: "You all stop your foolishness and quit." The defendant then said: "It was man and wife, and everybody ought to let them alone." The witness then told them when they got through with their "foolishness" to come on to the supper, and walked off, leaving defendant and deceased in the road together. About five minutes later, while standing at the gate of the house where the supper was given, a pistol shot was heard, and, when an alarm was given by a woman and her boys who had just passed through the gate in that direction, the witness, with others, went to the place of the shooting, some 70 yards from where he was

standing when the shot was fired, and found the deceased lying in the road, with a pistol ball wound in her head. Next morning, after a physician had said deceased could be moved, she was taken to a house, where she died the following Monday about sundown. The witness testified that there were signs of scuffling in the road. Another witness testified that, early on the Saturday night of the killing, the defendant came to the home of the witness, and asked for his wife, and, when told she was not there, said that, if she did not go home with him, he was going to kill her. This witness further testified that the defendant did not seem to be angry when he made this statement. Evidence was offered by the defendant seeking to impeach this witness, and sustaining evidence introduced by the state in rebuttal. Another witness for the state testified, in reference to a statement made by the deceased on Monday following the infliction of the wound, to the effect that the defendant shot her, and shot her for nothing. The testimony of this witness more fully appears from the opinion. Several witnesses stated that the defendant did not visit the deceased after she was shot.

The defendant in his statement claimed that he and his wife were returning from the supper referred to; that his wife, the deceased, was drunk; that she saw the pistol in his pocket and insisted on firing it; that the deceased snatched the pistol from his pocket, and he then grabbed her to keep her from falling, and also from shooting it; that he never got his hand on the pistol at all; and that while they were "tussling," and he was reaching for the pistol, she stumbled, and the pistol fired while in her hands and shot her. Defendant also stated that the pistol was not in good fix, and would not stand cocked. This condition of the pistol was corroborated by other witnesses, one of whom stated that it was a Smith & Wesson make, double-action pattern, and would fire when the trigger was pulled, and also that it was more dangerous than the average pistol, "because it will shoot of itself." Evidence was introduced by the defendant in support of a contention that the witness Ryan, the substance of whose testimony has been given above, was at the supper referred to continuously from the early part of the night up to the time of the shooting, and evidence was offered by the state in rebuttal of this contention.

1. The plaintiff in error contends that the court committed error in admitting the testimony of George Bunn, to the effect that the deceased stated that the plaintiff in error, Junior Oliver, shot her, and shot her for nothing. This testimony was admitted as a dying declaration, and was objected to on the ground that a proper foundation had not been laid for its admission. The court charged the jury not to consider this testimony, unless it was shown from the evidence that the declarations were made by the deceased as testified to, and unless the deceased at the time of making them was in the article of death and conscious of her condition. It appears from the evidence that these declarations on the part of the deceased were made on Monday, and that the deceased died Monday evening about sundown. About 3 o'clock in the afternoon on Monday, she went into a stupor, and remained in this condition until her death. The witness testified that the deceased said she would not live, and then made the statement that the defendant shot her, and shot her for nothing. The witness further testified that it was after she made the statement that the defendant shot her, and shot her for nothing, that she said she would not live. The witness in one part of his testimony said that the deceased made the statement referred to in the morning between 10 and 11 o'clock, and in another part he said that she made the statement just before 3 o'clock in the afternoon. It is uncertain from the testimony of this witness when the statement was made, and uncertain whether it was made before or after the deceased told him, or said in his presence, that she would not live. The testimony shows, however, that the deceased was shot in the head, and that on Monday, at the time she made the statement testified to, her brains were oozing out of her head from the wound inflicted by the pistol shot. The witness Ida Woodall testified that, between 7 and 8 o'clock on the morning of the day she died, the deceased stated that she was going to die. In view of the character of the wound, the fact that the brains were oozing out at the time she made the declaration, and the testimony above referred to, the court committed no error in permitting the witness to testify that the deceased stated that the defendant, Junior Oliver, shot her, and shot her for nothing, especially in view of his charge to the jury that they should consider this evidence only in case they believed the statement, if made by the deceased, was made while she was in the article of death and conscious of her condition.

2. The plaintiff in error assigns the failure of the court to charge the law of involuntary manslaughter as error, contending that such charge should have been given in view of the testimony of a witness for the state who stated the plaintiff in error, on the night of the homicide, told him that he killed his wife accidentally. The plaintiff in error, in his statement to the jury, claimed that the killing was accidental, and that the wife, while holding the pistol in her hand, shot herself and inflicted the wound from which she died. The theory of the state was that the plaintiff in error shot his wife intentionally, and that the killing was murder. The theory of the plaintiff in error was that the killing was done by the deceased herself, while she had the pistol in her hand, and that the killing was an accident. There are

no facts or circumstances in the testimony, or in the statement of the defendant, which would authorize the court to charge the law of involuntary manslaughter. Under the evidence and the defendant's statement, the killing was either murder, or an accident, relieving the defendant from any crime.

3. The only two assignments of error referred to by counsel for plaintiff in error in their brief are the ones hereinabove dealt with.

The evidence fully warranted the verdict, and, there being no merit in the two assignments of error above referred to, the judgment of the court below in overruling the motion for a new trial is hereby affirmed. All the Justices concur.

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(129 Ga. 698)

GRIFFIN et al. v. BROOKS et al.

(Supreme Court of Georgia. Dec. 21, 1907.)

SCHOOLS AND SCHOOL DISTRICTS—TRUSTEES—OUSTER.

If a school district was legally laid out, and an election of trustees was held therein under the act of August 23, 1905 (Acts 1905, p. 425), the fact that the portion of that act relating to local taxation by districts for school purposes was held to be unconstitutional (Brown v. Southern R. Co., 125 Ga. 772, 54 S. E. 729), did not oust the trustees from office; nor did the act of August 21, 1906 (Acts 1906, p. 61), amending the act of 1905, have that effect.

(Syllabus by the Court.)

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action by D. E. Griffin and others against J. W. Brooks and others, trustees. Judgment for defendants, and plaintiffs bring error. Affirmed.

Beall & Adamson and J. M. Moore, for plaintiffs in error. S. Holderness, for defendants in error.

LUMPKIN, J. After the passage of the act of August 23, 1905, entitled "An act to provide for the creation and operation of local tax district schools, for the levying and collection of local tax by counties for educational purposes, for the laying off of counties in school districts, and for other purposes" (Acts 1905, p. 425), an election was held in a school district in Carroll county, which is called in the record "Wesley Chapel District," to decide as to whether or not that district would adopt the local taxation for public schools as provided in the act, and also to elect a board of trustees for the district. At a later date this court held that the provisions in the act of 1905 for collecting a local tax by school districts, laid off in the manner prescribed, were inoperative as violating the constitutional requirement on the subject of uniformity in taxation. Brown v. Southern Ry. Co., 125 Ga. 772, 54 S. E. 729. In 1906, an act was passed to amend the act of 1905 (Acts 1906, p. 61). Certain persons, alleging that they were residents of Carroll county and of the Wesley Chapel district, and property owners and taxpayers in that district, filed an equitable petition, seeking to enjoin the trustees who had been elected from acting until another election should be held. The injunction was denied, and the complainants excepted.

No complaint is made in regard to the laying out of the district or the election of the trustees, except that it is contended that the decision in Brown v. Southern R. Co., 125 Ga. 772, 54 S. E. 729, rendered invalid such election; that, if this did not alone accomplish that result, it was completed by the act of 1906; and that it was necessary after that act to re-elect trustees for the district. This argument involves a misconception both of the decision of this court and of the act of the Legislature of 1906. What the Supreme Court decided was that so much of the act of 1905 as provided for the levying and collection of a local tax by school districts laid off in the manner prescribed therein was void because it did not include in the scheme of taxation railroad property, and therefore violated the requirement in the Constitution that taxes should be uniform and ad valorem on property subject to be taxed within the territorial limits of the authority levying such tax. It was not held that the entire act was void. On the contrary, a portion of the act was held to be constitutional in Georgia R. Co. v. Hutchinson, 125 Ga. 762, 54 S. E. 725. The act of 1906 was not intended to repeal that of 1905 entirely, or to destroy all legal steps which had been taken under it. The later act declared in its caption that it was one amending the former. It was curative and remedial, rather than destructive and repealing, in its character. In so far as its provisions amended or superseded those of the act of 1905, the former act became inoperative; but otherwise it was substantially re-enacted. The election for local taxation in the district under the act of 1905 became of no avail when that portion of the act was declared unconstitutional. In order to have local district taxation, an election for that purpose would be necessary in accordance with section 4 (page 63) of the act of 1906. Dealing with the only point made in this record in regard to the validity of the election of trustees, we hold that it was not well taken. This renders it unnecessary to consider the question of estoppel set up by the defendants.

Judgment affirmed.

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(129 Ga. 683)

MACON, D. & S. R. CO. v. JOYNER.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT — RAILROADS — SWITCHMEN — ACTION —INSTRUCTIONS.

The charge of the court below states the contentions of the parties fairly and with sufficient fullness and clearness. And certain inaccuracies appearing in the statement of the contentions of the defendant were not so material as to require the grant of a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 705, 718.]

2. SAME—CONTRIBUTORY NEGLIGENCE.
A charge to the jury, instructing them, in effect, that the law requires of an employé the exercise of only ordinary diligence to prevent the injury to himself, will not be cause for a new trial, where it further appears from the charge that the jury were distinctly instructed that the employé could not recover unless he was himself free from fault.

3. DAMAGES—HARMLESS ERROR.
It was error for the court to instruct the jury that they should add whatever amount the plaintiff "would be entitled to for pain and suffering to such sum as they might find he is entitled to for damages," inasmuch as pain and suffering in themselves constitute an element of the damages which plaintiff was entitled to recover; but the error was not hurtful to the defendant, as it is clear upon considering the entire charge that, by the use of the word "damages," the court meant and intended the jury to understand such damages as resulted from impaired or diminished earning capacity.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219–4228.]

4. TRIAL—INSTRUCTIONS—REQUESTS.
A refusal to give a written request to charge is not error, unless the charge requested is in itself correct and perfect.

5. MASTER AND SERVANT—INJURIES TO SERVANT—VERDICT—EVIDENCE.
The evidence authorized the verdict.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 950–953.]
(Syllabus by the Court.)

Error from Superior Court, Toombs County; B. T. Rawlings, Judge.

Action by G. F. Joyner against the Macon, Dublin & Savannah Railroad Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Joyner brought an action against the Macon, Dublin & Savannah Railroad Company to recover damages for personal injuries. The petition alleges that the plaintiff was an employé of the defendant company, and at the time of the alleged injury plaintiff was engaged in the performance of his duties as a yard switchman. Plaintiff's freedom from fault, and various specific acts of negligence on the part of the defendant, are also alleged. The defendant filed an answer, in which it denied all of the material allegations of the petition. Upon the trial of the case, the jury returned a verdict in favor of the plaintiff. The defendant made a motion for a new trial. All of the grounds of the motion, except the general grounds, complain of alleged errors committed by the court in its charge to the jury. The court overruled the motion for a new trial, and defendant excepted.

Minter, Wimberly, Akerman & Akerman, for plaintiff in error. T. W. Hardwick, J. E. Hyman, and Jas. K. Hines, for defendant in error.

BECK, J. (after stating the facts as above). 1. Several grounds of the motion for a new trial in this case embraced lengthy extracts from the court's charge, which contained a statement of the respective contentions of the plaintiff and defendant, and the complaint made in the grounds of the motion referred to is that those portions of the charge were argumentative, and presented with too much stress and detail the contentions of the plaintiff, and ignored and minimized the contentions of the defendant. But, upon a reading of the entire charge, it will appear that the judge fairly stated the contentions of each side. While it is undoubtedly true that the contentions of the plaintiff were stated more at length than those of the defendant, it cannot be inferred from this fact that undue stress was laid upon, or undue prominence given to, the contentions of the former. In the first place, the contentions, so far as appear from the pleadings of the plaintiff, are set forth fully and distinctly in his petition, properly paragraphed, and the defendant contented itself, as it had a right to do, with a bare denial of the allegations in the petition. If the plaintiff's case requires a full, definite, and affirmative allegation of certain facts, and the defense to the cause of action as stated rests upon a mere denial of the allegations in the petition, and the trial judge sums up the contentions of both parties by a fair statement of the material allegations in the petition, and then states that these allegations are denied by the defendant, how can it be said that he has failed to state the contentions of either party? But in the case at bar the judge, after setting forth in his instructions to the jury the affirmative allegations in the petition, went further, and gave, in substance, the contentions of the defendant as developed in the trial of the case, and it would seem that, if the defendant had desired a more elaborate statement of its contentions, a timely written request for such should have been offered. In the case of the Atlanta Con. St. Ry. Co. v. Bagwell, 107 Ga. 157, 33 S. E. 191, it was said: "In the sixth ground of the motion for a new trial, complaint is made that the court erred in its charge in stating specifically the contentions of the plaintiff, as set out in the declaration, and in regard to the contentions of the defendant merely charged that: 'You will also have the answer of the defendant company, and you can look to that for its contentions.' While the contentions of both parties should be stated by the court to the jury with equal fullness and fairness, yet in this case we do not think the plaintiff in error has any just cause of complaint in this respect, as the court in its charge fully, fairly, and correctly stated the law applicable to every issue in the case. Moreover, the answer of the defendant was simply a denial of the allegations in the declaration." And in the case of the Central Ry. Co. v. McKinney, 118 Ga. 535, 45 S. E. 430, it was held that: "The really important thing is for the judge to give the jury clearly and fairly the law applicable to the issues involved; and, if he does this, his failure to formally state the contentions as shown by the pleadings will not, as a general rule, be cause for a new

trial." Nor were the portions of the charge above referred to open to the criticism that they were argumentative, and contained expressions of opinion by the court as to the evidence upon any of the issues involved in the case.

Complaint is also made that the court erred in charging the jury as follows: "On the other hand, the defendant, the Macon, Dublin & Savannah Railroad Company, contends that the plaintiff was in the employment of the company, and was injured by an engine on the track of the defendant company." The assignment of error upon this charge is that "said charge is erroneous because it does not state contentions of the defendant, but, on the contrary, states contention of the plaintiff, and because it was calculated to mislead the jury." It is fair to say of this portion of the court's charge that it seems to have been a mere inadvertence. Certainly, it is not such a material error as to authorize the grant of a new trial. It could not have misled the jury in respect to any issue involved, for that the plaintiff was in the employment of the defendant company, and was injured by an engine on its track, was clearly established by the uncontradicted testimony in the case.

2. The court gave the following instruction to the jury: "If you believe from the evidence that the defendant was guilty of negligence, and the plaintiff by the exercise of ordinary care and diligence could have avoided the consequence of such negligence on the part of the defendant company, then I charge you that the plaintiff in this case would not be authorized to recover." And error is assigned upon the court's giving the charge just quoted. Authority for the doctrine here stated can be found in the case of Central of Ga. Ry. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590, and in the reasoning of the learned justice who delivered the opinion, as well as in the cases there cited. In the McClifford Case it was said: "Complaint is made that the judge charged the jury that the plaintiff was bound to the exercise of ordinary care; it being contended that, as he was an employé, he was bound to the exercise of extraordinary diligence. There was no error in this charge. The decree of diligence which the law requires of an employé is ordinary diligence only." There may be some conflict in the decisions on the subject of the negligence of a railroad employé which will bar a recovery, but it is unnecessary to discuss them here; for, even if the use of the words "ordinary care and diligence" might have tended to mislead the jury, and cause them to test the conduct of the plaintiff under the circumstances of the present case by too low a standard of care and diligence, if nothing further had appeared in the charge in reference to the employé's duty to exercise due diligence and care, the wrongful impression made was no doubt changed and corrected by other portions of the court's charge, wherein they were instructed that, before the plaintiff would be entitled to recover, it must appear that he was himself free from fault. We do not think that the error, if any, complained of in this ground of the motion for a new trial was hurtful or prejudicial to the defendant, in the light of the entire charge.

3. One ground of the motion assigns error upon the following charge of the court: "If you determine from the evidence in this case, gentlemen, that the plaintiff is entitled to recover damages, and you further find from the evidence that he suffered pain and suffering, you can look to the evidence and determine what amount he would be entitled to for pain and suffering, and you can add this amount to such sum as you find he is entitled to for damages, if you find that he is entitled to damages." In a subsequent ground of the motion, another extract from the court's charge in substantially the same words is also excepted to. The criticisms made upon this portion of the charge are, in substance, that it incorrectly states the measure of damages and the manner of arriving at the amount of damages; that it instructs the jury that they can add whatever amount they may find that the plaintiff is entitled to recover for pain and suffering to the whole sum he is entitled to recover as damages; that the phrase, "such sum as you find that he is entitled to for damages," includes every element of damages plaintiff is entitled to recover, and the jury could not add to this amount damages for pain and suffering, and that said charge, in effect, instructs the jury that, after they have ascertained the amount of damages the plaintiff is entitled to recover, they can add to this amount a sum for pain and suffering, not as damages, but as a penalty. Judged merely by the verbiage of these extracts from the charge, the criticism is well grounded; but, after an examination of the entire charge which we find in the record, we are of the opinion that the jury were not misled. We have reached this conclusion upon an examination of that portion of the charge wherein the court instructs the jury as to the measure of damages, and the use of the mortality and annuity tables. The examination of that portion of the charge shows, and it must have been so understood by the jury at the conclusion of the charge, that by the word "damages" the court meant pecuniary damages resulting from diminished earning capacity, and the jury were, in effect, instructed that if they should determine from the evidence that the plaintiff was entitled to recover, and should further find that he suffered pain and suffering, they could look to the evidence and determine what he would be entitled to for pain and suffering, and that they could add this amount to such sum as they should find he was entitled to, as pecuniary damages, resulting from impaired or diminished earning capacity. While pain

and suffering were, of course, a part of the damages sustained by the plaintiff, the court's charge was so framed and worded that, when the expression, "such sum as he, the plaintiff, was entitled to for damages," and other similar expressions containing the word "damages," were employed, the jury must, in the light of the entire charge, have understood the court to have the import and meaning which we have indicated above. They were, in effect, instructed to add that part of the damages which plaintiff was entitled to recover for pain and suffering to that which he was entitled to recover for impaired or diminished earning capacity. The plain meaning of the entire charge was that the jury should add together all the parts, and make the whole, and not that to the whole they should add a part already included in the whole. See, in this connection, the case of S. F. & W. Ry. Co. v. Ladson, 114 Ga. 762, 40 S. E. 699.

5. The court was requested in writing to charge the jury as follows: "When an employé of a railway company has his choice of two ways in which to perform a duty, the one safe, and the other dangerous, though convenient, he is bound to select the safe method, and if, having such choice, he chooses the dangerous method, and is hurt by the railroad company, he cannot recover." The court did not err in refusing to give this charge. It was not a correct statement of the law, in that it omits any reference to the employé's knowledge of the existence of the two ways, one of which was safe. A request to charge should in itself be correct and even perfect; otherwise the refusal to give it will not be cause for a new trial. Etheridge v. Hobbs, 77 Ga. 531, 3 S. E. 251. Upon the employé's knowledge of the fact that there were two ways might depend the other material question as to his negligence in the choice of ways.

6. No error committed by the court in his charge is shown in any of the grounds of the motion. The evidence authorized the verdict, and the court did not err in overruling the motion.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 700)

## THORNTON et al. v. JACKSON.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. EXECUTORS — ACTION AGAINST — LIMITATIONS.

Where suit was brought by descendants of a legatee under a will against the executor of the legal representative of the testator, alleging that the part of the estate which should have been paid to such legatee, but for her death, had been wrongfully held by the legal representative of the estate from January 1, 1867, to the bringing of the suit by the plaintiffs in 1906, and praying judgment for the amount so withheld, with interest from the first-named date, the suit was on its face barred by the statute of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1761.]

2. LIMITATION OF ACTIONS — PLEADING — DEMURRER.

Where, on the face of the petition, it appears that the suit is barred, the point may be raised by demurrer. If it does not so appear, the defense of the statute should be set up by plea.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 670–672.]

3. SAME—SUSPENSION.

If the declaration would show that the bar has attached, but the running of the statute is claimed to have been suspended by minority, or for other legal reasons, the ground of such suspension should be stated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 664–666.]

4. SAME—AMENDMENT.

An amendment which merely alleges that the action was brought within the time required by law, and other like conclusions and allegations, which were insufficient to save the petition from the demurrer, was properly rejected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 697.]

(Syllabus by the Court.)

Error from Superior Court, Fayette County; E. J. Reagan, Judge.

Action by Bennett Thornton and others against Bryant Jackson, executor. Judgment for defendant, and plaintiffs bring error. Affirmed.

Bennett Thornton, Mrs. Betty Parker, Lora Thornton, and Ola Lewis brought suit against Bryant Jackson, executor of Needham Jackson, deceased, alleging substantially as follows: In April, 1853, Jordon Jackson executed a will in which he bequeathed certain property to his wife for life, with direction that after her death it should be sold and the proceeds should be equally divided among his children, one of whom was Mary Jackson Thornton. Needham Jackson was nominated executor. The testator died, the will was probated, and Needham Jackson qualified as executor in 1862. In 1863 letters dismissary were granted to him. Subsequently, the widow of the testator having died, Needham Jackson again qualified as administrator of Jackson's estate. Under the will of Jordon Jackson his daughter, Mary Jackson Thornton, was entitled to a specific legacy of $250, and was also one of the residuary legatees, and as such was entitled to $105, making a total of $355. She died on September 1, 1863, intestate, leaving as her only heirs six children, namely, Bennett Thornton, Mrs. Betty Thornton Parker, Mrs. Mittie Thornton Lewis, Heyward Thornton, Jordon Thornton, and Herod Thornton. Of these Jordon and Herod settled with Needham Jackson, the executor of Jordon Jackson, with respect to their interests. Two of the other children of Mrs. Thornton, Bennett Thornton and Mrs. Parker, are among the present plaintiffs. Another son, Heyward Thornton, died, leaving as his only heir another one of the plaintiffs, Lora Thornton. The remaining child of Mrs. Mary Jackson Thornton (Mrs. Mittie Thornton Lewis) died, leaving as her only heir her daughter, Ola

Lewis, another plaintiff. There came into the hands of Needham Jackson, as administrator of Jordon Jackson, deceased, the sum of $2,304.37, which was realized from the sale of property belonging to the estate of the decedent, and no payment of their share has been made to the plaintiffs, nor was any settlement made with their ancestress, Mrs. Thornton. Nor was Needham Jackson ever discharged as administrator, nor did he make any final return, or any return showing any payment to Mrs. Thornton, or to the plaintiffs. "The said Needham Jackson reduced the assets of the estate of the said Jordon Jackson, deceased, to cash prior to the 1st day of January, 1867, and has held and retained the part of your petitioners and of their said ancestress, Mary Jackson Thornton, in his possession wrongfully from said 1st day of January, 1867, to the day of his death, and his said executor, Bryant Jackson, still holds same." He was indebted to the plaintiffs in the sum of $59.17 each, making a total of $236.68, "and these amounts bear interest at the rate of 7 per cent, from January 1, 1867, to day of judgment." Needham Jackson died on July 3, 1905, leaving a will. Bryant Jackson, the defendant, is his executor. Judgment was prayed against him for the amount alleged to be due to the plaintiffs, with interest from January 1, 1867. The defendant demurred to the petition on the ground that no cause of action was set forth, and because it showed on its face that the action was barred by the statute of limitations. The plaintiffs offered an amendment alleging as follows: They have been unable to find any bond given by Needham Jackson, as administrator, and therefore do not bring suit on any such bond. "Your petitioners further show that this suit was filed within the time provided by law, and within the statute of limitations, after they or their ancestress under whom they claim were entitled to bring such action. Petitioners further show that none of them have now or have ever had a guardian or guardians to represent them in bringing this action, neither is there now, nor has there ever been, an administrator who was entitled or required to bring this action. * * * Petitioners show that the statute of limitations does not begin to run against them, and does not begin to run at all in favor of the administrator under the law until the administrator has made his final return and an order has been passed discharging the said administrator." Objection was made to the proposed amendment because it was indefinite and did not set out any cause of action and would make no difference in the original case. The objection was sustained. The demurrer to the original petition was sustained, and plaintiff excepted.

J. W. Culpepper, Aldine Chambers, and W. M. Smith, for plaintiffs in error. J. W. Wise, for defendant in error.

LUMPKIN, J. (after stating the facts as above).

1-3. "All actions against executors, administrators, guardians, or trustees, except on their bonds, must be brought within 10 years after the right of action accrues." Civ. Code 1895, § 3772. This was an action by persons claiming under a legatee of a will against the executor of the legal representative of the original estate alleging that a distributive share of the estate was wrongfully withheld from their ancestress, to whose right they claimed to have succeeded, and from them. It was an action against an executor or administrator (or his legal representative standing in his stead), and it was just the character of suit to which the section of the Code above quoted applied. Ten years was therefore the period of limitation which would bar the action, and not four years, as in the case of a mere creditor by account against the estate or its representative. Ten years began to run from the time when the cause of action accrued, and continued to run, unless it was suspended for some legal reason. The petition alleged that Needham Jackson reduced the assets of the estate of Jordon Jackson to cash prior to the 1st day of January, 1867, and had wrongfully held and retained the share of the estate belonging to their ancestress, Mary Jackson Thornton, and to them, from that date to the day of his death. They sought to recover interest on the amount for which suit was brought from January 1, 1867. Thus the petition on its face fixed that date as the time when the possession of Needham Jackson became wrongful, when the plaintiffs or their ancestress had a right to recover, when interest began to run in their favor, and consequently when the statute of limitations also began to run against them. Unless, therefore, the petition showed some legal reason why the statute was suspended, the action was barred. It was alleged that Mary Jackson Thornton died on September 1, 1863. Two of the present plaintiffs claimed as her children. At her death she also left other children, under two of whom the other plaintiffs claimed as heirs. None of the ages of her children were given. All must have been born before her death, and the youngest, must have been of age in 1884. The present suit was brought in July, 1906. So that two of the plaintiffs were unquestionably barred in 1894, and the other two children of the legatee were then barred, if alive. The plaintiffs failed to allege when the two deceased children of Mrs. Thornton died. Nor did they allege their own ages, so as to show any suspension of the statute. The bar of the statute of limitations does not run against a continuing executory trust until its termination or repudiation. But the mere wrongful retention by an administrator of funds, due to an heir or legatee after the estate is ripe for distribution and the fund ought to be paid over, does not stand on

the basis of such a continuing executory trust. If on the face of the petition it appears that the action is barred by the statute of limitations, a demurrer will lie on that ground. If it does not so appear, a plea is the proper method of setting up the defense. In some cases, where it was doubtful when the right of action had accrued, or whether a trust was continuing, a plea was held to be the more appropriate mode of defense. Coney v. Horne, 93 Ga. 723, 20 S. E. 213; Lane v. Lane, 87 Ga. 268, 13 S. E. 335. In some of the decisions suit was delayed until long after returns had been made, or after an administrator had been discharged, and the plaintiffs were held to be barred. But the real test is, when did the right of action accrue? From that time the statute begins to run, unless suspended for some reason provided by law. As already shown, the plaintiffs alleged that the right of action which they sought to enforce accrued prior to January 1, 1867, and suit was filed nearly 40 years later. The suit was barred, and the petition was properly dismissed. We have not dealt with the question of the right of the plaintiffs to bring suit to recover the distributive share of their mother and grandmother, as her heirs or descendants, without showing that there was no administration, or that they had the assent of the administrator on her estate, because, under what has been said above, they were barred on the face of their petition. See on the general subject, Akins v. Hill, 7 Ga. 573; Jacobs v. Pou, 18 Ga. 846; Morgan v. Woods, 69 Ga. 599 (4); Hartley v. Head, 71 Ga. 95; Payne v. Bowdrie, 110 Ga. 549 (3), 557, 36 S. E. 89.

4. The proposed amendment set out mere legal conclusions, not facts. It would not have cured defects in the petition, and was properly rejected.

Judgment affirmed. All the Justices concur except HOLDEN, J., not presiding.

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(129 Ga. 656)

## PEARSON v. COURSON et al.

(Supreme Court of Georgia. Dec. 20, 1907.)

1. VENDOR AND PURCHASER—RELATION—SUBSTITUTION OF PARTIES.

Where a vendor and vendee of land, under an executory contract of sale, agree with a third person that such person is to take the place of the original vendor, and is to make the vendee a deed upon payment to such third person of the balance of the purchase money, such third person, by substitution, sustains the relation of vendor to the original vendee.

2. SPECIFIC PERFORMANCE — VENDEE IN POSSESSION—DEFENSES.

A vendee in actual possession, under an executory contract for the purchase of land, may, in equity, upon full payment of the purchase price, compel the execution of a deed. His remedy will not be defeated by the fact that the vendor, who did not have record title, but who had contracted for title, caused the deed to be executed to a volunteer, and not to himself. In such case the volunteer may be required to execute the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, § 196.]

3. SAME—PARTIES—QUIETING TITLE.

In a suit against the vendor and the volunteer for all the relief mentioned in the foregoing headnote, the person who, at the instance of the vendor, executed the deed to the volunteer, was not a necessary party. (a) If the vendor and volunteer are both parties to the suit, the vendee may also, as against them, obtain a decree establishing his title and quieting the right to possession.

4. SAME—BILL—AMENDMENT.

In a suit of the character indicated by the foregoing headnotes, the plaintiff may amend by alleging that the deed to the volunteer had not been delivered, but the plaintiff would assume the consequences of the effect of so amending.

5. PARTIES—STRIKING UNNECESSARY PARTIES.

The plaintiff may as a matter of right strike the name of one of several defendants, where such defendant prays no relief against the plaintiff or any codefendant, but in so amending the plaintiff takes the risk of the effect which the exercise of the right may have on the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 100–107.]

(Syllabus by the Court.)

Error from Superior Court, Hancock County; H. M. Holden, Judge.

Suit by Henry Pearson against T. N. Courson and others for specific performance. From a decree dismissing the bill, plaintiff brings error. Reversed.

This is a suit to compel the specific performance of a contract for the conveyance of land and for other relief. It was dismissed on general demurrer, and the plaintiff excepted. The declaration, in substance, alleged the following: Mrs. Guill was the owner of a tract of land. She sold it to Pearson, the plaintiff, giving him a bond for title and taking notes for the purchase money. By her permission, Pearson immediately entered and continuously remained in actual possession until the filing of the suit. While in possession, after Pearson, by payments, had reduced the amount owing on the purchase money to $224, Mrs. Guill conveyed the land to Lewis, and transferred to him the purchase-money notes for said balance. Afterwards, and while the balance of $224 was owing on account of the purchase money, Pearson entered into an agreement with Lewis and one T. N. Courson, to the effect that Courson should pay Lewis the said balance of purchase money and take a deed from Lewis; that Pearson should repay the $224 to Courson, and interest thereon at the rate of 10 per cent. per annum, said amount payable by delivery to T. N. Courson of 800 pounds of lint cotton in the fall of each year, to be sold at the current prices, and to be applied as payments of the balance due on said purchase money, until a sufficient sum had thus been realized to repay the debt, at which time Courson should convey the land to Pearson; that under this arrangement T. N. Courson paid the $224 to Lewis, but, instead of having the deed made to himself, Courson, without Pearson's knowledge or assent, had Lewis make the deed to N. C. Courson, the father of T. N. Courson, who paid no consideration, and who was in no wise con-

nected with the transaction nor had any interest therein. N. C. Courson afterwards died, and T. N. Courson was executor of his will. Sufficient cotton was delivered to T. N. Courson to repay the $224, with interest, and a deed in pursuance of the contract was demanded and refused. T. N. Courson not only refused to execute a deed, but asserted title and sought to compel Pearson to pay rent. The suit was brought against T. N. Courson as an individual and as an executor. Among other things, the plaintiff prayed "that the contract between your petitioner and Dr. T. N. Courson as verbally alleged be specifically performed; that a decree of this court be entered declaring your petitioner to be the owner of the above-described land; that his possession be quieted as against the claims of Dr. T. N. Courson and of the estate of N. C. Courson, deceased." It was sought to amend the declaration by striking therefrom T. N. Courson in his representative character, leaving the case to stand against him in his individual capacity only. Also by alleging that the deed from Lewis to N. C. Courson had never been delivered. The judge refused to allow the amendment. The plaintiff excepted to the order refusing the allowance of the amendment, as well as to the judgment dismissing his petition on general demurrer.

R. L. Merritt, for plaintiff in error. Seaborn Reese and Wm. H. Burwell, for defendant in error.

ATKINSON, J. 1. Under the allegations of the petition, while Pearson was in actual possession under an executory contract to buy, Lewis bought from Mrs. Guill, taking a deed and agreeing, upon payment of the balance of the purchase money, to execute a deed to Pearson. This agreement was ratified by Pearson, who continued to pay interest to Lewis, and otherwise manifested his consent to the transaction. Under these circumstances, Lewis assumed the position of Mrs. Guill, and the relation of vendor and vendee arose between Lewis and Pearson. By the subsequent contract between Lewis and Pearson and T. N. Courson, T. N. Courson assumed the position of Lewis, and the relation of vendor and vendee arose between T. N. Courson and Pearson.

2. After the relation of vendor and vendee arose between T. N. Courson and Pearson, the latter paid to the former all the purchase money. Under a familiar rule, stated in Civ. Code, § 4037, and numerous decisions cited thereunder, full payment of the purchase money, with nothing more to be done by Pearson in order to comply with his contract, entitled Pearson to the remedy of specific performance. His remedy was not defeated by the fact that after the agreement between Lewis and Pearson and T. N. Courson, and before the purchase money had been paid, but while Pearson was in actual possession, T. N. Courson, without Pearson's knowledge or consent, induced Lewis to make the deed, not to himself, but to his father, N. C. Courson, a mere volunteer, who was not a party to the contract, nor had paid value. Under these circumstances, N. C. Courson could, under no theory involved in the facts alleged, acquire as against Pearson a title, either from Lewis or T. N. Courson, except subject to Pearson's rights. He was a mere substitute offered by T. N. Courson as a depositary for the record title. After payment of the purchase money to T. N. Courson, in addition to other possible remedies, Pearson could, in equity, compel N. C. Courson to execute a deed. Pomeroy on Con. (2d Ed.) § 465; Bryant v. Booze, 55 Ga. 438. In this instance Pearson resorted to that remedy.

3. Lewis was not a necessary party, because the remedy adopted by Pearson was no attack upon the deed executed by Lewis. On the contrary, it was an adoption of the deed. The effort was merely to ratify the deed which Lewis had made, and to obtain a decree which would pass the record title on to the person intended by the contract. In view of the remedy adopted, Lewis had no possible interest involved. The only persons whose interests could be affected were the two Coursons, both of whom were properly before the court as parties defendant. With them before the court full equity could be administered; and it would therefore be competent for the court, also, as against them, to enter a decree judicially establishing the title of Pearson and quieting the right to possession. The petition was not amended. It was erroneous to dismiss the case on general demurrer.

4. The proposed amendment averring that the deed from Lewis to N. C. Courson was not delivered would have materially affected the plaintiff's case, and, in order to obtain a decree for specific performance, would have rendered Lewis a necessary party. If the deed had not been delivered, the record title would still be in Lewis, and he would have a right to be heard before it could be adjudicated out of him. There was no offer to make him a party. But other relief, founded upon a perfect equity, the equivalent of legal title, was sought in a decree judicially establishing Pearson's title as against the two Coursons, and quieting his possession as against their claims. Sufficient allegations were made to have authorized a decree of this character, although, for the reasons already stated, no decree against Lewis requiring him to make a deed could be made. Allegations in the original petition which were sufficient to authorize that character of relief were certainly sufficient to amend by. The amendment was germane upon that feature of the case, and was not of such character as to add or substitute a new cause of action. Its effect was eliminative, not additional or substitutive. The relief obtainable with the amendment allowed would not be as extensive as if it were not allowed, but, under the allegations in the present

case, that is a mere matter of choice for the plaintiff.

5. So, too, with respect to the amendment offering to strike the name of N. C. Courson as a party defendant. The plaintiff has the right at any time, by amendment, to strike the name of one or more defendants, provided a codefendant has not prayed for any relief against such defendant, or cross-relief has not been prayed against the plaintiff, but in so amending the plaintiff must abide the consequences. Coston v. Coston, 66 Ga. 382; Walker v. Wadley, 124 Ga. 275 (6), 52 S. E. 904. In this case T. N. Courson, the only codefendant, had not prayed for any relief against the estate of N. C. Courson, nor had any cross-relief been prayed against the plaintiff. The plaintiff should have been allowed to amend by striking the name of the legal representative of such estate as a party defendant.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 668)

## FLOYD et al. v. RICKETSON et al.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. ADVERSE POSSESSION—HUSBAND AND WIFE—CONVEYANCE BY WIFE TO HUSBAND—SUPERIOR COURT—ALLOWANCE—COLOR OF TITLE.

A deed made by a wife to her husband in pursuance of a sale by her to him, without the same being allowed by the superior court of the county of her domicile, though void as title, may be good as color.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 483.]

2. SAME—RECORD.

Record of a deed executed in 1889 was not necessary in order for it to operate as color of title, so that possession of a part of the tract of land therein conveyed would constructively extend to the limits of the lot or known tract described in it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 468.]

3. ADMINISTRATORS—SALE OF LANDS—ORDER—MINUTES—SIGNING.

An order granted by the court of ordinary authorizing an administrator to sell the lands belonging to the estate of his intestate, in all respects regular, except that it was not signed by the ordinary, is valid, if entered on the minutes of the court of ordinary and they are signed by the ordinary; and, in the absence of any proof to the contrary, it will be presumed that the ordinary signed the minutes.

4. SAME—ADMINISTRATOR'S DEED—RECITALS.

"A recital in an administrator's deed of a compliance with all the requisites of the law necessary to be done after the order of sale is granted is prima facie evidence that those requisites were complied with."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1604.]

5. SAME—EVIDENCE.

The administrator's deed admitted in evidence in the present case, though not good as color of title during the life estate therein created, was admissible in evidence for whatever light it might shed upon the bona fides of the husband in the subsequent transaction, wherein his wife conveyed to him a portion of the land covered by this deed.

6. WITNESSES—COMPETENCY—RELATION.

Where, in a suit involving the title to land, the plaintiffs relied upon a deed from the deceased husband of one of the defendants, and the defendants contended that such deed was void, and that, when it was executed, the legal title to the land was in the grantor's wife, where it had since remained, her son by such grantor was not, by reason of this relationship on his part, incompetent to testify to declarations of his father, prior to the making of the deed, in disparagement of his title to the land in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 120.]

(Syllabus by the Court.)

Error from Superior Court, Coffee County; T. A. Parker, Judge.

Action by Rebecca Ricketson and others against Roan Floyd and others. From an order granting a temporary injunction, defendants bring error. Reversed.

Rebecca Ricketson and her children, Fannie M. and Jesse C. Ricketson, brought an equitable petition against Roan Floyd to enjoin him from cutting the timber on the east half of lot 113, in the Sixth district of Coffee county, alleging his insolvency and that the damages from his cutting the timber would be irreparable. The defendant answered that he was cutting the timber as the agent of his mother, Rhoda Floyd, who owned the timber and the land upon which it grew. Rhoda Floyd, upon her petition, was made a party defendant to the case. She alleged in her petition that she was the owner of all of said lot 113, was the widow of R. P. Floyd, and that on November 13, 1889, she made a deed to the east half of such lot to him wherein the consideration expressed was $245, that this deed and pretended sale was not approved or allowed by an order of the judge of the superior court of her domicile, and, being a pretended sale by her to her husband, was therefore void. Upon the interlocutory hearing, the plaintiffs introduced a warranty deed from Timothy Kirkland to Henry Peterson, dated July 21, 1840, and recorded October 9, 1853, conveying all of lot 113, in the Sixth district of Coffee county, Ga. They also introduced a deed from Henry Peterson to Mark Lott, dated December 30, 1840, recorded January 4, 1907, conveying the same premises. They then introduced, over the objection of defendants, a deed from the administrator of Mark Lott, copy from the minutes of the court of ordinary of Coffee county of an order granting leave to such administrator to sell the land belonging to his intestate, and a certificate from the clerk of such court, which were, respectively, as follows:

"State of Georgia, Coffee County. This indenture made this the first day of January in the year eighteen hundred and sixty seven between Elisha Lott, administrator of the goods and chattels rights and credits and which were of Mark Lott deceased of the first part and Reuben P. Floyd of the second part. Witnesseth, that whereas the ordinary of said county of Coffee county did at his

court holde in the month of October last past to empower the said Elisha Lott as administrator as afore said to sell and dispose of all the real estate of the said Mark Lott deceased and whereas the said Elisha Lott having published notice of said sale for sixt days in a gazette published in the city of Quitman Brooks and said count and having complied with all the requistins of the law therein did on the first Tuesday of this present month prcead to expose the lott of land hereinafter described fore the sale at the court house between the houres in said county between the hours limited by law for sales and whereas the said R. P. Floyd bought sa d lot of land no. 113 and for the sum of fifty three dollars which was the biggest sum bid for the said lot no. 113 the said Elisha Lott administrator as fore said sum of fifty three dollars paid the receipt where of is hereby acknowledged has granted bargain and sold the said lot of land 113 to be delivered to said R. P. Floyd at the death of said Rodey Floyd at close of dowry, conveyed unto R. P. Floyd and by these presents does grant bargen sell unt R. P. Floyd and convey into Mark Lott his airs and assigns a lot of land in the 6 Destrict appling now Coffee county, known in the pland of said county as lot number 113 in the said Sixth destrict of apling now Coffee county to have and to hold the said primises to the said Mark Lott his heirs and assigns for ever in testimony whereof the said Elisha Lott administrator has hereto set his hand and seale this day and year above written.

"Elisha Lott [L. S.]"

"John Barber.

"J. W. Overstreet, J. P."

"Court of Ordinary, November term, 1866. Whereas Elisha Lott administrator on the estate of Mark Lott deceased made application for citation for leave to sell all the land belonging to said estate, ordered that Elisha Lott administrator have leave to sell said land."

"Ordinary's Office—ss.: I, W. P. Ward, ordinary and ex officio clerk of the court of ordinary of said county, do hereby certify that I have compared the foregoing copy of order to sell lands belonging to estate of Mark Lott, deceased, as recorded in minutes book 'A' page 331 with the original record thereof, now remaining in this office, and the same is a correct transcript therefrom, and of the whole of such original record. In testimony whereof, I have hereunto set my hand and affixed the seal of the court of ordinary, this the 10th day of May, 1907.

"W. P. Ward,
Ordinary and Ex Officio C. C. O."

Plaintiffs also introduced a warranty deed from R. P. Floyd to Rebecca Ricketson and her two children, Fannie Missouri Ricketson and Jesse Clifford Ricketson, dated June 14, 1898, recorded January 2, 1899, conveying the east half of lot 113, in the Sixth district of Coffee county, Ga.; the consideration recited being "one dollar and services to be rendered during his (Floyd's) lifetime." Evidence for the plaintiffs tended to show that there were some 25 to 40 acres of cleared land on the east half of lot 113, which had been in cultivation for many years, and that R. P. Floyd was in adverse possession of this half lot from the date of the deed from Rhoda Floyd to him until the execution of the deed by him to the plaintiffs, and that plaintiffs were in adverse possession of the same from the date of the deed from R. P. Floyd to them until some time in June, 1905. Plaintiffs also introduced evidence showing the insolvency of both Roan Floyd and Rhoda Floyd, and that the cutting of the timber in question would result in irreparable damages, which evidence was not controverted by defendants. Defendants contended that the consideration of the deed from R. P. Floyd to plaintiffs was based upon an immoral consideration, viz., a promise and contract on the part of Rebecca Ricketson of concubinage for life with R. P. Floyd. Defendants introduced evidence tending to prove such contention, while plaintiffs submitted evidence tending to disprove it. Plaintiffs put in evidence an affidavit of Rhoda Floyd to the effect that she married R. P. Floyd in 1864, and that, soon after the marriage, he went upon lot of land 113, and lived thereon until the time of his death. In another affidavit of Rhoda Floyd, put in evidence by defendants, she said, in effect, that she and R. P. Floyd lived together for 20 years or more after their marriage, and then separated on account of his attentions to Rebecca Ricketson, and that after such separation he built a one-room house on the east half of lot 113, and, further, "that the husband of deponent, after building the house above mentioned, requested this deponent to make him a deed to the east half of said lot of land, which request was refused by deponent; that the said R. P. Floyd proposed to make a deed to deponent to the west half, thereby relinquishing whatever claim he might have, if any, to the west half, and for deponent to make him a deed to the east half, proposing in this way to divide said lot of land, but deponent, owning the entire lot, bitterly refused to make the deed; that she finally consented to make the deed in question, and did make the deed, which is now relied upon by the plaintiffs in the above stated case, all of which was done contrary to the wishes of deponent; that the deed above mentioned was not a gift; that there is a consideration expressed therein, which the said R. P. Floyd claimed to have paid, by making deponent a deed to the west half of said lot; that said deed was not authorized or approved by the judge of the superior court as required by law." A witness for plaintiffs testified that R. P. Floyd deeded to Rhoda Floyd the west half of lot 113, in the Sixth district of Coffee county, and she deeded to him the east half

of this lot; and that, when Rhoda Floyd made the deed to R. P. Floyd, he took possession of the east half of the lot and built houses and outhouses, and opened up a farm thereon, and lived upon the same until his death. When the administrator's deed above set forth, the copy from the minutes of the court of ordinary of the order authorizing the sale by the administrator, and the certificate from the clerk of that court were offered in evidence, defendants made the following objections to the admission of the same: (1) They were irrelevant and immaterial. (2) The deed was not "connected with a good and perfect title from the state or any other source." (3) It purported "to convey a reversionary interest to be enjoyed after the death of one of the defendants in the present case, and, delaying possession of the land in controversy until the death of said defendant, is not admissible as color of title." (4) The order of the ordinary authorizing the administrator to sell the land was not signed or issued by the ordinary of Coffee county. (5) It does not appear from the deed that the sale was advertised the requisite number of days as required by law; and it does not appear that the sale was advertised in the official organ of Coffee county. These objections were overruled.

Defendants offered in evidence the following affidavit of Perry Floyd: "That he is a son of R. P. Floyd, now deceased, and Mrs. Rhoda Floyd, one of the defendants in the present case, now in life; that deponent heard his father say before he made the deed to the east half of lot No. 113, in the Sixth district of Coffee county, Ga., to Rebecca Ricketson, that he knew that he, R. P. Floyd, had no title to said land under the law, but that he intended to hold it with his gun or die; that deponent heard him make this statement several times; and that Rebecca Ricketson was present and heard the same." The judge rejected this affidavit, and refused to consider the same, on the ground that Perry Floyd was interested in the result of the litigation, by reason of being the son of Rhoda Floyd. Defendants also introduced the record of a suit brought by them against the plaintiffs in the present case for the recovery of the east half of lot 113, in the Sixth district of Coffee county, on which the timber in controversy is situated, from which it appeared that said suit had been filed in the office of the clerk of the superior court of Coffee county on September 12, 1905, and had been withdrawn by plaintiffs on October 2, 1906, and that the pleadings therein showed that the same issues were raised therein in respect to the title to the land as in the present case.

The judge granted a temporary injunction, and defendants excepted.

Lankford & Dickerson, for plaintiffs in error. Levi O'Steen and J. W. Quincey, for defendants in error.

FISH, C. J. (after stating the facts as above). 1, 2. If upon the separation of R. P. Floyd and his wife, Rhoda Floyd, she, on November 13, 1889, conveyed to him the east half of lot 113, in consideration of a given sum of money, or in consideration of his then conveying to her the west half of this lot, and he thereupon entered into possession of the east half of the lot, improved the same, by opening up a farm and building houses thereon, and continued in adverse possession until he conveyed such east half to plaintiffs on June 14, 1898, then, without more, the judge was authorized to find that plaintiffs had title to the land in question by prescription under color. The deed from Rhoda Floyd, under which R. P. Floyd went into possession, and held possession for more than seven years, was executed in 1889, and did not have to be recorded in order for his actual possession thereunder of a part of the tract of land therein described to become constructive possession of the entire tract, and to be the foundation for a prescription, under color of title, as to the whole of the premises described in the deed. As he held actual adverse possession of a portion of the east half of lot 113, under color of title to the whole of the same, for more than seven years before he, in 1898, conveyed this half lot to the plaintiffs, title, by prescription, thereto had ripened in him, and his deed to the plaintiffs transferred it to them, if such deed were otherwise valid. Roberson v. Downing Co., 120 Ga. 833 (4), 48 S. E. 429, 102 Am. St. Rep. 128; O'Brien v. Fletcher, 123 Ga. 427, 51 S. E. 405. This is true, although the deed to R. P. Floyd from his wife, Rhoda Floyd, might be void as title, because made in pursuance of a sale of her separate estate to her husband, without such sale having been allowed by an order of the superior court of her domicile; for, while such deed may have been void as title, it was nevertheless good as color of title, if there were no fraud in its procurement, and from the evidence there seems to have been none.

3. The court did not err in admitting in evidence the deed executed by the administrator of the estate of Mark Lott, over the objections of the defendants; the deed being accompanied by a certified copy from the minutes of the court of ordinary of Coffee county of an order, granted at the November term, 1866, authorizing the maker of the deed, as administrator of the estate of Mark Lott, deceased, to sell all the land belonging to such estate. Although it does not appear that either the order or the minutes was signed by the ordinary, yet, as it was entered on the minutes, it will be presumed, in the absence of proof to the contrary, that the ordinary signed the minutes, which was equivalent to signing the order. See Sweeney v. Sweeney, 119 Ga. 76, 46 S. E. 76, 100 Am. St. Rep. 159.

4. Nor was there any merit in the objec-

tion to the deed that it did not appear therefrom that the sale was advertised for the requisite number of days required by law and in the official organ of Coffee county. The deed recited that the administrator, "having complied with all the requistins [requisites?] of the law," etc. "A recital in an administrator's deed of a compliance with all of the requisites of the law necessary to be done after the order of sale is granted is prima facie evidence that these requisites were complied with." Davie v. McDaniel, 47 Ga. 195; Civ. Code 1895, § 3454.

5. While this deed was not connected with a good and sufficient title from the state or from any other source, and taken alone, or in connection with the prior deeds introduced, one to Mark Lott and the other to his grantor, did not show a perfect title, and there was no evidence that the defendant Rhoda Floyd claimed under this administrator's deed, so as to make it the common source of title claimed by plaintiffs and defendants, still the deed was admissible in evidence. Our construction of the instrument is that it conveyed the fee in lot 113 to R. P. Floyd, but that he was not to have possession of the premises until the death of Rhoda Floyd, and therefore neither he nor those holding under him could base a prescription under this deed as color during the life of Rhoda Floyd. But, as one of the controlling points in the case is as to whether or not there was moral fraud in the transaction between R. P. Floyd and Rhoda Floyd in which she conveyed to him the property in question, we think this administrator's deed was admissible as probably shedding some light on this question; for if, by this deed, the wife, Rhoda Floyd, took a life estate in the whole of lot 113, and the husband, R. P. Floyd, took the fee therein, they might, after their marital separation, each acting in good faith, have agreed to settle their respective claims to the lot in the manner indicated in her testimony; that is, by the execution of a deed, in fee simple, by her to him to the east half of the lot, and the execution of such a deed by him to her to the west half thereof. While it did not appear, on the trial, whether Rhoda Floyd claimed under this deed or not, yet the fact that such a deed was in existence at the time that she made her deed to her husband to the east half of lot 113 and he made her a deed to the west half thereof was a circumstance which the jury might take into consideration upon the question as to the good faith of R. P. Floyd in that transaction between his wife and himself. For only moral fraud on his part would prevent him from basing a prescription upon adverse possession under this deed from Rhoda Floyd to himself. The administrator's deed was very inartistically, unskillfully, and awkwardly drawn, and is therefore difficult of construction, and it may well be inferred that differences might have arisen between the husband and wife, after their domestic disagreement began, as to their respective rights under it, and that they agreed to settle these differences and contentions by the exchange of deeds shown by her testimony.

6. The judge erred in rejecting the affidavit of Perry Floyd, offered by the defendants, as it was certainly relevant on a controlling question in the case, viz., as to the good faith of R. P. Floyd in taking the deed from his wife, and the fact that Perry Floyd was the son of defendant, Rhoda Floyd, did not disqualify him as a witness. Blount v. Beall, 95 Ga. 182, 22 S. E. 52. For this error the judgment granting the injunction will have to be reversed as we cannot say what would have been the ruling of the judge had the affidavit been admitted and considered by him.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 676)

## NEAL et al. v. BOYKIN.

(Supreme Court of Georgia. Dec. 21, 1907.)

1. ADMINISTRATORS—NONRESIDENT DECEDENT—FRAUDULENT APPOINTMENT—VACATION.
The judgment of a court of ordinary appointing an administrator on the estate of a decedent who was a nonresident of this state and died in Florida may be vacated in a proper proceeding in equity, instituted for the purpose of setting aside such judgment, on the ground that the party obtaining the same falsely and fraudulently represented to the court that the decedent had assets within the county where the application was made.

2. SAME—PETITION.
It is alleged in the petition that at the time of the application for letters of administration in De Kalb county there was no portion of the estate of the nonresident decedent in the county where the application was made, except a certain promissory note, the maker of which resided in a different county; that this note had been brought into De Kalb county subsequently to the death of the decedent for the purpose of conferring improperly a colorable probate jurisdiction upon the court of ordinary of De Kalb county, and that the applicant was guilty of fraud when he represented to the court that some portion of the estate of the decedent was located in that county. *Held*, that the said note was not bona notabilia in De Kalb county, and that the petition sufficiently alleged that the judgment granting the letters of administration was procured by fraud.

3. SAME — PARTIES—TEMPORARY ADMINISTRATOR.
The heirs and creditors of the decedent, who had no knowledge that the application for letters of administration was pending, were proper parties to institute and maintain an equitable proceeding to set aside or vacate the judgment appointing the administrator. The temporary administrator has power or authority to institute and maintain such an action.

4. SAME.
The petition set forth a good cause of action; and it was error for the court to sustain a general demurrer thereto.
(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Suit by John Neal and others against B.

M. Boykin. From a judgment dismissing the bill, plaintiffs bring error. Reversed.

John Neal, Hiram Neal, Welborn Neal, and W. W. Beall, as heirs at law of McCormick Neal, deceased, and Bull and Alexander, as creditors of the decedent, filed an equitable petition to the superior court of De Kalb county against Boykin, seeking to set aside or vacate the judgment of the court of ordinary of De Kalb county appointing defendant administrator on the estate of McCormick Neal. Petitioners allege that the defendant falsely represented to the court that said McCormick Neal, a nonresident of this state, had assets in De Kalb county; that the decedent had no property of any kind in De Kalb county, and the court of ordinary of said county was without jurisdiction to appoint an administrator on the estate of said Neal. It is also alleged that the appointment of the defendant was obtained by fraud, and that petitioners had no knowledge that proceedings were pending before the court of ordinary of De Kalb county. It is further alleged that the deceased left certain property in Talbott county, Ga., and that one Stephen Neal has been legally appointed temporary administrator upon said estate in Talbot county. To the plaintiffs' petition and amendment thereto the defendant demurred generally as follows: "Because plaintiffs' petition shows that if any cause of action exists against the defendant by reason of the facts alleged in said petition, which is denied by defendant, the cause of action does not lie in favor of plaintiffs, but in favor of Stephen Neal, whom they allege has been appointed [temporary] administrator of said McCormick Neal's estate. Because plaintiffs' petition and the exhibits thereto attached show that defendant was regularly appointed administrator of the estate of McCormick Neal, deceased, and any objection that plaintiffs wished to make to said appointment should have been made in response to the published citation upon the application of defendant to be appointed administrator of said estate; that the order appointing defendant administrator of said estate cannot be thus collaterally attacked; that the issues now raised were adjudicated by said order appointing defendant administrator of said estate; that plaintiffs have had their day in court, and cannot now be heard upon the issues raised. Because the allegations of said petition are not such as to show that the defendant has been guilty of any fraud whatever. Because plaintiffs' petition, with the exhibits thereto attached, show that the court of ordinary of De Kalb county had jurisdiction of the estate in question, and that the appointment of defendant was regular. Because the allegations contained in plaintiffs' petition show that there is no equity in said petition, and set forth no cause of action against this defendant." The court sustained the general demurrer and dismissed plaintiffs' petition, to which order and judgment plaintiffs excepted.

J. J. Bull, W. D. Letford, and J. D. Kilpatrick, for plaintiffs in error. Green, Tilson & McKinney, for defendant in error.

BECK, J. (after stating the facts as above). 1. Courts of ordinary in Georgia have general and exclusive jurisdiction of "the granting of letters testamentary, of administration and the repeal or revocation of the same." Code 1895, § 4232. And the judgment of a court of ordinary granting letters of administration is entitled to that conclusiveness which attaches to the judgments of other courts of general jurisdiction. Maybin v. Knighton, 67 Ga. 103. The question here presented is whether such a judgment can be attacked directly, in a proceeding instituted for that purpose, in a court of equity on a proper case-made. This question has been adjudicated in a number of cases decided by this court. "The judgment of a court of competent jurisdiction may be set aside for fraud, accident, or mistake, unmixed with the negligence or fault of the complaining party, by a decree in chancery, or in a court of law under our practice, by appropriate pleadings, and by making the necessary parties to the proceeding for that purpose." Dugan v. McGlann, 60 Ga. 353. In the case of Jones v. Smith, 120 Ga. 642, 48 S. E. 134, Mr. Justice Cobb said: "If it could be made to appear that the judgment of the court of ordinary appointing the Joneses administrators was the result of a fraud perpetrated upon that court by a false representation that Lamar was a resident of the state at the time of his death, it may be that the defendants would have a remedy by a direct proceeding in equity to set aside this judgment on the ground of fraud. See in this connection, Collier v. Simpson, 74 Ga. 697; Langmade v. Hamilton, 89 Ga. 441, 15 S. E. 535; Phillips v. James, 115 Ga. 426, 41 S. E. 663." In the case of Wallace v. Walker, 37 Ga. 265, 92 Am. Dec. 70, the court said: "Wallace died in the state of Tennessee, the place of his domicile, leaving a will appointing an executor, who was duly qualified as such in the probate court of that state, and such executor filed an exemplified copy of his appointment in court, as required by the Code, exhibited his bill against the defendant, who had been appointed administrator on the estate of the deceased by the court of ordinary of this state, and as such had collected and received a portion of the personal estate of the deceased, alleging that said defendant represented to the court of ordinary at the time of his appointment, that the deceased had died intestate when he knew that he died leaving a will. Held, that a court of chancery in this state has jurisdiction to maintain a suit in behalf of such foreign executor to set aside the letters of administration

so granted upon the ground of fraud in obtaining the same." And in the case of McArthur v. Matthewson, 67 Ga. 134, it was held that: "Equity has jurisdiction to set aside a judgment granting letters of administration, where such judgment was obtained by fraud." And in the case of Davis v. Albritton, 127 Ga. 517, 56 S. E. 514, 8 L. R. A. (N. S.) 820, it was held that the heirs of the decedent could maintain a direct proceeding to have a judgment, admitting to probate the copy of a lost will, set aside on the ground that the party obtaining the judgment had fraudulently misrepresented to the court the facts necessary to give the court jurisdiction when such jurisdictional facts did not exist. See, also, Tant v. Wigfall, 65 Ga. 412; Civ. Code 1895, § 5370. It follows from the authorities cited above that if the court of ordinary of De Kalb county had no jurisdiction to grant letters of administration on the estate of McCormick Neal, and the granting of the same was the result of a fraud perpetrated upon the court by a false representation that the necessary jurisdictional facts did exist, a court of equity would have power to set aside the judgment granting said letters of administration, on the ground of fraud in its procurement.

2. Did the facts alleged in the plaintiffs' petition bring this case within the rule just announced? Code 1895, § 4234, provides that "the ordinary can grant administration upon no person's estate who was not a resident of the county where the application was made at the time of his death, or, being a nonresident of the state, has property in said county, or a bona fide cause of action against some person therein." The decedent, McCormick Neal, a nonresident of this state, having died in the state of Florida, the existence of bona notabilia in De Kalb county was a necessary jurisdictional fact upon which to grant letters of administration in that county. The petition alleges that at the time of the death of McCormick Neal said decedent left no property of any kind or character in De Kalb county, Ga., and at the time said defendant applied for letters of administration on the estate of said Neal there was situated and located in De Kalb county no property of any kind belonging to the estate of said decedent, except a certain promissory note executed in 1887 by one Culpepper; that said Culpepper is a resident of Talbot county, Ga., and is wholly insolvent. Petitioners allege that the carrying to De Kalb county of the said promissory note was for the fraudulent purpose of giving to the court of ordinary of De Kalb county jurisdiction to appoint defendant administrator on said estate, and that said defendant was guilty of fraud when he alleged in his application to the court of ordinary of De Kalb county that some portion of the estate of McCormick Neal was located in De Kalb county; that this allegation was not true, and that defendant knew it was not true. Mr. Schouler, in his work on Executors and Administrators (3d Ed.) 38, says: "Local jurisdiction [to appoint an administrator on the estate of a non-resident decedent] is upheld on the ground that bona notabilia exist when letters are applied for, notwithstanding the goods were brought into the country, or the debtor removed thither subsequently to the death of the owner or creditor; and this seems the better opinion, unless such bringing in or removal was in bad faith, and with the intention of conferring improperly a colorable probate jurisdiction." And so we hold in the present case that, if the note was brought into De Kalb county, as alleged in the petition, as a part of a fraudulent scheme for the purpose of giving falsely a colorable and pretended jurisdiction to the court of ordinary of that county, it would not be bona notabilia within the county of De Kalb for the purpose of founding administration.

But, irrespective of the question of bad faith in bringing the note into De Kalb county, the mere existence of such promissory note in that county payable to the decedent, when the maker of the note resides in Talbot county, would not confer jurisdiction on the probate court of De Kalb county to grant letters of administration on the estate of the deceased nonresident payee. In the case of Arnold v. Arnold, 62 Ga. 627, it was held that, for the purpose of granting letters of administration on the estate of a nonresident decedent, "debts by simple contract are bona notabilia in the county where the debtor resides." And in the case of Wyman v. Halstead, 109 U. S. 654, 3 Sup. Ct. 417, 27 L. Ed. 1068, Mr. Justice Gray said: "The general rule of law is well settled that, for the purpose of founding administration, all simple contract debts are assets at the domicile of the debtor, and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable." The doctrine here stated is an enunciation of the common law upon the subject dealt with, and is in harmony with the rule deducible from sections 3393 and 4234 of our Code of 1895, which are an adoption and codification of the common law upon the subject of the grant of administration on the estate of a nonresident. See, also, 11 Am. & Eng. Enc. L. (2d Ed.) 764; 18 Cyc. 73. If, therefore, the allegations of the petition are true, and they must be so considered in passing upon the general demurrer, the court of ordinary of De Kalb county had no jurisdiction to grant letters of administration upon the estate of McCormick Neal, deceased, and the rendition of the judgment appointing such administrator was procured by fraudulent representations, upon the

part of the defendant in this case, as to the facts necessary to give the court jurisdiction.

8. It was alleged in plaintiffs' petition that one Stephen Neal, of Talbot county, has been legally appointed temporary administrator on the estate of the said McCormick Neal, deceased, in Georgia, and defendant contends that the temporary administrator was the proper party to institute and maintain the present proceedings to set aside the judgment appointing defendant permanent administrator. Code 1895, § 3359, gives the ordinary power to appoint a temporary administrator "upon any unrepresented estate, for the purpose of collecting and taking care of the effects of the deceased," to continue until permanent letters are granted. Section 3361 declares that "a temporary administrator may sue for the collection of debts or personal property of the intestate." As was said by Chief Justice Simmons in the case of Banks v. Walker, 112 Ga. 542, 37 S. E. 866: "There is no other section of the Code which can be construed as giving to the temporary administrator any larger powers than these. * * * Under our Code a temporary administrator is appointed to collect the personal property, and to protect it from waste and deterioration, and preserve it until permanent letters are granted. * * * If the Legislature had intended to confer upon a temporary administrator the same powers which are vested in a permanent administrator, it would certainly not have used language apparently restricting his power, as in the Code. It is quite clear from the language of the sections mentioned above that the intention was merely to have some one appointed to look after the personal property of the estate during the interval which has to elapse before a permanent administrator can be appointed." Accordingly, it was held in the Banks Case that a temporary administrator could not maintain an action to recover land alleged to belong to the estate which he represents. An action to set aside or vacate the judgment of the court of ordinary appointing a permanent administrator is not a suit concerning personal property; nor was it instituted "for the purpose of collecting and taking care of the effects of the deceased." And we do not think that the temporary administrator has any power or authority to institute and maintain a suit for the purpose of setting aside or vacating such judgment. The petitioners in the present case were heirs and creditors of the decedent. They were interested in the assets of the estate, and their distribution. They would, therefore, have been heard as caveators when the application for letters of administration was pending. Towner v. Griffin, 115 Ga. 966, 42 S. E. 262. And it is quite clear that they are the proper parties plaintiff to the proceeding to vacate or set aside the judgment appointing the administrator. See Jones v. Smith, 120 Ga. 642, 48 S. E. 134. The fact that citation was published would not prevent the plaintiffs, who had no knowledge of the application for letters of administration, from moving in due time to have the judgment appointing the administrator set aside. Davis v. Albritton, 127 Ga. 517, 56 S. E. 514, 8 L. R. A. (N. S.) 820.

4. The plaintiffs' petition set forth a good cause of action; and it was error for the court to sustain a general demurrer thereto.

Judgment reversed. All the Justices concur, except HOLDEN, J., not presiding.

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(129 Ga. 644)

## SMITH et al. v. MOORE.

(Supreme Court of Georgia. Dec. 19, 1907.)

1. WILLS—CONSTRUCTION—NATURE OF ESTATE.

A. died testate, leaving both realty and personalty. The only item of his will necessary to be considered here is as follows: "I give, bequeath and devise to my wife, Affiah Ballenger, all of my real and personal property, in fee simple, during her life time, free of all charge, to her own proper use, benefit and behoof, with the privilege of selling or disposing of any real or personal property she may think best, except my farm on the Oostanaula river, known as the Caldwell place, she is to collect the rents of said farm and use the same." The wife of A. survived him and was his sole heir. *Held*, that whether the testator by the terms of his will sought to carve out a life estate in his property, or whether under his will the wife took a fee-simple title, inasmuch as there were no limitations over upon the death of the wife, she became vested with the complete title to all of the property.

2. ADMINISTRATORS — APPLICATION FOR LETTERS—CAVEAT.

The wife having died, her duly appointed administrator was the proper party to caveat an application by the next of kin of the deceased husband for letters of administration cum testamento upon his estate, inasmuch as there was no reversionary interest in his estate which the applicants would have had the right to administer or to interfere with.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Application by P. B. Smith and E. C. Smith for letters of administration. W. C. Moore filed a caveat. Caveat sustained, and Smith and others bring error. Affirmed.

W. M. Henry, W. H. Ennis, and Walter B. Shaw, for plaintiffs in error. George A. H. Harris & Son, for defendant in error.

BECK, J. 1. The issues in this case arose upon an application to the court of ordinary by P. B. Smith and E. C. Smith, as the next of kin of M. R. Ballenger, deceased, for letters of administration with the will annexed upon the estate of said M. R. Ballenger. Said application was caveated by W. C. Moore, administrator of Mrs. Affiah Ballenger, deceased, and applicants demurred to said caveat. The case was appealed by consent to the superior court, and there submitted to the presiding judge without the intervention of a jury. The court overruled applicants' demurrer, and the case proceeded to trial upon the application and caveat. It appears from the agreed statement of facts that in 1886 M. R. Ballenger died testate, leaving in

life his wife, the said Mrs. Affiah Ballenger, but left no lineal descendents. The only item of the will of M. R. Ballenger material to the questions involved in this case is as follows: "I give, bequeath and devise to my wife, Affiah Ballenger, all of my real and personal property, in fee simple, during her life time, free of all charge, to her own proper use, benefit and behoof, with the privilege of selling or disposing of any real or personal property she may think best, except my farm on the Oostanaula river, known as the Caldwell place, she is to collect the rents of said farm and use the same." This will was duly probated, and Mrs. Affiah Ballenger qualified as executrix. Mrs. Affiah Ballenger remained in possession of all of the estate left by M. R. Ballenger, including the Caldwell place, until her death in 1905, except so much of the personal estate as she consumed. The caveator, Moore, was duly appointed administrator of Mrs. Affiah Ballenger. After hearing evidence and argument, the court passed an order sustaining the caveat filed by said Moore, administrator, and denying the application for letters of administration on the estate of M. R. Ballenger. The applicants, P. B. Smith and E. C. Smith, excepted.

It is unnecessary to construe the item of the will set out above with reference to the question as to what estate the wife of the testator took under the terms of that will; that is whether she took a life estate in all of the property, or a fee in a part and a life estate in the remainder. Whatever answer might be made to either of those questions, the result, so far as the issues of this case are concerned, would be the same. The testator's wife, the legatee and devisee named in the will, was sole heir of her husband; there being no lineal descendants of his in life at the time of his death. If Mrs. Affiah Ballenger took a life estate merely in her husband's estate under the terms of the will, there being no limitation over after the life estate, it is clear that the entire estate vested in her. The mere fact that the wife, who was sole heir, took a life estate under the will, could not have the effect to disinherit her as to any interest which she might have had as heir. As was said in the case of Wilder, Adm'r, v. Holland, 102 Ga. 44, 29 S. E. 134: "There being nothing in the will expressly directing the reversion to vest in any other person, it necessarily vested in the heirs at law; and this would be true, even if the intention to disinherit the heirs were ever so manifest. The heir cannot be disinherited, unless the property be expressly devised to some other person." In the case of Oliver v. Powell, 114 Ga. 592, 40 S. E. 826, it was held that: "Where realty is devised to one for life, and no further testamentary disposition thereof is made, the reversionary interest in the fee remaining in the testator's estate vests immediately upon his death in those who are then his heirs at law, with the right of possession postponed until the death of the life tenant, and does not remain in abeyance while he lives and at his death vest in those who would then be such heirs." If by the terms of the will a life estate was carved out of the estate of the testator and vested in Mrs. Ballenger, the remainder interest was cast on her by law, and the two interests merged, and she was vested with a complete title to the property of the testator.

2. Mrs. Ballenger having gone into possession of the property and having died in possession of all that remained unconsumed, her duly appointed administrator was entitled to administer it, and the plaintiffs in error were not entitled to letters of administration cum testamento on the estate of M. R. Ballenger. They had no interest whatever in the property they seek the right and power to administer. That property was already in the hands of the one who was the proper party to administer it, and the proper party to raise objections to any interference upon the part of the applicants for the letters of administration on the estate of M. R. Ballenger. And the judgment of the court below sustaining those objections was right and should not be disturbed.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

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(3 Ga. App. 313)

RICHARDSON v. STATE. (No. 815.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. INTOXICATING LIQUORS — SALOONS — KEEPING OPEN ON SABBATH.

Although the length of time during which a tippling house is kept open is immaterial, the purpose for which it is opened is relevant and material in determining whether the offense denounced by the statute has been committed, or whether the door of the saloon was opened for a necessary purpose justified by law, and wholly innocent, because such opening is not connected, either by act or intention, with any violation of the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 158.]

2. CRIMINAL LAW—STATEMENT OF ACCUSED.

The privilege accorded a defendant in a criminal trial in this state of making a statement to the jury is an anomaly. The contents of the statement are not to be restricted or governed by the rules controlling the admissibility of evidence. "In all criminal trials the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense." Pen. Code 1895, § 1010. Though the court may prevent repetition of the same statements or debar the statement of circumstances wholly disconnected in fact with the facts upon which the defendant bases his defense, the statement of the defendant is not to be curtailed either by ruling or interruptions merely because the facts stated by the defendant, and which constitute a part of his narrative of his connection with the case, may, under the rules of evidence, be irrelevant, and do not present in law a valid defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1589.]

Powell, J., dissenting.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

J. C. Richardson was convicted of keeping open a tippling house on the Sabbath Day, and brings error. Reversed.

Austin Branch, for plaintiff in error. J. C. C. Black, Jr., Sol. and Jno. M. Graham, for the State.

RUSSELL, J. The defendant was convicted of the offense of keeping open a tippling house on the Sabbath Day, and excepts to the order overruling his motion for new trial. As plaintiff in error, he assigns error on certain instructions contained in the charge of the court and on failure of the court to charge certain principles which he contended were material on the trial. Error is also assigned on the ruling of the court in excluding section 149 of the City Code of Augusta, with reference to dealers in intoxicating liquors, and on the action of the court in interrupting the defendant in his statement, and the refusal of the court to allow the defendant to state his understanding of the law and his belief that he was acting legally.

1. The charge of the court alleged to be erroneous in the second ground of the motion for new trial was as follows: "I charge you that the offense of keeping open a tippling house on the Sabbath Day is complete whenever it appears that the house in question was a tippling house, and that it was open on the Sabbath Day. The law does not concern itself with the length of time during which it was open nor the purpose for which it was open." The objection to the charge is that it entirely ignored and excluded from the consideration of the jury the question whether the purpose for which the defendant stated he entered his saloon, to wit, a momentary entrance for the purpose of putting out his lights, was one which the law would excuse or justify, and misled the jury into supposing that a mere entrance by the defendant into the saloon for any cause or purpose whatsoever would constitute an offense, whereas, "an opening or keeping open" consists in having the house open for egress or ingress, or in allowing persons other than the proprietor or his agent to have access to the house. We think the court too greatly restricted the purposes for which a saloon may be opened even on the Sabbath Day. In so far as the time is concerned, no valid objection can be raised to the charge of the court, if the purpose of the opening was unnecessary. It has been repeatedly held that, if a tippling house be open or kept open even for a moment on the Sabbath Day, it is a violation of the statute. Monses v. State, 78 Ga. 110; Mohrman v. State, 105 Ga. 712, 32 S. E. 143, 43 L. R. A. 398, 70 Am. St. Rep. 74; McCarty v. Atlanta, 121 Ga. 366, 49 S. E. 287. We think, however, that the law, under some circumstances, justifies the opening of a house used as a saloon on secular days, even on the Sabbath Day, and that the judge should have presented the distinction between the lawful and unlawful opening of such a house. The time during which it may be kept open is immaterial, if the opening be not for a proper purpose, and none the less immaterial if the opening of the house be necessary.

In the early case of Harvey v. State, 65 Ga. 568, the court said: "If the door of the tippling house is kept open on the Sabbath Day so that persons had ingress and egress thereto, and persons did go in and out on such days, the defendant was properly convicted." This is judicial recognition of the fact, by implication at least, that there may be some circumstances under which the door of a saloon may be open, other than for the purpose of ingress or egress, which would be justifiable or excusable in the eyes of the law. In Sanders v. State, 74 Ga. 82, the distinction is generally recognized; the court ruling that: "Whenever it is shown that the house complained of is a tippling house, that the defendant is the owner, and that it has been kept open on the Sabbath Day or Sabbath night, the charge is completely made out, and without more the jury ought to convict. If the house was open and kept open against the owner's consent, express or implied, either by his clerk or by some other person, or if it was open for any cause or purpose which the law would justify or excuse, and if any of these facts be shown, the defendant would be entitled to be acquitted." In the decision in the Sanders Case, Judge Hall states the purpose of the act to be, not only to close up such establishments on Sunday, in deference to the finer and better feelings of orderly and well-disposed people, but to remove this incitement to graver and more dangerous violations of the law; but holds that, if the house is open for any cause or purpose which the law justifies or excuses and any of these facts be shown, the defendant would be entitled to an acquittal, holding, at the same time, that the mere invisibility of the proprietor would not establish a defense or cause one to be inferred. In the Seyden Case, 78 Ga. 105, the principle laid down in the Sanders Case, supra, is recognized, and this principle invoked in a charge was held to have been properly refused only because it was held to be inapplicable to the facts of the case then pending; and Judge Hall, again delivering the opinion, proceeds to give instances of some of the causes or purposes which in law would justify or excuse a defendant for opening a tippling house on the Sabbath Day. He proceeds to say in the opinion that: "If fire should break out on the premises or in the vicinity, the proprietor would be justified in opening the house to remove his goods to a place of safety; or if one on the spot or in the vicinity should be stricken down with unmistakable, dangerous, and sudden illness, requiring prompt

treatment, and the house should be opened for the purpose of furnishing liquor as a remedy, and the liquor should be supplied in suitable quantities, then the act of opening the house on Sunday would be excused. * * * There was, however, nothing approaching such a case in this instance. * * * The principle invoked by this request was inapplicable to the facts in proof, and the court properly declined to charge it." It cannot with good reason be said that the instances given by the court in the Seyden Case are exclusive of other like sufficient reasons. It is rather to be considered that the general principle that there are instances in which the opening of a saloon on Sunday may be justified is announced. This view is enforced by the consideration that the strict construction of the statute which has uniformly been employed is wholly judicial; and, if it is within the power of the courts to define by general rule the meaning of the term "keeping open a tippling house," which is the definition of the offense it is none the less within the power of the courts to provide reasonable exceptions to the rule. To show that the exceptions mentioned are not exclusive, we should think that one would be as excusable, and generally more justifiable, in opening his saloon if he detected a burglar in the act of robbing his cash drawer or a leak in his house damaging his goods, than in one of the instances mentioned by Judge Hall—that of supplying intoxicating liquor to one who supposedly, or, perhaps, feignedly, had been taken suddenly sick. If the owner saw the burglar or discovered the damages, the necessity at least would be real, whereas, in the case of one of the exceptions mentioned by Judge Hall, the necessity might be far more apparent than real.

The only definition of the offense of which this defendant is charged is judicial, for Pen. Code 1895, § 390, only declares that any person who shall be guilty of keeping open a tippling house on the Sabbath Day or Sabbath night shall be guilty of a misdemeanor. It is apparent from the language employed that the statute was originally aimed at the keeping open of houses where intoxicating liquors could be drank on the Sabbath. This would be the meaning of the words in their ordinary significance. That the statute was directed to the character of the house (regardless of whether anything was sold or not) and to practices generally prevalent in such houses is obvious from the other houses included in the context. The strictness of judicial interpretation which has been applied in the later cases is based largely upon the suspicion, generally well grounded, that dealers in intoxicating liquors are not always overzealous in their obedience of law, and that the courts should not be astute in shielding violaters of the law by resorting to niceties of verbal criticism. It is a settled rule, however, in determining the binding force of precedents, that the older decision shall control; and we therefore, not only base our construction of this statute upon what is plainly the ordinary meaning of the words employed, but upon authorities which must control until they are, in terms, disapproved and overruled. In every crime there must be the union or joint operation of act and intention or criminal negligence, and though the law presumes the actor to have intended to do the very act which, in fact, he does, and that every act which is in itself unlawful was criminally intended until the contrary appears, intent is ascertained by acts and conduct. "Intention will be manifested by the circumstances connected with the perpetration of the offense and the sound mind and discretion of the person accused." Pen. Code 1895, § 32. There can be no keeping open a tippling house on Sunday which is innocent, because the law forbids it; and, unless he who keeps it open is mentally irresponsible, the intention to violate the law will be conclusively presumed. The same would be true as to opening a tippling house if that were the language of the statute. But, as the statute, as construed in the Sanders and Seyden Cases, recognizes that there can be an opening without an intent to keep open, and as the statute does not make penal a temporary or absolutely necessary opening, which is entirely disconnected with the purpose of tippling, it is a question for the jury whether such opening was, in fact, absolutely necessary for an innocent purpose disconnected with tippling, and with no intent of keeping the house open, or whether even an instantaneous opening, which might be the subject-matter of discovery and observation, is not a mere subterfuge for violation of the statute against keeping open the tippling house.

We express no opinion on the evidence in this case, though it seems from the testimony that the lights that were to be put out were not extinguished. No reason suggests itself to our minds why two men were required to put out the light, nor why it was impossible, even with two, to accomplish the object for which it is said it was necessary to enter the saloon. Nor do we hold that the mere economy in the cost of lighting involved in a saving of the expense of the lights from Sunday morning to Sunday night is, in fact, an act of necessity such as would justify opening a saloon on the Sabbath Day for a purpose which could be accomplished at no other time, and which is wholly disconnected with the ordinary uses of the house. All of these are questions for the jury in ascertaining whether the intent of the accused was to violate the law by keeping open a tippling house, no matter for how short a time it was kept open, or whether the intent of the opening was to do an act absolutely necessary and which could not be postponed, entirely disconnected from the use of the house for tippling purposes, not offensive to the refined feelings of well-behaved persons, nor other-

wise violative of the public policy declared in Pen. Code 1895, § 390. The fact that a saloon is kept open, though but for an instant, on the Sabbath Day, if unexplained, will authorize a jury to convict—they will not err if they do convict—but the defendant has the right to explain, and then it is for the jury to decide whether urgent necessity and innocent intention justify the accused, or whether a hollow subterfuge, which the jury should not hesitate to spurn, is presented. The Supreme Court of this state has recognized the fact that good faith plays some part in determining whether or not the intention to violate similar statutes is present in the mind of the accused. In Stern v. State, 53 Ga. 299, 21 Am. Rep. 266, it was held that it would be a good defense that the saloon keeper in good faith believed that the minor, whom he allowed to play billiards, was of full age; and the same principle was afterwards reaffirmed in the Reich Case, 63 Ga. 619. So long as the state licenses the sale of liquor, a licensed dealer in liquor is not an outlaw. He is presumed to be innocent, and in the presumption of the law affecting his case he is entitled to the same right as other citizens. The defendant was entitled to have submitted to the jury, for whatever it was worth, his defense that in opening his saloon (the opening not being denied) he was engaged in an act of necessity, which, as he believed, was justified by the circumstances. Whether his defense was good or bad, whether it would be sustained by the jury or disregarded by them, was subject-matter for the determination of the jury. But the charge of the court effectually withheld from the jury the only defense the defendant presented, and one which, as we hold, he was entitled to have the jury determine.

2. We think, also, that the judge erred in interrupting the defendant in his statement. The defendant was proceeding to state to the jury that his license permitted him to enter his place of business between the hours of 11 o'clock at night and one hour before sunrise on Sunday for the purpose of getting his mail or putting out his lights. At this point the judge interrupted him by saying, in the presence of the jury: "You must not state what has been your custom in regard to entering your saloon, nor what has been the custom of other saloon keepers, or what your understanding of the law is. You must confine yourself to matters which are legally pertinent to the issue." In this ruling we think that the trial judge wholly exceeded his authority; and in the concluding portion of his remarks he laid down a rule which has more than once been expressly disapproved by the Supreme Court. The statement of a defendant in a criminal case in Georgia is an anomaly. It may be either what Judge Tripp held it to be—a poor privilege—or it may be, as held by Judge Bleckley, a right more valuable in some instances than the privilege of testifying. But, in any event, it is not controlled by any of the rules of evidence, and the defendant is not confined as he was by the judge in this case "to matters which are legally pertinent to the issue."

In Coxwell v. State, 66 Ga. 309, in which it was held in a case where the judge restrained the prisoner's statement after the defendant had occupied more than two hours in a rambling narrative that, while the court may so far restrain a prisoner's statement as to prevent his occupying the time of the court and jury with long, rambling and irrelevant matter, yet, as to all matters connected with the case, the prisoner may make such statement as he may think proper, and he should not be restrained from stating such facts as would be admissible in evidence. In the Coxwell Case, Judge Pottle interrupted the prisoner, and required, as Judge Eve did in this case, that the same be made under the rights governing the admissibility of evidence. In passing upon this point in the case, Judge Crawford, delivering the opinion, says: "The judge confined the prisoner within the limits prescribed for witnesses. This does not meet the broad and liberal purpose which the Legislature intended to accomplish. He is not allowed to come as a witness. He comes as a prisoner, charged with crime. He does not appear to give testimony. He appears to make a statement—a right far higher than the narrow limits which confine and guard against hearsay and conclusions, and expressly forbids the admissibility from his own witness of that which the party himself may have uttered in his own behalf. In the exercise of this right, he is authorized to make such statement in the case as he may deem proper in his defense. It was never contemplated that he should be embarrassed and circumscribed by the strict rules of law which control the admissibility of evidence. Nor, upon the other hand, should he be permitted to occupy the time of the court and jury with long rambling, irrelevant matter inapplicable to the case, and which, of necessity, must always rest in the sound discretion of the judge. This right granted to the prisoner is a modern innovation upon the criminal jurisprudence of the common law, advancing to a degree hitherto unknown the right of the prisoner to give his own narrative of the accusation against him to the jurors, who are permitted to believe it in preference to the sworn testimony of the witnesses. The law-making power, having given the right of making his statement to the prisoner, and having authorized the jury to give it such force as they may think proper, makes it the duty of the judge to execute the same in its letter and spirit. They are charged with the constitutionality, but not with the policy, of a law. But it is said that the right to rebut the prisoner's statement virtually destroys the right of the court to control the admissibility of testimony, as he may exclude from the mouth of witnesses what the prisoner

has the right to say. Our first reply to this is: 'Ita lex scripta est.'"

The case of Montross v. State, 72 Ga. 261, 53 Am. Rep. 840, is cited by counsel for the state as authority contrary to the principles announced in the Coxwell Case. We do not so construe the ruling of the court in the Montross Case. Montross purposely had himself indicted in order to test the law against prohibiting the publication of a paper of a certain character. He endeavored to exhibit to the jury, as a part of his statement, numbers of pictures and illustrations improper to be exhibited anywhere, and in no way affording him any justification, except by showing that others indulged in such publications. Clearly the ruling of the court in the Montross Case was within the terms of the decision which allow the courts to restrain statements inapplicable to his case, not because they were inapplicable in law (because the ruling in the Coxwell Case has never been modified), but were inapplicable in fact, entirely disconnected in fact with any act with which the prosecution was concerned. In several subsequent decisions it has been ruled that the defendant could not make profert to the jury of documentary evidence as a part of his statement, without at least forfeiting his right to the opening and conclusion. But the decisions upon this subject do not affect the ruling in the Coxwell Case. In Vaughn v. State, 88 Ga. 735, 16 S. E. 64, Chief Justice Bleckley discussed the decision in the Coxwell Case, and, construing it, says: "The statement is not made under oath. The accused is not sworn as a witness. He is not subject to cross-examination without his consent. He is unrestricted by the rules of evidence, and may state any fact as to the condition of his own consciousness or as to what he saw, heard, or believed at the time of the homicide." If that be the true construction of the statute, what would prevent Richardson from telling the jury that he believed from his license that he had the right to open his saloon for the purpose for which he stated that he did open it? The argument is made by state's counsel that the reason that he proposed to give would have been wholly irrelevant to the issue, and would have presented no defense. If this be granted, it was a statement as to his mental consciousness connected with the act in question, and the letter of the law permitted him to state it to the jury. It matters not that it may appear anomalous that a defendant can state that which is irrelevant and which in law may offer him no just ground of defense. And yet we think that the statute is not without good reason for allowing the defendant to state any matter which he may think proper, provided it has some bearing in fact on the case. Facts and circumstances wholly disconnected with any legal defense which might merely appeal to the sympathy of the jury and offer no reason for an acquittal might cause a defendant indicted for murder to be recommended to life imprisonment, rather than to be subjected to capital punishment; or they might cause the defendant to be recommended to be punished as for a misdemeanor in a case where otherwise punishment would be inflicted as for a felony. Or in a case of doubt of the credibility of the state's testimony, the jury having no less right to consider the appearance and credibility of the defendant than they have the appearance of the witnesses, the statement of the defendant, his manner of stating, and the apparent candor of reasons he might present as to the motives that influenced the witnesses, even though he should neglect or overlook reference to the main charge, and though some of his statements under the rules of evidence might be objectionable as conclusions or hearsay, might create and justify such reasonable doubt of the defendant's guilt as would authorize an acquital.

The remaining assignments of error, dependent upon the exclusion of testimony, or on alleged errors in the charge of the court, are so closely related to the subjects already discussed that we deem it unnecessary to consider them. In view of what has been said, any errors of which complaint is made in the pending bill of exceptions will doubtless be corrected in the new trial, which we feel constrained to grant.

Judgment reversed.

POWELL, J. (dissenting). In the light of repeated rulings of the Supreme Court, to which not only must I give full faith and credit as a judge, but to which I give full personal assent, I dissent quotis totis from all that is decided by the majority of the court, except only that I think the court should not have interfered with the defendant's statement; but, as to this, the error is harmless, for, when the defendant admitted he opened the saloon, he, in effect, pleaded guilty, and any reason he might have had could not affect his guilt or innocence, but only the measure of his punishment, and that was solely a question for the judge. The decisions cited by the majority have been subsequently considered and explained by the Supreme Court, and it is now the declared law of this state that there is no excuse for opening a tippling house on the Sabbath day. See Monses v. State, 78 Ga. 110; Klug v. State, 77 Ga. 734.

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(2 Ga. App. 598)

## WHISTENANT v. SOUTHERN STATES PORTLAND CEMENT CO. (No. 331.)

(Court of Appeals of Georgia. Dec. 17, 1907.)

RAILROADS — OPERATION — FRIGHTENING ANIMALS.

There is no liability for damages accruing from an injury received on a public highway and occasioned by the fright of an animal attached to a vehicle, where such injury is occasioned by the running of a railroad train in the usual course of its business, and where no un-

usual or unnecessary noises attend the locomotion of such engine and cars. No higher duty in this respect is imposed on railroads operated for the carriage of freight by private corporation than is incident to railroads generally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1241–1244.]

(Syllabus by the Court.)

Error from City Court of Polk County; F. A. Irwin, Judge.

Action by W. L. Whistenant against the Southern States Portland Cement Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Seaborn & Barry Wright and J. A. Wright, for plaintiff in error. Blance & Tison, for defendant in error.

RUSSELL, J. Whistenant brought suit against the Southern States Portland Cement Company to recover damages for personal injuries. The defendant demurred to the petition, and it was dismissed. The only question therefore presented for our consideration is whether the allegations of the petition were sufficient to withstand the general and the special demurrers. The defendant operated a railroad for private use, and it is insisted that rules different from those governing the liability of public service corporations operating railroads, should control.

The allegations of the petition, in brief, are that the defendant, a private corporation, operates a private line of railroad close to a public road or highway; that on the day named the plaintiff was driving along the public road, and, before he reached the point where the railroad and the public road run parallel with each other, he stopped and ascertained that the engine of the cement company was standing motionless near the company's plant; that he then drove along, and, when he reached the point in the road nearly parallel to where the engine was standing upon its track, the engineer, without warning, started his engine, and was in a short distance of plaintiff, when his horse became frightened at the approaching engine; that, "owing to a large and deep ditch being on the east side of the public road, petitioner had no opportunity to turn his horse and wagon around, and was attempting to get his horse on and by said engine, and his horse, being badly frightened and attempting to get away, caused petitioner's wagon to come uncoupled, causing and forcing petitioner to jump out of said wagon and to catch and take hold of the horse by the bridle. Defendant's engineer, seeing petitioner's plight and the unmanageable and frightened condition of his horse, made no effort or attempt to slow down or stop his engine, but ran on by where petitioner was and within about 20 feet of him, for a distance of about 30 yards, and then backed said engine into a switch, which runs parallel with the track, and coupled to some cars and had started back to main line of railroad with engine and cars. The engineer, still being in clear view of plaintiff, and seeing his horse frightened by the passing of engine, continued on by petitioner, and when opposite him his horse became frantic with fear, and uncontrollable, and jumped forward and jerked petitioner in the ditch running along and parallel with the public road." It is alleged that the defendant was negligent in maintaining a line of railroad in such close proximity to the public road; it being a place where stock being driven along said road were likely to become frightened and were frightened by the operation of said railroad; and that the company was negligent through its engineer in running its engine, and continuing to run it, in such close proximity to the petitioner after seeing his horse was frightened, and in making no effort to stop his engine, though his horse was frightened. It is not alleged that the horse was gentle or roadworthy.

Unless the company was negligent in having its railroad near the public road, or unless it is the duty of one operating a private railroad to suspend operation on its own track when it sees an animal frightened in the highway near by, the unreasonable fright of the horse was the proximate cause of plaintiff's injury. If the defendant company had no right to maintain its railroad in such close proximity to a highway upon which horses were likely the become frightened, or if it was the duty of the engineer, when he saw the frightened condition of the horse, to have desisted from the service he was performing for his master (away from the public road, though near by, and in sight of it), then, according to the allegations of the petition, the defendant's engine, being the cause of the horse's fright, can be considered as the causa causans, which produced the plaintiff's injuries. There can be no question that the defendant would be liable if its engineer, wantonly or willfully, by making useless and unnecessary noises, had frightened the horse and thereby caused the injury to the plaintiff. Barclay v. W. & A. R. R. Co., 102 Ga. 546, 29 S. E. 448, in which a judgment of nonsuit was reversed because it was easily inferable from the plaintiff's evidence that the noise was made willfully and wantonly without any other purpose than that of frightening the plaintiff's mules. But it is not alleged that there was anything unusual in the operation of the engine which frightened the horse in this case, nor that any unusual noise was made. It is therefore simply a question as to whether the engineer had the right to make any noise or do anything in the conduct of his business, after he saw plaintiff's horse was frightened.

It is insisted by learned counsel for plaintiff: That this case is not controlled by the decision in Hill v. Railway Co., 101 Ga. 66, 28 S. E. 631, and cases therein cited, for the reason that the defendant in this case is " a purely private concern, with none of the public duties, affording none of the public con-

veniences, and bound by no schedule, rules, tariffs," etc. "It serves itself only, and not the public." And that "the reason for the distinction is apparent and just, and rests upon the difference between a public and a private service." We fail to see the application of the distinction sought to be drawn. It is true that a public corporation is required to perform certain public duties which do not devolve upon a private corporation. But, at last, both are run primarily for the pecuniary gain of their stockholders. The fact that healthful regulation of the terms upon which public corporations shall deal with the public at large, who must of necessity have business relations with them, is necessary, does not seem to us to illustrate the point in this case. It certainly would not affect the person injured. The pain, the suffering, and the injury would be no less nor greater, if one's horse were frightened, whether the engine was public or private. The horse could not be presumed to know the difference. It has been several times held that a railroad company is not responsible for the fright of animals caused by the ordinary operation of their trains. Ga. R. v. Thomas, 73 Ga. 350; Morgan v. Central R., 77 Ga. 793, and others. It is equally well settled that the company will be liable for unnecessary noises. Ga. R. v. Carr, 73 Ga. 557, 558; Hill v. Rome St. Ry. Co., 101 Ga. 66, 28 S. E. 631. It is true that the defendants in these cases were public corporations, but the principle upon which each was decided was that the artificial person, just as the natural person might do, could pursue its ordinary vocation if it were such that no injury was intended to others, and if the business was such as did not necessarily tend to affect and invade the rights of others. The same reason must control when the operation of a private corporation is concerned. Most of the cases cited by the learned counsel for plaintiff apply specially to nuisances, and it has been held that a private concern operated upon a public highway is a nuisance.

This action, however, is brought upon the ground of negligence. The petition plainly shows that the damages are sought for injuries which it is claimed resulted from the defendant's negligence, and there is no hint that the injury was occasioned by a nuisance. It is to be presumed that the defendant was exercising a legal right in running his engine, for its name imports a corporation, and implies creation by law. It is likewise to be presumed that its location near the public road, which is alleged to be negligence, was permitted by a contract authorized by law. It is not alleged that the engine was being run at a high rate of speed or at an unusual or unlawful rate of speed. There is no allegation that any unusual or unnecessary noises were being made by the engine. The original fright of the horse, as alleged, was due to seeing the engine, and there is no allegation of negligence at all with reference to this, unless it be that the engineer started the engine without any warning. The company would not be liable for the fright of the horse due to the mere appearance of the engine. O'Donnell v. Chicago, etc., R. Co., 69 Iowa, 102, 28 N. W. 464. Nothing is alleged as to the character of the horse or as to his previous conduct. In many decisions, in cases originating from the fright of an animal, stress is laid on the fact that the horse was gentle. From the absence of this allegation in this petition, it can perhaps be presumed that the horse in question was not a trustworthy animal. As was said by the Supreme Court, in Atlanta Ry. Co. v. Johnson, 120 Ga. 912, 48 S. E. 391: "From aught that appears, it was as much the fault of the horse as anything else. It is not charged that the car was running at a high rate of speed, or that an unnecessary or unlawful noise was made by its running. Indeed, a fair inference from the petition is that, after becoming frightened, the mere sight of the cars aggravated the condition into which the horse had gotten. The defendant was doing only that which it had a right to do." So far as the first allegation of negligence is concerned, we must conclude that the judgment of the trial court in dismissing the petition was right. However annoying it may be to have your horse frightened by a passing train, it cannot be said to be negligence on the part of a company operating a railroad, whether public or private, to place its track near a road. If the location of the railroad, upon any legal ground, can be objected to, the case would be one of nuisance, and not of negligence.

The second allegation of negligence was likewise without merit, because the defendant's servant was only doing what he had the right to do. Furthermore, the allegations of the petition disclose such negligence on the part of the plaintiff himself as by their very terms offset any negligence on the part of the defendant. He was attempting to get his horse on and by the engine, after it was apparent that the horse was badly frightened. This was recklessness and negligence tending to aggravate the fright of the horse. It is next alleged that the wagon became uncoupled. It not being alleged that the uncoupling was due to the fright of the horse, it is to be presumed that it was due to the defective construction of the wagon, and, as this was the cause of the plaintiff jumping out of the wagon to hold the horse, which thereupon jerked him into the ditch, it may be that the uncoupling of the wagon was the occasion of the injury. Perhaps, if the plaintiff had not jumped out to hold the horse, he might have avoided the injury altogether. This case is controlled by our prior decision in Southern Ry. Co. v. Flynt, 2 Ga. App. 162, 58 S. E. 374. But authorities, almost without number, sustain the proposition that, no matter how great the nuisance (as used in common parlance), nor even how great the danger from the running of trains near by and not

upon a public road, there can be no recovery for injuries sustained by reason of the fright of animals, unless the same were caused, either in the making of unnecessary and unusual noises, or by the agents of the company either willfully and wantonly, or otherwise unnecessarily or unlawfully frightening said animals. The cases of injury arising from the running of automobiles are dissimilar to the case at bar, in that these vehicles are run in the public road, to the use of which the citizen driving his horse is as much entitled as he who is traveling in the automobile. This fact is adverted to in all the cases upon the subject, which we have been able to examine. In Shinkle v. McCullough, 116 Ky. 960, 77 S. W. 196, 105 Am. St. Rep. 249, while the real gravamen of the complaint was that the high rate of speed at which the automobile was run was the cause of the animals fright, and the noise was only incidental to the running, attention is called to this equal right on the public highway. In other decisions which we have investigated the fright of the horse was caused on a public highway, but in each the frightening cause was also in the highway.

In Myers v. Lape, 101 Ill. App. 182, a lady brought suit for damages and recovered. Her injuries were serious, and were caused by the frightening of her horse as she was driving on a public highway. The fright of plaintiff's horse was caused by a pony belonging to the defendant, which was of a very unusual size and mischievous appearance. The court of appeals of Illinois set aside the verdict, holding "that the mere fact that a horse is small or of unusual color does not preclude the owner using it on the public highway, even though some other horse may become frightened at it." The same court, in Galt v. Woliver, 103 Ill. App. 71, affirmed a judgment for damages in favor of the plaintiff, whose horse was frightened by a corn shredder on the road way. But the evidence showed (what does not appear from the petition in this case) that the plaintiff's horse was ordinarily a perfectly gentle animal, and that the corn shredder, which had broken down and was of strange appearance, had been negligently left on this public highway for several months before the accident, in spite of repeated orders, given to the defendant, to remove it. In Knight v. Lanier, 69 App. Div. 454, 74 N. Y. Supp. 999, the plaintiff's horse was frightened by an automobile on a private lane on which the plaintiff was riding as a licensee, and the judgment was affirmed; the court leaving to the jury what was the duty and consequent liability of the automobile driver, under the peculiar circumstances. But the case turned upon the respective rights of the parties in a lane which both had the right to travel. The casualty took place in a road or way where both parties had a right to be. It was not, as in the present case, an instance of the pursuit of one's ordinary vocation on his own premises. The case of Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, is also a case of a damage resulting from the careless operation of an automobile. The plaintiff relied on a municipal speed ordinance and negligence in the operation of the automobile. The horse was gentle and well broken, but became frightened at the automobile approaching, not only with unusual noise, but at the unusual speed of 20 miles an hour. The judgment was affirmed, but the court held that the liability of the defendant was not due to the fact that plaintiff's horse might become frightened at its passage along the highway in an ordinary and careful manner, although its tendency might be to frighten horses, and sometimes to cause injuries. As long as the automobile was carefully and prudently run, in spite of its noise and appearance, the automobile had an equal right on the highway with the horse and buggy. The plaintiff begged the automobile driver to stop his machine, and to allow him to take his horse, which the defendant plainly saw was frantic with fright, to a near-by cross-street, and get the animal out of the road. The chauffeur totally ignored the request, and proceeded at his reckless rate of speed to pass the horse, which ran away. The liability of the defendant, however, was expressly attributed to defendant's inconsiderate and reckless disregard of plaintiff's reciprocal right of the road. The Indiana case is not unlike that of Murphy v. Meacham, 1 Ga. App. 155, 57 S. E. 1046, in which it was held that, "if the automobile was being run properly, and not in an unusual manner, the defendant would not be liable merely because the mule was frightened, and the plaintiff injured."

A railroad company is not liable for personal injuries resulting from a horse taking fright at the appearance of a standing car or engine, unless the car has been left standing on or near the public highway. The allegation in this case is that the engine was near the company's plant. Nor does the fact that the plaintiff's horse was frightened by the sight of the moving locomotive or car, or by the noise naturally incident to its ordinary operation, nor the fact that the track was laid on its own land, though near by a public road, render a railroad company liable, without more. If a horse is frightened by the noises of a locomotive, or train, or escaping steam from the engine, in the necessary and proper operation of its machinery, the railroad is not liable for personal injuries resulting from the fright of a horse being driven on a near-by highway. There is no negligence because there is an absence of a duty towards those who are driving in the public highway. The servants of the company and its engine are where they have a right to be, and they have a right to use their locomotive and train, presumably, without affecting the rights of others. If, however, any act is wantonly or maliciously or negligently or unnecessari-

ly done in the operation of either engine or cars, by which a traveler on the public highway is affected, the individual or corporation operating a railroad or any other instrumentality is liable. So far as the duty and consequent liability of an individual or corporation, operating a private railroad, is concerned, it does not differ from that of a common carrier operating a railroad, so far as the right of travelers along public highways are concerned. The duties of a public railroad are essentially different in many respects from those devolving upon one who merely uses his private railroad for his own purposes and in the conduct of his business alone. But as to the traveler on a public highway the same rule is applicable to both. The maxim, "Sic tuo utere non alienum lædas," applies to both, with the privilege, however, of regarding the well-known fact that all roadworthy animals are not afraid of trains.

Judgment affirmed.

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(3 Ga. App. 305)

## AYERS v. STATE. (No. 811.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. LARCENY — INDICTMENT — DESCRIPTION OF PROPERTY.

In indictments for larceny, "the description [of the stolen property] should be simply such, as in connection with the other allegations, will affirmatively show the defendant to be guilty, will reasonably inform him of the instance meant, and put him in a position to make the needful preparations to meet the charge."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 64.]

2. CRIMINAL LAW — APPEAL — HARMLESS ERROR.

Where, by an erroneous conception of court and counsel, a misdemeanor case is tried as if it were a felony, but the error is discovered before sentence, so that no harm in this respect results to the defendant, the error is prima facie harmless to the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3085.]

3. EXECUTION—LEVY.

As to personal property the seizure, and not the official entry, constitutes the levy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 290–293.]

4. LARCENY—EVIDENCE OF VALUE.

In trials for simple larceny, it must appear that the stolen property is of some value, either generally or specially to the prosecutor. Direct proof of value, however, is not indispensable. It may be shown inferentially.

[Ed. Note.- For cases in point, see Cent. Dig. vol. 32, Larceny, § 18.]

5. SAME.

A person may steal his own property from an officer who has seized it under levy, and thereby be guilty of larceny.

(Syllabus by the Court.)

Error from Superior Court, Haralson County; Price Edwards, Judge.

D. J. Ayers was convicted of larceny, and brings error. Affirmed.

The indictment charged the defendant with the simple larceny of "one Eclipse Frick engine, 25 horse power, 1 Frick box boiler, log carts, 1 set lumber trucks, and track irons, all of the value of $500, and of the personal goods of one I. B. Witcher," a constable; the indictment reciting that the property had been levied on by the constable under a described attachment. The property belonged to the defendant, but the constable had seized it under an attachment. The defendant, after lulling the constable into a sense of security by promising to replevy the property, had it moved across the state line into Alabama. The further facts necessary to an understanding of the errors complained of appear in the opinion.

W. G. Brock, Jones & Hutchens, and Griffith & Matthews, for plaintiff in error. W. K. Fielder, Sol. Gen., and Lloyd Thomas, for the State.

POWELL, J. 1. The defendant demurred to the indictment on the ground that the property alleged to have been stolen is not sufficiently described. "The description should be simply such as, in connection with the other allegations will affirmatively show the defendant to be guilty, will reasonably inform him of the instance meant, and put him in a position to make the needful preparations to meet the charge." 2 Bishop, Crim. Proc. § 699, cited in Walthour v. State, 114 Ga. 76, 39 S. E. 872. See, also, Bone v. State, 120 Ga. 866, 48 S. E. 356; Sanders v. State, 86 Ga. 717, 12 S. E. 1058; Powell v. State, 88 Ga. 32, 13 S. E. 829. The general description aided by the more definite allegation that it was the property seized under a certain levy sufficiently individualized the transaction. See Bank of Sparta v. Butts, 1 Ga. App. 771 (3), 57 S. E. 1061; Phelan v. Vestner, 125 Ga. 826, 54 S. E. 697. By this additional identification of the subject-matter of the larceny, the case at bar is differentiated from the cases of Walthour v. State, 114 Ga. 76, 39 S. E. 872, Leonard v. State, 116 Ga. 559, 42 S. E. 795, and Melvin v. State, 120 Ga. 490, 48 S. E. 198.

2. The offense with which the defendant stood charged was a misdemeanor. The court charged the jury: "This case is being tried as a felony, and, if you should find the defendant guilty, you have the right to recommend—add to your verdict finding him guilty recommendation punishing him for a misdemeanor." The jury recommended that the defendant be punished as for a misdemeanor. We presume the court inflicted a legal sentence, as no insistence to the contrary is made. In certifying this ground of the motion for a new trial the judge in an explanatory note says: "For some reason, the court and counsel for both the state and the accused tried the case under the impression that, the property being of greater value than $50, the charge amounted to a felony, and the case was so tried up to the time of the delivery of the charge." The error in trying the case with the strict formality of a felony trial rather than with the ordinary misdemeanor procedure seems

to have been a disadvantage to the state rather than to the accused. While error, it was, as against the defendant (no special injury being shown), harmless error.

3. When the attachment under which the levy was made was offered in evidence, objection was made on the ground that the levy, as appearing from the entry on the attachment, is void for lack of definite description. The seizure, not the entry, constituted the levy. There was sufficient evidence of an actual levy. Corniff v. Cook, 95 Ga. 61 (2), 22 S. E. 47, 51 Am. St. Rep. 55.

4. Exception is taken to the following instruction by the court to the jury: "If you believe in this case that the defendant, in this county, on the day named in the bill of indictment or within two years before the finding of the bill of indictment, wrongfully and fraudulently took and carried away these goods, this property or any other portion of the property, and that the property so taken, whether the whole of it or part of it, had a value, and that it was the property of Witcher in the sense in which it is alleged here to have been his property, and such taking was done with intent to steal the same, under the rules I have given you in charge, it would be your duty to convict the defendant." The substance of the objection made is that neither in the indictment nor in the proof was any value shown as to any segregate portion of the property; and therefore, though it were shown that the defendant stole a portion of it, there was no proof of the value of the part taken. For example, if he took the engine, but not the log carts, there was no proof of the value of the engines; the only testimony as to value being that the whole outfit was worth $500. In prosecutions for larceny, it must be shown that the chattel stolen is a thing of value. Benjamin v. State, 105 Ga. 830, 31 S. E. 739; May v. State, 111 Ga. 840, 86 S. E. 222; Wright v. State, 1 Ga. App. 158 (3), 57 S. E. 1050. If the grade of the crime is dependent on the value of the article taken, the proof must show whether it is worth more or less than the diacritical amount fixed by the statute. Powell v. State, 88 Ga. 32, 13 S. E. 829. In other cases proof merely that the stolen article is a thing of value is sufficient. No particular value need be shown. Davis v. State, 40 Ga. 231; Lane v. State, 113 Ga. 1040, 39 S. E. 463; Hawkins v. State, 95 Ga. 458, 20 S. E. 217; Smith v. State, 95 Ga. 460, 21 S. E. 45; McCrary v. State, 96 Ga. 348, 23 S. E. 409. The courts will not take judicial cognizance that any article is of value, unless the law itself so designates it. Johnson v. State, 109 Ga. 268, 34 S. E. 573; Wright v. State, 1 Ga. App. 158 (5), 57 S. E. 1050. However, value, just as any other matter of proof, may be shown circumstantially or inferentially as well as directly or positively. Roberts v. State, 55 Ga. 220; Jenkins v. State, 50 Ga. 258; Irvin v. Turner, 47 Ga. 382; Carreker v. Walton, 47 Ga. 397; State v. Allen, R. M. Charlt. (Ga. Dec.) 520. In McCrary's Case, 96 Ga. 348, 23 S. E. 409, the only proof of value was the testimony of the prosecutor: "I lost something of value from my place of business. I lost a keg of whisky. It contained five gallons." The jury would have the right to infer that an engine and boiler recently in actual use, and about to be moved and put to work again, part of a mill outfit worth $500, was of some value. Likewise, the circumstance that the defendant hired teams and men to move the property tends to negative the idea that it was valueless. "If a thing has value to the owner, though to no one else, to steal it is larceny; its value to the rest of the world being immaterial." 2 Bish. Cr. Proc. § 751; State v. Allen, R. M. Charlt. (Ga. Dec.) 518; Ransom's Case, 2 Leach, 1090. The interest which the constable had in this case in bringing the property to sale, so as to protect himself against rule for contempt, made each and every part of the property valuable to him. In the Johnson Case, 109 Ga. 268, 34 S. E. 573, the court, in showing that judicial cognizance cannot be taken of the fact that meat is a thing of value, gives the reason that some meat is not valuable, "as, for instance, decayed meat or such as has not been properly prepared for food or for any other reason is not useful." Where the circumstances shown in the case are such as to indicate that an article, which according to common knowledge is usually useful, is, in the particular instance in fact valuable, the reason of the rule ends, and the jury is authorized to find that the article in question is a thing of value. The early holding in this state that in simple larceny value must be alleged and proved (Davis v. State, 40 Ga. 230) is based upon the fact that such was the requirement of the common law at the time of its adoption in this state. It was never the precedent of the common law, however, to extend the rule to absurdity in requiring proof of value. Note, for example, the case of Rex v. Edwards, 13 Cox C. C. 384. Three pigs which had been bitten by a mad dog were shot and buried, and were the same evening dug up by the prisoner, and sold for £9 3s. 9d. It was argued that the pigs had been abandoned, and were of no value to the owner; but the court upheld the conviction.

5. Upon an examination of the entire record, we find no error. While the property belonged to the defendant, the constable had such a title as to make the defendant's fraudulently taking the property and carrying it into another state with the purpose of appropriating it to his own use, thereby hindering or defeating the levy, a larceny. Davis v. State, 76 Ga. 721; Henry v. State, 110 Ga. 750, 36 S. E. 55, 78 Am. St. Rep. 137. His contention of good faith was fairly submitted to the jury.

Therefore let the judgment refusing him a new trial be affirmed.

(3 Ga. App. 309)

CURRIE v. STATE. (No. 813.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. LARCENY—DEFENSES.

The fact that one may commit forgery in accomplishing a larceny is no defense against the charge of larceny. The forgery may be the means employed for converting a stolen paper to the use of the thief.

2. SAME—PROPERTY SUBJECT.

A receipt representing a bale of cotton deposited in a warehouse and describing it by marks or by number, commonly called a warehouse receipt, is the subject-matter of larceny.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 13.]

3. SAME.

The fact that the owner of stolen property suffered no loss, or that the stolen property was recovered, is immaterial on the subject of the guilt or innocence of one accused of theft.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 54.]

4. SAME—INSTRUCTIONS.

The instructions contained in the charge of the court which are excepted to are without error.

5. SAME—EVIDENCE.

The evidence fully authorized the verdict of guilty, and there was no error in overruling the motion for new trial.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

G. T. Currie was convicted of larceny from the house, and brings error. Affirmed.

T. L. Griner and Jno. R. Cooper, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

RUSSELL, J. Currie was convicted of larceny from the house. His motion for new trial was overruled, and he excepts. The motion for new trial is predicated upon four grounds, which are insisted upon in the brief. These grounds are contained in the amendment to the original motion.

1. The first ground of the amended motion excepts to the charge of the court on the subject of larceny from the house, for the reason, as insisted, that the defendant could not legally be convicted of that crime. The defendant's contention is that, if he is guilty of any offense, he is guilty of the crime of forgery, and not of the offense of larceny from the house. We think that the defendant could have been convicted of forgery, but we do not think that it follows by any means that he may not also be convicted, under the evidence in this case, of the offense of larceny from the house. No exception is taken to the instruction of the court upon this subject, except that it was inapplicable to the evidence, for the reason that the evidence would not authorize a conviction of the defendant of the offense of which he stood charged. The question, then, raised by this ground of the motion, is whether evidence of the theft of two warehouse receipts for two bales of cotton will authorize a conviction of larceny. We think that there is no doubt that such warehouse receipts as are described in the indictment may be the subject-matter of larceny. The point might have been raised by demurrer to the indictment, for the proof corresponded with its allegations, but the defendant preferred to take his chances on a verdict. We are not now discussing the sufficiency of the evidence in this case, but we lay it down as a general rule that if the fact of the taking of a warehouse receipt for two bales of cotton is established, and the intent to steal this paper and thereby to convert the cotton which it represents to the taker's use is satisfactorily shown, the taker of the warehouse receipt would be guilty of larceny, if the ownership, value, jurisdiction, and other necessary allegations are made to appear. To steal a warehouse receipt which evidences a bale of cotton is as much larceny as the theft of a silver certificate, a national bank note, or a greenback. As held by this court in Livingston v. Anderson, 2 Ga. App. —, 58 S. E. 505, a warehouse receipt for cotton is symbolic of the cotton itself, and the evidence in this case established what is always true, that the receipt is worth as much as the market value of the cotton it represents. It matters not that in this case it may have been necessary for the defendant or some one for him to forge the name of the cotton buyer, Coley, in order to transmute the receipt into money. This was only the means used in converting the receipt to his own use, and additional evidence of the intent to steal; just as one who steals a $20 bank note, which is intrinsically of trifling value, may exchange it for two $10 gold pieces, which are actually worth the amount of which the bill is only symbolic. The warehouse receipt for the cotton is only a symbol of the intrinsic value of that cotton, just as the piece of paper, current as money, is symbolic of its actual value when redeemed.

2. The second assignment of error complains of the following charge: "You look to the evidence in the case, applying the principles of law that will be given you in charge, and ascertain whether or not he did, as charged in this indictment, enter that warehouse and take therefrom these two receipts as charged, and with intent to steal the same, with the intent to appropriate to his own use the property of another person. I charge you that a receipt representing a bale of cotton, showing on its face a deposit of the cotton, and identifying the cotton, given by the warehouse to the owner of the cotton, held by said warehouse for the owner, is property, and is a subject-matter of larceny." The plaintiff in error assigns error on this charge as being an expression of opinion as to the guilt of the accused, and because he insists that the receipts did not represent anything of value until Coley's name was forged to them. The instruction of the court that a receipt representing a bale of cotton, showing on its face a deposit of cotton (and identifying the cotton), executed by the warehouse to the owner of the cotton held by the

warehouse, is property, was not in any sense an expression of opinion of the court on the facts. Therefore it was not, for the first reason assigned, erroneous. It was simply a statement of the law applicable to the evidence in case the jury found in the evidence such a receipt as the judge described. As the receipts were in evidence, without contradiction or objection, the judge would have been authorized, without error, to refer to them as being in evidence. The second objection to this charge that the receipts did not represent any value until Coley's name was forged to them, and that in that event and for that reason, the prisoner would be guilty of forgery, and not of larceny from the house, is without point or merit, for the reasons already stated in the first division of this opinion.

3. Error is assigned in the third ground of the motion on the instruction by the court that the fact that the owner of the property had never been defrauded out of anything would be no defense to the defendant. There was no error in this instruction. In fact, the principle stated by the judge is so fundamental that it strikes us with surprise that it should be seriously questioned. It appears from the evidence that the cotton represented by the two warehouse receipts alleged to have been stolen by the defendant belonged to a negro named King. It further appears that the proprietor of the warehouse, after the theft was discovered, gave King duplicate receipts, as he should have done, and by means of these receipts King's cotton was restored to him. The result was that King lost nothing. But it would be to state a doctrine entirely new to the law to say that by reason of that fact the guilt of the defendant, if he be guilty, was propitiated. If, indeed, he stole the cotton receipts, nothing that happened subsequently could affect his guilt. The crime was complete, and there could be no propitiation or absolution, except in the penalty of the law. If the rule stated by the distinguished counsel for the plaintiff in error is true, all that would be necessary in order to wipe out the entire transaction would be for a thief, when detected, to return and restore the stolen property. And, if this be the law, it is fearful to contemplate how many defendants have suffered unjustly the pains and penalties of unholy sentences, particularly in the cases where horses were stolen, in which the penalty was at one time death. Many sentences have been enforced where the stolen property was recovered without loss by the owner. Nor was the charge of the court upon this subject an intimation of opinion, as contended by plaintiff in error. It was a clear and apt statement of the law, though contrary to the defendant's contention.

4. The fourth ground of the motion is but a repetition of the objections urged in the first and third grounds, and is for the reasons stated on these grounds without merit.

5. Returning to the general ground that the verdict is contrary to the evidence, it is apparent from what we have stated that it is only necessary to inquire whether the evidence was sufficient to show that this defendant took the receipts described in the indictment, knowing that they were not his, and converted them to his own use. The receipts show upon their face that they were issued to L. A. King. There was no chance of mistake upon that score. If the defendant forged Coley's name, it was because he knew that the receipts were not his, and he dared not carry them to Coley or any other cotton buyer before presenting them to the merchant who was accustomed to pay the cotton bills. It is not contended that Coley himself signed the receipts. The testimony as to another Coley was evidently not credited by the jury. And the state proved to the satisfaction of the jury that the defendant presented these receipts and got the money on them, and that immediately prior to his presentation of the receipts at Outler's store they were in a book in the warehouse of the company alleged in the indictment. Some point is made as to failure on the part of the state to prove the value, and the principle ruled in Wright v. State, 1 Ga. App. 158, 57 S. E. 1050, is invoked, but the witness Coley testified positively that the receipts were of the value set out in the indictment. Upon this subject, see Ayers v. State, 3 Ga. App. —, 59 S. E. 924. The testimony as to the amount received in exchange for the receipts is also sufficient upon this point.

There was no error in overruling the defendant's motion for a new trial.

Judgment affirmed.

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(3 Ga. App. 266)

## SOUTHERN RY. CO. v. MOUCHET. (No. 503.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. RAILROADS—INJURY TO PERSON AT CROSSING—PLEADING.

The allegations of the petition make a cause of action, and the demurrer was properly overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1107–1112.]

2. SAME—EVIDENCE.

A town ordinance prohibiting the blocking of street crossings over the tracks of the railroad beyond a specified time is admissible in evidence, where it is claimed that a violation of such ordinance in connection with other acts of negligence caused the homicide at the place of the killing.

3. SAME—ASSUMPTION OF RISK.

There can be no implied assent to do an act manifestly and obviously dangerous, such as to cross the track through an open space casually and temporarily left between two cars pending the work of switching. One who attempts to make use of such casual opening, and to cross the track at such time, assumes all the hazard of the dangerous undertaking, and, if killed in the endeavor, the company will not be liable, unless after seeing his danger, or realizing his perilous

purpose, it could have avoided or prevented the consequences of his culpable negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1039.]

4. SAME.

The verdict, being without evidence to support it, is contrary to law, and for that reason a new trial should have been granted.

(Syllabus by the Court.)

Error from City Court of Hartwell; W. L. Hodges, Judge.

Action by Callie Mouchet against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

A. G. & Julian McCurry, for plaintiff in error. Jos. N. Worley, for defendant in error.

HILL, C. J. The plaintiff, as the widow of Warren A. Mouchet, brought suit against the Southern Railway Company to recover damages for the homicide of her husband. In her petition she set out the acts of alleged negligence on the part of the defendant which caused her husband's death, substantially as follows: The tracks of the defendant company run through the town of Bowersville, dividing the business portion of the town. The freight depot is on one side of the tracks, and the passenger depot with the telegraph office is on the other side. There are two streets running east and west crossing the railroad tracks; Benson street crossing on the north and Schaefer street crossing on the south. Between these two streets, besides the main track, there are some side tracks of the defendant railroad, and also tracks of the Hartwell Railroad Company; the intervening space being used by both railroad companies as a switchyard. In addition to these two street crossings, it is alleged there is a pathway between the two street crossings over the tracks of the defendant company going from the business houses on one side of the tracks to the business houses on the other; that the public has used this path or footway continuously and uninterruptedly since the defendant has been operating the railroad; that the defendant during this entire period has left this pathway opened, and "permitted, invited, and licensed" the public to use said pathway to cross its tracks at this point; that on the day of the homicide petitioner's husband, desiring to go from one side of the town to the other, and it being necessary in order to do so to cross the defendant's tracks, went first to the Schaefer street crossing; that he found that crossing blocked by the cars of the defendant, and, this blocking continuing for 20 minutes or longer, he got tired waiting for the street crossing to be opened, and, being in haste to get across, he went to said path or footway and by this footway attempted to cross the side track where the defendant had left an opening between two cars about six feet wide to accommodate the public in crossing at this point; that one of its cars was standing on the south of said footway, and another on the north; that he had several times before on the same day crossed the track by said pathway at that point without danger or hurt, and, believing that the defendant had arranged its cars so as to keep said pathway opened for the use of the public, and that defendant was mindful of his use of said pathway for the time being, he undertook to make a crossing of the track over said footway, and, as he got in the middle of the track, the defendant suddenly and without warning kicked a lose box car against the box car standing on the south of said footway, and drove it back against the car standing on the north of said footway with great force, catching him between the drawheads of the two colliding cars, causing injuries from which he died within the next few hours. Two acts of negligence are specifically alleged: First, in keeping the Schaefer street crossing blocked with cars for over 20 minutes, this being an unreasonable time and in violation of the town ordinance; second, that the defendant, well knowing that said footway was being constantly used by the public, and on said day inviting the public to use it by opening its cars at said point, was charged with the duty of placing a watchman at said footway where it crossed the track to warn pedestrians of any impending danger, but this it neglected to do, and this negligence of the defendant was the proximate cause of the homicide. The petitioner alleged that her husband was entirely without fault or negligence; that finding the Schaefer street crossing closed, after waiting a reasonable time for the crossing to be opened, he had a right to cross the track by the footpath, and, in doing so, exercised all proper care and diligence in looking out for approaching engines, but, because of intervening box cars on the side track, he did not see and could not see the moving engine which drove the two cars together that caught and killed him. The defendant demurred generally to the petition, because the facts alleged did not constitute actionable negligence, and because the allegations showed such negligence on the part of the deceased as would prevent a recovery. The demurrer was overruled, and the defendant excepted pendente lite. The defendant moved to strike from the petition paragraph 11, which set up a town ordinance prohibiting under a penalty railroads from blocking street crossings for longer than 10 minutes. It was alleged that this ordinance was violated, and that this violation was an act of negligence that contributed to the homicide. This motion was overruled, and the defendant excepted pendente lite. At the conclusion of the plaintiff's evidence, the defendant asked a nonsuit, which was denied, and it excepted pendente lite. On the merits of the case, it was insisted by defendant that there could be no recovery (1) because its agents at the time of the homicide were in the exercise of all rea-

sonable care and diligence; (2) because the homicide resulted from the negligence of the plaintiff's husband; (3) because the defendant was guilty of no negligence whatever contributing to the homicide; but, if so, the consequences to himself of such negligence could have been avoided by the use of ordinary and reasonable care and diligence on the part of the deceased.

1. The petition set out a cause of action, and there was no error in overruling the demurrer.

2. The judgment refusing to strike from the petition the paragraph setting up an ordinance of the town prohibiting the blocking of street crossings by trains was right. A violation of this ordinance by the defendant might be proper testimony to be considered by the jury in connection with other testimony as bearing upon the question of negligence. Western & Atlantic R. Co. v. Meigs, 74 Ga. 857.

3, 4. The judgment overruling the motion for a nonsuit is immaterial, and we proceed to consider the merits of the case under the facts and the law applicable thereto. We are clearly of the opinion that the evidence does not legally warrant or support a recovery. There were two grounds of negligence alleged as the basis for damages—the blocking of the street crossings for an unreasonable time, and in violation of the town ordinance, which made it necessary for plaintiff's husband to seek the path or footway for the purpose of crossing the track; and the neglect of the company to have a watchman at the path or footway, or to keep a lookout there, in order to warn pedestrians of any impending danger, as the company had "permitted, invited, and licensed" the public use of the path or footway. There is some evidence that Schaefer street crossing, the one most convenient for the deceased to have used in crossing the tracks, was blocked with cars for over 10 minutes prior to and at the time of the homicide; but the evidence strongly preponderates in favor of the contention of the defendant that such crossing had not been unreasonably or illegally obstructed at any time preceding the homicide. Whatever may have been the truth as to this issue, the testimony in the record does not support the allegations that the deceased went to that street crossing and waited for 20 minutes for the crossing to be cleared. There is no evidence that he went to that street crossing and there waited, but the testimony is that he went from Holbrook's store up the path leading across an open space in the switchyard of the defendant to the track, and attempted to cross the track at a point 48 feet and 5 inches north of Schaefer street crossing. If, therefore, the street crossing was blocked, the fact did not in any manner contribute to the killing. He did not go to this crossing or endeavor to use it, but did go directly to an opening between two cars, and at this point attempted to cross the track. Even if street crossings are blocked in violation of law, this is no excuse for pedestrians desiring to cross the track to attempt to cross elsewhere, without waiting at all for the crossing to be cleared, and to select as a place to cross an open space of six feet between two cars on a track where switching is actually in progress. The second allegation of negligence is that the path or footway which was used by the deceased in attempting to cross the track was used by the public by permission, invitation, and license of the railroad company, and the company, being charged with the knowledge that said path or footway was being constantly used by the public, was "in duty bound to place some one at said footway to warn pedestrians of the danger into which the deceased fell." The evidence entirely fails to establish the existence of any path or footway leading across the tracks, and used by the public by the consent, express or implied, of the railroad company. The path or footway claimed to be used by the public was a footway about a foot and a half wide which led from Holbrook's store to the edge or side of the railroad bed, and then along the bed of the track to the passenger depot. This footway did not go across the track, but to the track, and then on the track to the depot and telegraph office. It was known as "Holbrook's path," and was largely made by him in going and coming to and from the telegraph office. The public did use the path in question to walk across the yard of the defendant to the track, and then on the track to the depot or elsewhere, but the company conducted its business without reference to this use of the footpath.

In Grady v. Georgia R. & Banking Co., 112 Ga. 668, 37 S. E. 861, it is held: "In a railroad yard in which there are several tracks in continuous use for the purpose of storing and switching cars and making up trains and the like, and where the dangerous character of the place is manifest and obvious, there can be no implied license to the public to cross the tracks either through open spaces casually left between the cars, or under or over the cars. In order to render the company liable for injury caused to a person who was passing between two cars in such a yard, and whose presence and danger were unknown to the agents or employés of the company, there must be proof of an express license from the company." See, also, Kendrick v. Seaboard Air Line Ry., 121 Ga. 775, 49 S. E. 762; Central Railroad Co. v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634; 3 Elliott on Railroads, § 1258. Whether this principle is applicable without limitation to a yard of a railroad company in the middle of a town where the tracks divide the business portion of the town is not necessary to be considered. Under the undisputed facts of this case, the deceased, in attempting to cross the defendant's track by the footpath while the switching was in progress, was a trespasser, and the company owed him no duty, except the duty imposed upon it in reference to a trespasser, not to hurt him

willfully or negligently after he was discovered or his presence known. Rome Railroad Co. v. Tolbert, 85 Ga. 447, 11 S. E. 849; Hall v. W. & A. R. Co., 123 Ga. 213, 51 S. E. 311. Under the uncontroverted facts of this case, and it is as clearly indicated by a diagram proved to be a correct representation of the place of the homicide, the deceased was not killed while attempting to cross the track by the path or footway. He was caught between the drawheads of two cars and killed 12 feet and 6 inches south of the point where that path led up to the railroad track. The case, therefore, as presented by the material and undisputed evidence, and, stripped of every extraneous or immaterial circumstance, is simply this: The deceased wanted to cross the track of a railroad in its switchyard. He did not attempt to cross at the public or usual place of crossing, but attempted to cross between two cars at a casual opening about six feet wide, and while switching was in actual progress. He was caught between the drawheads of the cars and killed. It was in the daytime. If he had exercised in the slightest degree his senses, he would have seen or heard the approaching engine, which was only a few feet away and moving back to the stationary cars. The danger of attempting to cross was clear, manifest, and imminent. The unfortunate man and his widow are the victims of his own culpable negligence, and under the law she cannot recover. There is no pretense that the employés of the railroad saw him when he was about to attempt his rash act, or when he was in his perilous situation, or that by the use of any degree of diligence they could have foreseen or avoided the injury. The defense made by the railroad company is complete. The case made by the evidence is a strong one disproving any negligence on its part, and proving negligence on the part of the deceased.

There is no merit in the several exceptions to the admission of testimony, and to the extracts from the charge.

The judgment of the court in refusing a new trial is reversed on the ground that the verdict is wholly without any evidence to support it, and therefore contrary to law.

Judgment reversed.

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(3 Ga. App. 275)

## BOYCE v. DAY. (No. 627.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. NEW TRIAL — GROUNDS — AMENDMENT OF PLEADINGS—REVIEW—EXCEPTIONS.

Assignments of error in allowing or refusing amendments to the pleadings are not proper subject-matter of a motion for new trial. Exceptions to such alleged errors, when embodied in the bill of exceptions, will not be considered unless preserved by timely exceptions pendente lite, or unless the bill of exceptions is presented within the time allowed by law for presenting it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 28; vol. 2, Appeal and Error, § 1490; vol. 3, Appeal and Error, §§ 2404, 2405.]

2. LANDLORD AND TENANT—LIEN—SUPPLIES—HORSE.

In foreclosing his general lien for supplies under section 2800, Civ. Code 1895, a landlord has the right to include any instrumentality necessary to make a crop which was furnished by him and used by his tenant, and which was essential to the creation and cultivation of the crop. If a horse be thus supplied, the nature of the contract (whether the horse be hired or sold by the landlord) is immaterial. The landlord would be entitled to his lien for the amount of the hire or for the purchase price, in accordance with the contract, whatever it might be. The vital question in cases of liens for supplies furnished is not the manner in which the supplies were obtained. The means employed by the tenant to obtain such things as are necessary to produce his crop are immaterial. The essential questions to be answered are: (1) Were the articles furnished to the tenant by the landlord himself? (2) Were the articles furnished by the landlord used in making the crop? And (3) was the use of the articles supplied essentially necessary to the making of the crop in question?

3. SAME — PROCEEDINGS — FINAL PROCESS — COUNTER AFFIDAVITS—CREDITORS.

The foreclosure of a landlord's lien is final process. For the counter affidavit of the creditor to arrest the proceeding and transform the foreclosure into mesne process, the counter affidavit must set forth and allege such substantial facts as affirmatively show either that the landlord is not entitled to a lien, or that the amount for which a lien is claimed is too large.

4. SAME—DEMURRER.

The counter affidavit cannot supply the office of a demurrer, and where the averments of the counter affidavit, though contradictory of those of the plaintiff's affidavit, themselves set up a lien for the plaintiff, though under different circumstances, no issue is presented for trial, and the direction of a verdict, finding against the lien as claimed, is error. The foreclosure of a landlord's lien being final, unless an issuable counter affidavit is filed, there is nothing to try.

5. SAME.

It was error to refuse a new trial.

(Syllabus by the Court.)

Appeal from Circuit Court, Walton County; C. H. Brand, Judge.

Proceedings by S. T. W. S. Boyce to foreclose a landlord's lien on a crop alleged to belong to one William Boyce, in which proceeding James M. Day, a mortgage creditor of William Boyce, filed objections. From a judgment for defendant, plaintiff brings error. Reversed.

Jos. H. Felker, for plaintiff in error. Napier & Cox, for defendant in error.

RUSSELL, J. Mrs. Boyce claimed a landlord's lien under the provisions of Civ. Code 1895, § 2800: "Landlords furnishing supplies, money, horses, mules, asses, oxen, farming utensils of necessity, to make crops, shall have the right to secure themselves from the crops of the year in which such things are done or furnished, upon such terms as may be agreed upon by the parties." Her claim of lien was based upon the fact that one William Boyce, colored, was her tenant, and that she had furnished him a horse to make the crops of 1906. She made an affidavit to foreclose her landlord's lien in accordance with the terms of Civ. Code

1895, § 2816, as follows: "Georgia, Walton County. Before me, J. O. Lawrence, an officer of said state and county duly authorized by law to administer oaths, personally came A. J. Boyce, agent for Mrs. S. T. W. S. Boyce, who on oath says that William Boyce, of Walton county, is indebted to the said Mrs. Boyce in the sum of seventy-five dollars, principal, and $4.50, interest, which amount is now due, having become due October 1, 1906, besides interest. Deponent, as agent, aforesaid, claims a lien for said debt upon the crops of the present year, now in the county of Walton, belonging to defendant; said crops having been raised upon the land lying in Walton county rented from the said Mrs. S. T. W. S. Boyce for the year 1906 by William Boyce, said debt being for the use of a bay horse furnished by the said Mrs. S. T. W. S. Boyce as landlord, and the the said tenant, William Boyce, to make said crops as follows: One bale of cotton in the house now in the seed, all the corn now in the field on land rented from said Mrs. S. T. W. S. Boyce, about two stacks of hay and one lot of fodder, now in the barn on the premises where said defendant now resides, being for the use of one horse to make said crops. Since said debt became due, deponent, as agent aforesaid, has made a personal demand for the payment thereof upon defendant, who refused to pay the same. Wherefore deponent, as agent for Mrs. S. T. W. S. Boyce, now comes, within one year after said debt became due, and prosecutes this, his lien, as agent aforesaid, pursuant to the provisions of section 2816 of the Civil Code of 1895." James M. Day, by counter affidavit, denied the existence of the lien. The execution issued by the justice of the peace is as follows: "To all and singular the constables of said county, greeting: We command you that of certain personal property of William Boyce of Walton county, to wit, one bale of cotton in the house, now in the seed, all the corn now in the field on land rented from Mrs. S. T. W. S. Boyce, about two stacks of hay, and one lot of fodder now in the barn on the premises where said defendant now resides, said personal property described being now in Walton county, you cause to be made the sum of seventy-five dollars, principal, and four and $^{50}/_{100}$ dollars, interest to this date, and future interest at 8 per cent., and ——— dollars for costs, which Mrs. S. T. W. S. Boyce, to wit, on November 26, 1906, before the N. P. and ex off. justice of the peace court of the 419th District G. M., said county, recovered against the said William Boyce and said described property by the foreclosure of a lien thereon pursuant to section 2816 of the Civil Code." We have inserted the execution because we infer from the brief of one of counsel that some question was raised as to a distress warrant which clearly is not involved. The counter affidavit was as follows: "In person appears before me James M. Day, who on oath says that the foreclosure of the lien in the above-stated case is illegal, and this deponent denies the existence of such lien, and for grounds says: That Mrs. Boyce, the plaintiff in said case, actually sold to the defendant the bay horse referred to in the affidavit of foreclosure, and took defendant's note for the same, with a mortgage on said horse to secure payment of said note; that she has now actually foreclosed said mortgage and levied on said horse, and is proceeding to sell the same to pay said debt; that this lien foreclosure is illegal, for the reason that the plaintiff in said case cannot foreclose a lien for 'the use of a bay horse furnished by Mrs. S. T. W. S. Boyce, as landlord, to said William Boyce, tenant, to make said crop,' when, as a matter of fact, she sold to said William Boyce said horse and put the title in him subject to the mortgage for purchase price of said horse." The issue was made by the affidavit of the landlord, and the counter affidavit of the creditor denying the existence of her lien, not in part, but in whole. As held by Justice Cobb, in Hawkins v. Chambliss, 116 Ga. 814, 43 S. E. 55: "The only issue in such a case is lien or no lien."

Upon the trial, A. J. Boyce testified that his mother rented land to the defendant, William Boyce, colored, to make a crop in 1906, and that the relation of landlord and tenant existed between the parties. He further testified that she furnished the horse mentioned in the affidavit of foreclosure to the tenant Boyce to make the crop levied upon, and that, when she sold him the horse for the purpose of making the crop, it was understood and agreed that the purchase price was to be paid out of the crop. The witness further testified that, as agent for his mother, he notified Mr. Day that she had rented land to William Boyce, colored, and furnished a horse to make the crop, and that her rent and the price of the horse had to be paid out of the crop, and that, if Day should sell him anything, it would be at his own risk. The plaintiff proved demand upon the defendant, that the debt was due, that suit was instituted within 12 months, that the defendant failed to pay, and that the amount stated in the declaration was correct. The defendant Day testified only that he was a mortgage creditor of the defendant William Boyce, colored, and that Boyce owed him about $75. At the conclusion of this evidence, the trial judge directed a verdict for the defendant. The plaintiff excepts to the judgment overruling his motion for a new trial.

During the progress of the trial, the plaintiff offered an amendment striking from her affidavit the words, "the use of," where they occurred before the words, "a horse." We think that the amendment should have been allowed, as its effect was not to substitute a new cause of action. The action was the foreclosure of a landlord's lien, and the only effect of the change would have been to al-

lege that what was furnished by the landlord was not "the use of" the horse, but the horse itself. As stated by Judge Bleckley, in Murphy v. Peabody, 63 Ga. 522, the rules of amendment in this state are as broad as the doctrine of universal salvation. The amendment of the affidavit is permissible, and the affidavit, containing enough to amend by on the subject of something furnished by the landlord, would have been amendable in that respect, even though it lacked enough to amend by in some other respects. It is only necessary that each respect have the proper measure of enough. The declaration is amendable in all respects, provided it contains enough to amend by in all respects; and a declaration which is amendable in form is always amendable in substance. The amendment is always to be allowed if the declaration has in it enough to amend by in respect to the contents and nature of the amendment offered. Ellison v. Georgia Railroad Co., 87 Ga. 691, 13 S. E. 809. We think the amendment should have been allowed, because it only varied the statement of what already set forth a perfect cause of action. The landlord has as much right to furnish the use of a horse as to sell the horse to be used in the crop. The horse is furnished in either case. If he furnishes a horse, or tools, or anything necessary in making the crop, for a stipulated hire, instead of selling it, he has as much right to include that among the supplies necessary to produce the crop as he would have to foreclose his lien for money with which the tenant might hire the horse from some one else. And that he would have the right to foreclose his lien as landlord, for money used perhaps to hire stock with which to cultivate the crop, cannot, under the previous decisions in this state, be questioned.

The plaintiff in error, however, cannot derive any benefit from the error of the court in disallowing the amendment, because the exception thereto is not properly presented. The refusal of the amendment was not proper ground for a motion for a new trial, and the plaintiff failed to file exceptions pendente lite. Improperly refusing or allowing an amendment to a petition is subject-matter of timely and direct exception, but not a proper ground of a motion for new trial. If the ruling on the amendment is set out in the motion for new trial as one of the grounds, and subsequently made one of the assignments of error in the final bill of exceptions, it can be considered, if the bill of exceptions is presented to the judge within 30 days from the overruling of the motion to amend, but not otherwise. If the bill of exceptions containing such an assignment of error is presented more than 30 days after the ruling complained of, it comes too late. Bullock v. Cordele Co., 114 Ga. 627, 40 S. E. 734.

The plaintiff in error further excepts and assigns error on the direction of the verdict by the judge. We think this exception is well taken. There was no motion to quash the affidavit. There was no motion to nonsuit for variance between the allegations and the proof. The issue in such a case is lien, or no lien. The plaintiff's affidavit sets up a lien for the use of the horse. She fully established a landlord's lien for a horse sold and furnished to her tenant for the purpose of making the crop upon which the lien was foreclosed; and it may be, as the word "furnished" is the term used in the Code, that the terms of the affidavit as to "the use of" a horse to aid in making the crop, though it be proved that the horse was furnished by sale, would not be such an inapt statement as to produce a fatal variance between the allegations and the proof. A vital question in the foreclosure of a landlord's lien, is the use to which the articles furnished are put. Are they necessary to and used in making the crop? The statement of the affidavit of foreclosure, the lien claimed "being for the use of one horse to make said crops," is not necessarily wholly contradictory of or incompatible with the fact that the horse used by the tenant was furnished by the landlord, and was sold to the tenant. The statute requires the horse to be furnished to the tenant, and to be used by him as a necessary to produce the crop on which a lien is claimed. If the use of the particular horse is not necessary to produce the particular crop, and if he is not furnished by the landlord, no lien can, in any event, arise by connecting the horse with the case. If the horse is necessary to make the crop, and the landlord furnished him, his lien for supplies arises, no matter what may be the terms of the furnishing. This applies to every case of landlord and tenant. Of course, a different rule would apply as to stock furnished a cropper; but, in the absence of an express contract to the contrary, in cases such as this, where the relation of landlord and tenant is alleged, it is to be presumed that the tenant rents only land, and, if he is supplied by the landlord with stock or anything else necessary to produce a crop, the lien of the landlord for such supplies will arise and include all such as are necessary.

As we have already remarked, the fact that the horse is loaned to the tenant, or even hired to him for a fixed price, if the horse was thus furnished to make the crop, would not prevent the landlord from foreclosing the lien given him by section 2800 of the Civil Code of 1895. The plaintiff therefore had a perfect lien, and when the execution issued the foreclosure was final, unless it was converted into mesne process by the filing of such a counter affidavit as presented an issue. The counter affidavit cannot subserve the purpose of a demurrer or of a motion to quash. It is useless, unless it raises the issue that the landlord is not entitled to a lien, or that the amount had been partially or fully paid. The defendant's counter affidavit did not set up any sufficient reason why the plaintiff was not entitled to her lien.

The fact that she had sold the defendant the horse referred to, and had taken a mortgage, or that she had foreclosed the mortgage and levied on the horse, was not a sufficient reason why she was not entitled to a lien, unless it had been further shown that by sale of the horse, under the mortgage foreclosure, the debt for the horse she had furnished had been extinguished. This was not alleged in the counter affidavit, and the evidence on the trial showed that the horse brought only $4. The allegation of the counter affidavit itself on this subject sustained and was pleading in support of a lien in favor of the plaintiff. The landlord would have just as much right to furnish a horse to make a crop by selling it as by lending or hiring it, and would have a right to furnish it in either of these ways. Nor does the fact that the landlord takes a mortgage, or otherwise secures himself for the payment of the articles furnished, defeat his lien as landlord for supplies furnished. In most of the decisions upon this subject, mortgages were taken. The lien of a landlord is not one of those liens which arise only where the party has taken no other security. Payment of the indebtedness due by the tenant to the landlord would, of course, be good subject-matter of a counter affidavit, whether a mortgage had been taken or not. But the fact of a mortgage having been taken, or of its having been foreclosed, might only tend to reduce the amount of the indebtedness. It might not reduce it at all. Nor does the fact that the plaintiff had sold William Boyce the horse, and put the title in him, subject to the mortgage for the purchase price, as alleged in the counter affidavit, present any reason why the plaintiff cannot foreclose her lien. As already stated, landlords can secure themselves by the lien if they see proper, and on the issue of lien or no lien, the only effect of such other security is to reduce the amount for which the lien may be foreclosed, or entirely extinguish it, as it may be alleged and proved that the landlord has received payment from the security.

The plaintiff's evidence having established her lien, and the defendant's counter affidavit or answer being insufficient, the court could not direct a verdict in favor of the defendant. If the counter affidavit had not been insufficient, the creditor could have moved to quash the plaintiff's affidavit, if insufficient. He could have moved for a nonsuit at the conclusion of the evidence, for the plaintiff showed that the horse had been furnished by being sold, instead of hired. But the court could not direct a verdict for the plaintiff, because the allegations of the counter affidavit were not sufficient to raise such an issue as transformed the foreclosure of the landlord's lien from final process into mesne process. The averments of the counter affidavit did not prevent a single reason in law why the levy of the fi. fa. issued upon the plaintiff's affidavit as final process should be arrested, or why the party making the counter affidavit should be heard in his own interest to attack the foreclosure of the landlord's lien. The affidavit of the landlord was perfect for the furnishing of the use of a horse at least, and, if it was not sufficiently specific in setting out how the horse used was furnished (if that is material), either a demurrer should have been filed, which would have given the plaintiff an opportunity to amend, or a motion should have been made to quash it. The counter affidavit of the creditor in this case is more in the nature of a demurrer than of an answer. The alleged defects of the landlord's affidavit are pointed out, and that she has any lien is denied; but none of the facts set up present any reason why, as a matter of right, she was not entitled to a lien, because, in fact, she was entitled to a lien under either state of facts, which the defendant in error says is ineffectual to create a lien. The defendant should not have been heard until he presented an issue. No trial should have been had, and therefore no verdict should have been directed. The refusal of the motion for a new trial was error.

Judgment reversed.

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(3 Ga. App. 322)

LEWIS v. STATE. (No. 816.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

VAGRANCY—EVIDENCE.

The evidence is wholly insufficient to support the verdict, and the trial court erred in refusing to grant a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Vagrancy, § 3.]

(Syllabus by the Court.)

Error from City Court of Americus; Chas. R. Crish, Judge.

Enoch Lewis was convicted of vagrancy, and brings error. Reversed.

Howell B. Simmons and E. A. Nisbet, for plaintiff in error. Zach Childers, for the State.

HILL, C. J. Enoch Lewis was convicted in the city court of Americus on an accusation charging him with vagrancy. The accusation contains in one count three classes of vagrancy as defined by the first, second, and third sections of the act of 1905, Ga. Laws 1905, p. 109. The evidence in the case is applicable to only the first and third classes of vagrants as described by the act: (1) "Persons wandering or strolling about in idleness, who are able to work, and have no property to support them." (3) "All persons able to work, having no property to support them, and who have no visible or known means of a fair, honest, and reputable livelihood." The act of 1905 is the re-enactment of what is known as the "Calvin Act of 1903," with an unimportant amendment. Acts 1903, p. 46. This act enlarges somewhat the meaning of the term "vagrant." It declares that

"visible or known means of a fair, honest and reputable livelihood" shall be construed to mean "reasonably continuous employment at some lawful occupation for reasonable compensation." In Hartman v. State, 119 Ga. 427, 46 S. E. 628, Mr. Justice Candler states that both under the old law and the amendment "the gist of the offense of vagrancy is the failure or the refusal of the offender to work when work is necessary to support himself or his family." And it may be said of the law generally, in the language of Mr. Chief Justice Simmons in Daniel v. State, 110 Ga. 916, 36 S. E. 293, that "the statute was enacted to prevent men able to work from idling and wandering about the community, and becoming drones or thieves, or charges upon the public." Now, what would be "reasonably continuous employment" is difficult to determine. Keeping in mind the mischief to be remedied and the purpose of the law, we think any work or labor which is sufficient to furnish the means of livelihood to the laborer, if he has no family, as in this case, and to prevent him from wandering about in idleness, would be "reasonably continuous employment" as defined by the statute. The public is not concerned in the length of labor or the proceeds of labor. Its only object is to protect itself from the idler and the results of idleness. The solicitous inquiry of society which the penal statute requires to be answered is that of the master of the vineyard, "Why stand ye here all the day idle?"

The only question made by this record is: Does the evidence prove the charge of vagrancy? The accusation was filed September 5, 1907, and the proof of the labor performed by the accused during the year prior to the date of the accusation may be summarized as follows: During January and February he helped build a house, and composted the ground of a neighboring farmer. In March and April he worked for 12 or 14 days as a carpenter, for which he was paid $1 a day. In May he hoed cotton and cut oats for another farmer. In June and July he cut 14 cords of wood, and got out stock for a sawmill for which he was paid from $10 to $15. The evidence does not show that he was paid for all his work, but it does show that he was paid at the rate of $5 per month for the eight months just prior to his arrest. One witness for the state testified that while he lived near him he "worked all the time," and the only time he saw him after he moved away he was standing on the roadside "with a hoe on his shoulder." According to this witness, instead of being an idler, he really was a type of labor, "The man with the hoe." The defendant stated that he worked constantly, giving the names of the persons for whom he worked. In Daniel v. State, supra, on facts showing the amount of work performed by the accused during the year much less than that disclosed by the facts in the present case, the Supreme Court held that the verdict was not warranted by the evidence; and in Hartman v. State, supra, a verdict against the alleged vagrant, when the labor was neither as continuous, as hard or as remunerative as here, was set aside as not supported by the facts. In this case the accused was without family, and his wants were probably few. He probably did not live in much luxury, but he lived without begging, and had a pig and a gun, and lived in a house. The witnesses declare that he was an ardent disciple of Isaac Walton, and was constantly seen going towards the river with his fishing pole on his shoulder, but that he was never seen with any fish.

We are sure that the evidence is entirely insufficient to establish the charge of vagrancy. Doubtless on much stronger evidence a large portion of the population of our towns and cities could be declared vagrants. The community where this defendant was convicted must be exceptionally industrious, or has a very high standard of labor. The evidence shows that the defendant did some considerable work during every month prior to his arrest, and that his only relaxation from too constant toil in working crops, cutting and cording wood and building houses was in "plying his finest art to lure from dark haunts, beneath the tangled roots of pendant trees," the alert and wary denizens of the river. Surely it will not be said that while thus engaged he was idling. If he was not successful, all the greater proof of his patient and hopeful labor. The individual members of this court know that fishing is far from idleness, and the court is unwilling to give its judicial approval to a verdict which even remotely so indicates.

Judgment reversed.

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(3 Ga. App. 326)

SMITH v. STATE. (No. 829.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. CRIMINAL LAW—NEW TRIAL—EVIDENCE.

The error sufficient to warrant the grant of a new trial must be such an error as contributed to or caused the verdict complained of. A verdict of guilty would have been demanded in this case if the evidence objected to had been excluded, and a new trial need not be granted for the purpose of reaching the same result technically.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, New Trial, § 2207.]

2. SAME — EVIDENCE IMPROPERLY OBTAINED —WITNESSES—PRIVILEGE—STATUTES.

While one cannot be compelled to give evidence against himself, and evidence obtained by an illegal arrest and unlawful seizure and search of one's person is inadmissible, because the defendant is thus compelled to testify against himself, evidence obtained by illegal search or illegal seizure of one's property may be used in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 876, 877.]

(a) The protection against self-incrimination, contained in Const. art. 1, § 1, par. 6 (Civ. Code 1895, § 5703), is entirely distinct from the right

guaranteed in paragraph 16 of the same article (Civ. Code 1895, § 5713). The Constitution protects a person both against being compelled to give testimony tending to criminate himself and against unlawful searches and seizures, but the two are entirely distinct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 872.]

(b) While, in a prosecution for a violation of the law forbidding the sale of intoxicating liquors, a bottle of whisky forcibly taken from the person of the accused, if illegally arrested, would not be admissible in evidence against him because he might thereby be compelled to furnish testimony against himself, still, if he be legally arrested, whisky found at his residence or place of business would be admissible in evidence against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 877.]

(c) One who sees another sell whisky in his presence may arrest without a warrant, and may seize the whisky in the possession of the defendant for the purpose of using it as evidence.

(d) It is only when by an unlawful search and seizure under an illegal arrest, the defendant is compelled to furnish incriminating evidence that such evidence is not admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 877.]

(Syllabus by the Court.)

Error from City Court of Waycross; Jno. T. Myers, Judge.

Leon Smith was convicted of selling liquor without a license, and he brings error. Affirmed.

J. L. Sweat, for plaintiff in error. Jno. C. McDonald, Sol., for the State.

RUSSELL, J. The defendant was convicted of the offense of selling liquor without a license. He insists that his conviction was illegal and unauthorized. He was tried by the judge of the city court without the intervention of a jury; trial by jury being waived. Two special exceptions are taken to the admission of testimony, and whether the defendant is entitled to a new trial is dependent upon these exceptions. In the fourth ground of the amended motion for new trial error is assigned on the admission of the testimony of the Sheriff Woodward that on the night of September 25, 1907, one Jack Dolan drove up in front of the courthouse in a drunken condition, and stated that he was going to find some "booze." This evidence was objected to by defendant's counsel as being mere hearsay, illegal, and inadmissible against the defendant, and for the reason that Jack Dolan was a competent witness, and was not produced, nor any foundation laid for the introduction in evidence of his sayings, and that his drunken condition rendered his statements of no weight and worthy of no credence. In the fifth ground of the motion it is alleged that the court erred in allowing the state to introduce in evidence the whisky claimed to have been taken from the defendant, over the objection that it was not legal evidence and was inadmissible.

The evidence in behalf of the state was as follows: D. A. Woodward, sheriff, testified that on the night of September 25, 1907, Jack Dolan drove up in front of the courthouse in a somewhat drunken condition and about the time that he started off he stated that he was going to get some "booze." The sheriff and the constable, C. E. Cason, followed him, and when within about 100 yards of his house met him coming back with two pints of whisky. The witness then gave him $1.50 in silver money to go back and get him more pint bottles of whisky. Cason and the sheriff went around and up to the house, and heard Dolan call the defendant, who got out of bed. Witness then heard Dolan tell him to let him have two more pints of whisky, and Dolan jingled the money in his hand as he had been told to do, and witness saw him reach out his hand as if to give the defendant the money for the whisky. After Dolan delivered these two pint bottles of whisky to the sheriff, the sheriff went into the defendant's house, and got several other bottles. The sheriff testified that he then arrested the defendant, and carried him to the jail. Witness told defendant that he had gotten entirely too bold. In response to this statement of the sheriff the defendant made no denial of selling whisky. On the contrary, he replied that he had not handled as much as was thought. He had only gotten about one case a week. The testimony of the constable, Cason, was substantially as testified by the sheriff. The whisky taken from the defendant by the sheriff, together with the two bottles procured through Dolan, was then introduced in evidence over the defendant's objection.

The defendant stated that the Saturday night previous to his arrest himself, C. E. Smith, John D. Davenport, and Jack Dolan were together in Waycross, when they agreed to go on a fishing trip, and arranged to order some whisky for the trip; C. E. Smith putting in $3, Davenport $4, and the defendant himself $3, and that he also put in $2 for Jack Dolan, as he did not have the money at the time. Dolan was to pay back the money when the whisky came. The $12 made up was sent to a house in Savannah, and the whisky ordered in the defendant's name. When the whisky came, it was carried to defendant's house at Gilchrist Park. The defendant further stated that on the night he was arrested Jack Dolan first came to him and paid him back $1 of the money that he had advanced, and he gave Dolan two bottles of the whisky. In about 30 minutes Dolan came back, saying that he must have two more bottles, and "I gave it to him, and he handed me the other $1, making the $2 which I had advanced to him." The defendant stated that, if Dolan had more money in his hand, he gave him only $1 the last time. The defendant stated that he also paid the express charges, and that, before his arrest, he bought frying pans, lard, and other things for the fishing trip, and notified Mr. Hickox, who lives down in the Okefenokee swamp,

that the party was going down there on a fishing trip, and would bring some "booze" with them. C. E. Smith and J. D. Davenport, as witnesses for the defendant, corroborated the statement of the defendant as to the agreement to take the fishing trip, and as to the purchase of the whisky for that purpose, the several parties contributing to the purchase of the whisky the amounts stated by the defendant and $2 being advanced by the defendant for Dolan, as stated by the defendant. D. W. Pitman as a witness for the defendant testified that the defendant the day before he was arrested came to the store of the witness and bought two frying pans, some lard, and other things, stating that they were going to take a fishing trip, and that Mr. Hickox came up, and the defendant told him that they were going down to his place on a fishing trip, and would bring some "booze" with them.

Two questions are raised by the record: Was the evidence sufficient to authorize the finding of guilty? And, if it was, is any sufficient reason shown for setting it aside? The answer to the first question is easy. It appeared in the evidence that there were 15 quarts of this whisky which cost $12, and, if Dolan was repaying his money and getting his share of the whisky, only he was paying more for it than it cost, which would be proof that the defendant was exchanging the whisky for money, and making a profit of 25 cents per quart in the bargain. The whisky cost only 75 cents per quart. According to the defendant's statement, Dolan paid $2 for two quarts. Furthermore, according to the testimony of Woodward, the defendant, instead of denying that he was selling whisky, tacitly admitted it by saying that he was not handling as much as thought —only about one case a week. In addition to this, if Dolan could pay for his share of the whisky and use it prior to the Okefenokee swamp trip, on which trip he was to be one of the parties, who was going to pay for Dolan's share of the "booze" consumed at the swamp? for Dolan does not seem to be averse to "booze." From all the facts and circumstances, it is plain to see that the defendant sold the whisky to Dolan, and was engaged in selling whisky even if the testimony of C. E. Smith, Davenport, and Pitman be the truth. Then, should the verdict be set aside because of the other errors assigned? As we have heretofore held, an error to authorize setting aside, must be such as contributed to or caused the verdict. In this case, even if the rulings of the court were erroneous and even if the court had ruled to the contrary, the result should have been the same. It is very clear to our minds that the verdict in this case does not need to rest upon the testimony of the sheriff that the remark of Dolan caused him to follow him, and thereby procure the subsequent evidence of a sale, nor upon the whisky introduced in evidence. A verdict of guilty would have been demanded if all of the evidence objected to by the defendant had been excluded. So that there is no particular reason for granting a new trial in order to have the same result more technically reached.

We will, however, consider the assignments of error contained in the fourth and fifth grounds of the motion. Their consideration at this time, just in advance of state wide prohibition, may serve a useful purpose. Counsel for defendant in error attempts to sustain his objection to the introduction of the whisky by the decisions in the cases of Hammock v. State, 1 Ga. App. 126, 58 S. E. 66, and Hughes v. State, 2 Ga. App. 656, 58 S. E. 390. The decisions in these cases will not sustain the contention of plaintiff in error. It must be borne in mind that there are two sections of the Constitution, one referring to self-crimination and the other to illegal searches and seizures, which are entirely distinct. Paragraph 6 of article 1 of the Constitution (Civ. Code 1895, § 5703) declares that "no person shall be compelled to give testimony tending in any manner to criminate himself." In the Hughes Case the defendant, without any act or volition on his part, and by force, was held while two policemen, who had no warrant nor any knowledge from personal observation that the defendant was guilty of crime, forcibly took from his person the whole evidence of his guilt of the offense of carrying a deadly weapon concealed. We held this to be a clear violation of a constitutional right, because it was, in effect, compelling the defendant to give testimony against himself, and we also hold that paragraph 16 of article 1 of the Constitution (Civ. Code 1895, § 5713) was violated, and that the search of his person was illegal, not only because there was no warrant, but because the officers had no right to arrest without a warrant. This paragraph guarantees against illegal searches. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue except upon probable cause, supported by oath or affirmation," etc. In the Hughes Case we endeavored to show the distinction between the facts in that case and those in the Williams Case, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269, in which there was perhaps an illegal search of the defendant's house. The Constitution protects both against unlawful searches and seizures, and against one being compelled to give testimony tending to criminate himself, but the two cases are entirely distinct. An authority to search, obtained as provided in paragraph 16, supra, does not convey power to violate the right guaranteed in paragraph 6. A search warrant to search A. B.'s house for stolen property would not authorize compelling A. B. to furnish evidence against himself, nor can it be implied. Right to search and seize depends upon the warrant. But it may also depend upon a sufficient substi-

tute for a warrant which the law provides. It is provided by law (and this question is dealt with in the Hughes Case) that an arrest may be made without a warrant, where the offense is committed in the presence of an arresting officer, or even of a private individual. The positive knowledge of the violation of the law on the part, either of the officer or of a private citizen, supplies the place of a warrant under the express provisions of Pen. Code 1895, § 896.

The sheriff in this case saw the crime committed. He had a right to arrest the defendant, and he had the right to seize the whisky by the terms of the decision in Williams v. State, 150 Ga. 515, 28 S. E. 624, 39 L. R. A. 269. The evidence was legally admitted. If a private person see a violation of the law against the selling of intoxicating liquors, he has the right to arrest the seller who committed the offense in his presence, and he has the right to seize the intoxicants being sold and produce them as evidence. This is not compelling the defendant to testify against himself in the terms of the decision in Hughes v. State; nor does it in any wise conflict with our rulings in the Hammock and Hughes Cases. Evidence obtained by illegal search of the defendant's premises was held in Williams v. State, supra, to be admissible. Evidence obtained where, by force, the defendant was compelled to incriminate himself, in that against his will he was required to expose his guilt, is expressly forbidden in the decisions of this court to which we have referred; and the admissibility of such evidence, we maintain, has never been upheld in this state. Another wide distinction which is adverted to in the Hughes Case, between a case like this and the Williams Case and some other cases, like carrying concealed weapons, is to be found in the fact that the evidence is not necessarily incriminating. In the case of forcibly taking a pistol, hitherto concealed on the person of the defendant, violently from his person, everything is disclosed which is necessary to convict. The discovery of whisky in the dwelling of a citizen, although the search should be illegal, does not afford complete evidence of guilt of any offense against the law. On the contrary, its possession would be presumed to be legal and proper, unless there was other evidence which showed that it was being used for violating the law. In the present case the sheriff had the right to seize the whisky because he saw the crime committed just as I would have a right to arrest a murderer and take his pistol away from him immediately upon seeing the fatal shot fired; and the pistol would be admissible in evidence. But, granting that the sheriff had seized the whisky illegally, its production in evidence would not be compelling the defendant to give evidence tending to incriminate himself, even though the seizure of the whisky might have been illegal. It is only where there is an unlawful search and seizure under an illegal arrest, and the person is compelled to furnish incriminating evidence against himself, that such evidence is not admissible. No decision of our courts prohibits the admission of evidence obtained in pursuance of a legal arrest.

Judgment affirmed.

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(3 Ga. App. 333)

## BARNES v. STATE. (No. 837.)

(Court of Appeals of Georgia. Dec. 20, 1907.)

1. MASTER AND SERVANT — CONTRACT LABOR LAW—VIOLATION—CONVICTION—EVIDENCE.
   The evidence authorized the verdict, and no error is assigned which warrants the reversal of the judgment refusing a new trial.
2. SAME—EVIDENCE OF INDEBTEDNESS—EFFECT—BURDEN OF PROOF.
   The fact of indebtedness, as against one accused of a violation of the labor contract act of 1903 (Acts 1903, p. 90), is of itself wholly insufficient to authorize conviction. It is merely persuasive evidence of intent to defraud, when considered in connection with evidence of failure on the part of the defendant to perform his contract or repay the money advanced. But by the terms of that statute the law raises, from proof of certain facts, the presumption of an intent to defraud, and the burden is thus cast upon the defendant to rebut and remove this presumption.
3. SAME—DEFENSES—REPAYMENT OF ADVANCES.
   For the repayment of money advanced on a contract of labor to be effectual as a defense, the advancement must be repaid on or before the first day of the term of the service of labor contracted for, if the defendant does not enter upon his term of service.
4. CRIMINAL LAW—EVIDENCE—SELF-SERVING DECLARATIONS.
   Statements of a defendant in his own behalf, made anterior to the trial, are not admissible as evidence in his favor.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Pie Barnes was convicted of violating the contract labor law, and he brings error. Affirmed.

J. W. Lewis, for plaintiff in error. R. W. Moore, for defendant in error.

RUSSELL, J. The defendant was convicted of the offense of misdemeanor, and he excepts to the overruling of his motion for new trial. The accusation was based upon an alleged violation of the act of 1903 (Acts 1903, p. 90). It is alleged that the defendant, after having contracted with one Peden to perform services as a farm hand from September 24, 1906, to December 25, 1906, for $10 per month, on the faith of said contract procured from said Peden the sum of $1, with intent not to perform such service. It is further alleged that Peden was damaged in the sum of $1 because the defendant neither performed the service contracted for, nor returned the money advanced, and that the defendant had no good and sufficient cause for not so doing. The motion for new trial was based upon general grounds; there being no exceptions to

the charge of the court, or to the admission of evidence. The only question, then, is whether the evidence authorized the finding of the verdict of guilty.

The testimony of Mr. Peden shows that there was a definite contract between himself and the defendant, beginning September 24, 1906, and ending December 25, 1906, and shows the price to be paid for the labor; that the money was procured on the contract; that there was a failure to perform the service contracted for or return the money; that he lost and was damaged to that extent. As we have heretofore held, in Patterson v. State, 1 Ga. App. 784, 58 S. E. 284, the intention, which is an essential element of crime, may either be proved or inferred or presumed. By the very terms of the second section of the act of 1903, the proof on the part of the state in this case raised the presumption that the money was procured with the intent to defraud. The state's case was complete, and the verdict of guilty was authorized, unless the defendant showed that he had made no contract, had procured no money, or had a good and sufficient cause for not performing the labor or returning the money at the time the labor was to be performed. Harwell v. State, 2 Ga. App. ——, 58 S. E. 1111. As held in Patterson v. State, supra, the act of 1903 was not intended to enforce a collection of debts on involuntary or oppressive labor contracts. "The fact of indebtedness can only be persuasive evidence, which may or may not lead to the conclusion that the paramount, controlling ever-essential element of the offense —the intent to defraud—was pre-existent to the offense and caused the extension of the credit." The fact of the defendant's indebtedness was mere persuasive evidence of the intent. But the indebtedness, coupled with the circumstances under which it was created and the fact that there had been neither compliance with the contract on which the money was paid, nor repayment of the money advanced, and that no good cause had been shown either why the work was not performed, or the money repaid, by the terms of the statute, raised the presumption of an intent to defraud.

We will see, therefore, whether the presumption of fraudulent intent was satisfactorily rebutted by the defendant. He denied making the contract. Evidently the jury did not believe this, or they would have acquitted him. He did not deny procuring the money. The contract being established to the satisfaction of the jury, did he show any good reason for not performing his contract or repaying the money? This was the burden placed upon him by the presumption of fraudulent intent raised by the statute. As held in Harwell v. State, supra, unless there was good cause for not repaying the money, it must be repaid on or before the day set for the commencement of the labor. The defendant tendered no evidence of repayment or of offer to repay, nor did he state that he had offered to repay the money. The same is true as to setting to work under the contract. When the day for the commencement of his labor under the contract arrived, he did not appear upon the scene. The defendant himself stated no good cause why he did not repay the money, nor why he did not begin the work. He merely denied the contract alleged in the accusation. Under the state's evidence, a clear case of guilt was shown, and the jury had the right to give it the preference. The testimony of the witness Griffith, introduced in behalf of the defendant, was without value to the defendant. It did not support his contention that he had made no contract with Mr. Peden because the witness did not claim to know anything on that subject. It did not present any good reason why he did not perform the contract or repay the money advanced by Peden. Testimony of Griffith as to the statement made to him by the defendant could well have been objected to, for the reason that it was the statement of a defendant in his own behalf anterior to the trial. But, even as such a statement, it amounted to nothing in showing a good reason why the defendant did not repay money advanced upon the contract, if the jury believed a definite contract had been made, as testified by Peden. The statement made by the defendant to Mr. Griffith did not show even bona fide effort to obtain the money to repay Mr. Peden the money advanced on his contract. He did not tell him that Mr. Peden had advanced him a dollar on a contract of labor which he decided to repay. We do not think that an unsuccessful effort on the part of defendant to borrow money to repay money advanced on a labor contract would be good cause, according to the meaning of the second section of the act of 1903, for not repaying the money or performing the service according to the contract. But even if such an effort, accompanied by evidence of good prospects that the effort would be successful, can be urged as a defense, it ought to appear that the money is sought to be obtained upon truthful, and not upon false, statements. We do not pretend to say that the defendant's statement to Mr. Griffith was untrue. It would be improper for us to express our opinion upon that subject. But if the jury believed that the contract of labor was made as testified to by the state's witnesses, it is very apparent that the statement made by the defendant to Mr. Griffith was untrue, and made merely to obtain money from him, and it appears that the defendant succeeded partially in this attempt.

As was ruled by us in Patterson v. State, 1 Ga. App. 785, 58 S. E. 285: "The statute of 1903 adds to the catalogue of those acts heretofore made penal two acts, the commission of either of which, if such act is inducted by such antecedent fraudulent intent, causes the actor to be deemed a common

cheat and swindler. It creates two new classes. It sets out two distinct offenses. In the one class is included any person who contracts to perform services of any kind with intent to procure money or other thing of value, and does not intend to perform the service. If loss or damage results to the hirer, such person is, on conviction, to be punished as a common cheat and swindler. This is the distinct class of those who get the money on the faith of the contract, but never set to work. The fraudulent intent antedates the contract. The second class is composed of those who, after making a contract, procure money or other thing of value with intent not to perform the service. This includes all those who, being already under contract, then conceive the fraudulent intent." This defendant belonged to the first class, and was so charged. From the evidence in behalf of the state, the law raised the presumption of fraudulent intent. The case for the state was perfect in every detail, unless the defendant could show good and sufficient cause why the money so advanced was not returned on the day set for the commencement of the labor, or the performance of the labor itself. The defendant failed to carry the burden to the satisfaction of the jury.

Judgment affirmed.

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(63 W. Va. 139)

## KELLAR v. JAMES et al.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. STATUTES—CONSTRUCTION—DEROGATION OF COMMON LAW.
Statutes in derogation of the common law are strictly construed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 320; vol. 10, Common Law, § 12.]

2. SAME—PURPOSE.
The rule requiring liberal construction of certain classes of statutes does not warrant an extension of them to the suppression of supposed evils or effectuation of conjectural objects and purposes, neither referred to nor indicated by any terms used, nor clearly within the spirit of the legislation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 316–320.]

3. HUSBAND AND WIFE—WIFE'S TORTS—HUSBAND'S LIABILITY — MARRIED WOMEN'S LAWS.
The husband is not relieved from liability for the torts of the wife by the statutes of this state, known as the married women's laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, §§ 694–700.]

4. SAME — TORTS OF HUSBAND — WIFE'S LIABILITY.
A wife is not jointly liable with her husband for a wrong perpetrated by him, in the doing of which she did not actually participate. She cannot be made liable by her mere prior or subsequent consent to, or approval of, the tortious act of the husband, or command or direction for the commission thereof.

5. ACTION — JOINDER — SLANDER — HUSBAND AND WIFE.
A declaration against a husband and wife, charging the utterance of a slander by the husband on one occasion, and by the wife on another, pursuant to a conspiracy previously formed, to injure the plaintiff in respect to character, is demurrable for misjoinder of actions.

(Syllabus by the Court.)

Error from Circuit Court, Tucker County.

Action by Verna Kellar against Nancy E. James and another for slander. From a judgment of dismissal, plaintiff brings error. Affirmed.

Cunningham & Stallings, for plaintiff in error. Chas. D. Smith and Jas. P. Scott, for defendants in error.

POFFENBARGER, J. In the circuit court of Tucker county, a demurrer was sustained to the declaration of Verna Kellar, alleging against the defendants, Nancy E. James and George McClellan James, slander and defamation of the character of the plaintiff, and to the consequent judgment of dismissal she obtained a writ of error.

The defendants were husband and wife, and the declaration charges, first, the utterance of slanderous language by the husband in the presence of certain persons named as well as others; second, the utterance of the same language by the wife in the presence of certain other persons named; and, third, the utterance of the language by both defendants in pursuance of a conspiracy, previously formed between them, and the speaking and publication of the false, scandalous, malicious, defamatory, and insulting words, by collusion and conspiracy, with intent to defame and disgrace the plaintiff among her friends and neighbors and the citizens of the state, and to bring into disgrace and disrepute her good name, fame, and character. In reply to the view that the declaration sets up two causes of action, one against the husband alone for his wrongful act, and the other against both husband and wife for the wrongful act of the latter, and so is open to the objection of misjoinder of actions, it is urged that all the matters alleged constitute one cause of action, founded upon the charge of conspiracy, and this argument is supplemented by the contention that such a conspiracy between the husband and wife may now exist because of the supposed change in the status of the wife, wrought by our married women's statutes. These statutes, very similar in character and form to those adopted in other states, relate, for the most part, to the separate property of the wife, her rights and powers respecting the same, and freedom thereof from the control of the husband, and liability for his debts, and the enlargement of the rights and powers of married women respecting contracts and enforcement of the same. To a certain extent, they also free the husband from liability for the debts of the wife. Though not in exact conformity with the terms or scope of similar statutes of other states, the respects in which our statutes differ from them are relatively slight and unimportant. The primary object

and general scope thereof are the same as those of modern married women's laws in other jurisdictions. In some states the courts have exonerated the husband from liability for the torts of the wife, without any warrant therefor in the letter of the statute, on the presumption of legislative intent to do so, arising out of deprivation of the husband of the control of the wife's property, and relief of the same from liability for his debts. These statutes are construed, in the jurisdictions in which such effect is given them, as if they had declared that a married woman should be deemed in all respects, as regards her power to contract, own, control, and manage property and liability for her acts and conduct, wrongful or otherwise, as if she were a feme sole. In doing so, the courts admit an interpretation which goes far beyond the letter of the statute. They set aside the common law in respect to matters as to which the statute is wholly silent, notwithstanding the rule requiring strict construction of all statutes in derogation of the common law. Moreover, they assume that the only reason for the husband's common-law liability for the wife's torts is found in the control which that law gave the husband over her property, notwithstanding the existence of other common-law principles and considerations which may reasonably be said to form, at least, a part of the ground of such liability. For many purposes, the wife's existence was deemed by that law to have been merged in that of the husband. She had no separate existence in law, and they were considered one person. In respect to the commission of many crimes, and wrongs not amounting to crime, done by the wife in the presence of her husband, she was deemed to have acted under his coercion, and was not liable either civilly or criminally. 21 Cyc. 1355. Our statute makes no reference to her liability or that of the husband for her wrongs. This branch of the law remains wholly untouched by any terms of the statutes. It seems to us that the application to them of the liberal rule of construction would not carry them into this untouched portion of the domain of law relating to married women and their relations to their husband and third parties. The liberal rule of construction only requires that a statute be so enforced as to carry into effect the will of the Legislature as expressed in the terms thereof, and give, not stintedly or niggardly, but freely and generously, all the statute purports to give. This stops far short of carrying the statute to purposes and objects entirely beyond those mentioned in it. One object of these statutes is to enable a married woman to have the absolute, free, and unrestrained control of her property, and power to make contracts respecting it, and to vindicate her property and contract rights by action in the courts of the state as if she were a feme sole. For the accomplishment of these purposes, the statute should be liberally construed. She is subjected, by this same law, to the reciprocal right extended to others to sue her in the courts as if she were a feme sole, and, for the effectuation of this purpose, the statutes should be liberally construed. So, in respect to all the other rights and liabilities expressly given and imposed by this law. The evils intended to be suppressed, and the purposes and objects to be promoted, are all mentioned in the statutes, and the rule of liberal construction requires no more than that they shall be so interpreted and applied as to suppress the named evils, and effectuate the specified purposes and objects. It does not authorize the court to add other supposed evils, purposes, and objects. By the decided weight of authority, these statutes are held not to have relieved the husband from his common-law liability for the wife's torts, as has been well said by Judge Brannon in Gill v. State, 39 W. Va. 479, 20 S. E. 568, 26 L. R. A. 655, 45 Am. St. Rep. 928, and in Withrow v. Smithson, 37 W. Va. 761, 17 S. E. 316, 19 L. R. A. 762. Though these expressions of opinion may not be regarded as matters of decision, their reasoning is valuable, and they show that the weight of authority is against the contention set up in the brief of counsel for plaintiff in error. To the authorities there cited by Judge Brannon in support of his opinion, we add the following: Henley v. Wilson, 137 Cal. 273, 70 Pac. 21, 58 L. R. A. 941, 92 Am. St. Rep. 160; Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912, 30 L. R. A. 521, 54 Am. St. Rep. 647; Bruce v. Bombeck, 79 Mo. App. 231; Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947; Taylor v. Pullen, 152 Mo. 434, 53 S. W. 1086; Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791; Fowler v. Chickester, 26 Ohio St. 9; Zeliff v. Jennings, 61 Tex. 458; MacQueen v. Fulgham, 27 Tex. 463; Seroka v. Kattenburg, 17 Q. B. D. 177; Bahin v. Hughes, 31 Ch. D. 390.

No authority need be cited for the proposition that the wife is not liable for the slander or other tort of the husband. The only qualification of this general rule is found in those instances in which the husband acts as the agent of the wife in respect to her separate property; and this is only an apparent exception, for there the act of the husband, her agent, is, in law, her act. By the common law, the wife could not be a trespasser by previous or subsequent consent to the act or trespass of the husband. She did not become liable except by her active, actual participation in the wrongful act. "A married woman is liable for torts actually committed by her, though she cannot be a trespasser by prior or subsequent assent." Chitty, Pl. 11 Am. Ed. 76. "And where several are concerned, they may be jointly sued, whether they assented to the act before or after it was committed, unless the party be an infant or a feme covert, who, we have seen, cannot be sued in respect to a subsequent assent." Id. 80. This doctrine is recognized in Ferguson v. Brooks, 67 Me. 251. In

the following terms: "That this doctrine is still properly applicable to numerous actions of tort brought against married women, we do not doubt. We should be inclined to say, for example, that a wife ought not to be held liable for the tort of her husband or any third party, in which she does not participate as an actor, by reason of prior or subsequent assent, consent, advice, or authority from her, in a case where she is not in any contingency to reap a profit, or her separate estate a benefit." In view of this principle of law, the allegation of conspiracy amounts to mere surplusage. It is utterly impossible that the wife can be held liable for the slander uttered by her husband in her absence, on the theory that she counseled, advised, or directed it, or assented to and ratified it after it was done. From this it results that the declaration necessarily sets up two separate and distinct causes of action, one against the husband, and one against the husband and wife. As to the latter, if maintained, judgment would go against both (Gill v. State, 39 W. Va. 479, 20 S. E. 568, 26 L. R. A. 655, 45 Am. St. Rep. 928, and the numerous authorities there cited); and, as to the former, against the husband alone. To allow recovery upon a declaration setting up both of these causes of action would make the wife liable for the husband's tort, contrary to law. This makes the declaration fatally defective, wherefore the court properly sustained the demurrer, and dismissed the action, instead of entering a mere judgment of abatement for misjoinder of parties. A misjoinder of counts or causes of action is fatal to the declaration on demurrer. Maisby v. Lanark Co., 55 W. Va. 484, 47 S. E. 358; Henderson v. Stringer, 6 Grat. (Va.) 130. This obvious and inevitable result renders it unnecessary to discuss the numerous other questions of law adverted to in the argument.

There being no error, the judgment will be affirmed.

Affirmed.

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(63 W. Va. 103)

## COAL & COKE RY. CO. v. TAYLOR, Justice of the Peace, et al.

(Supreme Court of Appeals of West Virginia. Dec. 3, 1907.)

1. JUSTICES OF THE PEACE—PLEADING—DESIGNATION OF DEFENDANT.

In an action in a justice's court, the defendant is designated as "Italian number 37, whose name is unknown." This is a sufficient designation under chapter 50, § 28, Code 1899 [Code 1906, § 1979].

2. PLEADING—DECLARATION—DESIGNATION OF DEFENDANT.

In an action a defendant may be designated by a fictitious name with the statement that the true name is unknown.

(Syllabus by the Court.)

Error from Circuit Court, Randolph County.

Application by the Coal & Coke Railway Company for writ of prohibition against E. E. Taylor, justice of the peace, and others. From the judgment denying the writ, plaintiff brings error. Affirmed.

Dailey & Bowers, for plaintiff in error. Jared L. Wamsley, for defendant in error Frank Molinari.

BRANNON, J. Frank Molinari brought before a justice of Randolph county 19 separate actions against divers persons for the recovery of money due on contracts. In the writs of summons he designated the defendants thus: "Italian number 17, whose name is unknown"; "Italian number 37, whose name is unknown." So on in every case. There was no other description of the defendants. "Italian number 37" is the designation in the case before us. No name of the person is given. The summons was returned "not found." A second summons was issued, which was posted at the front door of the courthouse and at other public places in the county. An attachment was issued in the case against the personal estate of the defendant, and the Coal & Coke Railroad Company was designated as having in its hands money and effects of the defendants, and made a garnishee. The justice gave judgment against "Italian number 37, whose name is unknown," for the sum of $5.77. The railroad company appeared afterwards, and moved the justice to quash the attachment, "upon the ground that the name of the defendant is not stated in the summons"; but the justice refused to quash the attachment. Later still the railroad company filed an answer, as garnishee, admitting that at the time of the service of the attachment upon it, to use the language of the answer, "it was indebted to an Italian working for it, under the No. 37, in the sum of $18.20." The justice gave judgment against the company for $11.52. Afterwards the Coal & Coke Railroad Company obtained from the judge of the circuit court a rule in prohibition against the justice, constable, and Molinari to show cause why a writ of prohibition should not be awarded to prohibit them from further proceedings in all the judgments entered in those cases; "Italian number 37" being one. On the motion of Molinari, the circuit court of Randolph county discharged the said rule, refusing to award the prohibition, and the railroad company sued out a writ of error from this court.

For the railroad company it is contended that there was no defendant named in these actions before the justice; that the designation of the defendant as "Italian number 37, whose name is unknown," is no naming of the defendant, and that the summons is one without a defendant, and constitutes no action, and that there was in law no suit before the justice in which judgment could be rendered against the Italian, or in which an attachment could be issued, or a garnishment effected, or judgment rendered therein; and that, therefore, the justice had no juris-

diction to take any steps because there was nothing before him in the shape of a valid legal proceeding. We know that there must in every suit be a plaintiff and a defendant, an actor and a reus; that a defendant must be named against whom the sentence of the law, by judgment or otherwise, can take effect. But suppose that defendant's name is not known. Is the creditor without any remedy? Where there is a right, there ought to be a remedy. The law in such case is that a fictitious name may be used, with a statement that the real name is unknown. If the true name appear during the proceeding, the written declaration may be amended. "If name is wholly unknown, use any appropriate description, as 'the man in command of the Sloop Hornet,' or 'John Doe,' or 'the infant son of John Doe and Mary, his wife.' If partly unknown indicate it as nearly as practicable thus, 'J. S. Smith, whose first name is unknown to plaintiff, but who is known as J. Stokes Smith.'" 1 Abbott's Forms, p. 13. In this case the defendant is described as Italian No. 37, whose name is unknown. This conforms to the rule as stated by Abbott and the law generally. Much law can be found to show that an approximate description, or some description, coupled with the allegation that the real name is unknown, meets the requirement of the law. As the court said in State v. Wilson, 30 Conn. 507: "That which, from the nature of the case cannot be alleged, need not be; and it is of frequent occurrence that the name of the person injured is unknown. Justice must not fail nor the community go unprotected for such cause. If the name is unknown, and it is so averred, it need not be proved." Even in indictments such is the law. 1 Bishop on Crim. Proced. § 546, tells us: "Where the name ought by the general rules to be stated, yet being unknown to the grand jurors they cannot state it, the usual form of the allegation is, 'A certain person whose name is to the jurors unknown,' or, 'A certain person or persons to the jurors aforesaid unknown.'" In note to that section we find old English authority for the proposition that "An indictment of murder, de quodam ignoto, or stealing the goods, cujusdam ignoti, is good where the person killed or robbed is unknown." We find in 14 Ency. Pl. & Prac. 279, this: "If the name of a defendant in a criminal prosecution is unknown, or if such is the case with reference to the name of any other person necessary to the description of a criminal offense, the fact that the name is unknown may be stated, with such description as is at hand, in lieu of the correct name." In 16 Am. & Eng. Ency. L. (1st Ed.) 131, it is stated that it is sufficient in criminal pleading, where a name of the accused or a third person is unknown, to state that the name is not known, and the accused may be proceeded against under any fictitious name, the right one to be inserted when discovered. "It is not, however, necessary in such cases to give a fictitious name. The name may be entirely omitted, and the identity shown by words of description." In State v. Jackson, 4 Blackf. (Ind.) 49, the deceased was described as "an Indian of this state, of the Miami Nation of Indians, the name of which said Indian to the jurors aforesaid is wholly unknown," and the indictment was held good. In Reed v. State, 16 Ark. 499, the deceased was described as "a certain Wyandotte Indian, whose name is unknown to the grand jury." The indictment was held good.

For the railroad company we are referred to two cases. One is McKinlay v. Tuttle, 42 Cal. 570. The complaint was against 67 defendants, and averred that the true names of 28 of them sued as John Doe, Richard Roe, and others were unknown. Persons named Castro appeared and filed an answer, and judgment went against them. It was held bad, not because no name was given, but because the Castros were never parties to the case. The case only further asserted that, when fictitious names are used, the pleadings must be amended by the insertion of their true names, when ascertained. The case is not in point here. The other case referred to is Varnell v. Speer, 55 Ga. 132. The suit was brought by L. N. Speer against the Missouri, Kansas & Texas Companies and their connecting lines on to Chattanooga, and the East Tennessee, Virginia & Georgia Railroad Company, garnishees. Here was no question of a defendant whose name was unknown, or fictitious name. The objection was that the words "companies and their connecting lines on to Chattanooga" were too indefinite. The plaintiff did not rely upon the rule relating to persons whose names were unknown.

The above principles I consider as those laid down by the common law; but we have a statute found in Code 1899, c. 50, § 28 [Code 1906, § 1979]. "When the name of a defendant is not known to the plaintiff, the summons may be issued against him by a fictitious name, or any description to designate the person intended, and shall not be set aside or dismissed for that cause, if served on the proper person; and in any case in which a defendant shall be proceeded against by any other than his true name it shall be the duty of the justice, when his true name is ascertained, to amend the summons by inserting the same therein, and thereafter to proceed against him by his true name." This is a very wide provision for the case of a defendant whose name is unknown. It not only allows the use of a fictitious name, but it allows any description to designate the person intended. Do not the words "Italian number 37" meet the requirement of this statute? I think they do.

But it is said that to apply that provision there must be personal service, and there was not in this case. That would seem to be a narrow construction. The statute is rem-

edial. Where the defendants cannot be found the statute relating to proceedings before the justice allows a second summons to be posted. That is a procedure in the suit, and why should that provision not apply as well in the case of a person not found for personal service as where he is found? Would this remedial statute not apply to either case? There is as much reason to apply it where the defendant is not found, and more, perhaps, than where he is found.

For these reasons, we affirm the judgment of the circuit court.

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(63 W. Va. 34)

## HOGAN v. CLARKSBURG HOSPITAL CO.

(Supreme Court of Appeals of West Virginia. Dec. 3, 1907.)

1. HOSPITALS — LIABILITIES — TORTS OF EMPLOYÉS.

A hospital, incorporated and conducted for private gain and for the benefit of the stockholders thereof, is liable in damages to its patients for the negligence or misconduct of its officers and employés.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Hospitals, § 13.]

2. SAME—CARE OF PATIENTS.

A patient sent to such hospital is entitled to such reasonable care and attention for his safety as his mental and physical condition may require.

(Syllabus by the Court.)

Error from Circuit Court, Harrison County.

Action by Edward Hogan against the Clarksburg Hospital Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Sperry & Sperry, for plaintiff in error. Davis & Davis and Osman E. Swartz, for defendant in error.

McWHORTER, J. Edward Hogan brought his action of trespass on the case in the circuit court of Harrison county against the Clarksburg Hospital Company, a corporation. The defendant demurred to plaintiff's declaration, which demurrer was overruled. The defendant then pleaded not guilty, and a jury was impaneled to try the case. When the evidence of the plaintiff was all in, the defendant moved the court to strike out the plaintiff's evidence, which motion the court sustained, and the jury returned a verdict for the defendant. Plaintiff moved the court to set aside the verdict of the jury, and grant him a new trial, which motion was overruled, and to which several rulings of the court the plaintiff excepted, and says that the court erred in sustaining the motion to strike out the evidence, and also in overruling the plaintiff's motion to set aside the verdict and grant a new trial.

Three witnesses were examined in the case —the plaintiff, Dr. Showalter, and Miss McGann, one of the nurses in the hospital at the time the plaintiff was an inmate. Plaintiff's own testimony shows that he was subject to epileptic fits prior to the time of his being taken to the hospital of the defendant in February, 1905; that he was suffering from one of his fits at the time he was taken to the hospital, and knew nothing of being taken there, and did not know who was treating him, but says his bartender was waiting on him before he went to the hospital, and when asked what physician, if any, he had, stated that "Dr. Johnson was said to be the man," but said that he did not know anything about who was treating him at that time. Miss McGann testified: That she saw two men bringing Hogan into the hospital from the ambulance. That she did not know his condition. She says: "I saw them bring him in, two men helped him in, and then I did not see him again until after he was burned." That he was placed in the front room on the second story on the right hall. That he was brought there, she thinks, about 9:30 o'clock in the morning. That the room in which he was placed was one of the best in the house, had two beds in it, and was heated by a gas fire, an open fire without a grate, with an asbestos back. She says she went upstairs when the tray bell rang for dinner, an odor quite intense met her, and she went to plaintiff's room, and found him in the middle of the floor. "His nightgown was mostly burned all off. Some pieces were burned in strips. He didn't know himself. He was quiet, making no racket at all." That both beds were ruffled up when she found them, and both were on fire—were not blazing. The mattress on one was burning considerably. Nobody was in the room except plaintiff. That Miss Leon was his nurse, but had gone off duty before he was burned. "We always got off two hours when we had time from 10 to 12, something like that." When asked to describe plaintiff's burns, witness said: "His hand was burned very bad, his side and his arm. Scars are there, I think, show better than I can tell you." And, when asked how long he had been in the building when he was burned, answered: "It couldn't have been more than an hour, or an hour and a half since he was brought in. He was brought in that morning, and when the tray bell rang was the time I found him." Then was asked: "How long after Mr. Hogan was burned before he regained consciousness, and knew about his injury? A. I don't know. I know he was there several weeks before he knew he was burned. For the first time or two he did not say anything about his burns, but after that he let us know he was burned when we dressed them. It was several weeks before he knew he was burned at the City Hospital." From the plaintiff's own testimony he seems to have been entirely oblivious as to when or how he got to the hospital or when he was burned. He states that, when he recovered consciousness, he had an interview with the superintendent, Dr. Payne, who wanted to know who was going to pay his bills, when he told him he would pay them himself; that there was no-

body else to pay them. He told the doctor he had a check book in his clothes; that they took his clothes out of the room and he asked the doctor to get his check book; that he went away, and he did not see him any more for three or four days, when the doctor came back and apologized, and told him that he had learned that he was all right; that he wanted to settle with him at the end of each week and get out of the hospital, but the doctor would not let him go. Plaintiff exhibited two checks, one for $75, payable to the Clarksburg City Hospital, the other for $60, dated April 11 and 19, respectively, 1905, the amount he had paid the hospital, and stated that he also paid Dr. Johnson $47 for treatment. The plaintiff also introduced Dr. U. W. Showalter, and proved that he was a stockholder in the defendant company, and that it operated that hospital when plaintiff was there.

Plaintiff in error, by counsel, says the case presented here involves two questions: "(1) What degree of care should be required of a hospital company maintaining a hospital for receiving and treating diseased persons for hire or profit toward persons committed to its care, while on its premises and under its control, the failure to exercise which constitutes actionable negligence? (2) Whether the evidence presented in this case makes a prima facie case of negligence such as should have been submitted to the jury." Counsel for defendant in error agree that these are the propositions involved, and say that their views on the first proposition differ very little from those advanced by plaintiff's counsel, and claim that the rule applied to public or charitable institutions does not apply to this case, citing from Thompson on Negligence §§ 6711, 6713, to support their contention that a hospital is nothing more than an aggregation of physicians and surgeons and their assistants, and that the hospital should conform to the rules laid down for physicians and surgeons in said sections; and also cite Lawson v. Conaway, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17, and quote from the syllabus point 3, in said case, the following: "The physician is bound to bestow such reasonable ordinary care, skill, and diligence as physicians in the same neighborhood in the same general line of practice ordinarily have and exercise in like cases"—which case was an action against a physician for malpractice in the treatment of a broken arm. All the authorities cited are inapplicable to the case at bar. The question here does not arise as to the skill, care, and attention of any physician. The plaintiff had just been put into the hospital, and it does not appear from the evidence that he had yet received the attention of any physician. He had simply been received by the nurses and placed in a room. That which is complained of in this case is not the wrong or unskillful application of remedies, but the neglect to give that reasonable and ordinary care and attention which was needed and due to plaintiff after being received into the hospital at the hands of the employés of the defendant. The incorporators and stockholders of the defendant procured their charter for the purpose of carrying on a business in their corporate capacity, not for charitable purposes, but for private gain, and held themselves out to the public as an institution wherein the sick and diseased would receive medical treatment and proper care; the objects and purposes stated in their charter being: "To conduct a general hospital for the treatment of all diseases, both medical and surgical; to conduct a training school for nurses and to grant diplomas or certificates of graduation to persons completing the prescribed course of instructions; to buy, sell, lease, or rent all real estate and personal property necessary to conduct and operate a general hospital and training school for nurses or either or both; and to transact all other business and to do all things necessary to properly conduct the business herein mentioned." As defined in 21 Cyc. 1106: "A hospital created and endowed by the government for general charity is a public corporation; and a public hospital may be defined in general as an institution owned by the public and devoted chiefly to public uses and purposes." And at page 1110, same book: "A private hospital is one founded and maintained by a private person or corporation; the state or municipality having no voice in the management or control of its property or the formation of rules for its government." And at page 1111, same book, it is said: "A private hospital which is in its nature a charitable institution is not liable in damages to patients for the negligence or misconduct of its officers or employés, but the rule is otherwise where the hospital is not a charitable institution." And authorities cited.

It cannot be claimed that the defendant hospital here is a charitable institution. It was chartered and organized by four physicians and one other stockholder for the profits that could be made out of it for their private gain. These physicians were in control of the hospital, and sent their patients to it to be treated and cared for in the usual and ordinary way that patients are treated and cared for in hospitals, and patients so sent to the hospital were entitled to such oversight, care, and attention as their mental and physical condition might require. The plaintiff, when received, was shown to be in an unconscious condition, but not entirely helpless physically. It is not stated that he was carried into the hospital, but that "he was helped in by two men," implying that he could move about by the help of others. In Railway Co. v. Wood, 95 Tex 223, 66 S. W. 449, 56 L. R. A. 592, 93 Am. St. Rep. 834, it is held: "If a railway corporation maintaining a hospital for its employés suffers one of them, while delirious from smallpox, to escape from the detention

camp, and thereby to communicate the disease to another, the latter may recover of the corporation for the damages thus inflicted on him, if it or any of its employés was guilty of negligence to which such escape was due." In that case it was held that the diligence required of the railway company maintaining a hospital or detention camp in which one of its employés was confined while suffering with smallpox depended upon the character of the disease, and the danger of communicating it to others; that it assumed the duties of using ordinary care to prevent him from exposing himself in deliriums, or being exposed otherwise, so as to communicate the disease to others. In Chapin v. Y. M. C. A., 165 Mass. 280, 42 N. E. 1130, it is held: "If, while much of the work of a corporation, which has no capital stock and applies all its revenues to the purposes of its organization, is of a charitable nature, its purposes are also social, and include the giving of lectures and of theatrical and other entertainments for the benefit of its members, the provision of a gymnasium and of athletic sports for promoting their health and the sale of food at a coffee or lunch counter, it has no right to exemption from liability for injuries occasioned by its own negligence to persons rightly on its premises." See, also, Davis v. Central Congregational Society, 129 Mass. 367, 37 Am. Rep. 368; Donnelly v. Boston Catholic Cemetery Association, 146 Mass. 163, 15 N. E. 505; Newcomb v. Boston Protective Department, 151 Mass. 215, 24 N. E. 39, 6 L. R. A. 778. There can be no question about the liability of a hospital which is being conducted for private gain, and not for charitable purposes, for damages to its patients through the negligence or misconduct of its officers and employés. It is bound to exercise that degree of care towards its patients placed therein measured by the capacity of such patients to look after and provide for their own safety. It is the duty of such hospital to employ only competent physicians and nurses, and to treat such patients with such skill and care as ordinarily obtains in the conduct of such institutions, and to protect its patients in such manner as their condition may render necessary, and such degree of care and diligence should be in proportion to the physical or mental ailments of the patient rendering him unable to look after his own safety. The motion to strike out the evidence, taking from the jury the consideration thereof and thereby directing a verdict for the defendant, is similar to a demurrer to the evidence which entitles the plaintiff to the benefit of all the facts proved by the evidence introduced and to all the facts and inferences which might be reasonably drawn or taken as true from any and all the facts actually proved by the evidence; and, if such facts and inferences together are sufficient to make a prima facie case of negligence, then the same should be submitted to the jury. The facts here proved were that four physicians were stockholders in the company, and were conducting the same for their private benefit. It may reasonably be inferred that Dr. Johnson, one of the physicians, sent the defendant to the hospital for treatment, as it is shown that he was his patient. It is proved that the plaintiff was suffering from epileptic fits, and that he was sent to the hospital while under the influence of epilepsy, and was unconscious, knowing nothing of what was transpiring. While it is contended by defendant in error that the plaintiff, when placed in the hospital, was wholly unable, physically, to walk alone, yet the inference is conclusive that he had sufficient physical ability to get about in the room. He was left alone; there were two beds in the room in which he was placed, and in which there was an open gas fire, both beds were rumpled, or as stated by the witness McGann, were "ruffled," and both on fire, showing beyond question that after he had gotten to the fire, and ignited his clothes, he had been to the beds, and fired them from his own burning clothes, and they were both burning when Miss McGann, the witness, entered the room and found him "in the middle of the floor," his clothes burning as stated by her. It is to be reasonably inferred, further, that some time elapsed from the time he came in contact with the fire until she found him, as no blaze was seen either on the beds or plaintiff's clothes, so they must have been slowly burning for some time. It is suggested by counsel for defendant in error that, in the absence of proof, the court will not take judicial notice of the time required to partially burn a cotton nightshirt off a man's back, but that all the burning proved might easily have occurred within two minutes or less. This occurrence was in midwinter, and the inference may readily be drawn that plaintiff's nightshirt was not cotton, and that the material burning was not of a very inflammable nature.

It is claimed by defendant in error that plaintiff failed to prove his condition when brought to the hospital. It was shown that he was brought there in an unconscious condition, and yet, from the evidence, it must be inferred that, while possibly not able to walk alone, he was physically able to get up, but liable to fall in any direction. It is also claimed that he failed to prove that physicians and nurses treating patients in a hospital, in the exercise of ordinary skill and diligence, are constantly in the room with such patients, or that in the treatment of a person suffering with epilepsy it was customary for them to remain constantly in the room of such person; and that he failed to prove any facts showing that the defendant's employés might have foreseen the possibility of injury to the plaintiff and guarded against it. Taking into consideration the condition of plaintiff when he was taken to the hospital, that he was unconscious and oblivious

to all his surroundings, and yet physically able to get up and tumble about, it was very easy to foresee the possibility of the result which came to this plaintiff with an open gas fire burning in the room by leaving him to look after his own safety. A hospital is not an insurer of its patients against injury inflicted by themselves, or that a patient in a hospital must be attended continuously by a nurse or other attendants, as it is claimed would be the case, as a matter of law, if the decision herein of the court below should be reversed, as indicated by defendant's counsel. On the other hand, hospitals will only be required as heretofore to us ordinary and reasonable care and diligence in the treatment and care of their patients. By what has been said, the court does not express an opinion as to the weight of the evidence any further than that it was sufficient to go to the jury for their consideration. The court erred in striking out the evidence.

We therefore reverse the judgment, and remand the case to the circuit court of Harrison county for further proceedings to be had therein.

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(63 W. Va. 119)

## STALEY v. BIG SANDY, E. L. & G. R. CO.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. INJUNCTION—DISSOLUTION—RES JUDICATA.
The granting of a motion to dissolve an injunction, before final hearing of the cause, is not conclusive of the party's right in the premises, and cannot be pleaded as res judicata upon his right to an injunction at the final hearing.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 396.]

2. INJUNCTION—DENIAL—REINSTATEMENT.
If an injunction is dissolved on coming in of an answer denying the equity of the bill, and testimony is afterwards taken and filed showing the right to such relief, the injunction may be reinstated.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 394.]

3. JUDGMENT—DISMISSAL—BAR.
An order dissolving an injunction, before final hearing, on filing of an answer denying the equity of the bill, is not conclusively final until the cause is ended, since the injunction may be reinstated pending the cause or at the hearing; and if the decree ending the cause is simply a dismissal without prejudice, such dissolution order is not a bar to an injunction in a new suit for the same purpose.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 396.]

4. SAME.
Dismissal of a suit without prejudice merely prevents operation of the decree as a bar to a new suit, leaving to the parties the same rights of prosecution and defense as if the new suit were the first instituted.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1018.]

5. SAME.
The dismissal must be upon the hearing, and not in terms directed to be without prejudice, to entitle a decree or order dismissing a former bill to be pleaded in bar to a new bill for the same matter.
[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1031, 1032.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wayne County.

Suit by S. C. Staley against the Big Sandy, East Lynn & Guyan Railroad Company. From certain decrees reinstating the cause and permitting complainant to file a supplemental bill, awarding an injunction thereon, and refusing to dissolve such injunction on the filing of defendant's plea of res judicata, it appeals. Affirmed and remanded.

Holt & Duncan, for appellant. William Fry and Campbell, Heffley & Davis, for appellee.

ROBINSON, J. An injunction having been awarded plaintiff, restraining the defendant, a public railroad corporation, from further building its roadbed, or grading and constructing a way for same through his land, the defendant filed its answer, to which there was general replication, and moved for dissolution of the injunction. The allegations of plaintiff's bill as to entry of the defendant on his land and construction of its railroad thereon were admitted by the answer, but it was denied that such entry and construction were without acquired right therefor; and it was averred that the defendant entered and commenced its work thereon with the express consent of plaintiff; that it had purchased from plaintiff the right of way, and paid a valuable consideration therefor; that it had taken possession thereof pursuant to said purchase and payment, and constructed its roadbed thereon at great expense; that plaintiff well knew he had sold the same as aforesaid, and made no objection until long after defendant had taken possession and performed much work thereon; and that plaintiff had conceived the wrongful and fraudulent intention of depriving defendant of said right of way, notwithstanding he had fairly sold same and received the full contract price therefor. The answer sets forth details relative to the aforesaid alleged purchase, the taking of possession by defendant thereunder, and its failure to receive conveyance in pursuance thereof. It prays that the injunction be dissolved, the contract for purchase of said right of way be specifically enforced, and the plaintiff required by decree to make proper conveyance. Said motion being heard in the circuit court on October 6, 1903, upon bill, answer, general replication, and the other proceedings in the cause, it was decreed that said injunction be dissolved, and the cause retained for further adjudication of the other matters involved therein. Depositions were thereafter taken; and on February 23, 1905, the cause was again heard, upon the aforesaid papers and proceedings, and depositions taken and filed; whereupon the court was of opinion that the defendant was not entitled to the affirmative relief sought in its answer, and said answer and the bill were dismissed. "without prejudice to the right of either party to institute any other suit or proceeding at law or in equity,

upon any of the matters set up in said bill or answer, in any court having jurisdiction thereof, should they or either of them be hereafter so advised." Upon the motion of plaintiff at a subsequent term, on May 17, 1905, the court, reciting that it appeared there had not been three terms of said court since entry of said decree dismissing the cause, ordered the cause to be reinstated and placed upon the docket; and thereupon the plaintiff was permitted to file that which is called in the record a supplemental bill, and the cause was remanded to rules for process thereon. Upon this last-named bill, on May 8, 1905, the court, in vacation, awarded an injunction in pursuance of its allegations and prayer, restraining the defendant from further entering upon the lands mentioned in the original bill, and from operating and maintaining a railroad over the same, until further order of the court.

We find the said supplemental bill to make no reference to the original bill or cause, but to set forth plaintiff's ownership of the same land, and to make substantially the same case; except it is alleged that the said railroad is completed through the land, that defendant is daily operating the same in running trains back and forth thereon, and is a constant trespasser, without authority for entry upon said land, or the construction or maintenance and operation of said railroad.

The defendant, on May 29, 1905, in vacation, moved to dissolve the injunction order so awarded upon said supplemental bill, and tendered and filed its plea of res judicata, to which there was general replication. By said plea it was averred, in substance, that the order of October 6, 1903, dissolving the former injunction, was a finality of the right to an injunction as prayed for by the supplemental bill; that the matters and things adjudicated upon the original bill are the same as those attempted to be reopened by this supplemental bill; that the parties and subject-matter are the same, and reference is made to the record in the cause in verification thereof; that the decree of February 23, 1905, was final, and a full adjudication of all matters arising upon the record of the cause, and is a bar to the prayer of said supplemental bill. Thereupon, as recited by the record, the cause was heard upon the plaintiff's bill, answer of defendant thereto, general replication to said answer, supplemental bill, said plea of defendant with general replication thereto, depositions taken and filed, the several orders and decrees theretofore entered, and the motion of the defendant to dissolve said injunction awarded May 8, 1905; upon consideration whereof, with consent of parties that the cause be heard upon the supplemental bill the same as if fully matured and set for hearing, the motion to dissolve was denied. From the said decrees reinstating the cause on the docket and permitting the supplemental bill to be filed as aforesaid, awarding an injunction on said supplemental bill, and refusing to dissolve such injunction on filing of defendant's plea of res judicata, the defendant appeals.

The right of the plaintiff to prevent, by process of injunction or the interposition of a court of equity, such taking of his property as alleged is so well settled as to demand no review here. As to this, it suffices to refer to the opinion in Jackson v. Big Sandy, East Lynn & Guyan Railroad Co. (decided at this term) 59 S. E. 749, wherein the defendant is the same as here. Has the plaintiff's plain right to so interfere been determined against him by final adjudication, so as to bar him from the relief sought in the last prayer he makes? This is the meritorious question; and the gist of the whole matter presented by this record is determined by answer to it. It is insisted that the dissolution of the first order of injunction is res judicata, and bars plaintiff from further relief. In view of the peculiar determination of the original cause by the decree without prejudice, is such position tenable? We hold that it is not. Mere dissolution of the injunction, on coming in of defendant's answer and replication thereto, is not by any means a final determination of plaintiff's right to an injunction in the cause, notwithstanding this remedy was his sole object. The cause still pending, he was entitled to introduce further proof and have the injunction reinstated. Or, indeed, since the allegations of the answer that the defendant had a right to the land it was taking, by a purchase from plaintiff which it asked to be specifically performed, negatived the allegations of the bill on which the injunction rested, and called for its dissolution at that time, yet when this sole defense disappeared by failure of proof, leaving the allegations of the bill in fact without defense, plaintiff was entitled to reinstatement of the injunction. Why it was not then promptly reinstated, instead of a dismissal of the right without prejudice to a new suit for the same purpose, we are wholly unable to discern. We cannot understand why the court by such dismissal compelled plaintiff to begin over again. At such dismissal he was, as the cause stood, clearly entitled to the relief prayed. There was in the answer no denial of the entry upon and damage to the land by construction of the railroad; this was admitted in plain terms. The defendant's only defense was that it had purchased of plaintiff the right of way, paid him in full for it, and was by such purchase and payment in possession. The court was of opinion that in this contention defendant failed in proof. Thus the one thing presented in bar of plaintiff's prayer was out of the way, and the prayer should have been granted, instead of ordering plaintiff back to first base, whence he was given permission to start again for the same goal he had attained.

Such decree was erroneous; but plaintiff

did not appeal, and chose to begin again. We infer lapse of time made him believe it advisable to form his allegations and prayer to meet the fact that the railroad was completed, and that the defendant's trespass then was the operation of trains thereon instead of construction work. The plaintiff now assigns cross-error as to this erroneous decree; but we need not consider or decide the question that presents itself as to his right to so assign herein, and at this time, in respect to the view we take of the whole matter. It is, to use a common phrase, "as broad as it is long." Were we to reverse that decree, we would consider the new bill as supplemental to the former one, presenting completion and operation of the railroad in violation of plaintiff's rights. We must not do a useless act. Reversal of that decree, and reinstatement of the injunction to which plaintiff was entitled, would do him no favor; the purposes and availability of that injunction are at an end by change of time. A somewhat new case, so made necessary, is presented by the new bill. It serves plaintiff the same purpose to consider it as an entirely new one, as it would to reverse that decree, reinstate the injunction, and permit the new bill to come in as supplemental for the purpose of seeking an enlargement of the injunction. The first injunction, were we to reverse the decree and reinstate it, would not now apply; it was a restraint simply against building the roadbed, and grading and constructing the way. We would therefore be compelled to look to the new bill for the right to relief, and to consider it as an original bill, which, by its terms and substance, it is. We may also, in respect to this view, pass the question presented as to the evidently erroneous procedure of reinstatement of the original cause on the docket. Certain it is, the decree dismissing the plaintiff's rights, as made by his bill, decided nothing, except that he could begin again, as he did. Having filed in fact a new and original bill, it may rightly be treated as an entirely new suit, upon the same subject-matter, presenting the changed state of facts as caused by time, and praying to fit the present emergency, and the old suit discarded.

But let us proceed further in answer to the contention that the decree dissolving the first injunction was a final adjudication of the right to enjoin. We say it would have been such if the final decree in that cause, entered on the merits, had been made so as to be final, as is usual in disposing of a cause on its merits. But that decree left the question expressly open for further adjudication. It, in its terms, barred nothing that had been in litigation in the suit. As we have said, dissolution of the injunction by the decree of October 6, 1903, being simply on the weight of the defendant's answer, was not final as to plaintiff's right thereto. For finality to be effective, there must have been a hearing of the cause upon the merits and a final decree thereon. High on Inj. § 1501, states this clearly: "The granting of a motion to dissolve is not conclusive upon the right to an injunction, and cannot, therefore, be pleaded as res judicata upon the right to an injunction at the final hearing. The effect of sustaining such motion is only to determine that, upon the showing then made, plaintiffs were not entitled to an interlocutory injunction, and the order is in no sense a bar to a perpetual injunction upon full proof at the final hearing. If, however, the injunction is made perpetual at the hearing, by the final judgment in the cause, that judgment becomes res judicata, and the court cannot afterward sustain a motion to dissolve." Surely the converse of the last proposition is true; and it would be most applicable here, were it not for the fact that the decree was not final, in that it left all matters open for litigation again. At section 1586, the same author says: "Refusal to grant an injunction upon an interlocutory application constitutes no bar to a subsequent renewal of the application, which can only be barred by a decree upon a full and final hearing." These principles we find quite uniformly recognized. Bart. Ch. Pr. § 140, says: "Although an injunction has been dissolved, and even though the order of dissolution has been affirmed by an appellate court, yet the plaintiff may introduce further evidence, and on that move to reinstate the injunction. Such a motion is in the nature of an original application for an injunction, and, if it be denied, the complainant may apply to the court of appeals, or any one of its judges, who may direct the reinstatement;" and "a court of chancery is indeed always open for the purpose of reinstating an injunction, either upon new evidence, or for any other reason, and the jurisdiction either to renew or revive an injunction is fully exercised." The Virginia cases there cited support this, and are authority binding on us. See, also, Hogg's Eq. Pro. § 716. In Tucker v. Carpenter, Hempst. 440, Fed. Cas. No. 14,217, it is held, upon reason and authorities there given, as follows: "Where an injunction has been dissolved on the coming in of the answer denying the equity of the bill, and testimony has afterwards been taken and published tending to show the right of the complainant to relief, the injunction on application may be reinstated." In Daniel's Ch. Pr. (6th Am. Ed.) 1681, it is stated: "In order to entitle a plaintiff to an injunction, at the hearing, it is not absolutely necessary that he should previously have made an interlocutory application for one, and he is at liberty then to claim an injunction, although he may have previously failed to obtain one, or to support it when obtained." In accord with all the authorities above quoted is the trend of the courts. The cases are multitudinous. A few of the many we have examined are Massam v. Thorley's C. F. Co., 14

Ch. Div. 748; Banks v. Am. Tract Soc., 4 Sandf. Ch. (N. Y.) 467; Johns v. Schmidt, 32 Kan. 383, 4 Pac. 872; Fisher v. Beard, 40 Iowa, 625; Glass v. Clark, 41 Ga. 544.

It is argued that the dissolution order was final because the court ordered that the cause "be retained for further adjudication of the other matters involved herein." Counsel say that the only other matter involved was the affirmative relief, specific performance of the alleged purchase, asked by defendant's answer. But the right of plaintiff to reinstatement of the injunction, pending the cause, or at the hearing, was also plainly one of the other matters involved.

We observe, therefore, that, since there can be reinstatement of an injunction dissolved on bill and answer, at any time during further progress of the cause, or at the hearing on the merits, there is no finality in the dissolution order of October 6, 1903. It is finality of the suit that bars, not mere dissolution of the injunction, retaining the cause for further hearing. All this is consistent with the decisions of this court. In Fluharty v. Mills, 49 W. Va. 446, 38 S. E. 521, it is held: "A decree dissolving an injunction upon the merits, where no relief but injunction is sought, is final and res judicata." Note here the words "upon the merits." Observe them also in Gallaher v. Moundsville, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. Rep. 942: "An order dissolving an injunction, based on the merits of the case, where the only relief sought by the bill is such injunction, is, as regards finality, such a decision as will sustain the defense of res judicata." The same distinction applies in Burner v. Hevener, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948, where the same words, "upon the merits," are used. Each of these cases involved a decree on the merits, which was pleaded in bar—a decree ending and foreclosing the matter litigated. But in the case now before us, the decree ending it was expressly excepted, by its very terms, from effect of finality. It did not foreclose anything.

Dismissal without prejudice, such as we find here, merely prevents operation of the decree as a bar to a new suit, leaving to the parties the same rights of prosecution and defense as if the new suit were the first instituted. 16 Cyc. 469; Black on Judg. § 721. In the section last cited, we find: "Nor does it alter the case that the court erred, by dismissing the bill without prejudice, when it ought to have been dismissed finally upon the merits." So we say it does not alter the case that the court below erred in this cause, by dismissing the bill without prejudice, when it ought to have decreed in favor of plaintiff. It must be corrected on appeal, and, until that is done, it must stand as rendered and cannot be impeached collaterally. Black on Judg. supra; Wanzer v. Self, 30 Ohio St. 378. Such decree was no bar to the prayer of plaintiff's new bill, and, dissolution of the former injunction not being foreclosed thereby, was likewise no bar to a new injunction in relation to the same subject-matter. Directly in point is Story, Eq. Pl. § 793: "A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismission was upon the hearing, and was not in terms directed to be without prejudice."

These observations lead us to the conclusion that the plea did not set up a bar to the right of plaintiff for the injunction prayed in, and awarded upon, his new bill. The circuit court did not err in refusing to dissolve the last-named injunction. Its decrees taking cognizance of such new bill, awarding the injunction thereon, and refusing dissolution thereof upon defendant's plea of res judicata, are therefore affirmed; and this cause is remanded to the circuit court to be further proceeded in, if moved by either party, according to the principles herein and the rules governing courts of equity.

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(63 W. Va. 128)

## HUTCHINSON v. UNITED STATES EXPRESS CO.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. CARRIERS—EXPRESS COMPANIES—LIABILITIES.

Being common carriers, and, as such, insurers of property intrusted to them for shipment, express companies are liable as insurers until after they have performed all that the law or the special contract of shipment has enjoined upon them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 481.]

2. SAME.

Such insurance is not primary or special in its nature, but only incidental to the contract of carriage, and neither begins earlier nor continues longer than is necessary to secure faithful and efficient execution of the contract of carriage.

3. SAME—DELIVERY.

Ordinarily, an express company must make delivery of goods or packages, carried by it, to the consignee in person at his place of business or residence, or to some person authorized to receive the same, before its liability as a common carrier and insurer thereof ceases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 300.]

4. SAME—SPECIAL AGREEMENT.

But the general rule, respecting the place and mode of delivery, may be modified or set aside by usage or special agreement, under which delivery may be made at the express office or agency; and the duty of the carrier in the premises is then measured by the usage or custom or the terms of the special agreement.

5. SAME—NOTICE OF ARRIVAL.

Liability as carrier for a package carried to a point at which the established practice is to make deliveries at the express office or wareroom, on application for the goods, pursuant to notice of their arrival, given by mail, does not terminate until a reasonable time, allowed for removal after the giving of the notice, has elapsed.

6. SAME—FAILURE TO GIVE NOTICE.

If the duty to give such notice be omitted, and the goods are lost by reason of a cause, other than one of those for which the law makes

an exception in favor of the carrier, such as an act of God, or the like, the carrier is generally held to accountability as an insurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 481.]

7. SAME — LIABILITY AS WAREHOUSEMEN — LOSS OF PACKAGE—LIABILITY.

But if failure to mail the notice, when such is the adopted mode of giving it, is not the proximate cause of the delay in removing the package, and the loss would have occurred if it had been mailed, and sufficient time has elapsed for the receipt thereof and removal of the goods, if one had been mailed, and the consignee had exercised reasonable diligence, the carrier is liable as warehouseman only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 609.]

8. SAME—NOTICE.

A consignee who did not call for his mail, and would not have received notice of the arrival of his package at an express office, at which deliveries are made only at the office after notice by mail, cannot hold an express company liable as carrier, for a package which arrived at 4:30 p. m. on Saturday, and remained in the office until the following Monday night, when it was stolen, without fault or negligence on the part of the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 520, 521.]

9. TRIAL—DEMURRER TO EVIDENCE.

When the practice, on the part of an express company at a particular office thereof, to make deliveries only at the office after mailing notice of arrival of packages is not controverted, and the plaintiff testifies to such practice, respecting consignments to himself, his testimony affords sufficient ground, in the evidence, for an inference that the usage exists, to take the case from the jury, as to that question, by a demurrer to evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 346.]

10. WAREHOUSEMEN—NEGLIGENCE.

The fact that a building in which a warehouseman stores goods is not burglar proof is not evidence of negligence on his part, in an action against him for their loss by theft.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Warehousemen, § 52.]

11. CARRIERS—LOSS OF GOODS—NEGLIGENCE.

Leaving an express package in the freight room of a railway station, at which the express office is maintained, instead of in a room thereof in which such packages are usually placed, neither continues or extends liability as carrier, nor amounts to negligence as warehouseman.

(Syllabus by the Court.)

Error to Circuit Court, Braxton County.

Action by H. B. Hutchinson against the United States Express Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Hall Brothers, for plaintiff in error. Haymond & Fox, for defendant in error.

POFFENBARGER, J. In an action pending in the circuit court of Braxton county, on appeal from a judgment of a justice's court, in which H. B. Hutchinson was plaintiff and the United States Express Company defendant, for the recovery of $128.60, the value of a package of furs, stolen from the express company, a demurrer to the evidence was sustained, and judgment rendered for the defendant, of which Hutchinson complains here.

Hutchinson, a dealer in furs for a number of years, residing in the vicinity of Cogar, a town in Braxton county, frequently, if not generally, sent out through the country one or more buyers who bought furs at such prices as could be agreed upon, and turned them over to him at certain fixed prices, retaining the difference as compensation for the service. These buyers graded the pelts according to quality, and shipped them by express to him at Cogar, and if the packages so shipped were small and of little value, he took them from the express office, but if they were of considerable size, he regraded and repacked them for the market and consigned them to a dealer in New York, without removing them from the express office premises. Deliveries were never made to him by the express company, but it was the practice to notify him by mail of the arrival of packages. The furs for the value of which this action was brought had been collected by B. F. Blake, who resided on Hutchinson's farm, and by him delivered to the express messenger on the train at a place called Carl Siding, on Saturday, February 4, 1905, consigned to Hutchinson at Cogar. Blake took passage on the same train for the same place, and, on alighting from the train at Cogar, saw the package of furs. This was after 4 o'clock p. m. of that day. No notice of the arrival of the package was given to Hutchinson by the express company, and he knew nothing of it, until late Monday evening, February 6th, when Blake came to his house and informed him of the fact. Had notice been given him by mail, it would probably have been received at about the same time. That Monday was a bad, stormy day, the ground being covered with a heavy, soft, melting snow, and the stream lying between Hutchinson's place and Cogar somewhat swollen. He probably would not have called for the package on that day, had he been aware of its arrival. On the next day, he and Blake together went to Cogar, and found that, on the preceding night, the railway station in which the express office was, and in the freight room of which the package had been left, had been burglarized and the package stolen. It further appears from the testimony of Hutchinson himself that, had he found the package there, he would not have taken it away, but would have regraded it and immediately shipped it to New York, it being one of considerable size and value. Whether, at the time the package was taken, it was in the hands of the express company as common carrier, or merely as warehouseman, is a question of the gravest importance. A common carrier is exempted from liability for loss of goods, intrusted to it for carriage, in only a few instances, and, subject to these exceptions, it is an insurer of them to the extent of their value. Ordinarily, it can be relieved only on the ground of loss or damage by act of God, vis major, or inevitable accident. These are things against which pru-

dence and care cannot avail, and, for that reason, the law exonerates common carriers from liability for loss attributable to them. Moore on Common Carriers, pp. 219, 224, inclusive; Hutchinson on Carriers, § 265; 6 Cyc. 376, 377; 5 Am. & Eng. Ency. Law, 233. The exceptions are classified by Hutchinson as follows: (1) Those arising from what is known as the act of God; (2) those caused by the public enemy; (3) those arising from the act of the public authority; (4) those arising from the act of the shipper; and (5) those arising from the inherent nature of the goods. Loss by theft or robbery is not within any of these exceptions. "The common-law liability of a common carrier, as an insurer of goods carried, did not extend to losses caused by the acts of public enemies; and the term "enemies" was understood to mean the public enemies of the country of the carrier, and not of the owner of the goods, and did not include thieves, robbers, or those engaged in mobs, riots, or insurrections." Moore on Common Carriers, 225; Hutchinson on Carriers, § 316. A much lighter degree of responsibility rests upon the carrier, after the function of carriage is deemed by the law to have been completed, and its relation to the property and the owner thereof has assumed the character of that of mere custodian. After the goods have reached their destination and the lapse of a reasonable time, within which the owner is expected to remove them, the carrier's liability respecting them is measured by the legal principles applicable to warehousemen. Under these principles, a loss not due to the negligence of the custodian or his failure to exercise such care and diligence for their safety, as an ordinarily prudent person would bestow upon his own property, is excusable. He is not an insurer, and not liable for loss by robbery or theft, if he has not contributed to it by negligence. Berry v. Railroad Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781; Hutchinson on Carriers, § 685; Moore on Common Carriers, 181. These are general principles more directly applicable to such carriers as railway companies and steamship lines, which, ordinarily, do not make deliveries to the consignees, but, on the arrival of the goods at the points of destination, store them in warehouses until called for. But the law of warehousemen sometimes governs the duty, rights, and liabilities of express companies. These are common carriers, like railroads, steamships, and other instrumentalities for the transportation of goods generally; and, as such, they are insurers so long as the goods remain in their hands as carriers. 12 Am. & Eng. Ency. Law, 546; Hutchinson on Carriers, § 80. Good reason for rigidly applying to express companies the law of common carriers is their profession and representation of superiority over other carriers in respect to facilities, whereby they obtain both preference and higher compensation. They claim to have specialized and limited their business, and so enabled themselves to bestow upon property instrusted to them a degree of care that a general carrier cannot give, and to have employed agents and instrumentalities of peculiar and superior fitness for handling certain classes of commercial articles in transportation, so that, on the whole, they excel in respect to safety and economy in time.

By the general rule of law, express companies are required to deliver the goods to the consignee in person, or his authorized agent, at his residence or place of business. The duty of carriage is not terminated on their arrival at the point of destination, that is, at the station or agency to which they are directed. The duty of carriage and the liability as carrier continue beyond this point to the residence or place of business of the consignee. 12 Am. & Eng. Ency. Law, 550; 6 Cyc. 454; Hutchinson on Carriers, § 716. In this respect, express companies differ from other public carriers. But this rule is subject to some qualifications. If a diligent and honest effort to find the consignee or any person authorized to receive the goods has proved unavailing, failure to make actual delivery is excused, and the company may then deposit the goods in a reasonably safe warehouse. From the time of such deposit, its liability as carrier ceases, and it holds the property in the capacity of warehouseman. 12 Am. & Eng. Ency. Law, 551; 6 Cyc. 454; Van Zile, Bailments & Carriers, § 567; Hasse v. Express Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328. Of course, the commencement and termination of liability as carrier may be limited and controlled to some extent by special contract. How far this may be done, it is unnecessary here to inquire. The general rule of law is also relaxed, varied, or set aside by usage or custom established by the company, and recognized and acquiesced in by the public. The maintenance of delivery messengers and vehicles involves an expense wholly out of proportion to the business transacted at small way stations, and, at such places, a custom or usage generally obtains under which deliveries are not made elsewhere than at the express company's office. The consignee is expected to call at the office for his package after having been notified of its arrival. Even in cities, delivery districts are sometimes established, beyond the limits of which deliveries are not made. Hutchinson on Carriers, §§ 717, 718; 12 Am. & Eng. Ency. Law, 553. The duty to give notice, usually by mail, is founded upon the usage or custom, dispensing with the general rule requiring delivery at the residence or place of business of the consignee. Bearing this in mind, the conclusion that the express company is bound to give notice of the arrival of the goods is not inconsistent with the holding in Berry v. Railroad Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781, declaring that a railroad company is not required to give notice to the consignee of such arrival. The rules of law prescribing the

duties of railroad companies and express companies differ in this respect, and the difference is founded upon the additional burden placed by the law upon express companies to carry the goods from the office to which they are consigned to the residence or place of business of the consignee. But for the usage to the contrary, the liability as carrier would not end until after such delivery or an unsuccessful effort to effect it. The general rule is only partially set aside by the usage. Instead of making such actual delivery, the company gives a notice of the arrival, and so substitutes for actual delivery a sort of constructive delivery. It necessarily follows that a reasonable time must be allowed for removal of the goods after notice has been given. Hutchinson on Carriers, § 716; Express Co. v. Holland, 109 Ala. 362, 19 South. 66; Laporte v. Express Co., 23 App. Div. 267, 48 N. Y. Supp. 292. The notice must be given promptly on the arrival of the goods. Baldwin v. Express Co., 23 Ill. 197, 74 Am. Dec. 190; American Express Co. v. Schier, 55 Ill. 140.

But the heavy burden of insurance, incident to the contract of carriage, is not extended farther than is necessary to enforce good faith on the part of the carrier, and secure reasonable safety of transportation. While in transit, property is wholly in the hands of the carrier and beyond the personal control of the owner, who can neither know to what perils the carrier subjects it, nor take any measures for its safety, and the opportunities of the carriage contract for imposition by fraud and collusion are very great. These and other considerations form the basis of the insurance feature of the contract, and when these reasons for its continuation have ceased, by the completion of the contract of carriage, the liability as insurer terminates. From its exceptional and arbitrary character, it necessarily follows that the party in whose favor it is imposed must be diligent in the performance of every duty imposed upon him by law or the special contract. The insurance is not primary or special in character, but merely incidental to the main duty of carriage. It begins and ends with the duty of carriage, and the incidental time necessary to receiving the goods for shipment and delivering them after shipment. It has no independent life or being. The owner of the goods cannot consult his mere convenience in respect to time of removal after notice. He must remove promptly, though the weather be inclement and the roads difficult for travel. "A consignee must promptly and diligently remove goods in a reasonable time after arrival, without regard to distance from the depot, or the means of removal or convenience of the consignee, else the carrier will cease to be further liable as carrier." Berry v. Railroad Co., cited. While this is railroad law, it clearly applies to an express company after it has fully performed its duty. In Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 350, the plaintiff having called for his package, and found it ready, left it, intending to call for it the next morning. In the night it was stolen. The court held the carrier not liable, since the box was in its care as warehouseman only. In Lemke v. Chicago, etc., R. R. Co., 39 Wis. 449, goods arrived at their destination on Saturday evening, and were destroyed by an accidental fire on the Tuesday following, at about noon; and the court held that the owner had had a reasonable time in which to remove them. It was further held that consignee's absence from the town during most of the time elapsing between the arrival and loss of the goods was immaterial. In Chalk v. Charlotte, etc., R. R. Co., 85 N. C. 423, the goods were left on the platform of the depot for the convenience of the consignees, and remained there for nearly two days. The consignees had notice of the arrival, and had paid the freight charges, and with knowledge of the place of deposit, but failed to remove the goods on account of inability to secure a drayman for the purpose. On the afternoon of the second day, the goods were destroyed by an accidental fire, and the court adjudged the railroad company not liable. A consignee having had notice of the arrival of goods on Saturday afternoon, and neglected to call for them until the following Wednesday, has had more than a reasonable time, and can hold the carrier liable as warehouseman only. Wynantskill Knitting Co. v. Murray, 90 Hun, 554, 36 N. Y. Supp. 26. Three full days to remove after notice of arrival is a reasonable time, and the carrier cannot be held as an insurer after the lapse of such a period. Tarbell v. Royal Exchange, etc., Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350.

As no notice of the arrival of the package was given, in this instance, it is insisted, in the argument for plaintiff in error, in view of the principles stated, that liability as carrier had not ceased, and the demurrer should have been overruled. But there is another principle which must not be overlooked. The omission of duty, relied upon as fixing upon the carrier liability for the loss, must have been the proximate cause thereof. In Berry v. Railroad Co. this principle was applied against the carrier so as to hold it for the loss. The consignee having called upon the agent for the goods was told, contrary to the fact, that they had not arrived. But for this false statement, they would have been removed and saved from loss by fire. The false statement by the agent continued or extended the liability of the railroad company as carrier and insurer of the property. Had he truthfully informed the consignee that they had arrived, and they had then been left in the warehouse of the defendant liability as a carrier would have ceased, and the loss would have fallen upon the consignee. Application of the same principle here would exonerate the express company; for,

though no notice was given, the result would have been the same, if it had been. The plaintiff himself testifies that if a postal card addressed to him, notifying him of the arrival of the package, had been placed in the post office, he would not have received it earlier than Monday evening, the time at which he had actual notice from another source. Hence, he would not have called for the package until the next day. To excuse a carrier from liability on the ground that the cause of the loss was the act of God or the like, it must appear that such act was the proximate, not the remote, cause of the loss. 6 Cyc. 382. Conversely, if the proximate cause is an act of God, the carrier is relieved, although, preceding the loss he had been negligent, and, but for that negligence, the goods would not have been exposed to the peril resulting in their destruction. 6 Cyc. 382. This is probably subject to the qualification that the negligence must not have contributed to the loss. The rule is also applicable where the loss is due to a cause from which the carrier has exempted itself by a valid contract. Richmond, etc., R. Co. v. Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; Missouri, etc., R. Co. v. McFadden, 89 Tex. 138, 33 S. W. 853. The package in question here remained in the care of the express company at Cogar from Saturday afternoon, about 4:30 p. m., until Monday night. Had a notice of its arrival been deposited in the post office on Saturday afternoon, the company would then have performed all it was incumbent upon it to do. The consignee might well have been expected to obtain the notice on that evening or Monday morning, and then, on Monday, to have called for and received his package, and either taken it from the office or reshipped it; and, in the latter case, it would, on Monday night, have been in transit for New York and thus escaped loss. Though no such notice was placed in the post office, this fact neither occasioned nor contributed to the failure of the consignee to call for his package on Monday. By his own testimony, it appears that he would not have received the notice; for, owing to the inclemency of the weather and the bad condition of the road, he did not go to the post office on Monday. Failure to send the notice did not, therefore, prejudice or injure him in any sense or degree, and was not the cause of his loss. To hold the express company liable would virtually amount to an infliction of punishment for an omission of duty which in no way injured the plaintiff. We feel bound, therefore, in obedience to the general rule of law which precludes relief against wrongs or failures of duty, not prejudicial or productive of injury, mere technical wrongs, to say that recovery could not be sustained on the mere failure to give notice of the arrival of the package. To this it may be replied that, if the consignee had gone to the post office for his mail on Saturday evening or Monday, his mission would have been fruitless, as regards notice of the arrival of his package; but, had he done this, his position would have been different from what it is. He could then have said that the omission of duty on the part of the express company had wrought injury to him. He could then truthfully have said that he had exercised the diligence required of him by law, and had sustained a loss by reason of failure of duty on the part of the company. Lack of sufficient evidence to establish the usage, above mentioned, relieving from the duty to make actual delivery, is suggested, but it seems to have been regarded as a concessum. The plaintiff says such deliveries were never made to him. He was simply notified by postal card, and as he was a patron of the office, his testimony lays ample ground for the inference that such was the practice or custom as to all patrons thereof; for discrimination is not to be presumed, and none is proven. The inference so raised is not contradicted in any way.

Effort is made to hold the company liable on the ground of the character of the place of deposit. Just what sort of a building it was, the evidence does not disclose, but it seems to have contained at least three rooms, a waiting room, a freight room, and an office room, and there may have been another, used as a special place of deposit for express packages. It was entered by breaking a window and prying the hinges of an inner door loose. The package was left in the freight room. No law requires the maintenance of a burglar proof building, and it must be obvious that the ordinary railway station constructed of wood, brick, or stone, and having glass windows unprotected by iron shutters, as practically all such buildings have, may be easily entered by any one who wills to do so. The protection upon which the citizen relies for the safety of his property is not so much in the burglar proof character of buildings and other places of deposit, as the honesty of the masses of the people, and the wholesome fear which the comparatively few criminals have of the penalties of criminal law. This building was not left open nor unlocked, and the entry was made with force and violence. There is nothing in the evidence relating to its character or condition which would have warranted a jury in finding a verdict against the defendant on the ground of failure to deposit the goods in a safe place. The evidence wholly fails to show any fact or circumstance tending to prove that the building was not reasonably safe. Nor could a verdict stand upon the failure to place the package in the express room instead of the freight room. No law requires the deposit to be made in any particular room. If the place of deposit be reasonably safe, the requirement of the law is fulfilled. Deposit in the freight room instead of the express room is neither like, nor analagous to, ship-

ment to a wrong destination; for the goods are still in the immediate custody and control of the carrier, and ready for delivery at the place of destination.

The views and conclusions just expressed result in an affirmance of the judgment.

Affirmed.

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(63 W. Va. 144)

## STEVENSON v. YOHO.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. DEEDS — DESCRIPTION — CONTROLLING EFFECT.

A general description of land in a deed which can be made certain by the surrounding circumstances, or identified by reference to the land itself or other objects that more or less distinctly indicate or determine it, will control a partial and uncertain description by boundaries, if it satisfactorily appear from the terms of the deed, read in the light of the situation of the parties, the subject-matter of the deed, and the conduct of the parties in the negotiation of the contract and their subsequent conduct, respecting the deed and land, that it was the intention of the grantor to convey the same as so generally described.

2. SAME.

A deed, executed by a parcener who has made a verbal partition of the land and is in the exclusive possession of part thereof, conveying a portion of the oil and gas therein, and describing the land wherein the oil and gas so conveyed are as land "owned and controlled" by him, and also in a general, indefinite, and incomplete manner as bounded by adjacent lands of other persons, passes title to the oil and gas in that portion assigned to him by the verbal partition.

3. PARTITION—OPERATION AND EFFECT.

In a suit brought by the grantee in such deed for partition of the oil produced by a well located on a portion of the land, other than that which was assigned to the grantor by the verbal partition, under a claim of title thereto by virtue of such deed, such grantor may, by reason of the implied warranty obtaining between coparceners, defend and resist the demand for partition of the oil from such well.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 450.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County.

Bill by Josiah Stevenson against Solomon G. Yoho. Decree for defendant, and plaintiff appeals. Affirmed.

Hall & Hall, for appellant. M. R. & P. D. Morris, for appellees.

POFFENBARGER, J. Josiah Stevenson complains of a decree of the circuit court of Wetzel county, made in a suit brought by him against Solomon G. Yoho and others, denying to him participation in the royalty oil of a certain well located on a small tract of land containing about 15 acres, part of a larger tract containing more than 90 acres, which said 15-acre portion is owned or claimed by Mary E. Smith, and the residue by said Yoho. Stevenson's claim to the oil is based upon a deed executed by Yoho and his wife, the construction of which is the sole question presented for decision.

The entire tract of land had formerly belonged to Samuel Yoho, the father of both Solomon G. Yoho and Mary E. Smith. Dying a good many years ago, he left surviving him Katherine Yoho, as his widow, and seven children. Solomon, as early as January, 1887, became the owner, by purchase, of five of the shares, which, together with the one he inherited, gave him title to an undivided six-sevenths of the land, leaving the other seventh in his sister, Mary E. Smith. The western line of said tract ran almost directly north and south, and the northern line almost directly east and west. The western line ran on a course reversed S. 25° and 20′ E., a distance of 78 poles; and thence the southeastern line ran on a course reversed S. 58° and 40′ W., 133 poles. From the southwestern end of this last line, a short line connected with the southern end of the western line. In 1891, Solomon Yoho purchased of S. C. Miller a small oblong tract of 10 acres adjoining the 90-acre tract, on the southeastern side, where the long line above mentioned is, and this 10-acre tract adjoins the large tract at some distance southwest of the eastern corner of the large tract by the abutting of the northwest end thereof on said line. In 1893, a strip containing 37 acres and uniform in width, running across the northern end of the large tract, was laid off by a surveyor, and exclusive possession thereof taken by Katherine Yoho, widow, and Mary E. Smith, with the understanding that said 37 acres should be held and possessed by them, as covering in full the dower of said Katherine in the whole tract, and the share of Mrs. Smith therein, amounting to about 15 acres. Mrs. Smith's share, according to this understanding and agreement, was located in the eastern end of said strip, the northeastern corner of the entire tract; and was to be bounded on the north and east by lines of the original tract, on the south by said newly established line of the 37-acre portion, and on the west by a line to be located far enough from the east line of the original tract to give her the requisite quantity. On the 16th day of March, 1897, Katherine Yoho and Mrs. Smith and her husband executed to one Furbee an oil and gas lease on a tract of land, which, by the description as to boundaries, seems to be said 37-acre tract, although it is described as containing 40 acres more or less. This lease treated the remainder of the tract as being in the ownership of Solomon G. Yoho, for it says the tract leased is bounded on the south by the lands of S. G. Yoho. On the same day, S. G. Yoho and wife executed to Furbee a lease for oil and gas purposes, which, it is claimed, was intended to cover the residue of the 90-acre tract, as well as the adjacent 10-acre tract. This lease purports to cover 70 acres more or less, but, in the description by boundaries, it takes no notice of the 37-acre strip cut off of the northern side, and, on that side, calls for the John R. Gorby tract, lying north of the entire 90 acres. Both leases after-

wards came into the ownership of the Kanawha Oil Company, and five wells were drilled on the premises, three outside of the 37-acre strip, one on the 37-acre strip, but not on the portion thereof claimed by Mrs. Smith, and another on the portion claimed by Mrs. Smith, the oil from which is the matter in controversy here.

The deed under which the plaintiff claims one-fourth of the royalty oil from said well, 1/32 of the entire production thereof, executed by Solomon G. Yoho and wife to W. S. Stevenson, now deceased, son of the plaintiff, Josiah Stevenson, on the 24th day of May, 1900, for and in consideration of the sum of $315, conveyed 1/32 of all the oil in the premises described as follows: "Said land containing ninety (90) acres, more or less, and situated in Center District, Wetzel county, West Virginia, and owned and controlled by Solomon G. Yoho, and is bounded as follows: On the north by the lands of John Gorby; on the south by the lands of A. J. Livingston; on the east by the lands of Marcellus Postlethwait; on the west by the lands of C. P. Strosnider and J. W. Moore." The intention to include in this the 10-acre tract appears from the reference in the description thereof to the Marcellus Postlethwait tract adjoining the same, but which did not join the original Yoho tract. That the deed includes this tract is not controverted. The original deed for the 90-acre tract to Samuel Yoho described it as containing 68 acres. The quantity thus called for, taken in connection with the facts and circumstances known to the parties, is relied upon as important. If it was intended to convey the oil and gas in the whole original tract, as well as in the 10 acres, the quantity could not have been described, consistently with the original deed, as being less than 78 acres. Mrs. Smith and the widow, at the date of the deed, held and had held for some years exclusive possession of the 37-acre tract. Stevenson knew Solomon G. Yoho did not own the entire original tract, and that he owned or claimed part only of the 37-acre strip, subject to the dower of his mother therein. As evidence, apparent on the face of the deed, of intention not to include the 13 or 15 acres claimed by Mrs. Smith, failure to mention, in the description, the tract of land which adjoins said northeastern corner on the east side thereof, namely, the land of S. C. Miller, is relied upon. The Postlethwait land, called for as the eastern boundary, lies southeast of the 10-acre tract, and does not touch the original 90-acre tract anywhere. Furbee took leases on separate portions of the land on the same day, and it is under these two leases that the oil in question is produced, but the deed from Yoho to Stevenson makes no mention of these leases. It conveys 1/32 of the oil in place, the equivalent of one-fourth of the usual royalty. Stevenson knew Mrs. Smith owned either an undivided one-seventh interest in the land on which he took the lease, or in severalty the supposed equivalent thereof, and her interest was under discussion between him and Yoho at the time the deed was executed. He never claimed any interest in the oil from the well on the land claimed by her, nor, in fact, in that from the other well on the 37 acres, and, after taking the deed in question, he contemplated purchase of oil in that tract from Mrs. Smith. Besides, he took a deed calling by quantity for less land than the combined area of the original Yoho tract and the 10-acre tract. To this is to be added the proven circumstance that they reckoned the acreage in their negotiations, and concluded that Mrs. Smith's share would be 15 acres, and the deed describes the land as land "owned and controlled" by the grantor, which was not at the time true as to the 15 acres. Much testimony was introduced to show that, by express agreement between Stevenson and Yoho, the deed was not to cover the interest of Mrs. Smith, but this evidence is not admissible. If the deed is ambiguous, in the light of its terms as applied to the subject-matter, and we think it may be so regarded, the circumstances and situation of the parties, their conduct in entering into the contract, and their subsequent conduct bearing upon its construction, and the peculiar nature and situation of the subject-matter, constitute all the evidence admissible on the question of construction. Newman v. Kay, 57 W. Va. 98, 49 S. E. 926; Winton v. McGraw, 60 W. Va. 98, 54 S. E. 506; Crislip v. Cain, 19 W. Va. 438.

If the deed is ambiguous, as suggested above, we think the circumstances amply sufficient to negative intention to include the land assigned to Mrs. Smith in the partition. Though the line across the 37-acre strip, cutting off her share from the residue of the dower land, was not run until after the deed to Stevenson was executed, the testimony shows that her interest and the extent thereof in acres was fully discussed between the parties. Stevenson knew the grantor did not either own or claim all of the land, and also the exact number of acres Mrs. Smith claimed. The description by boundaries is very general and somewhat inaccurate, and, as suggested in the brief, there is a significant failure to mention in it the Miller tract, adjoining the northeast corner of the original Yoho tract. Stevenson did not think he had all the land in his deed, for he asked one Morris to obtain an option on the 37-acre tract, after he had taken the deed from Yoho, and the quantity called for in his deed was less than the combined area of the 90 and 10 acre tracts.

Perhaps it would be more in conformity with legal principles to say that the deed is not ambiguous, and that on its face it calls for land which can be none other than that to which Yoho held the complete equitable title, under the parol partition and assignment of dower. The deed conveys oil un-

der land "owned and controlled" by the grantor. He then owned, under the partition, part of the 37-acre tract, of which he did not have possession, and he owned completely, and had in his exclusive possession, all of the original tract except the 37 acres. This peculiar language of the deed suggests peculiarity in the subject-matter, or rather an intention different from that indicated by deed conveying land by mere metes and bounds or description as to location. It suggests something within the peculiar knowledge of the parties, and with reference to which they contracted, and, taken in connection with the facts and circumstances to which reference has been made, it leaves no doubt as to the intention to limit the grant to oil in the two tracts of land, less the portion assigned to Mrs. Smith. The reasoning and principles stated in Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895, fully sustain this construction of the deed. A general description of land in a deed will control a particular description by metes and bounds, when shown by the surrounding circumstances to be more consistent with the intention of the parties. Adams v. Alkire, 20 W. Va. 480. This conclusion is supplemented and fortified by the further consideration that Stevenson was bound to take notice of the possession of Mrs. Smith. Ellison v. Torpin, 44 W. Va. 414, 30 S. E. 183; Campbell v. Fetterman's Heirs, 20 W. Va. 398; Western Mining, etc., Co. v. Peytona, etc., Co., 8 W. Va. 406. As sustaining this conclusion, the rules and principles applied in Barbour, Stedman, and Herod v. Tompkins, 58 W. Va. 572, 52 S. E. 707, 3 L. R. A. (N. S.) 715, may be invoked. Point 6 of the syllabus in that case seems to be clearly applicable. It reads as follows: "When the other terms of the description in a deed are equivocal and uncertain as to the identity of the land, and the description by quantity, location, and ownership, viewed in the light of admissible extraneous evidence, makes clear the intent of the grantor to convey only the land so described by quantity, location, and ownership, the deed is not void for uncertainty, and will be given effect according to the manifest intent, as gathered from the whole instrument." Other well-settled rules of construction approved and applied in that case, obviously apposite here, read as follows: "The deed is to be construed with reference to the actual state of the property at the time of its execution, and the law assumes that the parties refer to this for a definition of the terms made use of in their deed." "If there is any land wherein some of the demonstrations are true and some false, only those lands shall pass wherein the demonstrations are true, or, in other words, where the grantor in a deed owns lands which comply with all the particulars of the description, the deed passes title to those lands only, although it may appear that the grantor intended other premises to pass also, which were included within only a part of the description." "In describing land, quantity controls where other parts of the description are not sufficiently certain in defining the parcel of land intended to be conveyed."

A serious question is injected into the case by the failure of Mrs. Smith to answer the bill. As to both her and her husband, it was taken for confessed, and the defense is made by Solomon G. Yoho only. Has he such interest in the premises as entitles him to defend? We think he has. Having the legal title to six-sevenths of the whole tract in his hands, he has made a deed which the grantee interprets as covering the entire tract. The partition between him and Mary E. Smith, at the time this deed was made, was imperfect and incomplete. As regards the legal title, he and Mrs. Smith were still coparceners. They had severed the estate in respect to possession only. Equitably, they held and enjoyed the land in severalty, but, legally, they owned it together. Even when partition between coparceners has been fully executed, in a legal as well as in an equitable sense, there is an implied warranty in favor of each against the others, as long as the relation of privity exists among them, which compels them to make good any loss by failure of title to the part assigned him. He may call for and obtain a repartition. Cain v. Brown, 54 W. Va. 656, 46 S. E. 579; Dingess v. Marcum, 41 W. Va. 757, 24 S. E. 624; Bowers v. Dickinson, 30 W. Va. 709, 717, 6 S. E. 335; Rawle, Covenants of Title, § 270; Freeman, Co-tenancy, § 533. It would seem necessarily to follow that in the case of a mere parol partition, no legal title having passed, the duty to make good any loss to one coparcener, occasioned by the act of the other, would be still more imperative. After the parol partition, Yoho held the legal title to six-sevenths of the 15-acre tract in trust for his sister. She held the equitable title as to that portion, with right to call for a conveyance of the legal title. Having the legal title, Yoho executed a deed which the grantee claims carries both the legal and equitable title to said six-sevenths of the 15-acre portion. The enforcement of the deed, according to the grantee's interpretation thereof, would undoubtedly enable Mrs. Smith, under the principles above stated, to demand and have a repartition of the tract of land. She could set aside the parol partition, and proceed as if it had never been made. Being then a tenant in common with Yoho, she could treat him and his grantee as wrongdoers, guilty of waste, and compel both to account to her jointly, under principles stated in McNeely v. South Penn Oil Co., 58 W. Va. 438, 52 S. E. 480. This being so, Yoho is vitally interested in seeing that the deed executed by him is not used by the grantee so as to defeat the partition made

between him and his sister, and subject him to an accounting.

For the reasons stated, the decree will be affirmed.

Affirmed.

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(63 W. Va. 152)

## STATE v. GILLISPIE.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. CRIMINAL LAW — TRIAL — INSTRUCTIONS — REPETITION.

It is not error to refuse an instruction which is in substance and effect a repetition of another already given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

2. INTOXICATING LIQUORS — ILLEGAL SALE — EVIDENCE.

Upon the trial of an indictment for selling, offering, and exposing for sale without a state license therefor "spirituous liquors, wine, porter, ale, beer and drinks of like nature," under section 913, Code 1906, when it is proved that the defendant sold a drink known as "senoj" cider, it is competent to prove that other parties had handled and sold, two years before, a cider having the same commercial name and designation, from the same manufacturers, and that the same was intoxicating.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 291.]

3. CRIMINAL LAW — EVIDENCE — OTHER OFFENSES.

Upon such trial, evidence of previous sales, and that defendant had received consignments of senoj cider about the time of the alleged sales, is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 822.]

4. SAME—EVIDENCE.

Syllabus, point 1, State v. Good, 56 W. Va. 215, 49 S. E. 121, approved and applied.

(Syllabus by the Court.)

Error from Circuit Court, Webster County.

Del Gillispie was convicted of the illegal sale of liquors, and brings error. Affirmed.

W. S. Wysong, for plaintiff in error. W. L. Wooddell, for the State.

McWHORTER, J. Del Gillispie was indicted in the circuit court of Webster county for unlawfully selling and offering and exposing for sale on the ——— day of September, 1905, in said county without a state license therefor "spirituous liquors, wine, porter, ale, beer and all drinks of like nature." The defendant entered his plea of not guilty, and a jury was impaneled and returned a verdict of guilty. The defendant, by counsel, moved the court to set aside the verdict of the jury and grant him a new trial, of which motion the court took time to consider. On the next day, April 6, 1906, the court overruled said motion, and entered judgment against the defendant for a fine of $200 and three months' imprisonment in the county jail, to which judgment the defendant obtained a writ of error and supersedeas. On the trial the defendant excepted to various rulings of the court in admitting testimony on the part of the state, claimed by defendant to be inadmissible, and erroneously refusing to admit testimony offered in behalf of defendant. The court gave instructions on behalf of the state, numbered respectively 1, 2, 4, 5, 9, 10, and 11, to the giving of which the defendant objected and excepted; and the court also refused an instruction offered on behalf of defendant, marked instruction "B," to which ruling of the court in refusing said instruction the defendant excepted. A part of the exceptions taken by the defendant were saved to him in separate bills of exceptions, the first of which goes to all the instructions given on behalf of the state.

Instructions Nos. 1 and 2 are based upon point 1, syllabus, State v. Good, 56 W. Va. 215, 49 S. E. 121. No. 4 tells the jury that they should consider all the testimony offered on behalf of the state and on behalf of the defendant in arriving at a proper verdict in the case. No. 5 tells the jury they should consider all evidence offered on behalf of the state and on behalf of the defendant in determining the effect of the use and drinking of such cider, mixture, preparation, or liquid upon the person to whom it was sold, in determining whether the same would produce intoxication. No. 9 tells the jury that, in weighing the credibility and the testimony of any witness who testified in the case, they should take into consideration his interest in the result of the trial, if any he had, and demeanor in testifying, and that they were at liberty to believe or disbelieve the testimony of any witness or witnesses. In No. 10 the jury were told that it was not incumbent upon the state to prove drunkenness as a result of drinking the cider, mixture, preparation, or liquid, sold by the defendant, to justify a conviction, but that it would be sufficient to warrant a conviction of the defendant if they should believe from the evidence, beyond a reasonable doubt, that he, without a state license therefor, in said county and within a year prior to the finding of the indictment, sold any of said articles that would produce intoxication. And No. 11 tells the jury that if they should believe from the evidence, beyond a reasonable doubt, that the defendant, without a state license therefor in Webster county, and within the said time, sold spirituous liquors, wine, porter, ale, beer, or drinks of like nature, they should find him guilty as charged in the indictment. These instructions seem to be unobjectionable, and nothing is urged against them in the brief of counsel for defendant.

Bill of exceptions No. 2 goes to the ruling of the court on the refusal of defendant's instruction "B." By this instruction the court was asked to tell the jury that "they must believe beyond a reasonable doubt from the evidence that the cider in evidence would produce intoxication, before they can find him guilty, and if the jury have any doubt in their minds from the evidence as to whether or not said cider would or did produce intoxication, as alleged in the indictment, then they

should find the defendant not guilty." This instruction may be misleading, because, after being charged therein concerning a reasonable doubt, they are told that if they have "any doubt" in their minds as to the intoxicating qualities of the cider they should find the defendant not guilty. The latter part of the instruction seems to be contradictory of the first part, in that the defendant should have the benefit of any doubt, however slight, and whether reasonable or not. But whether this instruction was good or bad, that portion of it which was proper to be given was fully covered by another instruction given on behalf of the defendant, where the jury are told "that if they have reasonable doubt from the evidence, whether the cider in evidence would produce intoxication, the defendant is entitled to the benefit of said doubt." It is not error to refuse an instruction which is in substance and effect a repetition of another already given.

The further exceptions of the defendant go to the admission of testimony on the part of the state, over the objections of the defendant, as set out in bill of exceptions No. 4. Witness Sizemore was asked, "Did you state before that body (meaning the grand jury) that you had bought cider from Del Gillispie about the month of September, 1905, that would intoxicate?" Witness replied, "If I understand you right you want me to repeat the statement that I made before the grand jury. Q. Answer my question. A. Well, can I go on and make a statement? Q. Answer my question. The Court: Let him answer the question and go on and make his statement." The witness then said: "I believe I got some cider there that really would have some effect and make a man feel a little better than what he did; make a man have different feelings. I never got drunk on it." So that it appears that witness did not tell what he had stated before the grand jury, but simply states the fact that he believes he got some cider there that would have some effect, etc.

The next question mentioned as excepted to in same bill of exceptions, No. 4, is, "In your judgment from the quantity you drank there [referring to the cider in question], do you believe a sufficient quantity would produce drunkenness?" In Carl v. State, 87 Ala. 17, 6 South. 118, 4 L. R. A. 380, it is held: "In a criminal prosecution for the sale of intoxicating liquors in violation of a local prohibitory liquor law, the article sold being compounded by a druggist, and the bottles labeled 'Elixir Cinchona,' or 'Cinchona Bitters'; it is permissible for the prosecution to prove that it was bought and used by many persons as a beverage, the use to which it was applied being illustrative of its nature and properties; and a person who had swallowed it may state its exhilarating effect on himself, and, though not technically an expert, may testify that, 'in his opinion, it would produce intoxication.'" Defendant further in said bill of exceptions, in the examination of J. P. White, a witness for the state, objected to the following question: "Have you ever handled within the last few years any senoj cider, or had it handled about your store or about your stores?" Which objection was overruled and witness answered, "Yes, sir"; and was also asked the following question, which was objected to, "Can you be mistaken about the effect of the senoj handled by you?" and answered, "Our men to whom we sold it were intoxicated, and at the same time they were drinking this cider, and I knew of nothing else by which they could have gotten drunk." It is shown by the testimony of White that the firm of Heckmer & White handled the senoj cider some two years before; that this cider was manufactured by Jones & Company of Louisville, Ky, and that the name "senoj" given to the cider simply was the name of Jones spelled backwards, that when the firm found that their men were getting drunk on it they notified the house from whom they bought it, and compelled them to take it back. This name "senoj" was the commercial name and designation given to this special kind of cider, mixture, liquid, or preparation sold as cider, and there is nothing in the record to show that any other article was placed upon the market by any other firm than Jones & Company of Louisville, Ky., under the commercial name of "Senoj." In Commonwealth v. Goodman, 97 Mass. 117: "On a complaint under Gen. St. 1860, c. 86, § 34, for unlawful keeping of intoxicating liquor for sale, evidence of a chemical analysis of other beer, called by the same name, as beer kept for sale by the defendant, and similar in color, flavor, and strength, is competent as tending to prove that the defendant's beer was of like quality in all respects to the beer analyzed." Commonwealth v. Pease, 110 Mass. 412; State v. Wills, 106 Mo. App. 604, 80 S. W. 311; Murry v. State, 46 Tex. Cr. R. 128, 79 S. W. 568.

In same bill of exceptions a question asked witness Joe Berry is excepted to. The witness had stated that he was in the employ of Heckmer & White, and that White had bought six barrels of senoj cider from the Sutton Grocery Company, and was asked if that cider was intoxicating, and answered, "I found the men were getting drunk on it"; and was asked the question, "He [meaning Mr. White] returned it?" The question was objected to, and the objection overruled, and the question answered in the affirmative. It is proven by W. C. Diller, agent, at Webster Springs, of the Holley River & Addison Railroad Company, over the objection of the defendant, that, on the 5th of August, 1905, Gillispie received three barrels of senoj cider, besides several other shipments of barrels, half barrels and kegs of cider at various other times from May 12 to September 29, 1905. "Evidence of previous sales, and that accused had received consignments about the

time of the alleged sale, is admissible." 4 Cur. Law, 274, and authorities there cited.

It is proved by witness White that senoj was intoxicating. Witness Berry stated that it would intoxicate. Pole Baughman testified that in the summer of 1905 he purchased cider from defendant; bought three glasses and drank it, and that it made him a little light-headed; that he was drinking no whisky at the time; that he paid 10 cents a glass for the cider; and that the effect upon him was similar to the effect produced by drinking whisky, that he felt the same way. Currence Baughman testified that he bought cider from Gillispie in August and September, 1905, two glasses at one time and one at another; paid 10 cents a glass for it. When asked if the cider he got there had any intoxicating effects, answered, "I think it did"; that he had taken one small drink of whisky, that the whisky he drank would not have produced the degree of intoxication he experienced after having drunk the cider. Chris Baughman bought one glass in the summer of 1905 for which he paid 10 cents; said that it made him a little light-headed.

The defendant admits on cross-examination that he handled cider called "Senoj" in 1905; that he got a barrel of it, and the first he sold out of the barrel some fellow, he believes it was Will Cooper, said he believed if a fellow would drink enough of that he could feel some effect from it; that he did not sell any more of that, but took what was left of it and "put it half water, so that I knew they could not feel any effect from that, and I never sold any senoj after that but what was half water or more." And he stated that that had been probably three years ago. Says he never handled any senoj since that time, "unless I put it half water"; that he saw the traveling salesman that sold him the senoj, and told him he thought it was a little stronger than it ought to be, and the salesman suggested if it was too strong he might water it, and he told him if he shipped him any more to send a weaker grade, and witness thought what he got after that was some weaker than the first.

Witness Sizemore says he saw a great many men intoxicated at defendant's place, he does not know whether they were drunk on cider or whisky. From the evidence the defendant's place of business seemed to have been a kind of rendezvous for the class of people who spend their time and congregate about saloons and places where they can take their sprees. Witnesses stated that they did not know whether the persons they saw there were drunk on the cider they were getting or on whisky. The defendant himself, while on the witness stand, made a very significant voluntary statement when he said, "I wish to state as there has been a great deal of talk about the sale of senoj, I will not buy any more senoj, and I will not sell any more of it. Yet, I cannot see that it is any violation of the law." Which statement, taken together with the admission that he had never handled any senoj since the first barrel without putting it half water, and the further fact that he had received a consignment of three barrels of senoj August 5, 1905, makes it very clear that he had been handling and selling it constantly ever since he began to deal in it, notwithstanding he had been warned and advised against it by various persons. After he was informed by one of his customers of its intoxicating character, defendant states that he mixed it with water, and continued to sell it.

The defendant's own testimony, together with the abundant proof of the fact that the liquid senoj he sold was intoxicating, would warrant his conviction. There is no error in the judgment of the circuit court, and the same is affirmed.

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(63 W. Va. 202)

## MARSHALL WINDOW GLASS CO. v. CAMERON OIL & GAS CO.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. GAS—NATURAL GAS—CARE IN DELIVERY.

The duty devolving upon a person or corporation engaged in furnishing to consumers thereof natural gas for fuel and light is not that of insurer, but to exercise such care, skill, and diligence in all its operations, as called for by the delicacy, difficulty, and dangerousness of the nature of the business, that injury or damage to others may not be caused thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gas, § 14.]

2. SAME—INJURIES FROM EXPLOSION.

The application of the rule of res ipsa loquitur depends upon the facts and circumstances of each individual case; but the mere fact of explosion of a gas regulator, which up to the time of the accident had properly performed its functions, is not a circumstance to which the rule may be applied.

(Syllabus by the Court.)

Error to Circuit Court, Marshall County.

Action by the Marshall Window Glass Company against the Cameron Oil & Gas Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Simpson & Showacre, W. A. McGlumphy, and Charles E. Carrigan, for plaintiff in error. Charles C. Newman, A. Leo Weil, Charles M. Thorp, and S. Leo Ruslander, for defendant in error.

MILLER, P. In an action on the case, the plaintiff seeks to render liable the defendant for loss by fire of its factory, due to explosion of gas, the alleged result of negligence of defendant. On the trial, the motion to exclude the plaintiff's evidence and direct a verdict for defendant prevailed; and it is to review the judgment of the circuit court on the verdict so found that the case is brought here.

Gas was furnished by defendant, under written contract of August 1, 1903, by which it agreed, among other things, to supply plaintiff gas for one year thereafter at a stipulated price per 1,000 feet, to maintain

pipes or connections to plaintiff's plant, and to place on the plaintiff's premises meters and regulators to control the flow of gas; and the plaintiff agreed to furnish, put in place, and keep in repair all pipes, valves, and fittings necessary to distribute and burn said gas. The contract provided also that the defendant should at all times have access to said premises to inspect the pipes, meters, and regulators; that the pressure of gas should be determined by it, under supervision of its superintendent; that ownership of the regulators and all other fixtures placed by it on said premises should remain in it, and that it might remove or replace the same before or after termination of the contract; that, "as production of gas wells and conveyance of it over long distance are subject to accidents, interruptions, and failures which cannot be foreseen or prevented by any reasonable care or expenditures, the company does not by this contract undertake to furnish to the consumer a full and uninterrupted supply of gas for the period named herein, but only to furnish such a supply and for such length of time, limited to the term hereof, as its wells and pipe lines are reasonably capable of, it being understood that the company may require a block or discontinuance of operations at any time by the consumer temporarily, in whole or in part, without prejudice to its right to continue its supply to other consumers"; that "it is expressly agreed by the consumer that the company shall not be liable for any loss, damage, or injury that may result either directly or indirectly from such shortage or interruptions"; that "the company shall not be liable to the consumer or to any other person for any loss, damage or injury resulting from the use of the gas in the said plant, all risks in the said use being assumed by the consumer."

The declaration is in two counts. The only charges of negligence are that the defendant negligently permitted gas to pass through the plaintiff's pipes, etc., in such quantities, and at such pressure, that the same were rent asunder, causing escape of gas, and consequent ignition and destruction of the factory; and that it permitted its regulators and other fixtures to be and remain out of proper order and repair, so that an excessive pressure of gas passed into the pipes and fittings of plaintiff, causing ignition and destruction of the factory. The declaration does not, as stated by plaintiff's counsel, charge negligent and inadequate construction by the defendant of its system of pipes and regulators; and consequently, even if there was evidence (which there was not) to support such charge, it could not have been submitted to the jury.

It is conceded that, if there was evidence tending in an appreciable degree to support the charges of negligence, there was error in the judgment. In support of the first charge, the plaintiff relies upon the evidence of its president and other employés that, shortly before the explosion, there was a shortage of gas, resulting in complaint on its part at the office of the defendant, followed shortly, it is claimed, by such quantities of gas and pressure as could not be resisted or controlled by the pipes and fittings of the plaintiff. It is admitted that up to that time gas had been furnished in reasonably proper quantities and at proper pressure; that all pipes, regulators, and meters of defendant had performed their proper functions. There is absolutely no evidence that the quantity of gas and pressure at the time of the explosion were any greater than usual. But it is claimed that, after the complaint of shortage, there was a sudden onrush of gas, causing flames therefrom in the furnaces and ovens of the plaintiff to ignite and destroy the buildings and all its property contained therein; that these facts, accompanied by the further fact proven that one of the defendant's regulators about the same instant exploded in the regulator house, furnish evidential circumstances to make a prima facie case of negligence in the particular charged, as these results could not have followed in the ordinary course of events. But this position is met by the evidence of the same witnesses for the plaintiff, one or more of whom say they noticed no unusual pressure at their places in the factory. One says that, after the flames came out of the furnaces and some of the workmen had jumped out at the windows of the building, they crawled back, and he turned the valves in the factory and the gas came down normal, when "the boys came back laughing and joking"; and, speaking with respect to the condition then at the blow furnace, he says that, after the gas came on in large quantities, he did not close the valves there entirely, but "turned them down so the fire would stay in the furnace," and that after he did this he had no excess of gas at the blow furnace. This same witness says that the reason they did not shut off the gas at the flattening oven, where the flames were coming out and setting fire to the building, was because they could not get at the valves. The valves had been so located that they could not be reached under the circumstances; if they had been placed differently, plainly the gas could have been shut off there as well as at the blow furnace, and the damage averted; for it was not until after failure to reach the valves there that they proceeded to the regulator house for the purpose of obtaining control of the gas. He also says "there was nothing wrong with the line; the only thing wrong was with the gas." There is other evidence of like character tending to show no unusual pressure, but that, on account of the low pressure shortly prior to the explosion, the valves in the factory had all been thrown wide open, and were left in that condition when the gas came on again in quantities sufficient to bring about the conditions at the time of the explosion. But how about

the regulator which exploded? If there was no unusual pressure in the factory, the explosion of the regulator we cannot assume was due to overpressure of gas coming through the line. But the evidence was that the president, with the blacksmith and another employé, without notice to the gas company, almost at the instant the gas came on, and immediately after they had unsuccessfully attempted to reach the valves at the flattening oven to control the gas there, ran to the regulator house, where the blacksmith, by direction of the president, suddenly shut off the gates on the outlet or low pressure side of the regulator which exploded, and that almost instantly the explosion occurred. There are admissions by the witnesses for the plaintiff of other prior interferences by its employés with at least one of the regulators of the defendant in piling weights upon it, against which protests were made by the defendant. The blacksmith explains that the reason why he did not shut off the inlet gates in place of the outlet gates was because there was no wheel on the inlet gates; that he knew the proper thing to do was to shut off the inlet gates, but he then had no wrench with which to do so. We do not think the jury could have said, nor can we say, from this evidence, that there was an undue pressure of gas. The fact that it was controlled by the valves of the plaintiff where they could be reached, and that there was no explosion of the regulator until after interference with the gates in front of it, it seems to us precludes all idea of undue pressure.

With respect to the charge of want of proper repair of pipes, regulators, etc., there is no affirmative evidence to support it. The plaintiff here relies entirely upon the fact that the explosion occurred, and the regulator was blown open, and seeks to apply the rule res ipsa loquitur to the fact of the explosion in support of both branches of this case. But, without more, we do not think this rule applicable. The defendant in its contract had provided against damage to plaintiff in the general use of gas in its plant. It was not an insurer of the plaintiff's property. As was held in Barrickman v. Oil Co., 45 W. Va. 634, 32 S. E. 327, 44 L. R. A. 92, the mere fact that a building furnished with gas was set on fire from the gas is not sufficient to justify the inference that an increased pressure of gas caused the fire. The defendant here was engaged in lawful business, so recognized by its contract with the plaintiff. The maintenance by it of the pipes, meters, and regulators on the plaintiff's premises was not a nuisance, although employed in supplying the plaintiff with a dangerous agent. The only duty devolving upon it under the law was to exercise such care, skill, and diligence in all its operations as called for by the delicacy, difficulty, and dangerousness of the nature of its business, that injury or damage to others might not be caused thereby. Barrickman v. Oil Co., supra; Cosulich v. Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475. The maxim res ipsa loquitur was not applied by this court in the case of the explosion of a boiler (Veith v. Salt Co., 51 W. Va. 96, 41 S. E. 187, 57 L. R. A. 410), nor in the case of an explosion of natural gas in Pennsylvania (Allegheny Heating Co. v. Rohan, 118 Pa. 223, 11 Atl. 789); and we can see no reason, in principle, for applying it to the case of an exploded gas regulator. The application of this rule depends upon the facts and circumstances in each individual case; but the bare fact of the explosion of the regulator here, which, up to the moment of the accident, had performed its functions properly, was not a circumstance from which the jury, if the evidence had been submitted to it, could properly have inferred negligence as to the pressure of gas or repair of the instrument itself. Whether there was contributory negligence of the plaintiff we need not say, as we find no evidence of negligence of the defendant.

What caused the explosion of the regulator we do not know. It may have been due to the sudden turning off of the gates by the plaintiff's employé, or to circumstances and conditions over which the defendant had no control or power of prevention. If the former, it was due to the negligent act of plaintiff; if the latter, defendant could not be held liable; in neither event could the jury have been justified, upon the evidence, in giving a verdict for the plaintiff. We therefore affirm the judgment.

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(63 W. Va. 158)

## JOHN v. ELKINS et al.*

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. VENDOR AND PURCHASER—CONTRACT—CONSTRUCTION—OPTION.

An agreement dated December 11, 1902, contains the following provisions: "In consideration of one dollar in hand paid, and for the further consideration of one hundred and fifty dollars per acre for each and every acre used by said second parties for a R. R. over the premises hereinafter mentioned, and to be paid upon delivery of a general warranty deed after notice of acceptance by said second parties. * * * It is further agreed by and between the parties hereto that if a railroad is not commenced or constructed across said land within twelve months from this date, then this contract shall be null and void and of no effect, but on the other hand if the road is commenced or constructed within twelve months from this date, across said land, then said second party shall be entitled to hold said strip of land in fee simple, and said second party agrees to pay a reasonable damage if there be any damages done to the buildings now standing, and it is further agreed in the event that the said second parties fail to complete said R. R. within 24 months from this date, then said second parties shall pay to said first party a forfeit or penalty of two hundred dollars for every year said second parties fail to complete said R. R." No notice of acceptance was ever given by the parties of the second part, nor was such railroad commenced or constructed across said land within

* Rehearing denied January 7, 1908.

the time mentioned. *Held* such agreement was an option and not an executory contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 87.]

2. SAME—ACTION—PLEADING.

A declaration in an action of assumpsit, brought on such agreement at the end of three years from the date thereof, to recover the penalty of $200 for the failure of defendants for the first year after the expiration of the 24 months to complete said railroad is bad on demurrer.

(Syllabus by the Court.)

Error to Circuit Court, Monongalia County.

Action by Lemuel N. John against Davis Elkins and George C. Sturgiss. Judgment for defendants, and plaintiff brings error. Affirmed.

E. M. Everly and W. S. John, for plaintiff in error. Glasscock & Glasscock and Frank P. Corbin, for defendants in error.

McWHORTER, J. This was an action of assumpsit brought by Lemuel N. John in the circuit court of Monongalia county against Davis Elkins and George C. Sturgiss upon the following agreement in writing:

"This agreement made and entered into this 11 day of December, 1902, between L. N. John, of the first part, and Davis Elkins and George C. Sturgiss, of the second part, witnesseth that in consideration of one dollar in hand paid *and for the further consideration of one hundred fifty dollars per acre for each and every acre used by said second parties for a R. R. over the premises hereinafter mentioned and to be paid upon delivery of a general warranty deed after notice of acceptance by said second parties, which land so used shall include all land between the fences inclosing said road*, and the benefits and advantages which will accrue to the party of the first part by the construction of a proposed railroad through the lands of the parties of the first part by the party of the second part, or their assigns, the party of the first part hereby agrees to sell and convey to the said party of the second part the following described real estate, to wit: A strip of land 66 feet wide at the graded surface of the railroad of the party of the second part to be constructed over the lands of the party of the first part, said location through said tract of land to be determined by the engineer of the said second party or their assigns, situate in Cass district, Monongalia county, state of W. Va., adjoining lands of Sample Heirs and Waters and River, estimated to contain 2½ acres, more or less, that is to say, *so as not to unnecessarily injure or close any other possible right away through the said land of L. N. John* the said railroad shall erect and maintain *substantial fence* on each side of said railroad if required by said first parties *and it is further agreed that said second parties shall so construct a culvert at the run on said premises, that said first party shall have a passage way for live stock to and from the river over a solid bed bottom, and to make and maintain one crossing over said R. R.* It is further agreed by and between the parties hereto that if a railroad is not commenced or constructed across said land within *twelve* months from this date, then this contract shall be null and void and of no effect, but on the other hand if the road is commenced or constructed within twelve months from this date, across said land, then said second party shall be entitled to hold said strip of land in fee simple, and said second party agrees to pay a reasonable damage if there be any damages done to the buildings now standing, *and it is further agreed in the event that the said second parties fail to complete said R. R. within 24 months from this date, then said second parties shall pay to said first party a forfeit or penalty of two hundred dollars for every year said second parties fail to complete said R. R.*

"In witness whereof the parties hereto have hereunto affixed their signatures and seals the day and year first above written.

"[Seal.] Lemuel N. John, [Seal.]
"[Seal.] Davis Elkins, [Seal.]
"George C. Sturgiss,
"Per J. L. Hatfield, Agent."

The portions of said contract italicized are the portions alleged by plaintiff to have been written in ink.

The purpose of the suit is to enforce the payment of the penalty of $200, as provided in said agreement, for the year ending with December 11, 1903, being the first year for which plaintiff claims the penalty after the 24 months from the date of the agreement had expired within which the railroad should be completed.

The declaration contains three special counts upon said writing, besides the common counts. The defendants appeared and demurred to the declaration and to each count thereof, in which demurrer plaintiff joined, which being heard the court sustained the demurrers as to the first, second, and third counts, and overruled the same as to the other counts, when the plaintiff declined to amend his declaration, and waived all the other counts, and asked that the case be dismissed as to them, which was done. The judgment of the court was then that the plaintiff take nothing by his action, and that the same be dismissed with costs to the defendants.

Plaintiff brings the case to this court upon writ of error, and says the court erred in sustaining the demurrer and dismissing the action, and also in holding that the plaintiff was not entitled to recover the sum stipulated to be paid as liquidated damages for delay. The agreement seems to have been a printed form with certain parts written in with pen and ink. The last clause of the last paragraph in the agreement relating to the penalty of $200, for each year of failure to complete the railroad, being so written with pen and ink, the plaintiff in error re-

lies upon the principle governing contracts, that the words written with pen and ink upon a printed form will be given effect over conflictory printed words, which as a principle will not be disputed; but to ascertain the intention of the parties the whole contract must be taken and considered together. Was it the intention of the parties that the railroad should be built in any event, although the parties of the second part should not accept the land for the right of way, not having given notice of acceptance of the offer to sell the land? There is also written in ink a provision in the first paragraph of the agreement relating to the consideration for the land proposed to be purchased, "to be paid upon delivery of a general warranty deed after notice of acceptance by said second parties." From this language it would seem that the agreement was only a proposal on the part of the plaintiff to sell to the defendants the right of way, and the same was not to be conveyed to them until notice of acceptance of the proposition by the parties of the second part. This notice was not given, and it is not alleged that it was given.

The proposal to sell or to purchase, if you please, the land mentioned in the agreement was for a definite purpose—that was, the building of a railroad—and it was specifically agreed between the parties by a provision written with pen and ink that it was "to be paid upon delivery of a general warranty deed after notice of acceptance by said second parties." This amounts to nothing more than a proposal to sell the land to the defendants in case they concluded to accept the same and to give notice of such acceptance. In Dyer v. Duffy, 39 W. Va. 148, Syl., pt. 2, 19 S. E. 540, 24 L. R. A. 339, it is held: "A mere proposal to sell land does not become a sale until acceptance, and notice of acceptance given the proposer." To constitute a contract there must be an offer and also an acceptance. See Dyer v. Duffy, supra; Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; Barrett v. McAllister, 33 W. Va. 738, 11 S. E. 220; and Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536. In McMillan v. Philadelphia Co., 159 Pa. 142, 28 Atl. 220, the distinction is drawn between an option and a contract of sale or lease. It is there said: "An option is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land, if the holder elects to accept them within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract. If an acceptance is not made within the time fixed, the owner is no longer bound by his offer, and the option is at an end." Rivers v. Sugar Co., 52 La. Ann. 762, 27 South. 118; Schlieder v. Dielman, 44 La. Ann. 462, 10 South. 934; 21 A. & E. E. L. 925, 926. No notice of acceptance having been given according to the terms of the agreement, and no railroad having been commenced or constructed across said land within 12 months from the date of the agreement, according to its own express terms, the same became "null and void and of no effect." Of course, this rendered the whole agreement void; the agreement not having become a contract, the penalty provided for in the last paragraph became inoperative and nonenforceable. Yet it is insisted by plaintiff in error that the provision in the last clause of the agreement for liquidated damages is legal, citing 6 Cyc. 17: "A provision for liquidated damages is usual in building contracts"; and also citing Foundry Co. v. Steel & Iron Co., 58 W. Va. 62, 51 S. E. 129, and many other authorities. In the case of Foundry Co. v. Steel & Iron Co., cited, there was a contract for the sale of certain machinery and putting it in place, and providing for liquidated damages of $50 for each day the selling company delayed the completion and delivery of all the machinery contracted by the purchasing company, and the contract contained no provision limiting the duration of the period of delay; and it is claimed that the contract in the case at bar is identical in these respects, fixing the liquidated damages at $200 for each year, and containing no provision limiting the duration of the period of delay, and it is insisted that the decision in that case is controlling authority upon the point involved in case at bar. There is a wide difference in the two cases. In the Foundry Company Case the defendant was a going concern, and contracted for the purchase of necessary machinery for its business, and there was a consideration in the way of losses in not being able to prosecute its business in a perfect manner for the lack of the use of the necessary machinery. In that case the contract was complete and in course of execution, one which could be enforced when violated by either party and had none of the elements of an option in it. In case at bar, the provision in the agreement sued upon, to wit, the forfeiture and penalty of $200 for each year, was dependent upon the provision for the sale of the right of way to the parties of the second part, which, not having been completed by notice of acceptance by the said parties of the second part, became null and void and of no effect.

It is strenuously insisted by plaintiff in error that the defendants contracted and promised to build a railroad, and, upon their failure to complete the same within 24 months, then the contract for the payment of the $200 for each year of such failure would be enforceable. When the 24 months from the date of the agreement expired, the defendants had no place to build a railroad. Their option for the purchase of the land on which to locate it had expired, they not having accepted the terms on which it was offered. It is said by plaintiff in error that there could be no failure to complete the railroad if there was no promise to build it, and hav-

ing promised to construct the road the defendants were liable for the penalty on their failure to complete it. The building of the road was contingent upon the purchase of the land on which to locate and build it, and the agreement to locate and construct the railroad was necessarily conditioned upon the taking of the land by the defendants for the purposes of a railroad. The minds of the parties never met as to the purchase of the land, the option was never carried into contract by acceptance. The proposed enterprise in which the defendants were engaged was the building of a continuous line of railroad which, to be effective, would have to pass through and over many other estates and properties; and whether the same should be successfully prosecuted depended upon the success of the parties interested in procuring rights of way through such other properties, and, unless successful in procuring such other rights of way, the one they were seeking to obtain through the property of the plaintiff in error would be utterly useless to them. This fact alone stamps the agreement containing the provision for acceptance of the offer as an option, and renders the provision for notice of acceptance of the first importance as disclosing the true intent of the parties, and is a complete answer to the contention of the plaintiff in error that "the court should regard the occasion which gave rise to the contract, the obvious design of the parties, and the object to be attained as well as the language of the instrument itself, and give the instrument that construction which will effectuate the real intent and meaning of the parties"; and, in support of the contention, cite Cobbs v. Fontaine, 3 Rand. 484, Railroad Co. v. Railroad Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297, Gas Co. v. Oil Co., 56 W. Va. 402, 49 S. E. 548, and Bailey v. Hill, 77 Va. 492.

It is insisted that if the court should be of the opinion that the written and printed clauses of the contract are consistent, and that the contract can be construed so as to give effect to both clauses, then the principles announced in the case of Roberts v. Bettman, 45 W. Va. 143, 30 S. E. 95, apply to this case. We are unable to see how the principles decided in that case can be applied to this case. In Roberts v. Bettman, the contract in question was an oil and gas lease, and the object, on the part of the lessor, was to have his property developed as an oil and gas property and it was presumptively the intent of the lessee to so develop it, which development could be effected independently of all other properties, and could be operated for the purposes of the lease whether any other property in the neighborhood of it was developed or not. Not so in case at bar. Unless the defendants could succeed in obtaining a continuous right of way through the various estates lying between the points the railroad was intended to run, the right of way through plaintiff's property alone would be utterly useless to the defendants, and the railroad, if built over plaintiff's property, would likewise have been of no use to him in developing the coal and other products upon his property. Plaintiff suffered no loss or damage. His land and the title thereto were left free from incumbrance by reason of the agreement being rendered void. Where was the consideration passing from plaintiff to defendants which would make the alleged promise to build the road binding upon them? "A valuable consideration is the relinquishment by the promisee of some right which he may lawfully exercise or enforce, or the incurring of some risk or trouble at the instance of the promissor." County Court v. Hall, 51 W. Va. 269, 41 S. E. 119.

We find no error in the judgment of the circuit court, and the same is affirmed.

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(62 W. Va. 476)

## CHEUVRONT v. HORNER et al.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907. Rehearing Denied Jan. 7, 1908.)

1. JUDGES—DISQUALIFICATION.

To disqualify a judge from hearing a cause, because of his interest therein, it must appear that such interest is in the subject-matter of the cause, and not merely in a legal question involved therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Judges, §§ 184–207.]

2. JURY—RIGHT TO JURY TRIAL—FRAUDULENT CONVEYANCES.

The statute (section 2, c. 133, Code 1899; Code 1906, § 4005) giving a creditor right to attack a fraudulent conveyance before judgment on his claim does not deny right of trial by jury, since such suit as therein provided for is based upon fraud, and a court of equity has jurisdiction of the subject-matter of the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 73.]

3. PRINCIPAL AND AGENT—MONEY PAID TO AGENT—RECOVERY.

If money has been paid to an agent for the use of his principal, the legality of the action of which it is the fruit or with which it was connected does not affect the right of the principal to recover it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 160.]

4. CONTRACTS—PARTIES IN PARI DELICTO.

The maxim "In pari delicto potior est conditio defendentis" applies only as between the immediate parties to an illegal contract, and therefore does not govern where the suit is by one of such parties to recover money received by a third party in respect of the illegal contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 684–689.]

5. TRUST—EVIDENCE TO ESTABLISH.

The uncorroborated testimony of the husband and wife is insufficient to establish an express trust in favor of the wife in property purchased in the name of the husband against a creditor of the husband seeking to subject such property to the payment of his debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 66–68.]

(Syllabus by the Court.)

Appeal from Circuit Court, Doddridge County.

Bill by Joseph Cheuvront against William J. Horner and others. Decree for plaintiff, and defendants William J. Horner and Maggie Horner appeal. Affirmed.

J. V. Blair, for appellants. Millard F. Snider, for appellee.

ROBINSON, J. In the circuit court of Doddridge county, at the October rules, 1904, Joseph Cheuvront instituted this suit in chancery, presumably under section 2, c. 133, Code 1899 (Code 1906, § 4005), for the purpose of enforcing a claim against William J. Horner, and in pursuance of such object to set aside and cancel, as made in fraud of his rights as a creditor of said Horner, certain transfers of real estate and personal property made by said Horner to his wife, Maggie Horner.

It may be proper to make reference to the opinion of this court in the case of Cheuvront v. Cheuvront, 54 W. Va. 171, 46 S. E. 238, for a statement of the facts explaining the source of this litigation. It is useless for us to repeat them at length here. To a great extent, in the view we take of this case, they have nothing to do with it. It is there shown, as it is shown in this suit, that Joseph Cheuvront, on the 30th day of October, 1899, placed in the hands of William J. Horner the sum of $750 with which to compromise a certain divorce suit then pending between said Joseph Cheuvront and his wife, Elizabeth Cheuvront, and took his receipt for such sum, in which receipt there are certain stipulations hereinafter referred to; that said Horner went to Parkersburg, where the said Elizabeth resided, and where his wife then also resided, it being shown that there was intimacy between these two women, taking with him a contract which had been prepared by the attorney of Joseph Cheuvront, and which affected materially the rights of the wife in her husband's property, and, to use the language then employed by the parties, compromised said divorce suit; and that the said Elizabeth was induced by the said Horner and his wife to execute the same. This contract expressed a consideration of $750, but only $400 of such sum so furnished him by Joseph Cheuvront was paid Elizabeth Cheuvront by Horner, and he retained from the $750 the residue of $350, less $5 paid to the notary for taking the acknowledgment, and less the further sum of $18 afterwards paid by Horner on certain costs of said divorce suit. Subsequently, at the suit of said Elizabeth, the contract so obtained was set aside and annulled by a decree of the circuit court of Harrison county, which was affirmed upon appeal to this court, reported as aforesaid, as having been obtained by fraud upon the said Elizabeth Cheuvront. Thereupon, after the affirmance of said decree, this suit was instituted to recover back the money so placed in the hands of said Horner, and to recover the costs and expenses to which Joseph Cheuvront had been put in the suit to set aside and annul said contract. In that suit Joseph Cheuvront maintained, as he does in this suit, that whatever fraud was committed in the procurement of the execution of said contract from the said Elizabeth was the act of the said Horner and wife, and not his, and that Horner was only authorized by him to pay her the full sum intrusted to his hands for the purpose aforesaid, in case she would execute the contract, and was not authorized by him to make any other representations. Certain it is, however, that said Horners not only deceived the said Elizabeth as to the amount for which the contract called, but, to induce her to sign same, represented that her husband would immediately come and reside with her again. In fact, there is a long story connected with all this, enough of which is shown in said former opinion for the purposes of this case, and really little of which pertains to the real questions now before this court. Joseph Cheuvront was held, by the adjudication in the suit to set aside said contract, to be bound by the act of Horner, who was held to be his agent in the transactions aforesaid, and, further than setting aside said contract, the court refused to decree to him the return of the $400 paid to his wife as aforesaid, or, in legal language, to place the parties in statu quo. The reasons for this are clearly stated by the learned judge of this court through whom that opinion was handed down.

In the plaintiff's bill his claim is founded upon the receipt given him by Horner for the $750, in which writing it is expressed that the said sum is to be used in such compromise, and to be paid Elizabeth Cheuvront in case she signed the contract, and in which Horner guaranteed to return to Joseph Cheuvront said sum "in case same should be lost or any accident to same, if not paid to her upon said compromise." The bill also sets up the fact that plaintiff had, prior to the filing of the bill, instituted an action at law in said circuit court of Doddridge county upon his aforesaid claim, for $1,000, in assumpsit, against said Horner, and claims that he had office judgment, which became final and was erroneously set aside. It appears, however, that plaintiff's contention in this particular is not well founded, and that he must rest upon his right to recover in this suit. In fact, his counsel has, we infer, abandoned that contention. The plaintiff's bill also exhibits the record and opinion in said former case, which are asked to be read in connection therewith. This fact it is important to note here, as appellants insist that it is thereby disclosed that the money which Horner received from Cheuvront as aforesaid and now demanded back was paid Horner for an illegal purpose, and that therefore the law

gives no action therefor. The bill further charges that, after the adjournment of the term at which said office judgment was set aside, the said Horner, on the 11th day of August, 1904, with intent to hinder, delay, and defraud plaintiff from collecting his debt, by deed of that date, conveyed to M. K. Horner, trustee, a certain lot or parcel of ground in the town of West Union, on which Horner, his wife, and family resided, and a drug store in said town, and all fixtures and appurtenances connected therewith, and the soda fountain therein, for a pretended consideration, and that, in furtherance of his purpose to hinder, delay, and defraud plaintiff, the said M. K. Horner, trustee, on the next day conveyed the whole of said property as described in said deed to Maggie Horner, the wife of the said William J. Horner. The said M. K. Horner, trustee, is shown to be the brother of William J. Horner. The bill is distinct and definite in its averments of facts constituting a fraud upon the creditors of William J. Horner, by the transfers of the property aforesaid, and, after making proper averments relative to a vendor's lien which rested upon the property, prays for a decree against William J. Horner, requiring him to pay complainant the debt in question, and that the conveyances aforesaid be set aside and declared null and void as to plaintiff's claim, and the said property sold to satisfy the debt, and for general relief.

A demurrer to the bill was interposed in behalf of the said William J. Horner and Maggie Horner, and as ground thereof they assigned want of equity jurisdiction, multifariousness, want of sufficient averments, and omissions. The demurrer was overruled, and a day given to answer. William J. Horner and Maggie Horner filed their joint and separate answer to the bill, and such answer denies the claim of plaintiff and the charges of fraud in the transfers of the property aforesaid by Horner to his wife. It admits that the $350, less the two small deductions, was retained by Horner, and claims the same as compensation for his services in getting said contract signed. It denies the right of recovery, also, in effect, upon the maxim "In pari delicto potior est conditio defendentis." The answer is definite and concise in its averments in meeting the allegations of the plaintiff's bill, and particularly in resistance of the charges of fraudulent conveyances, averring that the property had been really purchased by said Maggie Horner, and the cash payment actually paid by her from her separate estate; that the deed was made to her husband, with the understanding and agreement between her and him that he would secure her therein, and, in consideration of her funds already applied thereon and other money he had borrowed from her, that he agreed to convey and have conveyed to her in legal form the property aforesaid; that he had neglected from time to time to do this, until she insisted on consummating the agreement, which respondents say was done by the said conveyances charged by the complainant to be fraudulent.

There was a general replication to the answer, and testimony taken, the greater part of which relates to the question of whether or not the conveyances from Horner to his wife, through the instrumentality of his brother as trustee, are fraudulent. Upon the hearing of the cause the court entered a decree, on the 18th day of September, 1905, finding that the plaintiff is entitled to recover from the defendant William J. Horner the sum of $350, less the $18 paid as hereinbefore mentioned, with interest from the 22d day of November, 1899, aggregating the sum of $447.90, and that the conveyances aforesaid, and each of them, should be set aside in so far as they affect said debt so found; and thereupon decreed that the said Horner should pay to the said plaintiff the aforesaid sum, with interest until paid, and the costs of suit, and fixed the same as a lien upon the real estate described in the bill, second in priority to a vendor's lien in favor of Lewis Maxwell by said decree properly ascertained and fixed; and further adjudged and decreed that the conveyances aforesaid were fraudulent, null, and void in so far as they affect the debt decreed to plaintiff, and, after giving a day to the said Horner, or some one for him, to make payment, directed a sale in case default should be made.

It is assigned that the court erred in hearing and deciding the cause, because of such interest of the judge therein as to disqualify him. It is claimed that one of the depositions in the suit to set aside and cancel said contract between Joseph Cheuvront and Elizabeth Cheuvront discloses that the judge of said court, prior to his taking office, had been one of a firm of counsel for the said Elizabeth Cheuvront in the divorce suit, which was undertaken to be compromised as hereinbefore stated; and this is the only charge of disqualification made. There is nothing in the record to show that the party there mentioned as such counsel was at the hearing of this cause the same person as the judge of the circuit court, and such assignment of error is therefore groundless. But, assuming such to have been the fact, and the point properly presented, it comes within no rule that would disqualify a judge. 23 Cyc. 586; Work on Courts and Their Jurisdiction, p. 396. To disqualify, the interest of the judge must be a pecuniary one. It must be in the subject-matter of the cause, and not merely in a legal question therein involved. Forest Coal Company v. Doolittle, Judge, 54 W. Va. 210, 46 S. E. 238.

It is also insisted that the demurrer to the bill should have been sustained; but we find this bill to be an ordinary one for the equitable remedy given by section 2, c. 133, Code

1899 (Code 1906, § 4005), and that it is amply sufficient in its averments in the premises. There is no denial of the right of trial by jury in a suit of this character, as insisted by appellants, as it is the charge of fraud that gives such suit life and being. It is based upon fraud, a well-recognized ground of equity jurisdiction. Broderick v. Broderick, 28 W. Va. 378; Cecil v. Clark, 44 W. Va. 659, 30 S. E. 216. The allegations of fraudulent conveyances for the purpose of hindering and delaying plaintiff in the collection of his debt give plaintiff the right to maintain this suit, before judgment on his claim, provided he proves the allegations of his bill. Hogg's Eq. Prin. § 183; Tuft v. Pickering, 28 W. Va. 330; Hoffman v. Fleming, 43 W. Va. 762, 28 S. E. 790. If there is any merit in the demurrer, it is upon the alleged ground that the bill shows plaintiff was in pari delicto with the defendant. But as this question arises, not only upon the demurrer, but as well upon the hearing of the cause, the defendants insisting in their answer that the plaintiff is in equal fraud with Horner, we may here dispose of it upon the whole.

The question of whether or not plaintiff is inhibited from recovering this money under the maxim hereinbefore stated is important and controlling. A marked distinction must be made between this case and the usual ones where the doctrine of in pari delicto arises. The money here is in a situation where the plaintiff may seek to recover it without the invocation of the aid of the illegal contract mentioned and relied upon by appellants in their contention on this point. Whenever a case can be made without invoking the aid of the illegal contract, the plaintiff is entitled to recover. 1 Bigelow on Fraud, p. 206; Clarke, Harrison & Co. v. Brown, 77 Ga. 606, 4 Am. St. Rep. 98. In this instance Joseph Cheuvront is not compelled to invoke the contract with Elizabeth Cheuvront which has been declared to be illegal to assist him in making out a case for the recovery of the money from Horner, which by Horner's own conduct never left his hands and never had at all to do with the illegal contract. That contract is wholly collateral and immaterial, in fact, to this suit for the recovery of the money from him, and cannot be invoked by this plaintiff to assist him in a recovery from Horner, since Horner is no party to such contract. The plaintiff may rely on the receipt alone, as he does. It is a contract with Horner. The record discloses no illegality as to it, or suggestion of illegality in connection with it, at the time it was given. Were there no receipt, he could rely on the implied promise existing under such circumstances.

But there are other principles, those belonging directly to the law relating to principal and agent, which relationship the former decision found between Cheuvront and Horner in the transactions relative to the said illegal contract, which deny to Horner a right to resist plaintiff's claim for this money upon the ground that it was placed in his hands to be used for an illegal purpose. "The broad rule has been laid down that when money or property is delivered by a principal to his agent for an illegal purpose, or for the purpose of carrying into execution an illegal contract, the agent cannot set up such illegal object to prevent a recovery by the principal from the agent of such money or property, so long as it remains in his hands." 15 Am. & Eng. Enc. (2d Ed.) 1009. In Hertzler v. Geigley, 196 Pa. 419, 46 Atl. 366, 79 Am. St. Rep. 724, it is held: "The law cannot enforce an illegal contract; but if the servant or agent of another has, in the prosecution of an unlawful enterprise for his master, received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction." This is supported by the decision in Berkshire v. Evans, 4 Leigh (Va.) 223. The contract of the agent to pay the money to his principal grows out of the receipt of the money for his principal, and is not immediately connected with the illegal transaction. Story on Agency, § 347. If money has been paid to an agent for the use of his principal, the legality of the action of which it is the fruit or with which it was connected does not affect the right of the principal to recover it. The agent's liability arises solely from the fact of having received money for another's use. Dunlap's Paley's Agency, 62; Wood on Master and Servant, § 202; Mechem on Agency, § 526; 1 Am. & Eng. Enc. (2d Ed.) 1088; Clark & Skyles on Agency, § 428.

And closely related to the foregong considerations is the doctrine in equity that a court will not go outside of the real subject-matter of the controversy, and make its interference to depend upon the character or conduct of the moving party in no way affecting the right which he asserts against the defendant. Pomeroy's Equity Jurisprudence (3d Ed.) § 399. The doctrine of in pari delicto, as founded on said maxim, is not applicable to this case, since it applies only as between the immediate parties to an illegal contract, and therefore does not govern where the suit is by one of such parties to recover money received by a third party in respect of the illegal contract. Broom, Leg. Max. (7th Am. Ed.) 723; Kiewert v. Rindskopf, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731.

Whose money is it? Clearly, under the terms of said receipt, it was Cheuvront's money until paid to the said Elizabeth Cheuvront pursuant to the stipulations in that writing. Then it narrows down to this: Has Horner shown himself to be entitled, as he claims, to retain it for compensation for his services in securing the illegal contract? This question of fact was one for the circuit court, and its finding that he was not so entitled is not here to be disturbed, since

the evidence justified it, and especially since it appears just to deny such an extortionate claim for his services for such a fraudulent transaction as Horner carried out in the absence of Cheuvront and without any defined proof in the record that Cheuvront directed him in relation thereto, had knowledge thereof, or acquiesced therein. The counter assignment of error, on the part of the appellee, to the action of the circuit court in not decreeing the repayment of the full $750, with interest thereon, is not well taken. We consider the matter of the $400, which the court refused to return plaintiff in the other cause, to be adjudicated, and for which the plaintiff has no further redress.

The evidence relied upon by Horner and his wife to rebut the presumption of fraud in the transfer of the property by the husband to the wife falls short of the rule that the burden is upon the wife to show by clear and satisfactory evidence that the transaction was made in good faith, the consideration adequate and valuable, and that the consideration was paid out of her separate estate. All the testimony on this line, and in relation to these conveyances of the property from husband to wife, we find to be either wholly uncertain as to the amount of money claimed to have been invested in the property by the wife, or to be of questionable and suspicious character. This testimony is wholly insufficient to meet the rule that, when a wife claims in a contest against the creditors of her husband to have purchased real estate, there is a presumption against the bona fides of the transaction, which she cannot overcome except by clear and full proof that the property was paid for by her with money derived from some other source than her husband. Miller v. Gillispie, 54 W. Va. 450, 46 S. E. 451; Burt v. Timmons, 29 W. Va. 441, 2 S. E. 780, 6 Am. St. Rep. 664; Spence v. Smith, 34 W. Va. 697, 12 S. E. 828; and many other cases. The claim undertaken to be made by this testimony on behalf of the husband and wife is that there was a secret parol agreement, at the time of the purchase of the property, that the husband was to hold it in his name in trust for the wife, and the wife in her testimony says that this was to give him a better rating in business. The only evidence of such secret trust is that of the husband and wife. This cannot overcome the presumption, nor prevail against the creditor in such case. There is prima facie a presumption of mala fides as to such agreement. The uncorroborated evidence of the husband and wife is insufficient to establish such trust in favor of the wife arising out of such parol agreement. Pickens v. Wood, 57 W. Va. 480, 50 S. E. 818. All the facts and circumstances in the record, taken with the acts and conduct of the parties, do not corroborate the testimony of this husband and wife in their efforts to support a trust agreement. The property was held in the name of the husband for nearly two years, and upon the wife's own admission it was placed that way so that he would be in a position to secure credit. We have nothing but the mere testimony of the husband and wife of the private understanding between themselves that the property was to be held by the husband for the wife, and the presumption of a gift, of the very uncertain amount of money which it may be said went into this property from the wife's means, is not sufficiently rebutted by this testimony. The principles announced in Zinn v. Law, 32 W. Va. 447, 9 S. E. 871, and similar cases, fittingly apply. These conveyances have rightly been held fraudulent and properly set aside.

There is no error, and the decree of the circuit court is affirmed.

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(62 W. Va. 409)

## NICHOLS v. CAMDEN INTERSTATE RY. CO.

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907. Rehearing Denied Jan. 7, 1908.)

1. APPEAL—HARMLESS ERROR.

No judgment should be reversed by the appellate court when it is clear that the error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4029–4037.]

2. EVIDENCE — PRESUMPTIONS — FAILURE TO PRODUCE WITNESS.

Where a party to a controversy fails to examine a material and important witness in his behalf, it will be presumed that the evidence of such witness, if given, would be adverse to such party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 96, 97.]

3. APPEAL—REVIEW—AWARD OF DAMAGES.

The verdict of the jury in an action by a passenger against a carrier for injuries sustained must govern, unless the damages allowed are so excessive as to warrant the belief that the jury was influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944–3947.]

4. TRIAL—INSTRUCTIONS—DAMAGES.

In such action, where there is a demurrer to the evidence, it is not error for the court to tell the jury, if the issue is found for the plaintiff, "the damage should be at least one cent."

(Syllabus by the Court.)

Error to Circuit Court, Cabell County.

Action by Nella Nichols against the Camden Interstate Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Vinson & Thompson, for plaintiff in error. Isbell & Perry, for defendant in error.

McWHORTER, J. This was an action of trespass on the case, brought in the circuit court of Cabell county by Nella Nichols against the Camden Interstate Railway Company for personal injuries to the plaintiff when a passenger on one of the cars of the

defendant, inflicted upon her by a drunken fellow passenger; the defendant failing and neglecting to protect plaintiff while such passenger from injuries by such drunken man, as it was defendant's duty to do. Plaintiff's grounds of complaint are set out in her declaration as follows: "And the plaintiff avers that on the year and day aforesaid, in accordance with the regulations made by the defendant, she paid to the street car conductor, one of the defendant's servants, on this said street car, cash fare from Clyffside Park, Ky., to Huntington, W. Va., whereby the said defendant undertook and agreed to transport the said plaintiff as a passenger on and over its said street car from the said Clyffside Park, Ky., to Huntington, W. Va., when it then and there became and was the duty of the said defendant to use proper care and vigilance to protect this plaintiff from injuries by such persons that might reasonably have been expected to do said plaintiff some injury; but the said defendant, disregarding the rights and wholly failing to protect this plaintiff and to use proper care and vigilance to protect her from injuries by another passenger, which might have reasonably been foreseen and anticipated, and could have been reasonably foreseen and anticipated, permitted a drunken man to become a passenger on the car with this plaintiff, and to thereby assault this plaintiff, to fall upon her, to vomit upon her, and to cause her great pain and distress of body and mind, and to become sick, fainting, and to otherwise endanger the plaintiff's life. Wherefore plaintiff says that she is injured and hath sustained damages to the amount of $2,500." Defendant interposed a demurrer to plaintiff's declaration which was overruled. Defendant then entered its plea of not guilty, which plea was tried before a jury, and when the plaintiff's evidence was all in the defendant demurred thereto, in which demurrer the plaintiff joined, and the jury returned a verdict that, if the law should be held to be for the plaintiff, then they found for the plaintiff and assessed her damages at $300; but, if the law should be found for the defendant, then they found for the defendant. The defendant moved the court to set aside the verdict and grant it a new trial, because the said verdict was excessive, and because the court misdirected the jury, which motion the court overruled, to which ruling the defendant excepted, and the court, having maturely considered the defendant's demurrer to the evidence, overruled the same; and the court, being of the opinion that there was error in the admission of the testimony relative to the injuring of the plaintiff's hat and dress, and that the evidence relating thereto should not have gone to the jury, required plaintiff to release $25 of the verdict of the jury assessed as the plaintiff's damages herein. Whereupon the plaintiff released said $25. To all of which action of the court the defendant excepted. The court then rendered judgment for plaintiff for $275, the amount of damages assessed by the jury, less the $25 so released.

The evidence is all certified in the defendant's demurrer and made a part of the bill of exceptions. Counsel for plaintiff in error rely in their brief for defense principally upon the want of evidence to sustain the verdict, and cite from section 1639, vol. 4, Elliott on Railroads, where it is said, if the company and its employés have no knowledge of the dangerous character or condition of the person who commits the injury, and could not have reasonably foreseen and anticipated it, the company would not be liable. But we find in the same section: "As a railroad company is in duty bound to use care and vigilance to protect its passengers who have placed themselves under its control, and as it has the right and power to eject disorderly persons, it is liable to a passenger who, without fault on his part, is assaulted and injured by a stranger or a fellow passenger, if it or its employés in charge of the train could reasonably have foreseen and prevented it. Thus, where an intoxicated and disorderly or dangerous person is knowingly admitted to the train, or the conductor and other employés fail to take any steps to remove a passenger who becomes disorderly and dangerous, or to otherwise protect other passengers from him when they could do so, the company will usually be liable for injuries caused by him to such other passengers." At section 1591, Id., it is said: "The rule affirmed by the weight of authority is that a railroad carrier is bound to exercise a high degree of care to protect its passengers from injury by third persons. * * * Whether the care the law requires was exercised must generally be determined upon the facts of the particular case." And authorities are there cited.

A. C. Howell, a witness for plaintiff, testified that the conductor on the car passed the drunken man twice and pushed him from the aisle into his seat; that after he passed the man would again take hold of the guard rail on the side of the seat and again swing around; and stated that, if the conductor "didn't know he was drunk it was past me, because he had to push him out of his way twice. I knew he was drunk." Witness further states that, after the drunken man had vomited on plaintiff and she had fainted, he asked the conductor if there was any water on the car, and the conductor said, "No, sir; we don't carry water." The witness states that he and a young man were working with plaintiff to bring her to consciousness. He said: "She looked mighty sick to me. She was as pale as a corpse." He was asked whether the conductor assisted him, and answered: "No, sir; the conductor didn't do anything. He didn't pay any more attention to him than if he had been a possum." He further states that the conductor and motorman, after the car got to Cere lo,

at the switch, came and took hold of the drunken man and put him off pretty rough. This must have been several minutes after the man had "thrown up," as the witness stated that when he "threw up" the car "was somewhere close to the viaduct that goes across the river at Kenova. I think it was as close to that as I can possibly describe it." The injury to plaintiff by becoming sick from the effects of the vomiting upon her and the drunken man falling or being thrown upon her is proven by herself and Mrs. Nichols, mother of the plaintiff.

The plaintiff offered evidence to prove injury to plaintiff's hat and dress, to which evidence defendant objected; there being no allegations in the declaration covering that damage. Defendant also offered an instruction "that the plaintiff is not entitled to recover any damages in this action on account of injury to or loss of her dress, hat, or other wearing apparel," which the court refused to give. Before rendering judgment, however, the court required the plaintiff to release $25 from the verdict, which was the maximum amount proved to be the damage sustained by the clothing, hat, and dress, and gave judgment for the residue of the verdict —$275. So that the defendant was not prejudiced by the admission of the evidence and the refusal to give said instruction, and such error is not reversible error. "No judgment should be reversed in a court of error, when it is clear that the error could not have prejudiced and did not prejudice the rights of the party against whom the ruling was made." Lancaster v. Collins, 115 U. S. 222, citing Deery v. Cray, 5 Wall. (U. S.) 795, 803, 18 L. Ed. 653; Gregg v. Moss, 14 Wall. (U. S.) 564, 569, 20 L. Ed. 740; Lucas v. Brooks, 18 Wall. (U. S.) 436, 454, 21 L. Ed. 779; Allis v. Insurance Co., 97 U. S. 144, 145, 24 L. Ed. 1008; Cannon v. Pratt, 99 U. S. 619, 25 L. Ed. 446; Mining Co. v. Taylor, 100 U. S. 37, 53, 25 L. Ed. 541; Hornbuckle v. Stafford, 111 U. S. 389, 394, 4 Sup. Ct. 515, 28 L. Ed. 468.

Instruction No. 3, offered by defendant in the following words:

"The court instructs the jury that an intoxicated man has a legal right to ride in a public conveyance, and that the failure of a street car company to expel an intoxicated man from its car does not render it liable for an injury inflicted by him upon a fellow passenger, where the intoxicated man has not been demeaning himself in such manner as to forfeit his legal right to ride; and so long as an intoxicated man remains quiet and molests no one he cannot be legally expelled.

"And if the jury believe from the evidence in this case that the intoxicated man referred to by the witness was quiet and orderly, and was guilty of no misconduct other than swaying from side to side in the aisle of the car, that the conductor of the said car would have no right to put him off the car; and if they believe that after the drunken man vomited and thereby became offensive to the other passengers the conductor and officers of the said car did put him off, then the defendant was not guilty of any wrong or negligent conduct towards the plaintiff, and the plaintiff is not entitled to recover damages"

—was modified by leaving out the last paragraph of said instruction, being all after the word "expelled." This modification was proper, because the part left out would tell the jury that, if the conductor and officers of the car put the drunken man off after he vomited and became thereby offensive to the other passengers, then the defendant was not guilty of any wrong or negligent conduct towards the plaintiff, and the plaintiff is not entitled to recover damages; and this without regard to the condition or conduct of the drunken man prior to and including the final act complained of, and the duty of the conductor and agents of the defendant in relation to the expulsion of such man from the car, or exercising such control over him as to secure full protection to the plaintiff and other passengers from the improper conduct of the man, whom it is shown the conductor knew to be drunk, and that if, at any time after the mischief was done, they put the offender off the car defendant would be relieved from liability. Witness Howell says the conductor paid no attention to him at that time, although his attention was called to the matter when the witness asked him if there was any water on the car. It was clearly inferable from this that the conductor was present at the time witness was trying to resuscitate plaintiff, and probably when the vomiting took place. The "putting off" took place at the switch at Ceredo, while the "throwing up" occurred at the viaduct, or somewhere between Kenova and Ceredo. The distance from Kenova to Ceredo is not shown; but it is shown that it took from ten to fifteen minutes to run the car from Hampton City, on the opposite side of the Sandy river from Kenova, to Ceredo. With all this evidence in support of plaintiff's claim, the defendant elects to risk his demurrer to the evidence, instead of showing the incorrectness of it by the conductor, who was a competent witness in the case and a very important one for the defendant; but he was not called. And why? The presumption is that if he had been placed upon the stand his testimony would have corroborated that of the witnesses for plaintiff and would not have helped the defense. In Dewing v. Hutton, 48 W. Va. 576, 37 S. E. 670, it is held: "When a party to a controversy fails to examine a material and important witness in his behalf, the law raises the presumption that such witness' evidence, if given, would be adverse to such party." See, also, Vandervort v. Fouse, 52 W. Va. 214, 43 S. E. 112; Trust Co. v. McClellan, 40 W. Va. 405, 21 S. E. 1025.

It is insisted by plaintiff in error that the verdict is excessive. In 1 Sutherland on Damages, § 459: "Where there is not a legal measure of damages, and where they are unliquidated, and the amount thereof is referred to the discretion of the jury, the court will not, ordinarily, interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the court; and the law does not recognize in the latter the power to substitute its own judgment for that of the jury. Although the verdict may be considerably more or less than in the judgment of the court it ought to have been, still it will decline to interfere, unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake, or, in other words, that it is the result of accident or perverted judgment, and not of cool and impartial deliberation." And cases are there cited. In Farish v. Reigle, 11 Grat. (Va.) 697, 62 Am. Dec. 666, it is held: "In actions by passengers against carriers, for injuries sustained, the judgment of the jury as to the amount of the damages must govern, unless the damages allowed are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case." See, also, Trice v. Railroad Co., 40 W. Va. 271, 21 S. E. 1022; Boster v. Railway Co., 36 W. Va. 318, 15 S. E. 158; 13 Cyc. 121, and cases there cited. In Boster v. Ry. Co., cited, at page 324 of 36 W. Va., and page 160 of 15 S. E., Judge Holt says: "It was right to give him some damages, but how much? Thirty cents would have made him whole for the money paid out, for which he received nothing. The court would have told them, if asked, that after considering the case carefully, fairly, and dispassionately, according to all the facts, they could, in fixing the damages, if they allowed any, take into consideration what would be a proper compensation for mental and physical pain, insult, and humiliation, if any, in addition to the thirty cents." In Railway Co. v. Baird, 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43, it was held: "Two thousand five hundred dollars is not an excessive award against a street car company for the act of its conductor in striking a passenger several times in the face merely because, in order to stop the car, he pulled the bell rope so hard as to break it." And in Mabry v. Electric Ry. Co., 116 Ga. 624, 42 S. E. 1025, 59 L. R. A. 590, 94 Am. St. Rep. 141, it is held: "A railroad company is liable in damages for an injury to the feelings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though such passenger may not have received any physical injury thereby." In Stevens v. Friedman, 58 W. Va. 78, 85, 51 S. E. 132, 135, Judge Cox, in speaking for the court, says: "It may be very difficult to see, from reading the record, how the jury arrived at the conclusion that plaintiff was entitled to $1,000 damages, under the evidence and circumstances presented. But in obedience to plain law we feel compelled to sustain the finding." Mr. Minor, in his fourth volume of Institutes at page 930, treating of this principle, says: "The estimation of damages is peculiarly within the province of the jury, they being considered especially competent to determine such matters; and therefore it is particularly incumbent upon the court to forbear any encroachment upon the function of the jury in this particular, save in the strongest cases of injustice. No mere difference of opinion on the part of the court, however decided, justifies an interference with the verdict for this cause; but the amount must be so out of the way as to evince passion, prejudice, partiality, or corruption in the jury"—citing 6 Com. Dig. 227, Plead. R. 17; Coleman v. Southwick, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253; McConnell v. Hampton, 12 Johns. (N. Y.) 234. In Heard v. Railway Co., 26 W. Va. 455, Syl. points 1 and 2, the rule is clearly stated as to how a demurrer to evidence, where there is no conflict, should be considered by the court, which rule has been followed by this court in many cases since. In Mannon v. Camden Interstate Ry. Co., 56 W. Va. 554, Syl. point 4, 49 S. E. 450, it is held: "Judgment of the circuit court overruling a demurrer to evidence will be affirmed, unless it is contrary to the plain preponderance of the evidence, or it is without evidence to support it as to some material question at issue."

It is further said that the court erred to the prejudice of the plaintiff in error in its remarks to the jury respecting damages, stating that, in case they found the issue for the plaintiff, "the damage should be at least one cent." The jury was not instructed to find for the plaintiff, but simply told, if the issue was for the plaintiff, she was entitled to damages, however small. Counsel for plaintiff in error in his brief does not point out how his client is prejudiced by the remarks of the court.

There being no reversible error in the judgment of the circuit court, the same is affirmed.

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(63 W. Va. 182)

## STATE v. HOOD.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. HOMICIDE—DYING DECLARATIONS—ADMISSIBILITY.

It is no ground or excluding a dying declaration that it does not appear that the declarant believed in God, and rewards and punishment after death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 445½.]

2. CRIMINAL LAW—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

A written dying declaration contains matter that is admissible, and other matter not ad-

missible, because hearsay. There is a general objection to the admission of the paper and one item thereof, but no specific objection to matter of hearsay. It was the duty of the objector to specify the objectionable matter, and there is no error in overruling the objection to the admission of the paper for such hearsay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1637.]

3. SAME—INSTRUCTIONS—WITHDRAWAL.

An erroneous instruction may be withdrawn from the jury with a direction from the court that it is withdrawn, and is to be disregarded by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1992.]

4. HOMICIDE—AFFRAY—DUTY TO RETREAT.

In case of affray, where retreat is necessary before taking the adversary's life in self-defense, that retreat must be in good faith, not as a cover to execute a fixed design to kill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 168, 169.]

(Syllabus by the Court.)

Error to Circuit Court, Ritchie County.

Hezekiah Hood was convicted of involuntary manslaughter, and brings error. Affirmed.

J. G. St. Clair and Freer & Robinson, for plaintiff in error. Atty. Gen. C. W. May and S. M. Hoff, for the State.

BRANNON, J. This is a writ of error from a judgment of the circuit court of Ritchie county, sentencing Hezekiah Hood to the penitentiary for four years upon a verdict finding him guilty of involuntary manslaughter, upon an indictment against Hezekiah Hood and Henry Hood, for the murder of John Barnes.

It is claimed that the court erred in allowing the dying declaration of Barnes, reduced to writing, to go before the jury. One objection to the dying declaration is that it does not appear that Barnes believed in a God, and rewards and punishment after death. By the common-law of England, want of such belief makes a witness incompetent, on the principle that one who does not have such religious faith will not consider himself bound by an oath. This was so strongly embedded in the common-law that it was said in a very well-considered opinion in Atwood v. Welton, 7 Conn. 74, that there is no adjudged case, and hardly a dictum, in the English books to the contrary. We may say so virtually in America, save where statute or Constitution changes the rule. 2 Elliott on Ev. § 773; 1 Greenleaf on Ev. § 369; 2 Wigmore on Ev. § 1443; 30 Am. & Eng. Ency. L. (2d Ed.) 936; 92 Am. Dec. note 473. In Perry's Case, decided by the General Court of Virginia in 1846 (3 Grat. 631), such seems to be the tacit admission, as a rule of the common-law; but the court, by reason of the Virginia Bill of Rights and the Virginia Act of Religious Freedom, held that this ground for the exclusion of a witness had been abrogated. It stated the broad proposition that "no person is incapacitated from being a witness on account of his religious belief." That case quotes this language of those acts as abrogating the common-law rule: "No person shall be enforced or otherwise restrained, molested, or burdened in his body or goods, or otherwise suffer on account of his religious opinions and belief; but all men shall be free to profess, and by argument maintain, their opinions in matters of religion; and the same shall in nowise affect, diminish, or enlarge their civil capacities. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force and violence." The West Virginia Bill of Rights must have the same effect from the following language: "No religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment." "No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever; nor shall any man be enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess, and by argument to maintain their opinions in matters of religion; and the same shall, in nowise, affect, diminish or enlarge their civil capacities; and the Legislature shall not prescribe any religious test whatever, or confer any particular privileges or advantages on any sect or denomination." These wide provisions plainly speak religious freedom, and forbid the disfranchisement of a person from giving evidence in the public courts in the administration of justice. The courts are a part of the government; they perform functions in such administration; and they call witnesses in doing so as indispensable to their procedure; and it is to the interest of the state that persons shall not be excluded for such a cause. The right is valuable to the citizen—a great right to bear testimony for his protection, and the protection of his state or neighbor. The right is a civic right of laudable and worthy distinction, and of high value; its denial a brand of inferiority and disgrace. In Perry's Case we find the question, "the Constitution declares that all men shall be free to profess, and by argument to maintain, their religious opinions. Is the man who is stigmatized by the law as unworthy of belief; one who, in the language of Lord Coke, is in the condition of those who have lost 'liberam legem,' because of his opinions, as free to avow and defend those opinions as one who can fearlessly enter a court of justice, and offer his testimony to protect the property, the reputation, or the life of his neighbor? * * * The proscribed man may suffer in his property, or in the persons of the members of his family. His goods may be stolen, his dwelling broken into by the midnight robber, or burned by the incendiary; his child may be beaten, or his

wife murdered before his face, and the offender escape because of the incapacity of the injured man to give evidence against him. This very incapacity may have caused the calamity, and can he be told that he lives under a government of equal laws? That he has suffered nothing on account of his opinions?" Church and state are separate in America. The old rule prevailed when the government adopted and cruelly enforced one religion—indeed one church—as the only true one; but where the state has no religion, and religious freedom dominates, such a rule cannot and ought not live. It is too late in these days of liberalism to assert it. It is entirely against the spirit and letter of American constitutional law. But, as Greenleaf on Ev. § 370, says, "defect of religious belief is never presumed; but, to the contrary, there is a presumption that every one reared in a Christian land has such belief." Nothing is shown as to the belief of Barnes. So says Underhill, Crim. Ev. p. 129.

There can be no question that this dying declaration was admissible; but it is argued here that it contained hearsay. In his declaration, Barnes stated that he started to the place where he was shot by Hood, and said, "On crossing the hollow just beyond where I had started, I met Reymond Hanes and Archie Hanes, and they said that the Hoods —that Hezzie Hood—swore that if I [meaning John F. Barnes] came up there to clean out them holes that he would kill me." It may be conceded that this was inadmissible, because hearsay. A dying declaration must be such as would be admissible if the party were living and giving evidence. State v. Burnett, 47 W. Va. 731, 35 S. E. 983; 4 Elliott on Ev. § 3033. Therefore, hearsay cannot be rendered admissible by being included in a dying declaration. 4 Ency. of Ev. § 992. But the defendant made a general objection to the introduction of the written dying declaration, and he did not put his finger upon that clause. He did specify one clause, but not that matter. This will not do. Long v. Perine, 41 W. Va. 314, 23 S. E. 611; Warren v. Warren, 93 Va. 73, 24 S. E. 913. Except as to another clause, his objection was general. Some of the dying declaration was plainly admissible. Where a deposition contains some matter admissible, and other matter not admissible, the party objecting must specify the particular portion to which he objects. Richardson v. Donehoo, 16 W. Va. 685. If a record is offered in evidence, a part of which is objected to, the objector must specify the part objected to, or his objection is properly overruled. Parsons v. Harper, 16 Grat. (Va.) 64; Trogdon v. Commonwealth, 31 Grat. (Va.) 862. When a party moves the court to exclude evidence, he must specify the particular evidence. Where some of it is proper, the motion may be properly overruled on account of the generality of the motion. Friend v. Wilkinson & Hunt, 9 Grat. (Va.) 31. "Where evidence is offered, a portion of which is admissible and a portion not, and the objection is general, the objection must be overruled." Washington, etc., R. Co. v. Lacey, 94 Va. 463, 26 S. E. 834. Since writing to this point I meet with the case of Stansbury v. Stansbury's Adm'rs, 20 W. Va. 23. In that case a will was given in evidence over a general objection. The court held that: "Where a paper is offered in evidence to the jury, and a general objection is made to its being read, and the objection is overruled, this court will not hold such ruling to be error, if such paper could be properly read as evidence for any purpose."

The case in hand involves a large number of instructions. The court gave one, and it was before the jury while two counsel, one one each side, argued the case, and before two other counsel, one on each side, made their arguments to the jury, the court withdrew that instruction, and charged the jury to disregard it entirely as if it never had been given. We must take it that jurymen are intelligent men, and can understand the directions of the judge, and have capacity not to be influenced by an instruction afterwards eliminated from the case. If this is not so, why any instructions? Judge Holt, in Osborne & Co. v. Francis, 38 W. Va. 319, 18 S. E. 591, 45 Am. St. Rep. 859, cited authority for the statement that a court may cure errors in instructions by withdrawing, explaining, or correcting them. So do Hughes on Instructions, and Shakelford v. State (Tex. Cr. App.) 53 S. W. 884. This power, or I should say duty, of withdrawal of a bad instruction is recognized in McKelvey v. C. & O. Ry. Co., 35 W. Va. 500, 14 S. E. 261. 2 Thompson on Trials, § 2326, sustains this power in a court. If it did not exist, it would be a misfortune. The rule contended for by counsel would frustrate tedious, costly trials, and obstruct the administration of justice. Substance must not always yield to technicality.

Complaint is made of refusal of defendant's instruction 6 bearing on self-defense. It leaves out, in connection with retreat, the element of good faith, and in saying that the defendant may kill when he has reasonable ground to believe that there is design to destroy his life or commit a felony, it omits the words "and does believe." The "good faith" feature was important in the case, because evidence showed that, when Hood backed some steps from Barnes, he told his son to get his gun, and told his son to shoot Hood, and he was shot just then, tending to show that such retreat as there was, was not in good faith. State v. Zeigler, 40 W. Va. 594, 21 S. E. 763. Other instructions given practically cover this instruction so far as the case demanded.

Complaint is made of the refusal of instruction No. 8, saying that "if they are satisfied from the evidence that when Hezekiah Hood retreated from the posthole, Barnes,

armed with a revolver, fired the same off one or more times, thereby assaulting the defendant, and that the defendant had cause to believe, and did believe, that great bodily harm was about to be inflicted upon him, and that under such belief and fear he fired the shot with intent to protect himself," then he was not guilty. It is said that this court approved that instruction in State v. Hobbs, 37 W. Va. 812, 17 S. E. 380. I suppose instruction No. 4 is referred to. Perhaps that instruction was right in that case; but the instruction under consideration differs from that in the Hobbs Case, because is assumes that Hood retreated, which is not an element of the instruction in the Hobbs Case. And it leaves out the words "retreated in good faith," and it assumes that, by firing the pistol, Barnes assaulted Hood. Other instructions cover self-defense.

Complaint is made of the giving of an instruction for the state, defining reasonable doubt, and containing the clause, "The oath of a juror imposes upon him no obligation to doubt where no doubt would exist, if no oath had been administered." It is said that this is plain error, as telling the jury that the oath imposed no obligation. It is instruction 4 in State v. Bickle, 53 W. Va. 599, 45 S. E. 917, and was held no error in that case. We do not think this is error. We find this test in many of the cases. It is put in note on page 491 of 12 Cyc. An oath does not compel a juror to doubt, when he would not doubt on the same evidence as an honest man, acting in a grave matter. The great Chief Justice Gibson, a polar star in judicial decisions, said that a juror is "not at liberty to disbelieve as a juror while he believed as a man." Commonwealth v. Harmon, 4 Pa. 270. Of course, he meant on the evidence, not outside the evidence. Also, I find that in State v. Kellison, 56 W. Va. 690, 47 S. E. 166, it was held that the giving of such instruction is no error. The jury in this case were told over and over again that the state must prove Hood guilty beyond a reasonable doubt. I will add for myself, that as the verdict found Hood not guilty of murder in either degree, but guilty of voluntary manslaughter, and as there was no question that Hood shot and killed Barnes, and so stated himself as a witness, I do not see how the matter of reasonable doubt is involved in the case.

There are other instructions in the case, but they involve no principles of law not settled by numerous decisions in Virginia and West Virginia binding us, so that a discussion of these instructions would only be a rehash of law fixed and settled by them. If the case were to go back for another trial, it would be proper to say which instructions were good and which bad; but as the case does not go back, why write pages and pages to restate settled law? We have carefully examined the instructions and do not find any error therein.

Counsel discuss the evidence in this case, and ask the court to pass on it, and determine whether the accused was guilty of manslaughter or excusable on self-defense. As there was no question as to Hood shooting Barnes, the question of self-defense was one peculiarly for the jury. Witness after witness proves that, and the circumstances of the shooting. The deceased made his statement as to the facts, the prisoner gave evidence as to the facts. Other witnesses gave evidence as to the facts of the homicide. The evidence is of much volume. The prisoner moved to strike out the state's evidence as being insufficient. By no means could that motion prevail. It was a case peculiarly proper to go before the jury. Of course, that motion could not prevail in the circuit court nor in this court. In this court it involves only the question whether Hood was entitled to the excuse of self-defense. That was peculiarly a jury question. The trial was fair, and the verdict supported by the evidence. The proper function of this court, except in rare cases, is not to discuss facts, but lay down law principles for public guidance. It is not a jury to weigh and balance evidence.

Judgment affirmed.

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(63 W. Va. 196)

## FIRST NAT. BANK OF JEFFERSON v. THOMPSON et al.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. EQUITY—TAKING DEPOSITIONS.

An order in a chancery case shows that depositions are to be closed by a date, and the case submitted in vacation by a later date. It is no error to read depositions taken subsequent to those dates on the hearing at a later term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, § 121.]

2. APPEAL—REVIEW—DECREE IN EQUITY.

Where a chancery case turns on the effect and weight of evidence and credit of witnesses, and that evidence is such that reasonable men may differ as to its effect, the appellate court cannot reverse the circuit court's decree. A decree so turning on evidence cannot be reversed unless manifestly wrong.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

(Syllabus by the Court.)

Appeal from Circuit Court, Jefferson County.

Bill by the First National Bank of Jefferson against Jennie Thompson and others. Decree for defendants, and plaintiff appeals. Affirmed.

H. H. McCormick, for appellant. Forrest W. Brown, for appellees.

BRANNON, J. This is a suit in equity in the circuit court of Jefferson county by the First National Bank of Jefferson against Jennie Thompson and her husband and others, to subject to indebtedness of C. H. Thompson land conveyed to Jennie Thompson by J. M. Hotckiss, on the charge that

the husband of Jennie Thompson furnished the money which purchased the land, and that the conveyance to his wife was to defraud his creditors. The decree dismissed the bill.

One assignment of error is that certain depositions were read. The court made an order showing that the defense was given until June 15, 1904, to complete depositions, and the plaintiff five days thereafter, after which the depositions should be closed, and the case submitted in vacation on or before 11th of July, 1904, "as counsel may agree"; and these depositions were taken July 14th. The case was heard March 1, 1905. We have not the question whether the court could have refused to read the depositions, but whether it erred in reading them in its discretion. We do not think there is error in this, for reasons which will appear in Buster v. Holland, 27 W. Va. 510; Fulmer Coal Co. v. Morgantown & K. R. Co., 57 W. Va. 470, 50 S. E. 606; Radford v. Fowlkes, 85 Va. 820, 8 S. E. 817; Hogg's Eq. Procedure, § 493. But, furthermore, no exception to the depositions was called to the attention of the court, and this avoids any error in this matter. Hogg's Eq. Proced. § 498; Whitehouse v. Jones, 60 W. Va. 680, 55 S. E. 730. And the plaintiff cross-examined these witnesses, which it seems is a waiver of an objection such as this. Hogg's Eq. Proced. § 500.

On the merits there can be no question that when a wife acquires real estate, in a contest between her husband's creditors, the law presumes that it was paid for by the husband, and she must show by clear proof that she paid for it with her own means. Miller v. Gillespie, 54 W. Va. 450, 46 S. E. 451. But after a careful review of the evidence Jennie Thompson fairly meets this demand. She, her husband and two brothers prove that she had means with which to pay the purchase money, and a disinterested witness proves its payment in cash by her. There is no positive evidence to the contrary—only some circumstances arousing some question or suspicion; not sufficient to overthrow the positive evidence of four witnesses, unless we arbitrarily say that their evidence is perjured. If they are believed, the defense is clearly established. There can be no question but that reasonable men would differ, on weighing the evidence in this case, as to its effect, and in such case this court cannot reverse the decree of the circuit court, and can only do so where we can see that the finding of the circuit court is plainly wrong. Camden v. Dewing, 47 W. Va. 310, 34 S. E. 911, 81 Am. St. Rep. 797; Shaffer v. Shaffer, 51 W. Va. 126, 41 S. E. 166. The case involves no principles of law, but turns only on evidence and credit of witnesses. It would answer no purpose to detail mere evidence. The object of opinions published in the state reports is to lay down principles of law, not evidence.

We must affirm the decree.

(63 W. Va. 198)

## HANSFORD v. SNYDER.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. AFFIDAVITS—SUFFICIENCY.

An affidavit which, after the title of the case, has the venue, "state of West Virginia, Tucker county, to wit," sufficiently shows that the notary is a notary of Tucker county and administered the oath in that county.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Affidavits, §§ 35–37.]

2. BILLS AND NOTES—ACTION—PLEA—NECESSITY OF AFFIDAVIT.

In an action of debt on a promissory note, an affidavit being filed with the declaration as authorized by Code 1899, c. 125, § 46 [Code 1906, § 3866], the clerk cannot receive an issuable plea in bar at rules without the affidavit of the defendant required by section 46. Though he does receive such plea, and omits to enter judgment against the defendant, and no plea is filed by leave of the court at the first term, no plea can be filed by the defendant thereafter, but the plaintiff has right to have judgment recorded by the court for his demand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1542–1554.]

(Syllabus by the Court.)

Error to Circuit Court, Randolph County.

Action by L. Hansford, trustee, against Sampson Snyder. Judgment for plaintiff. Defendant brings error. Affirmed.

C. H. Scott, for plaintiff in error. Jared L. Wamsley and J. F. Harding, for defendant in error.

BRANNON, J. L. Hansford, trustee, brought debt in the circuit court of Randolph county against Sampson Snyder, on a promissory note for $500. He filed with the declaration the affidavit required by Code 1899, c. 125, § 46 [Code 1906, § 3866]. The declaration was filed at rules, and at the first rules a conditional judgment was entered. At the next rules the defendant filed pleas of nil debet and payment, and the clerk set the case for hearing, entering no judgment against the defendant, as required by Code 1899, c. 125, § 45 [Code 1906, § 3865]. No affidavit contesting the plaintiff's affidavit as to the amount due was filed by the defendant. No action whatever in the case appears at the first term of court after the rules. At the second term the defendant asked to withdraw the pleas filed at rules and substitute others of nil debet and payment accompanied by an affidavit denying that there was anything due the plaintiff, and moved the court to set aside the proceedings at rules, and the court allowed the pleas filed at rules to be withdrawn, and set aside and corrected "accordingly" the rule proceedings, not saying what proceedings or how corrected. We must presume the correction was to conform to law, as that, though not essential, would be proper. The plaintiff objected to the filing of the new pleas, and moved for judgment, and the court took time to consider. At the next term the defendant moved the court to quash plaintiff's affidavit for defects on its face, and ob-

jected to judgment for the plaintiff, and the court overruled the motion to quash the plaintiff's affidavit, rejected the defendant's pleas, and entered judgment for the plaintiff's demand. I should have stated that a demurrer to the declaration was overruled.

Demurrer to the declaration: The declaration states that Hansford is trustee in a deed of trust made by J. H. Simmons and Charles Simmons to Hansford, that Snyder alone made to J. H. Simmons the note sued on, and that the note had been conveyed to Hansford by said deed of trust. The objection to the declaration is that it avers nonpayment to J. H. Simmons and Hansford, but not to Charles Simmons. The declaration does not hint of any interest or connection of Charles Simmons with the note. He may have transferred something else by the deed of trust, but had no interest in the note, so far as appears.

The affidavit: The defect alleged is that it does not show of what county the notary is a notary. Its caption after the title of the suit is "state of West Virginia, Tucker county, to wit." We will presume from this that the notary was a notary of Tucker county and administered the oath in that county. Quesenberry v. People's B. & L. Ass'n, 44 W. Va. 512, 30 S. E. 73. See Kesler v. Lapham, 46 W. Va. 294, 33 S. E. 289; Carpenter v. Dexter, 8 Wall. (U. S.) 513, 19 L. Ed. 426.

Objection is also made to the substance of the affidavit, but it plainly answers the demand of the statute. It is even said that Simmons must make the affidavit, and that the trustee could not do so for want of personal knowledge. This is highly technical. Hansford was assignee of the note, and would likely inquire and be conversant with the facts concerning it. Should the court have entered judgment? Which the sounder line of thought?

1. Though the clerk should not at the second rules have received the plea, because not accompanied by a counter affidavit of the defendant, yet he did so, and there was in fact no entry of a common order confirmed, and therefore the court in term ought to have accepted the plea and affidavit, and not entered judgment final for plaintiff, as there was no office judgment to prevent a plea.

2. The plea without affidavit filed at rules was a nullity, because Code 1899, c. 125, § 46 [Code 1906, § 3866], prohibits, prohibits I say, any plea without affidavit to meet the plaintiff's affidavit, and the clerk should not have filed it, and the court at a subsequent term ought to have treated the case as if no plea had been filed at rules, but as if judgment had been in fact entered at rules.

We think the second proposition the sounder one. The Code, in section 46, gives a plaintiff filing the affidavit required by it a judgment by default in an action of debt, unless his right proven by his affidavit shall be repelled by an affidavit by the defendant. The law prohibits the defendant from contesting the merits to which the plaintiff's affidavit relates, unless the defendant purges his conscience by a counter affidavit. The statute writes this judgment in the rule book, so to speak. The statute gives it. The clerk's admitting the plea, and omitting to enter a judgment, was fruitless to prevent such judgment. In Anderson v. Doolittle, 38 W. Va. 629, 18 S. E. 724, and Bradley v. Long, 57 W. Va. 599, 50 S. E. 746, the clerk, in an action of debt, improperly entered an order for an inquiry of damages, which, if valid, would prevent an office judgment; but we held that such order for inquiry of damages was void and ineffectual to prevent an office judgment. So we hold as void the act of the clerk in receiving the plea and in omitting to enter judgment in the office. That the law enters the office judgment was held under the statute as it was in the Code of 1860, which declared that office judgment should be final on the last or fifteenth day of the term in Enders v. Burch, 15 Grat. (Va.) 64, and Alderson v. Gwinn, 3 W. Va. 229. This quality or character of finality has been given such office judgment under the West Virginia Code, if the plaintiff files such affidavit. Hunter v. Snyder, 11 W. Va. 198; Marstiller v. Ward, 52 W. Va. 74, 43 S. E. 178, as also by the two cases cited above. James Sons & Co. v. Gott & Ball, 55 W. Va. 223, 47 S. E. 649, does not hold against the finality of such a judgment, and does not allow a plea after the first term, because there was agreement to continue in that case. That is given as the reason of the decision. Under these views the action of the court in setting aside or correcting the proceedings at rules is immaterial. Nor is it material that this was done, not at the next term. Therefore the Code provision that the court may correct proceedings at rules at the next term is not involved, because under principles of cases above the action of the clerk in filing pleas and failing to enter judgment at rules is void and to be "disregarded," as held in the Anderson Case and Bradley Case above cited. The clerk could not dispense with an affidavit by the defendant, or deprive the plaintiff of the judgment given him by law. The clerk's action was void, because the statute forbids a plea without affidavit, and commands him to write an office judgment. The statute is mandatory. The suitor's right is involved, and as the statute prohibits a plea without affidavit, the suitor has right to such judgment. It is not a matter of discretion with the clerk. Cases are cited to say that there is no judgment by default when there is appearance; but suppose the appearance is in a mode prohibited by the letter and spirit of the statute? Grigg v. Dalsheimer, 88 Va. 508, 13 S. E. 993, on a similar statute, so holds.

Judgment affirmed.

(63 W. Va. 107)

## MILLER v. PRUDENTIAL BANKING & TRUST CO. et al.

(Supreme Court of Appeals of West Virginia. Dec. 10, 1907.)

1. BUILDING AND LOAN ASSOCIATIONS—STATUTES—COMPLIANCE—USURY EXEMPTION.

If a foreign building and loan association, doing business in this state, contravenes the provisions of section 26, c. 54, of the Code of 1899 [Code 1906, § 2318], relating to building and loan associations formed in this state, the exemption from usury, afforded by that statute, will be denied it.

2. SAME—PREMIUMS—BIDDING FOR FUNDS.

Premium or profit, for the use of an advance or loan by a building and loan association, to a member thereof, must be fixed or determined, under the law of this state, by competitive bidding, by the members of such an association, for right of priority to the mutual funds; or, in default of bidders at or above a minimum premium, fixed by the by-laws, by awarding the money to a member at such minimum premium.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Building and Loan Associations, § 46.]

3. SAME — USURIOUS CONTRACTS — ENFORCEMENT.

When such premium or profit is fixed or determined by any other method than that regulated by our law, and such premium or profit is greater than the legal rate of interest, the contract respecting the advance or loan is usurious, and, to the extent of such usury, cannot be enforced in the courts of this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Building and Loan Associations, § 46.]

4. SAME—PREMIUMS ARBITRARILY FIXED.

Premium or profit arbitrarily fixed by the by-laws of an association, domestic or foreign, in contravention of section 26, c. 54, of the Code of 1899 [Code 1906, § 2318], and without regard to its provisions as to ascertaining the right of priority among members to loans, by a selling of the money in the treasury to the bidder of the highest premium therefor, or, in default of bidders at or above a minimum premium, fixed by the by-laws, by awarding the money to a member at such minimum premium, is unlawful and usurious if it exceeds the legal rate of interest, when stipulated for in a contract respecting an advance or loan.

5. SAME—RENEWAL.

A renewal of an usurious contract between the same parties, partakes of the infirmity of the original agreement, and the original taint attaches to all consecutive obligations or securities growing out of the original vicious transaction.

6. SAME — CHANGE OF SECURITIES—EVIDENCE OF DEBT.

A mere change of securities or evidences of debt for the same usurious loan, to the same person who reserved the usury, does not purge the original consideration; and, whether such new securities or evidences of debt are in renewal of former ones, or in payment of the debt tainted with usury, the original taint remains until a new consideration intervenes.

7. SAME—RENEWAL OF DEBT.

A debt, evidenced by bond and secured by deed of trust on real estate in this state, not wholly void in its inception because of usury with which it is tainted, and which usurious debt is afterwards simply renewed, or the form thereof changed, by the execution and delivery of notes for the same usurious amount, secured by new deed of trust on the same real estate, which execution and delivery of said notes and deed of trust securing them, and the place of payment fixed by them, are in a state by the laws of which contracts are void for usury, is not wholly invalidated because of such renewal or change in said state, so as to prevent its enforcement to the extent justified by the laws of this state, under which said original usurious contract is called in question.

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.

Bill by James S. Miller against the Prudential Banking & Trust Company and others. From an adverse decree, defendants appeal. Affirmed.

W. K. Cowden and Ordway Puller, for appellants. C. S. Welch, for appellee.

ROBINSON, J. The assignments of error, and the arguments in the briefs of counsel herein, may at once be reduced to the real question presented. Nor does it behoove us to now state the facts involved. These will sufficiently appear as we proceed.

The question is: What sum is legally due from the plaintiff to the defendant company, as the successor of the Metropolitan Building and Loan Association, of Richmond, Va., on account of an advance of $1,900 made to him by said association, on his 19 shares of stock therein, on the 11th day of March, 1897, the repayment of which was evidenced by his bond, secured by deed of trust on his real estate in the city of Huntington, the residue of which indebtedness after payments thereon was, in the year 1901, renewed by a series of notes, payable monthly, with legal interest, executed by plaintiff and delivered to defendant company, secured by a new deed of trust on the same real estate? In other words, was the said building and loan contract invalid as such, under our law, and therefore usurious; and, if so, did the usury follow into, and taint therewith, the said notes given in renewal? The controversy arises by this suit of plaintiff, in the circuit court of Cabell county, alleging such usury in the notes aforesaid, and enjoining a sale under the deed of trust securing them, and a full resistance, by the defendant company and its receiver, of plaintiff's contention and procedure. We are therefore called upon to consider the original building and loan contract, and to see if it was such as is authorized by our law, and by it exempt from usury, because of the bonus or premium taken above the legal rate of interest. We find it to be a contract calling for the repayment of said advance by monthly installments of $23.75 each, until such time as the shares of stock should be fully paid up, or until 144 such payments should be made, which monthly payments were recited to be in full of all dues, premium, and interest in accordance with the charter and by-laws of the association. But in the said charter and by-laws we find no mention of anything under the name of premium and interest, although the dues are therein stated to be 50 cents per month per share. The by-laws did provide, under the head of advances, that, for the class of stock which plaintiff held, the bond should provide for the payment of $1.25 per month per share,

until the maturity of said shares, but when 144 payments were made, no further payments were required. This sum, we know by the by-laws, embraced the 50 cents for dues, but the residue of it was given therein no particular name. The bond and deed of trust, however, tell us that this residue was to be in full of premium and interest, but nowhere in the papers pertaining to this loan or advance, is it stated what portion was premium, and what portion was interest. A reference to the by-laws also discloses to us no provision whatever in relation to awarding loans or advances to members, upon a bidding of premium therefor, or, in default of bidders, awarding the money in the treasury to a member at a minimum premium; nor does the bond and deed of trust show that the advance was awarded plaintiff by that method. A minimum premium, and the mode of making the award, were not fixed by the by-laws; nor was there any provision for selling to the stockholders the money by bidding the highest premium, profit, or bonus for the priority of right therefor. It is insisted by plaintiff that this failure to definitely state the amount of premium exacted, and to provide for competitive bidding of premium for priority of right to loans, was in conflict with our statute by which a premium charged by a building and loan association is exempted from being usury, and that the by-laws and contract did not come within the defined requirements in said statute, so as to entitle the contract to such exemption.

Our Legislature has deemed it well to encourage the formation of building and loan associations, for the purpose of encouraging industry, frugality, and home building, and saving among the members, and has exempted them from the usury laws as to the profit, taken to the general fund belonging to the members, for the use of money therefrom by a member. It has given them certain and defined powers, to be exercised in the promotion of said objects, and as tending to equality among the members, the safety and security of the mutual funds, and the advancement of the correct principles that should obtain in such enterprises. True building and loan associations, founded and conducted upon proven principles of such financing, are most worthy of such recognition as has been given them in this state by the lawmakers; but, in order that only such principles should be invoked in their formation and operation, our law has jealously delegated to them only such powers as are believed to relate to their true purpose and propriety. If formed and conducted for the purposes expressed in the law, exercising the powers therein granted, and complying with the rules thereof, a building and loan association doing business in this state is entitled to exemption from the usury laws; otherwise, it is not. It must render something for such exemption; and that which it must so render is the benefit to its members, and through them to the community, in the promotion of the true objects of such associations as viewed by the public and expressed through the lawmakers.

Let us see. What is our law? It is sections 25 to 29, inclusive, chapter 54 of the Code of 1899 [Code 1906, §§ 2317–2321], section 26 of which is as follows: "Every such association shall have the power to provide by its by-laws for selling to the stockholders, who shall bid the highest premium therefor, the money in the treasury, or in default of bidders at or above a minimum premium, may award to a member the value of any shares held by him less such minimum premium; the minimum premium, and the mode of making the award to be fixed by the by-laws. Or such association may charge and receive the premium, bid by a stockholder for the priority of right to such loans, in periodical installments; but the by-laws of every association shall set forth whether the premium bid for the prior right to a loan shall be deducted therefrom in advance, or be paid in periodical installments. But whether the premium be deducted from the loan, or paid in periodical installments, the transaction shall not be deemed usurious, although any and all the dues, fines, premiums and interest, shall exceed the legal rate of interest on the amount of money received by the stockholders." And this, and its accompanying sections, are ended by section 29 in the following words: "Every such association shall adopt by-laws, which shall embrace all the provisions of the four preceding sections, and such further provisions for its government and the management of its business, not inconsistent with these sections, as it may deem proper." By this law must the said transaction be governed, notwithstanding the domicile of the defendant company was without the state, and notwithstanding it is claimed that the contract was a Virginia contract, because the payments were there to be made. Floyd v. National Loan & Inv. Co., 49 W. Va. 327, 38 S. E. 653, 54 L. R. A. 536, 87 Am. St. Rep. 805. This court has held, repeatedly, that this statute requires that the premium be a definite sum, whether payable as a lump sum or in periodical installments, and that the member must know, if the premium is payable in such installments, when such payments are to end, so that he may calculate the aggregate sum of the same; and that, if a definite time is fixed after which no more stated installments of premium are to be made, it is a compliance with the law. Brown v. Rockey, 60 W. Va. 268, 54 S. E. 343; Tahaney v. Washington Nat. B. & L. Ass'n, 59 W. Va. 296, 53 S. E. 791; Thompson v. Nat. Mut. B. & L. Ass'n, 57 W. Va. 551, 50 S. E. 756; Prince v. Holston Nat. B. & L. Ass'n, 55 W. Va. 19, 46 S. E. 708; Gray v. Balt. B. & L. Ass'n, 48 W. Va. 164, 37 S. E. 533, 54 L. R. A. 217, and other cases.

Whether, in the case before us, the premium or profit charged was a sufficiently definite sum, as provided in said by-laws and set forth in said contract and deed of trust, we do not deem important, in view of the conclusion we reach. Another observation merits precedence over this, and precludes the necessity of its consideration.

There was no selling of the money in the treasury to the stockholders, and no provision for the bidding of premium or an amount of profit without that name. There was, if anything of the kind, a fixed premium, or a fixed and limited amount of profit to be paid by members for advances; but our law does not provide for a fixed premium or profit. It has chosen the method of competitive bidding, and provides for none other, except in default of bidders. It fixes this bidding as a method of determining priority of right to loans from the common fund. Its theory and terms are that such method is to be pursued in the proper and equitable conduct of these associations. The member bidding the highest premium is given the right of priority to the mutual funds, or, in default of bidders at or above a minimum premium fixed by the by-laws, the money may be awarded to a member at such minimum premium. If more than one member desires the money, there must be bidding of profit to the association for priority of right to it. And this method of competitive bidding for priority of right to the fund is plainly made applicable to premium bid that by the by-laws is payable in periodical installments, as well as to premium bid that is to be deducted in a lump sum from the loan. Note the word "bid" and the prevalent idea of "bidding" throughout the statute. This statute simply embodies that which has been long recognized to be the true and proper conduct of these associations, and is in complete accord with the highest authority as to correct principles to be applied to them. In Endlich on Building Associations, § 409, the very theory of our statute is laid down in the text as follows: "The premium which is to be paid by any member, upon an advancement made to him by the society, must be fixed by free and open competition between all the applicants, and in no other way. It is the price to be paid for obtaining preference before other members who may desire the same loan, and at the same time a compensation to them indirectly for the disappointment and postponement which falls to their lot. There can, then, be only one proper method of getting at the exact amount, which, in fairness and equity, a borrower should, at any given time, be required to pay, viz., by competition. If no other person wants the money, or if, among these who would take it, there is none to whom the precedence of another causes any appreciable inconvenience, there is little for which the borrower is bound to offer compensation, and the premium must be trifling, unless positive injustice is to be done him. On the other hand, if there are many who desire the advancement, and if the prospect of obtaining it appears to them worth a considerable sacrifice, then he to whom the loan was most necessary and advantageous, and who has therefore bid the highest has but done his duty towards the other applicants in agreeing to a signal concession, and has nothing to complain of if the premium is rather oppressive. Hence a premium, in order to be lawful, must be one bid for the right of precedence in taking a loan, at a competitive sale of such right; and where there was no such sale and no bid there can be no lawful premium."

In contravention of this method established by our statute, the association with which plaintiff dealt provided for no such priority of right between members, accepted no such plan as being beneficial and proper in the conduct of such an association, but, on the contrary, adopted the plan that "each application shall be numbered in the order of its receipt by the secretary, and when two or more are made at the same time they shall take precedence in order of their receipt, other things being equal; provided however, that those having the best security shall be given the preference." Thus one member could be readily favored to the exclusion of another, something against which our statute jealously guards. The whole scheme of this association, in the particular of fixing a premium and determining the right of priority to loans, is clearly repugnant to the policy of our legislation. It contravenes that which our statute deemed equitable and beneficial; and, by so contravening our law, it is put without the pale of that same statute wherein is the exemption from usury. This association, viewed by our law, in this particular is not a building and loan association, such as practices the beneficent features which that law has prescribed, and for the practicing of which there is given the right to take for the use of money more than the legal rate of interest. Therefore, the contract between plaintiff and the association was usurious, and, to the extent of the usury, is not enforceable in this state, "because it is such a contract as is clearly repugnant to the public policy of the state, plainly written in its legislation, and therefore prohibited as to all building associations." Floyd v. Nat. Loan & Inv. Co., supra.

Most similar to our statute was the one involved in Bates v. People's Savings & Loan Ass'n, 42 Ohio St. 655, where the court makes the following comment, directly applicable here: "The premium named in the note is unlike the premium named in the statute. It was not measured or ascertained by competitive bidding among the members and depositors, as we understand the statute to require. It was, in fact, a part of the price named by the lender to be paid by the bor-

rower for the use of the money loaned. The assent of the borrower to pay the price required did not make him a bidder within the meaning of this statute. Calling the excess above the highest legal rate a 'premium' did not change the nature of the transaction. It was usurious." In McCauley v. Workingman's Building & Savings Ass'n, 97 Tenn. 421, 37 S. W. 212, 35 L. R. A. 244, 56 Am. St. Rep. 813, it was held: "The taking of a fixed premium for a loan by a building association is forbidden by a statute providing that the loan shall be to the highest bidder." And to the same effect is the great weight of American authority. Brown v. Archer, 62 Mo. App. 277; Bechtel v. Saginaw B. & L. Ass'n, 143 Mich. 599, 107 N. W. 695; Darr v. Guaranty Loan Ass'n, 47 Or. 88, 81 Pac. 565; Stiles' Appeal, 95 Pa. 122; Douglass v. Kavanaugh, 90 Fed. 373, 33 C. C. A. 107; Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256; Clarke v. Conners, 18 S. D. 600, 101 N. W. 883; Assets Real. Co. v. Wightman, 105 Ill. App. 618; Jamieson v. Jurgens, 195 Ill. 86, 62 N. E. 917; McDonnell v. De Soto Sav. & Loan Ass'n, 175 Mo. 250, 75 S. W. 438, 97 Am. St. Rep. 592; Mut. Home & Sav. Ass'n v. Worz, 67 Kan. 506, 73 Pac. 116; Iowa Sav. & Loan Ass'n v. Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. Rep. 197; Post v. Building & L. Ass'n, 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; Skinner v. South. Home B. & L. Ass'n, 46 Fla. 547, 35 South. 67; 3 Current Law, 567; 5 Current Law, 482; 7 Thomp. on Corp. 8778–80; 4 Am. & Eng. Enc. 1069–70. Upon this subject, Thompson on Building Associations, § 188, says: "The manner of charging the premium by auction of money is the one usually contemplated by the statute, and is more in harmony with the general scheme. The power of determining its cost is thus placed with the borrowers themselves, and the managers cannot impose upon them an arbitrary rate. If the statute shows that this method was the one intended by the Legislature, the courts require compliance with it." And in Floyd v. Nat. Loan & Inv. Co., supra, this court recognized the principle that strict compliance with the statute by these associations is essential to the exemption from usury. At page 343 of 49 W. Va., page 653 of 38 S. E. (54 L. R. A. 536, 87 Am. St. Rep. 805), the opinion says: "The care which the Legislature has taken to state explicitly the plan upon which such associations may operate, and the means it has adopted to compel adherence to it, indicate that the lawmaking power of the state deems it important. The law relating to the subject of building associations is contained in four sections of the chapter, followed by these words: 'Every such association shall adopt by-laws, which shall embrace all the provisions of the four preceding sections, and such further provisions for its government and the management of its business, not inconsistent with these sections, as it may deem proper.' No departure from the method of doing business thus prescribed is allowed. There can be no question as to the legislative intent to compel absolute adherence and obedience to its plan for conducting the operations of these societies."

It is contended, however, on behalf of the defendant company that, conceding the original contract to be usurious, as we now hold, the renewal of the debt thereunder by the notes aforesaid made an entirely new contract which was free from the usury. We cannot so hold. As stated by Judge Snyder in Hess v. Dille, 23 W. Va. 90: "The doctrine is well settled, both in Virginia and this state, that the giving of a new note for a previous one which has become due will not be regarded as an absolute payment or extinguishment of the precedent note or pre-existing debt, unless it be expressly so agreed, whether the new note was that of one previously bound or of a stranger." The whole of the same debt, the exact amount claimed, a part of which was usurious, was simply put into another form, and evidenced and secured by new papers, changing, between the same parties, only the amount and character of the monthly payments. The correspondence between plaintiff, his attorney, and those representing the defendant company, calls it a "change"; and so it was. They gave it the proper construction. It was a renewal of the usurious contract between the same parties—nothing more. "A renewal of the usurious contract between the same parties partakes of the infirmity of the original agreement." Webb on Usury, § 312. "The original taint attached to all consecutive obligations or securities growing out of the original vicious transaction, and none of the descendant obligations, however remote, can be free from it, if the descent can be traced." Dunning v. Merrill, 1 Clarke, Ch. (N. Y.) 252. "A mere change of securities for the same usurious loan, to the same person who reserved the usury, does not purge the original consideration; and whether the new security is in renewal of the former evidences of debt, or in payment of the debt tainted with usury, the original taint remains until a new consideration intervenes." King v. Perry Ins. & Trust Co., 57 Ala. 118. This doctrine is uniformly sanctioned. 21 Am. & Eng. Enc. 665; 29 Am. & Eng. Enc. 517. It has received recognition by this court. Crim v. Post, 41 W. Va. 397, 23 S. E. 613. These new notes included an usurious amount for which plaintiff is entitled to be credited on what he legally owes of the original debt. Reger v. O'Neal, 33 W. Va. 159, 10 S. E. 375, 6 L. R. A. 427.

The plaintiff counter assigns as error the refusal of the court to declare the said notes absolutely void, upon the ground that they were executed and payable in the state of New York, and were contracts governed by the law of that state, by which law, pleaded

and proved in this cause, notes and other contracts whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, than 6 per cent., shall be void. But it must be remembered that this usurious debt did not originate in the state of New York, in which state new evidences in the form of said notes were given for it. The usury not being conceived there, the law of this forum, where the original usurious contract is in question as being in violation of our law, is proper to apply. The contract containing such usury was not made there; it was simply "changed" there. These notes are only usurious because of the usury in the original contract for which they are a renewal. The usury was in the inception of the transaction, not in the execution of the notes in the state of New York, or the contract for their payment there. The notes there executed covered the identical usurious amount that the company claimed from plaintiff, as contracted elsewhere than in that state, and were not a novation, but were simply the residue of the original debt put in another shape and secured by the same real estate. This suit calls in question said original contract by which the usury was conceived, not the renewal contract, as being violative of our law, and by such law it is proper to measure it, even in its renewed form. By such law it will be enforced after it is purged of that which is in conflict with that law, the usury. While it is uniformly held that "a void contract remains void everywhere," yet it must be kept in mind that, as far as it is made to appear in this litigation, the usurious contract in question was not, in its inception, wholly void. This suit strikes at the very inception of the contract into which usury entered, but which was not wholly void on that account. Only by doing so can it involve the notes as usurious. It is the debt itself at which we must look, and which we must keep in mind, not the papers evidencing it. This being true, surely the mere change or renewal of the debt in the state of New York did not wholly invalidate that which in its inception was not wholly void. It remained the same debt we have held herein, and, therefore retained, along with the taint of usury, such good qualities as it originally had. True, the lex loci contractus governs as to the validity of a contract. But, as we have shown, the locus contractus of this usurious debt was not in the state of New York. The law of that state does not, therefore, govern in relation to it herein. In this view we are supported by the decision in Bowman v. Miller, 25 Grat. 331, 18 Am. Rep. 686. It is directly in point. There it was held, reducing the point of the syllabus to the few words by which it is stated in the Michie Encyclopedic Digest, vol. 3, p. 110: "Where a new note is taken for the balance due on an old note, made and indorsed by the same parties as were on the old, this note not being considered a novation of the old note, is to be governed by the same law, even though entered into and made payable in another state." The circuit court properly excluded this usury from the claimed indebtedness, finding "that the defendant company is entitled only to the amount of the balance on said original loan treated as a straight loan at 6 per cent. per annum interest, after giving the plaintiff credit for all payments made by him as of the times they were severally made, computed upon the rule of partial payments," and correctly decreed accordingly. Miller v. Monumental S. & L. Ass'n, 57 W. Va. 437, 50 S. E. 533, syl. 1.

There is no error, and the decrees are affirmed.

POFFENBARGER, J. (concurring). Out of deference to the great weight of judicial opinion and authority, I concur in this decision, for the sole reason that the by-laws of the association do not conform to the statutory regulation which, the courts generally say, was intended to give members the privilege of competing for the right of preference in respect to loans; but I do not wish to be understood as saying competitive bidding is compulsory, and that the loans of an association whose members all see fit to bid the minimum premium and no more, and await their turns to obtain loans at such bids, are usurious and void as building association loans. The equity and fairness of the uniform premium is so apparent that I am not prepared to say the Legislature intended to forbid it. At the same time, the statute seems to express intention to give every member of an association the right to put in a competitive bid for any loan it may be able to make, and to require this right to be secured by provision therefor in the by-laws. In failing to adopt such a by-law, this association has ignored the requirement and put itself technically without the pale of building and loan association law.

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(63 W. Va. 230)

STATE ex rel. WHITE, Tax Com'r, et al. v. WIRT COUNTY COURT et al.

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907.)

For majority opinion, see 59 S. E. 884.

MILLER, P. (dissenting). I cannot concur in the decision of the court. Prior legislation and the legal principles applicable are all opposed to the construction given the statute. The insertion in the act of 1905 of the words "including district road taxes," and "the word taxes shall be construed to include district road taxes as well as all other taxes for county purposes," did but declare the law as existing prior to the declaration, which only made plainer its meaning, and no more necessary for any other

purpose than the insertion of the words, "including the probable expenditure for county purposes," after the words, "all county debts and liabilities payable during the year," in the forepart of the same section. "A declaratory statute is one which is passed in order to put an end to doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been." 23 Am. & Eng. Enc. Law (Orig. Ed.) 143; 1 Bl. Com. 86. The maximum limitation of the Constitution on county taxation was based on the method of valuation prevailing at the time of its adoption; and, though adequate then, has become wholly inadequate on the basis of values prescribed by recent legislation; hence the necessity for legislative action.

In view of what has been done in enactment and execution of new laws of taxation, it is unthinkable that by the omission in the act of 1907 of the declaratory words in the act of 1905, amending section 29 of chapter 39 of the Code of 1899 [Code 1906, § 1231], the Legislature intended county authorities should go unrestrained with respect to taxation for roads and bridges, except by the maximum of the Constitution, or that a casus omissus has resulted; rather, that the Legislature, in view of Brannon v. County Court, 33 W. Va. 789, 11 S. E. 34, 8 L. R. A. 304, Neale v. County Court, 43 W. Va. 90, 27 S. E. 370, and Dillon v. County Court, 60 W. Va. 339, 55 S. E. 382, has failed to anticipate the action of this court on the present occasion in attempting to distinguish between a "county debt or liability," or a levy for "county purposes," and a levy for "district road purposes." If those cases decided anything, it was that a debt or liability contracted or incurred by county authorities, on account of or for a district, was a county debt or liability. By the Constitution itself it could be nothing else; no other authority except the county court having power to contract such a debt or incur such a liability. Therefore, ex necessitate legis, such debt or liability must be included within the constitutional limitation on incurrence of county indebtedness. If debts or liabilities incurred for district road purposes be county debts or liabilities, then by the very words of command of section 29 they must be included in the annual estimate required of "all county debts and liabilities payable during the year," and covered by the limitation of 35 cents prescribed thereby. As was said by Judge Poffenbarger in Dillon v. County Court: "The cost of county government is occasioned by exercise of police power lodged in the hands of the county authorities, which includes the establishment and regulation of roads, ways, bridges, public landings, ferries, and mills, and other things." The limitation of the statute is and was plainly intended to be a substitute, under the new conditions created by it, for the constitutional limitation under the old; the Constitution (as held in Dillon v. County Court) having left the subject of limitation, within the maximum there prescribed, under the control of the Legislature. It is no answer to this argument to say that in Brannon v. County Court and Neale v. County Court the court had reference to the limitation on county authorities imposed by the Constitution—that being one thing, the statute another—or that the language of the one differs in some respect from the language of the other. The point here is that the court in those cases decided, and decided rightly, in the first case that taxes imposed by the county court for road purposes was a debt or liability to be included with other taxes levied by the county court in determining whether the limitation fixed by the Constitution had been exceeded, in the latter, that a district subscription for the purposes of limitation upon county indebtedness fixed thereby is to be regarded as county indebtedness, and to be included therein in determining whether the total county indebtedness will exceed the limitation. A levy for district road purposes by the county authorities being then a county debt or liability, the statute commands that it be brought into the annual "estimate of the amount necessary to be levied for the current fiscal year to cover all county debts and liabilities payable during the year," and hence must of necessity be brought within the limitation of 35 cents on the $100. Such estimate could not possibly cover "all county debts and liabilities," if it omitted levies for district road purposes.

The argument based on the fact that, while section 23 of chapter 39 of 1899 [Code 1906, § 1225] imposes the duty, it is left to chapter 43 to prescribe the manner, of keeping in good repair and condition the county roads, bridges, etc., is equally unavailing to avoid the statute of limitation. Chapter 46 does the same thing with respect to the poor: section 28 of that chapter [Code 1906, § 1230] requiring the county court to provide therefor in the county levy, which, in effect, is what section 22 of chapter 43 of 1899 [Code 1906, § 1224] requires with respect to roads, bridges, etc. I can see nothing in the provisions of section 12 of the same chapter [Code 1906, § 1210] to take the levy for district road purposes out of the class "county debts and liabilities payable during the year," nor out of the levy "for county purposes," to which the limitation applies. Chapter 52 of the Code of Virginia of 1860 (the law of this state until the Code of 1868) likewise made provision in a separate chapter for keeping in good repair and condition the public roads. The Code of 1868 adopted as a whole under the Constitution of 1863, which provided for separate township or district organization, and carried into sections 39 and 47 of chapter 39 of Code 1899 [Code 1906, §§ 1250, 1261], substantially the provisions of chapter 53, Code Va., imposing the duty and providing for the levy; and sections 39 and 47, c.

39, Code 1868, relating to the same subject, are, so far as the present question is concerned, substantially sections 23 and 29 of chapter 39 of the present Code as amended. The Code of 1868 for the first time introduced the feature of apportioning the levy for roads, etc., among the townships or districts in connection with the separate township organizations; but by the Constitution of 1872, and the legislation thereunder, such separate township or district organization was abolished, and the county courts restored to their former jurisdiction in respect to roads and bridges, and most of the matters covered by chapter 49, Code, relating to districts were superseded by various acts of the Legislature, and in many instances rendered obsolete by the provisions of the new Constitution, but retained in the Code because not entirely repealed by express legislation. So it is, I think, with reference to the provision in this chapter for the collection by the sheriff of taxes for roads and bridges, because, never expressly repealed, the provisions respecting district road taxes are still retained there, along with the provisions respecting district school taxes. The Code of 1860 left no doubt that levies for roads and bridges were levies for county purposes; and by the employment of the same language in the present Code, and the amendments thereto under consideration, as was well said in argument, "county debts and liabilities" and levies "for county purposes" must be regarded as including district road taxes, regardless of the fact that the declaratory words of the act of 1905 are omitted from the act of 1907.

It seems to me that all provisions of the Code relating to the duty of the county courts respecting roads and bridges, and the manner of executing the same, must be read and considered together as a complete whole, and as relating to the same subject, and as in pari materia. I cannot agree that there is legislative intent here to treat road levies and county levies as distinct subjects, nor that the declaratory words of the act of 1905 were necessary to link them together. The declaration of that act that "the word 'taxes' shall be construed to include 'district road taxes' as well as all other taxes for county purposes," shows at once that the Legislature already regarded district road taxes as "taxes for county purposes"; and, although these words are omitted in the act of 1907, the section otherwise being as before, I do not see how we can escape the conclusion that district road taxes are to be covered in the annual estimate provided for in section 29, and limited thereby.

But, if there was any doubt about this, the duty is upon us to give such construction to the statute, being one of great public interest, as will accomplish the object plainly intended, and as will bring it in harmony with the spirit and purposes of the new scheme of taxation of which it is a part.

(78 S. C. 366)

## TOWNES v. STULTZ & BAUER.

(Supreme Court of South Carolina. Sept. 7, 1907. On Rehearing, Oct. 8, 1907.)

1. APPEAL—REVIEW—EQUITY DECREE.
An action to set aside a conveyance by a debtor to a creditor in preference to others, four months next preceding adjudication in bankruptcy, requiring an intricate accounting and seeking a recovery of the amount so transferred, is in equity, authorizing the Supreme Court to review the findings on appeal.

2. FRAUDULENT CONVEYANCES — KNOWLEDGE OF GRANTEE.
A conveyance by a debtor to a creditor to whom he was far behind in his payments would authorize a finding that the creditor knew, or might have known, of the insolvency of his debtor, where there is also positive testimony by the debtor that at the time the creditor came to his place of business he expressly told him that he must fail.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, §§ 904–908.]

3. BANKRUPTCY—ASSETS—RIGHTS OF TRUSTEE.
A purchaser entered into an agreement with the seller that, whatever securities he took for pianos sold to and by him, he would turn over to the seller until he was paid in full. *Held*, that a trustee in bankruptcy of the buyer had no claim to the securities taken for pianos sold under the contract, and turned over to the seller within four months of adjudication in bankruptcy, but could recover the proceeds of all other securities turned over to secure the creditor's account.

Appeal from Common Pleas Circuit Court of Greenville County; Dantzler, Judge.

Action by S. O. Townes, trustee in bankruptcy of M. L. Alexander, against Stultz & Bauer. Decree for plaintiff, and defendants appeal. Modified.

Cothran, Dean & Cothran, and Haynesworth & Patterson, for appellants. McCullough & McSwain and Oscar Hodges, for respondent.

POPE, C. J. M. L. Alexander, a dealer in pianos, organs, machines, etc., in Greenville, S. C., was in October, 1900, adjudged a bankrupt by the United States District Court for South Carolina. Thereafter, in April, the plaintiff herein, S. A. Townes, was appointed trustee of the bankrupt estate, and in that capacity in January, 1905, began this action against the defendant corporation, Stultz & Bauer, alleging that the bankrupt, M. L. Alexander, for the purpose of preferring that firm to other creditors, assigned to it certain collateral papers and contracts under a written agreement that defendant should collect them, and turn all excess over to bankrupt's wife. The complaint, among other things, asks judgment for $7,000, with interest from May, 1901, that the transfer made by said Alexander to the defendant be null and void, and that said defendant be also required to account for all moneys collected on account of said assets belonging to the estate of Alexander. The matter was referred to J. W. Gray, Esq., master for Greenville county, to take testimony and report his conclusions of law and fact to the court of common pleas.

After reference, he reported that the defendant was indebted to the plaintiff in the sum of $3,033.73, together with costs of the action, and, further, that the defendant be required to surrender all notes and leases still in its hands, which had not been collected. On appeal to the circuit court, Judge Dantzler, in a decree of February 13, 1906, affirmed the report of the master. Defendant now seeks relief at the hands of this court.

1. The first eight exceptions involve questions of fact, and respondent, relying on the cases of Hodges v. Kohn, 67 S. C. 69, 45 S. E. 102, and Hodges v. Bank, 70 S. C. 478, 50 S. E. 192, contends that they cannot be considered by this court. This case is distinguished from those, however, by the fact that here, in addition to the mere money demand, it is asked that the whole transaction be set aside, and the defendant be required to account for all moneys collected on account of assets belonging to the estate of M. L. Alexander. The entire transaction is alleged to have been fraudulent. According to the rule laid down by Pomeroy in his Equity Jurisprudence (section 911), a court of law has jurisdiction in those cases of fraud only where the primary right and the remedy both being legal, complete and satisfactory determination of the issues may be had. Where the remedy is inadequate, the far-reaching power of a court of equity must be called into action. Again, where a case involves an intricate accounting, one which a jury, under the ordinary circumstances and opportunities which the courtroom affords, could not be expected to make, it must devolve upon a court of equity to award to each of the parties his right. Such being the jurisdiction of the court, it can hardly be questioned that in hearing this case the court sat as a court of equity, and not as a court of law, for the reason that the legal remedy would have been inadequate and a very intricate accounting is involved. Therefore this court not only has power to review the findings of fact by the court below, but the duty devolves upon it so to do.

2. The first three exceptions allege error on the part of the court below in holding that the defendant had or should have had knowledge of M. L. Alexander's bankrupt condition. This is one, or, in fact, it may be said that this is the pivotal, question in the case. Without such knowledge or facts sufficient to put a prudent person on inquiry and thus lead to such information, the transaction could not be said to be fraudulent, and thus would not be set aside. That there is not such an absence of facts here as would put a person on inquiry seems to be evident. True, there is testimony that the business was "in full blast," but some time prior to the assignment of the collateral in dispute Alexander had been behind in his payments. When he was approached by Golden, agent of Stultz & Bauer, he was unable to make practically any payment, and turned over as collateral, papers of other firms. Granted that his house was full of pianos, etc., this, in our opinion, should have made the defendant's agent more careful; for, since the bankrupt was so far behind in his payment to one creditor, it would be a reasonable and probable supposition that he was likewise very far behind in his other accounts. In addition to such reminders as these, there is the positive testimony of the bankrupt that he had Golden come to his place of business, where he expressly told him that he must fail. While it is true that there are witnesses who swear that they would not believe Alexander on oath, yet the contract entered into on that date seems to substantiate his statements. It seldom happens, we think, that a person has so departed from the paths of rectitude and truthfulness that he cannot under any circumstances state facts as they are. Many a transgressor, very untruthful though he be, urged on by the desire to be revenged on his unfaithful accomplice, has revealed to the world truths which must otherwise have remained forever hidden. Such it seems was the case here. There, too, are the letters written by Golden to Alexander, which, to say the least of them, savor very much of fraudulent intention. Their tone is certainly very far from honest openness and frankness, a tone which, to our mind, defendant falls very short of explaining. We are of the opinion, therefore, that the finding of the court below on this point should be sustained.

3. The difficult question arises in seeking to reach a correct conclusion as to the amount of the assets of M. L. Alexander in the defendant's hands. Stulz & Bauer seek to relieve itself to a certain extent by an agreement under which it is alleged that the corporation was doing business with Alexander. This agreement, however, never having been recorded, cannot avail the defendant, and we therefore pursue our inquiry independent of it. Nevertheless we think it may be of aid to us in reaching a proper conclusion in the case. From a system of cards used by the defendant to keep the transactions as to each piano sold, the referee found that during the four months previous to the adjudication of bankruptcy the defendant had received $5,955.64. He concludes, however, that since the evidence did not show that all of these accounts were assigned during the four-month period, the defendant could not be held for the entire amount. We think the record will be searched in vain for evidence showing that any of these accounts were assigned during that period. Here, then, the existing agreement gives us light, or at least leads us to a presumption. The condition upon which the pianos were furnished being that any security taken on them be turned over to the defendant, it is reasonable to suppose that immediately upon the sale of a piano the papers taken would be at once turned over. Of course, if this agreement was violated and the papers were found in

the hands of Alexander, or it was proved that he transferred them during the four-month period, then the agreement not having been recorded such papers would be assets of Alexander. A reference to the cards offered in evidence shows that the latest sale of pianos by Alexander was in June, 1899. There were several others sold by different parties; three being sold by the sheriff. Hence, if we presume that the contract was complied with, which we may legitimately do in the absence of evidence to the contrary, assignments of security for these sales had been made prior to the agreement of June, 1900. The testimony seems to substantiate this presumption. Miss Alexander, bookkeeper for M. L. Alexander, testified that on June 29, 1900, only notes on pianos of other makes than Stultz & Bauer were assigned to that corporation. M. L. Alexander testified himself that at that time according to his calculation defendant had about $7,000 worth of assignments from him, but he goes further, and testifies that on that occasion he transferred collateral only to the amount of $3,873.65, thus showing that there had been previous assignments to the defendant. W. C. Golden's receipt of that date is only for that amount and a list of the collateral set out in the record as Exhibit 8 aggregates the same. It is as follows:

| | |
|---|---|
| J. H. Hamlon, balance due | $ 245 00 |
| W. W. Cole | 343 00 |
| B. K. Beacham | 225 00 |
| B. B. Pearson | 210 00 |
| T. M. Knox | 125 00 |
| J. A. Baumgarden | 310 00 |
| W. T. J. Philips | 175 00 |
| H. A. Miller | 113 50 |
| J. H. Stallnecker | 238 00 |
| L. P. Deaton | 225 00 |
| E. J. Youngblood | 135 37 |
| J. H. Feagle | 75 00 |
| W. E. Touchstone | 178 72 |
| O. B. Brawer | 85 00 |
| Annie Loadholt | 175 00 |
| J. L. Buist | 218 00 |
| J. S. Oliver | 175 00 |
| A. S. Dukes | 296 00 |
| F. P. Yates | 200 00 |
| J. D. Leonard | 126 00 |
| | $3,873 65 |

There is absolutely nothing to show a transfer of any other papers subsequent to this transaction. Hence it is our opinion that all papers taken by Alexander for Stultz & Bauer goods were transferred prior to four months preceding the bankruptcy adjudication. Then any collection made by the company or by its agents on these accounts would be the defendant's property, until it had received payment in full for goods so sold to Alexander. Even Alexander in making collections for them after he had transferred the papers acted only as their agent. Therefore, if payments made by him to the company are shown to be on these accounts, the defendant cannot be compelled to repay such collections. Taking up Exhibits 9, 13, 14, 15, 16, in which the collections are itemized, the names of the payor being given, and in each case referring to the list of collateral above quoted, it will be found that in no case is a payment made by a party named in that list. Reference to the cards will show that in each case the payor is a debtor named in these accounts transferred to the defendant. Stultz & Bauer therefore have a right to the payments so collected, and to continue to hold these securities so transferred to them unaffected by the bankruptcy proceedings until they are paid in full. Of course, just as soon as defendant receives the money due it for pianos, the accounts revert to M. L. Alexander. It must, therefore, account strictly for all collections made on them. With collateral securities, however, it is different. They being transferred within the four-month period, any collection made on them or to be made is the property of the trustee. The list is set out above and is receipted for by W. C. Golden as agent of Stultz & Bauer. On the same day that this assignment was made the defendant, through its agent, turned over to M. L. Alexander for collection the following list, aggregating $1,325:

| | |
|---|---|
| Note of Dr. T. D. Leonard | $ 126 00 |
| Note of F. B. Yates | 200 00 |
| Note of A. L. Dukes | 296 00 |
| Note of J. S. Oliver | 175 00 |
| Note of J. L. Buist | 218 00 |
| Note of Annie Loadholt | 175 00 |
| Note of E. J. Youngblood | 135 00 |
| | $1,325 00 |

In collecting these he would therefore act as agent of Stultz & Bauer. This being so, his possession of these securities would be the possession of the defendant, and it would be responsible for any collections made on them and must surrender or be held accountable for any of these notes not so collected. It is also responsible for any collection made by it or its agents on the securities not retransferred to M. L. Alexander, and must surrender or be held to account for those not collected. Exhibit 12 contains a number of payments made by Alexander to the defendant. They not being itemized as in the case of the others, and therefore not to be credited on the regular accounts kept by the defendant, we presume, in the light of the evidence, that they were made on the collateral securities to be collected by Alexander for Stultz & Bauer. They aggregate $813.88. Defendant itself, taking its own figures as a basis of the calculation, collected $868.50 on these retained by itself for collection. The evidence shows that collections made by Goodlet and included by the referee were on Stultz & Bauer paper, and therefore, according to the conclusions reached above, should not have been made a part of his judgment. The payment of $150 in cash on June 29, 1900, was properly included.

The judgment of this court, therefore, is that the judgment of the court below be modified as follows: That the defendant pay

over to the trustee $1,832.38, with interest and the cost of the action, and also that it be required to surrender, or be held to account for, collateral notes and leases which were transferred to it, and still remain uncollected.

On Rehearing.

PER CURIAM. After a careful consideration of the petition herein the court is satisfied that no material question of law or fact has been overlooked.

It is therefore ordered that the petition be dismissed, and the order heretofore issued granting a stay of the remittitur be revoked.

(78 S. C. 143)

## YOUNG et al. v. McNEILL.

(Supreme Court of South Carolina. July 10, 1907. On Rehearing, Sept. 11, 1907.)

1. TRUSTS — CONSTRUCTION — OPERATION OF STATUTE OF USES.

Testator devised all his estate in trust to allow his son to use all the profits and income thereof during his life, the property not to be subject to the debts or contracts of the said son, and, after the decease of the said son, the estate to descend to any son of his who may be called "Henry," or, in default of such son, then to such other children of the son as may be living. *Held*, the use created by the will was not executed either in the life of the tenant or that of the contingent remaindermen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 175, 175½.]

2. ADVERSE POSSESSION—PARTIES AFFECTED.

Limitations, adverse possession, and presumption of title will run against the legal title in a trustee and the rights thereunder of the beneficiaries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 19, 20.]

3. LIMITATION OF ACTIONS — POSSESSION OF LAND.

Code Civ. Proc. 1902, § 109, barring actions for possession of land after 40 years, does not apply where the cause of action had accrued when it was enacted or before it was in force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 16–25.]

4. DEEDS — PERFORMANCE OF CONDITIONS — EVIDENCE—PRESUMPTIONS.

After 20 years the presumption is that a grantee and those claiming under him have complied with the conditions of the grant.

5. EJECTMENT—DEFENSES.

In an action to recover land, defendant may introduce a deed in another party tending to defeat plaintiff's title.

6. APPEAL—HARMLESS ERROR.

The admission of incompetent evidence is harmless error, where similar evidence has been introduced without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

7. TRIAL—ARGUMENTS TO JURY.

Where the court has decided there is no issue of fact for the jury, neither party has a right to address the jury by counsel.

Appeal from Common Pleas Circuit Court of Horry County; Gary, Judge.

Action by Virginia D. Young and others against Donald T. McNeill. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Robt. B. Scarborough and Johnson & Quattlebaum, for appellant. Montgomery & Lide, W. F. Clayton, S. W. G. Shipp, M. C. Woods, and George Galletty, for respondents.

GARY, A. J. This action was commenced on the 8th of July, 1901, to recover the possession of a small tract of land. The complaint alleges: "(1) That Henry Du Rant, late of the county of Horry, in the state of South Carolina, departed this life on or about the 6th day of June, in the year 1837, leaving of force his last will and testament, which was duly admitted to probate, and is recorded in the office of the judge of probate for the county of Horry, a copy of which will is attached and made a part of this complaint. (2) That under the terms of said will his son, William W. Du Rant, took a life estate in the rents and profits of his estate, real and personal, with remainder in fee to a son of William W. Du Rant, who shall survive him and be called Henry, but, in default of such male child, then to the child or children of William W. Du Rant living at the death of the life tenant. (3) That the life tenant departed this life on or about the 15th day of December, 1896, leaving no son surviving him called Henry, but leaving as remaindermen under the will of Henry Du Rant his children, as follows: Laura E., who first intermarried with one Covington, and afterwards with W. H. Wade; Virginia D., who intermarried with W. J. Young; Gertrude, who intermarried with W. H. Lide; Louisa, who intermarried with J. T. Brown; Florence D., who intermarried with Junius H. Evans; Fleetwood, who intermarried with C. B. Whilden; Pauline, and Claudia. (4) That since the death of the life tenant, to wit, during the month of November, 1898, Laura E. Wade has departed this life, leaving as her only heirs at law her children, Harrison W. Covington and Jessie W., who intermarried with James Liles. (5) That among the numerous tracts of land devised under the will of Henry Du Rant, and which falls to these plaintiffs as remaindermen under said will, is a certain tract of land, situate in Horry district (now county), on the north side of Waccamaw river, adjoining the village of Conwayboro (now Conway), more particularly described in a plat and grant to John Du Rant, of date July 6, 1818, and by John Du Rant conveyed to Henry Du Rant, January 17, 1821; also some town lots in the village of Conwayboro. (6) That the said William W. Du Rant did some time in the month of November, 1838, convey to one James Beaty the aforementioned tract of land, with the exception of 29 acres, and that the said James Beaty did at various times and to divers persons convey portions of said tract of land. (7) That the defendant is in possession of and claims all that certain lot or tract of land in the county of Horry and state of South Carolina, containing 3⅛ acres —the same being a part of the lands granted

to John Du Rant, and by him conveyed to Henry Du Rant, and by William W. Du Rant conveyed to James Beaty, as above mentioned, and through James Beaty to defendant. That the plaintiffs herein, as remaindermen under the will of Henry Du Rant, are the owners of and entitled to the immediate possession of the above-described tract of land, with the rents and profits from the death of William W. Du Rant, and, although demand has been made upon the defendant for the possession of the said tract and $400 rents and profits, he wrongfully withheld the same, and refused to give possession, or to pay said rents and profits." The defendant denied generally the allegations of the complaint, and set up the defenses of the statute of limitations, adverse possession, possession long enough to presume a grant, and section 109 of the Code of Civil Procedure of 1902, as a perpetual bar. The jury under the direction of his honor, the presiding judge, rendered a verdict in favor of the plaintiffs, and the defendant appealed.

1. The first question that will be considered is whether the legal title was executed under the statute of uses, in those holding the beneficial interests. The provision of the will out of which this question arises is as follows: "I hereby give to my brother, John Du Rant, and my friend, Eleaser Waterman, all the estate I die possessed of, with the following exceptions and limitation, that is to say, in trust to the intent that William W. Du Rant do be permitted to take, use and enjoy all the profits and income of my estate, real and personal, without let or hinderance, from the period of my decease, during his natural life, it being my express will and intention, that no part or parcel of the said estate shall in anywise be subject to the debts or contracts of the said William W. Du Rant, that do now or may hereafter exist, and it is further my will that after the decease of the said William W. Du Rant, then and in that case, the estate aforesaid shall descend to the son of the said William W. Du Rant, should any such be then living and called Henry, and in default of such male child, then to such other child or children of the said William W. Du Rant as may then be living." The following authorities show the inclination of the courts to protect the contingent remainders as far as possible: "The court of chancery will never execute the estate in law to tenant for life of a trust to enable him to destroy contingent remainders." Fearne on Rem. 320. "Before I dismiss the notice of estates in trustees to support contingent remainders, it may be proper to observe that although equity does not interpose in cases of the destruction of contingent remainders, by tenant for life, where there is no trust in the case to bring it within the cognizance of a court of equity, yet it views such destruction of contingent remainders in the light of a wrong or tort which it is anxious to prevent, and consequently seizes every occasion and makes every possible stretch for extending its protection against it." Fearne on Rem. 337. "When the tenant for life is only a cestui que trust, he cannot forfeit or bar a remainder by feoffment; the legal title being in the trustee." Dehon v. Redfern, Dud. Eq. 115. "The destruction of contingent remainders by tenant for life is considered as a wrong with remedy, and so strongly a tort that it is a forfeiture of his own estate, and thereupon works destruction of the remainder. Now, if equity never suffers any wrongful act, or anything similar, to gain or defeat the trust estate, whilst the trustee is in possession, why should this take place, or the court strive to preserve a power to cestui que trust for life, the execution whereof the law calls a wrong?" 1 Atkyns Rep. 694. "Another difference between the rules regulating legal estates and trusts applies to contingent remainders. By the common law, if the particular estate by which such remainder is supported is destroyed by the act of the tenant before the remainder becomes vested, the remainder is itself destroyed. But no such consequence will follow, in respect to a contingent remainder of the equitable ownership, by any act proceeding from the tenant of a prior particular estate of the same equitable ownership. * * * In short, the equitable effect of the trust is commensurate with the legal effect of an executory use (as distinguished from a contingent remainder), both equally rejecting the strict rules of the common law." 2 Wash. on Real Prop. § 1458. "In trust estates, though generally governed, so far as contingent remainders are concerned, by the same rules as estates at common law, a rule prevails that a legal estate of freehold in the trustee will support a contingent limitation of the estate of a cestui que trust, although this may not vest by the time the preceding equitable limitation in trust expires. Nor can any cestui que trust, having a prior trust estate, destroy a contingent remainder expectant upon his estate by any mode of conveyance, since the legal estate in the trustee will support the remainders as they rise." 2 Wash. on Real Prop. § 1594. Realizing the injustice of permitting a life tenant to destroy a contingent remainder, a statute was enacted in 1883, providing that "no estate in remainder, whether vested or contingent, shall be defeated by any deed of feoffment with livery of seisin." That statute, however, only applies to cases arising since its enactment. In the case of Posey v. Cook, 1 Hill, 413, the plaintiff claimed the land as trustee under a deed of conveyance executed by Thomas Posey in trust, for the use and benefit of Charles Posey, "until his youngest son, William Posey, shall arrive at the age of twenty-one years, or if the said Charles Posey should die before that period, then for the benefit of his family until that time; as a house for his wife and children; but it is expressly

understood that the said tract of land and premises, is not to be liable for the present debts or future contracts of the said Charles Posey," etc. The presiding judge nonsuited the plaintiff on the ground that the legal estate was not in the trustee. The court, per Harper, J., used this language: "In Gregory v. Henderson, 5 Taunt. 772, the devise was to trustees, to permit testator's wife to occupy, possess, and enjoy the premises, and to receive the rents, her receipts for which, with the approbation of the trustees, to be good. This was held not to be executed. The court puts it on the intention that the legal estate should not vest in the wife, and laid hold of the circumstance of the trustee's approbation being required to the receipts, as indicating the intention. Perhaps the rule might be more accurately expressed to say that where the intention is that the estate shall not be executed in the cestui que use, and any object is to be effected by its remaining in the trustees, there it shall not be executed. In the present case, there can be no doubt about the intention. The donor declares that it shall not be subject to the debts or contracts of Charles Posey. This cannot be, if he is to have the legal estate. The object to be effected is that the trustees shall retain the legal estate, so as to protect it from being sold for Charles Posey's debts, until the period of division shall arrive, and, in the event of his death before that period, to preserve it as a home for his wife and children."

The words, "it being my express will and intention that no part or parcel of the said estate shall in any wise be subject to the debts or contracts of the said William W. Du Rant, that do now or may hereafter exist," bring the case under consideration within the principle just stated, as they clearly show that the duty imposed upon the trustees rendered it necessary for the legal title to remain in them, in order to prevent the land from being made subject to the debts or contracts of the life tenant. The respondents, however, contend, that, when there are persons entitled to different beneficial interests in the trust estate, the use may be executed as to some, and not as to others; and that, even if there was a duty in this case resting upon the trustees, that required the legal title to remain in them in so far as the life estate was concerned, they nevertheless had no duty to perform with reference to the contingent remaindermen, and that the use was therefore executed as to them. The principal case relied upon by them to sustain these propositions are Faber v. Police, 10 S. C. 376, and Howard v. Henderson, 18 S. C. 184. There is no doubt as to the principle that, when estates are conveyed to trustees for the benefit of parties taking different interests, the statute may execute the use in one and not in the other. This proposition is fully sustained by the case of Howard v. Henderson, 18 S. C. 184. In the case of Faber v. Police, 10 S. C. 376, 390, C. H. Faber, by his will, devised certain lands to trustees for the use of his son, John Lewis Faber, for life, and from and immediately after the death of his son in trust for the lawful issue of said son living at the time of his death; and, in case of his death without leaving issue living at the time of his death, then to his residuary legatees and devisees. The tenant for life made a deed of feoffment with livery of seisin, and the other heir of the testator released all interest in the land. The question was whether this conferred a good title on the purchaser. The court held that the deed of feoffment with livery of seisin defeated the estate of the contingent remaindermen, and, together with a release of all right on the part of the testator's other heir, conferred a marketable title, which the purchaser was bound to accept. In discussing the question whether the use was executed, the court used the following language: "It is argued, however, that, though the will does not in terms create a trust to preserve the contingent remainders, yet that such a trust may be implied. We know of no authority for such a position, and none has been cited. We are at a loss to conceive by what right a court could undertake to add to the words of a will, by which additional trusts to those which the testator has seen fit to declare should be raised. It is very true that in some cases, where no trusts whatever are declared, a court of equity will imply a trust from the conduct and relations of the parties, as where one purchases lands with the money of another, and takes title in his own name, or where one comes into the possession of trust property, with notice of the trust, or where, prior to the Constitution of 1868, property was given for the sole and separate use of a married woman. But where the owner of property in disposing of it, either by deed or will, declares the trusts upon which he desires it to be held, we are unable to see by what authority a court could undertake to add to the trust so declared. We think, therefore, upon principle, as well as upon express authority, especially the case of Ramsey v. Marsh, 2 McCord (S. C.) 252, 13 Am. Dec. 717, where the trusts declared were very much the same as in the case now under consideration, that the legal title to the premises in question was, by the operation of the statute of uses, vested in the cestui que use." The court does not indicate in what manner the statute executed the use. When C. H. Faber devised the land to trustees for the benefit of his son for life, and after his death to his issue living at that time, he thereby created two equitable estates—one for life and the other in contingent remainder. When the statute executed the use in John Lewis Faber the life tenant, it could not clothe him with the legal title to a larger estate than the equitable estate conferred upon him by the will.

This surely must have been the views of the court; for, if it supposed that the entire fee was vested in him by operation of the statute of uses, then there was no necessity for the court to have discussed at great length the effect of the deed of feoffment with livery of seisin upon the rights of the contingent remaindermen, as in that event it would only have been necessary for John Lewis Faber to tender an ordinary deed in the form prescribed in the Code of Laws. Nor can the position be accepted that John Lewis Faber thereby became a trustee for the contingent remaindermen; for the selection had already been made by the testator, and the court should not allow another trustee to be substituted by mere operation of law, as this would defeat the intention of the testator. The object in executing the use is to free the estate from the control of the trustee, which would not be effected by a mere substitution.

Nor can it be successfully contended that the statute executed the use in the contingent remaindermen, for one of the requisites to the execution of the use is that the cestui que use should be ascertained, and capable of enjoying the estate at that particular time, which was not the case when, as contended by the respondent's attorneys, the contingent remaindermen were vested with the legal, instead of the equitable, title, as it could not be ascertained until the death of the life tenant who would take in remainder. When the trustees accepted the trust, it became their duty to hold the property until the beneficiaries therein mentioned could be ascertained. "Three things must concur to give the statute effect: First, a person seised to a use; second, a cestui que use in esse; and, third, a use in esse, either in possession, reversion or remainder." 2 Wash. on Real Prop. 1351. "In order to have an estate take effect under the statute, there must be a cestui que use in esse. And, if an estate is limited to the use of some one not in esse, or capable of being ascertained, the statute cannot have any operation until the cestui que use comes into being, or is ascertained, and in the meantime the use will remain in the original grantor waiting to be executed by the statute whenever there shall be a cestui que use to take it." 2 Wash. on Real Prop. § 1356. See, also, 28 Ency. of Law, 929, 930. Our conclusion, therefore, is that the use was not executed either in the life tenant or in the contingent remaindermen.

The exceptions also assign error in the ruling of his honor, the presiding judge, that the deed of conveyance by William W. Du Rant to James Beaty, in 1838, purporting to convey the fee, did not defeat the contingent remaindermen. As stated by the respondent's attorneys, this question does not arise if the statute did not execute the use, and, as we have shown that the use was not executed, it therefore will not be considered.

2. There was tendency tending to show that the defendant, and those under whom he claimed title, had been in possession of the land since 1838, when W. W. Du Rant conveyed to James Beaty. The legal title after said conveyance remained in the trustees, but their right and that of the cestui que trusts was subject to be defeated by the statute of limitations, adverse possession, and the presumption of title in the defendant, arising from long, continuous, and hostile possession. Benbow v. Levi, 50 S. C. 120, 27 S. E. 655. The inference to be drawn from these facts should have been submitted to the jury.

3. The defense based upon section 109 of the Code is disposed of by what was said in the case of Sutton v. Clark, 59 S. C. 440, 38 S. E. 150, 453, 82 Am. St. Rep. 848: "It had not been 40 years since the Code was adopted when this action was commenced, and its provisions did not extend to cases where the right of action had already accrued. Code Civ. Proc. 1902, § 93. In fact, section 109 of the Code does not seem to have been enacted until several years after its adoption, as it does not appear in the Revised Statutes of 1873."

4. The next question involves the construction of the Greenwood grant. The defendant introduced in evidence the same chain of title as the plaintiffs, except the deed from W. W. Du Rant to James Beaty. He also introduced in evidence a grant from King George of England to James Greenwood, dated March 17, 1775, which, it was contended, conveyed the land in dispute, subject to certain conditions therein mentioned. The presiding judge ruled as follows: "As to the Greenwood grant, I hold that no one being before the court asserting any interest in that grant, the original grantee not asserting any interest under it, and the grant on its face being a conditional grant, the presumption is that the conditions have not been complied with, and that is not enough to show the title out of the state of South Carolina; the presumption being that the title is in the state." In the case of Riddlehoover v. Kinard, 1 Hill, Ch. 376, 377, the court says: "The lapse of 20 years is sufficient to raise the presumption of a grant from the state of the satisfaction of a bond, mortgage, or judgment, or of the grant of a franchise or the payment of a legacy, or almost anything else that is necessary to quiet the title of property." This language is quoted with approval in the case of Corbett v. Fogle, 72 S. C..312, 320, 51 S. E. 884, 886, in which the court used this language: "The lapse of 20 years afforded evidence of acquiescence on the part of Emiline O. Fogle in the terms of the deed; and likewise of any fact necessary to give it full force and efficiency." After the lapse of 20 years the presumption was that the grantee, and those claiming under him, had complied with the conditions mentioned in the grant.

5. The authorities in this state settle the rule that a defendant may introduce in evi-

dence a deed in a third party with which he has no connection as this tends to defeat the plaintiff's action. Martin v. Ranlett, 5 Rich. Law, 541, 57 Am. Dec. 770; Sutton v. Clark, 59 S. C. 440, 38 S. E. 150, 82 Am. St. Rep. 848; Love v. Turner, 71 S. C. 322, 51 S. E. 101; Pooler v. Smith, 73 S. C. 108, 52 S. E. 967; McGuire v. Blount, 199 U. S. 142, 26 Sup. Ct. 1, 50 L. Ed. 125; Sedgwick & Wait on Trial of Title to Land, §§ 57, 477.

6. The next question for consideration is whether the exception can be sustained which assigns error "in allowing the witness Virginia D. Young to testify as to the death of her grandfather, Henry Du Rant, basing her testimony upon a written memorandum, which she testified had been taken from a family Bible; whereas, he should have held that the memorandum referred to could not be used by the witness to refresh her memory, unless she had made the memorandum herself, or seen it made." When objection was made to this testimony, the witness testified, without objection, that she had seen the tombstone of her grandfather, and it shows that he died in 1837. Therefore, even if the testimony mentioned in the exception was inadmissible, it was immaterial.

7. Another exception assigns error on the part of the presiding judge in refusing to allow the defendant's attorney to address the jury. The question whether there was any testimony to be considered by the jury was one of law, upon which the defendant's attorney had the right to be heard by the presiding judge, and this right was accorded him. He, however, was not entitled to be heard upon the facts before the jury, after the presiding judge ruled that there were no questions of fact in the case, as it would have been merely a useless consumption of time. The jury was bound to render a verdict in accordance with the directions of the court. If the judge was in error, the parties had the right to correct his ruling by appeal. It would, however, tend to great disorder if the jury had the right to disregard the instructions of the presiding judge, and would subject its members to punishment for contempt of court.

It is the judgment of this court that the judgment of the circuit court be reversed and the case remanded to that court for a new trial.

ALDRICH, J., sat as associate justice in this case in place of WOODS, J., disqualified.

On Rehearing.

PER CURIAM. After careful consideration of the petition herein, this court is satisfied that no material question of law or of fact has either been overlooked or disregarded.

It is therefore ordered that the petition for a rehearing be dismissed, and that the order heretofore granted staying the remittitur be revoked.

(146 N. C. 266)

## FREELAND v. NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Dec. 11, 1907.)

MASTER AND SERVANT—INJURY TO SERVANT—PROXIMATE CAUSE—QUESTION FOR JURY.

Whether the placing in the middle of a freight train, among heavily loaded cars, instead of at the end of the train, just ahead of the caboose, as required by the rules or custom of the railroad, of an empty round top horse car, having no walkway on top, being several inches higher than the other cars in the train and built to handle on passenger trains, was the proximate cause of the death of the brakeman, who, while performing in the nighttime his duty of seeing that all the brakes were properly adjusted after the train left a station, fell off said car, is properly left to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1016.]

Appeal from Superior Court, Mecklenburg County; Ferguson, Judge.

Action by Thomas L. Freeland, administrator, against the North Carolina Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

J. D. McCall and Brevard Nixon, for appellant. W. B. Rodman and L. C. Caldwell, for appellee.

CLARK, C. J. The plaintiff's intestate was a brakeman on the defendant's freight train. It was his duty, upon leaving a station, to go over the top of the train of cars from one end to the other, while the train was running, to see that all brakes were off and properly adjusted. While discharging this duty in the nighttime, he fell off the train, and was killed. There was in the train that night an empty "Armes palace horse car," which was built with a round top, and several inches higher than the other freight cars in the train. It had no walkway on top like that on other freight cars. It was built to handle on passenger trains. Under the rules or custom of the company, cars of that kind were required to be placed at the end of the freight train, just ahead of the caboose at the rear. But on this occasion this round top palace car, which was empty, was placed in the middle of the train of loaded cars, and the brakeman in going along over the top of his train while in motion fell off said car, striking his head against the end of a crosstie, and was killed.

The charge of the court was full and complete, and was not excepted to. The question was fairly submitted to the jury whether placing the round top, higher and empty car, whose top "built like a passenger car," in the middle of the train of loaded cars, contrary to the rule or custom of the company, was the proximate cause of the death of the intestate and whether he contributed to his own death. There are numerous exceptions to evidence, to special prayers for instruction, which were given at request of the plaintiff, and for refusal of certain of the requests of defendant to charge.

After full and careful scrutiny, we find no

error in any of the particulars alleged. It was almost entirely an issue of fact for the jury, and no good purpose can be attained by setting out and passing upon each exception seriatim. There was no serious conflict in the evidence, and the charge was careful, clear, and full. It was the duty of the defendant to give its employés a safe walkway over the tops of the cars. This car being an empty one, among heavily loaded cars, made it unsteady. Being higher and with a round top, it could not have a walkway like the flat top freight cars, and it was perilous to get on it, or off it, to and from the other steadier and lower cars. The jury found, under the careful charge of the court, that this was the cause of the death of plaintiff's intestate.

No error.

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(146 N. C. 321)

## LAMBERT-MURRAY CO. v. SOUTHERN EXPRESS CO.

(Supreme Court of North Carolina. Dec. 11, 1907.)

CARRIERS—EXPRESS COMPANIES—FAILURE TO DELIVER WITHIN REASONABLE TIME—DAMAGES.

Where, owing to the failure of an express company to deliver a box containing souvenirs, suitable for sale only in the city to which sent, within a reasonable time, they were without market value, the measure of damages was the market value of the souvenirs when shipped, though the express company was not informed of the contents of the box.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 451–461.]

Appeal from Superior Court, Buncombe County; Cooke, Judge.

Action by the Lambert-Murray Company against the Southern Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The action began before a justice of the peace, and on an appeal in the superior court the following facts were agreed: "The plaintiff company delivered to the defendant at Asheville, N. C., on February 21, 1906, a plain, closed box for shipment to New Orleans, La. The box had no writing on it, except the address, 'A. I. Hirsch, New Orleans, La.', and the defendant was not told what the box contained, nor that any loss would result from delay. The box arrived in New Orleans February 24, 1906, but was not delivered to the consignee; the defendant being guilty of negligence in this respect. On March 31, 1906, after four days' notice to the defendant of their intention to do so, the plaintiff sent a duplicate shipment to Hirsch. Claim was made to the defendant by the plaintiff for damages, liability was denied, and suit was begun April 30, 1906. On the hearing before a justice of the peace April 30, 1906, the original shipment was tendered to the plaintiff by the defendant, and refused by it. The box contained rhododendron souvenirs, marked 'New Orleans,' and suitable for sale only in that city, being made to order. The goods when shipped were worth $12.60, which is the amount sued for, but on the day suit was brought, April 30, 1906, they had no market value and have since had none, although they have sustained no physical injury, having suffered their loss of value on account of failure on part of the defendant to deliver within a reasonable time." The court rendered judgment for $12.60, with interest from February 21, 1906. Defendant appealed.

Julius C. Martin and Geo. H. Wright, for appellant.

CLARK, C. J. The negligence is admitted. The only controversy is as to the measure of damages. The defendant at the trial tendered to the plaintiff the return of the original box and contents, but admits that at that time they had no "market value, and have since had none, although they have sustained no physical injury, having suffered their loss of value on account of failure on part of the defendant to deliver within a reasonable time." As the defendant admits that the loss of value was caused by its own negligence, it is difficult to conceive any reason why it should not be responsible for the damage caused by its own wrong. It undertook, for a consideration, to carry the goods speedily and safely to its destination. It did not do so. It has offered no excuse; indeed, it frankly says that it has none. If it had been important to know the contents of the box to spur it to diligence, it does not appear that it inquired. The very nature of its business and the application for its services were notice that prompt delivery was of the essence of the contract. The defendant relies upon the well-known doctrine of Hadley v. Baxendale, 9 Exch. 341, that the damages for breach of contract should be "such as may fairly and reasonably be considered either as arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of it." The defendant did not inquire as to the contents of the box, but, when it received the box for quick transportation, what may more reasonably be supposed to have been in the contemplation of both parties than that, if by reason of the negligence of the defendant the package was so delayed in transmission as to become wholly or partially worthless, for any reason, the carrier, who, for a price, had stipulated for prompt and safe delivery, should be liable for any damage or loss caused by such negligence? A carrier by ordinary freight train is insurer of safe delivery and within reasonable time. An express company guarantees the promptest possible delivery, and is liable for any deterioration in the value of the goods caused by failure to fill that contract.

Affirmed.

(146 N. C. 453)

## COWAN, McCLUNG & CO. v. CUNNINGHAM & WARD.

(Supreme Court of North Carolina. Dec. 18, 1907.)

1. PARTNERSHIP—CONTRACTS UNDER SEAL.
A note under seal, executed in the partnership name by one of the partners, is the simple contract of the partnership, regarding the seal as surplusage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 247.]

2. JUDGMENT — DEFAULT — SETTING ASIDE — DISCRETION OF COURT.
Though it should be conceded that a judgment by default final is not allowable on an unverified complaint, a judgment so entered is irregular only, and can be set aside only, in the discretion of the court, and where applicants, to have such a judgment set aside, did not move within a reasonable time, and there was no satisfactory evidence that they had a good defense, their application was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 265, 266.]

Appeal from Superior Court, Swain County; Cooke, Judge.

Judgment by default final having been entered for Cowan, McClung & Co. against John T. Cunningham and D. A. C. Ward, as partners, and Ward thereafter died, his representative and widow and heirs moved to set the same aside, and their motion having been denied, they appeal. Affirmed.

F. C. Fisher, for appellant. E. R. Hampton and A. M. Fry, for appellees.

PER CURIAM. The judgment in this case was rendered against Jno. T. Cunningham and D. A. C. Ward, as partners at the spring term, 1901, of the superior court of Swain county, on a note for $537.30, signed, "J. T. Cunningham & Co. [Seal], per. J. T. Cunningham [Seal]"—with an allegation that the company was composed of defendants, J. T. Cunningham and D. A. C. Ward. The complaint was filed in due course of the court at fall term, 1900; and at spring term, 1901, defendants having filed no answer, judgment by default final was rendered against defendants for the amount of the note and interest. Some time after the judgment one of the defendants (Ward), having died, his representative and widow and heirs at law at spring term, 1907, moved to set aside the judgment, on the ground that judgment by default final had been taken on an unverified complaint.

Under the authorities, and on the face of the papers, the obligation is the simple contract of the firm, regarding the seal as surplusage. Pipe Co. v. Woltman, 114 N. C. 178, 19 S. E. 109; Burwell v. Linthicum, 100 N. C. 145, 5 S. E. 735; Bates on Partnership, § 418. If it should be conceded in such case that a judgment by default final is not allowable on an unverified complaint, the defect only amounts to an irregularity, and such judgments are not set aside, as a matter of right in the party affected, but in the sound legal discretion of the court. As said in Becton v. Dunn, 137 N. C. 562, 50 S. E. 289: "Such judgments are not set aside as a matter of right in the party litigant, but rest in the sound legal discretion of the court. It is always required that a party claiming to be injured should show that some substantial right has been prejudiced, and he must proceed with proper diligence and within a reasonable time."

We are of opinion, in the present case, that the applicants have not brought their cause within either of these requirements. They did not move within a reasonable time, and there is no satisfactory evidence given that a good defense exists against the demand, and for these reasons their motion was properly refused.

Affirmed.

(146 N. C. 447)

## WHITE v. CITY OF NEWBERNE.

(Supreme Court of North Carolina. Dec. 18, 1907.)

1. MUNICIPAL CORPORATIONS—OBSTRUCTIONS ON SIDEWALK—ACQUIESCENCE—EFFECT.
A city cannot escape liability for injury to a pedestrian, who, while exercising due care, strikes steps negligently permitted to project upon a sidewalk, because for many years property owners have been permitted to so project their steps.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1606.]

2. SAME—IMPUTED KNOWLEDGE OF DEFECT.
Where an obstruction has remained upon a sidewalk for 30 years, it must be presumed the city authorities knew of its existence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1648.]

3. SAME—CITY'S LIABILITY.
A city not being liable absolutely for injuries caused by a defective sidewalk, and only bound to provide a reasonably safe way, and liable only for negligence, the mere existence of a defect does not show a cause of action for an injury, but notice of the defect, and power to remedy, and neglect to do so, must be shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1589, 1641.]

4. SAME—DUTY TO LIGHT STREETS.
In the absence of statutory requirement, a city need not light its streets, and, where a city does so, the character of the lighting rests largely within the authorities' discretion, and, in an action for injury caused by a defective sidewalk at night, that the street was defectively lighted does not of itself show negligence, but is only evidence on the principal question whether, at the time and place of the injury, the sidewalk was reasonably safe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1656.]

Appeal from Superior Court, Craven County; Neal, Judge.

Personal injury action by E. J. White against the city of Newberne. From a judgment for plaintiff, defendant appeals. New trial ordered.

There was evidence tending to show that on the night of June 23, 1906, plaintiff going along Middle street, one of the public streets of the city of Newberne, struck his right foot against some steps which projected in front

of a residence and into the sidewalk of said street. These steps extended about four feet onto the sidewalk, leaving something like five or six feet of passway between the bottom step and the driveway of the street, and they had existed so in this and other portions of the city for as much as 30 years; that it was a dark and drizzly night on this occasion, and the public lights were out at the time. Plaintiff testified that the lights were out on the night of the injury, and had been frequently going out for several months prior to that time; that the city owned the light plant and sold lights to private persons for gain. There was no testimony that the streets were not reasonably safe, except as to the existence of the steps, and the absence of or defective lighting. On issues submitted, and under the charge of the court, the jury rendered a verdict that defendant was guilty of actionable negligence; that plaintiff was at the time in the exercise of proper care, and awarded substantial damages for the injury. Judgment on the verdict for plaintiff, and defendant excepted and assigned for error: "(4) That the court erred in its refusal to give the first prayer for instructions of defendant, as follows: That municipal corporations are not bound to light the streets at night; that, while its charter may confer the power, this power is of a governmental and discretionary nature, and for exercise of the same the city would not be liable. (5) That the court erred in its refusal to give the fourth prayer for instructions, as follows: That the city is not liable absolutely for defect in its streets, sidewalks, and the mere existence of such defects therefore is not sufficient to constitute a cause of action; that the city is not held to guarantee safety, but is only held to provide a reasonably safe way of travel, and the ground of liability to private party for injury while passing over the sidewalk or streets is only a liability for negligence or neglect, and the mere existence of an obstruction or defect is not in itself sufficient, but to constitute negligence it must be shown that the authorities of the city had notice of the defect, or obstruction, and had power to remedy the same, and neglected to do so. (6) That the court erred in its refusal to give the fifth prayer for instructions, as follows: That if the jury shall find that from its early days steps and porches have been allowed upon the sidewalks of the streets, and that they had been used by the property holders from ancient times, the city should not be held liable for failure to compel the removal of the same."

D. L. Ward, for appellant. W. D. McIver, for appellee.

HOKE, J. (after stating the facts as above). Considering the defendant's assignments of error in reverse order, the position taken that the projection of the steps upon the sidewalk was sanctioned by the continuous existence of such a condition for 25 or more years cannot be sustained. If this projection of the steps was such an obstruction of the street that it amounted to an actionable wrong, it cannot be rendered lawful by lapse of time, however great. As said in Elliott on Roads and Streets (2d Ed.) p. 706: "No length of time will render a public nuisance, such as the obstruction of a highway, legal, or give the person guilty of maintaining it any right to continue it to the detriment of the public. Each day's continuance of such a nuisance is an indictable offense." Where an obstruction is a wrong of this character, a city government can neither validate it by grant, nor sanction it by acquiescence; and, having the power in the exercise of their ministerial functions of summary abatement, the city is responsible to an individual who is injured by its existence, when the injured person is himself in the exercise of due care. State v. Railway, 141 N. C. 736, 53 S. E. 290; Elliott on Roads and Streets, pp. 700, 705, 965.

As to the second position, we have held, in Fitzgerald v. Concord, 140 N. C. 110, 52 S. E. 309: "(A) The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. (B) The town does not warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that a defect existed, and an injury has been caused thereby. It must be further shown that the officers of the town 'knew, or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated.'" And the same doctrine has been announced in several other decisions of the court. As to the city's knowledge of these steps, the authorities must have had knowledge of them, or such knowledge will be imputed, for they had existed in like condition for as much as 30 years, and in the present case this portion of the prayer is not material; but we think that the principle of these decisions is embodied in the prayer as a whole, and there was error to defendant's prejudice in not giving the same or some substantially similar instructions.

Again, we think that the prayer indicated in defendant's fourth assignment for error is sound as a general proposition, and is correct as applied to the facts of the case. In the absence of statutory requirement, a city is under no legal obligation to light its streets, and such obligation does not arise or exist from the fact that the city has been given the power to light them. And where a city or town has undertaken the duty, the placing

and character of the lights must be allowed to rest very largely in the discretion of the authorities. Brown v. Durham, 141 N. C. 249, 53 S. E. 513; City of Columbus v. Sims, 94 Ga. 483, 20 S. E. 332; Canavan v. Oil City, 183 Pa. 611, 38 Atl. 1096; Macomber v. Jaunton, 100 Mass. 255; Randall v. Railway, 106 Mass. 276, 8 Am. Rep. 327; Freeport v. Isbell, 83 Ill. 440, 25 Am. Rep. 407; Elliott on Roads and Streets, § 623. Undoubtedly, temporary obstructions and hindrances on a highway, or permanent conditions, may be such that an absence of lights at the particular locality would import negligence, and to this principle possibly may be referred the decision in Chicago v. Powers, Adm'x, 42 Ill. 169, 89 Am. Dec. 418. But when the streets of a municipality are otherwise reasonably safe, the weight of authority and the better reason are to the effect that neither the absence of lights nor defective lights is, in itself, negligence, but is only evidence on the principal question whether, at the time and place where an injury occurs, the streets were in a reasonably safe condition. As said by Mr. Justice Dean, delivering the opinion in Canavan v. Oil City, supra: "As to whether sufficient light was provided by the city on the night of the accident, we may briefly say that there is no legal obligations on a municipality to light its streets when their construction is reasonably safe for travel. That is solely a question for the municipal Legislature. It may do many things not enjoined by law to promote the general well-being and comfort of a citizen; but, in not doing that which no statute commands, negligence cannot be imputed to it. This, however, in no sense relieves it from the duty of that ordinary care which requires that temporary excavations for building purposes should be exposed by proper light, or that temporary obstructions of the streets by building material should be made conspicuous in the same way." There is nothing in our present decision which in any way conflicts with the case of Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857. That was an action for an injury caused directly by the negligence of defendant in the operation and management of its plant. A live wire had fallen, and was negligently permitted to remain in a menacing condition, whereby one on the highway was hurt. The city was held responsible chiefly because it appeared that the plant was being operated, not only in the public lighting of the streets, but in selling lights to private persons for gain. The opinion in express terms excludes all consideration of the question as to how far the city could be held responsible for negligence when engaged solely in supplying lights to the public. As a matter of fact, that decision is not an apposite authority in the present case at all, for the primary and controlling question here is whether the streets were in such a dangerous condition as to import negligence against the municipality, and whether such negligence was the proximate cause of plaintiff's injury; and the presence or absence of lights, or the condition of lights, at the time, is only evidential on the issue.

For the errors indicated, the defendant is entitled to a new trial of the cause, and it is so ordered.

New trial.

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(146 N. C. 425)

## SHELTON v. MOODY.

(Supreme Court of North Carolina. Dec. 16, 1907.)

COUNTIES — COUNTY COMMISSIONERS — LIABILITY FOR PENALTY.

Failure to comply with Code 1883, § 752 (Revisal 1905, § 1388), requiring the board of county commissioners, under penalty for failure so to do, to post at the courthouse within five days after each regular December meeting, and for at least four successive weeks, a statement of the county revenue, the disbursements of the same, etc., and to publish the statement in some newspaper, does not subject a commissioner whose term of office expired on the day of that meeting to the penalty.

Appeal from Superior Court, Haywood County; Moore, Judge.

Action by S. J. Shelton against C. F. Moody. Judgment for plaintiff, and defendant appeals. Reversed.

This action was instituted by plaintiff, a citizen and resident of Haywood county, against defendant for the recovery of a penalty. It originated in a justice's court, and was brought by appeal to the superior court. The plaintiff alleged "that the defendant above named was a member of the board of county commissioners for said county for the two years immediately preceding the first Monday of December, 1904; that the defendant, together with the other members of the board of county commissioners, failed and neglected to make and publish a statement of the county revenue, the disbursements of the same, the permanent debt of county, showing when the same was contracted and the interest paid or remaining unpaid thereon, together with the names of every individual whose account had been audited, showing the amount claimed and the amount allowed, for the year next preceding the first Monday of December, 1904, as required by section 752 of the Code of 1883 of North Carolina." When the cause was called for trial, the defendant lodged a motion to dismiss this action, for that the plaintiff's complaint failed to set forth facts sufficient to constitute a cause of action, and upon the further ground that the defendant and others composing the board of commissioners of Haywood county for the two years next preceding the first Monday of December, 1904, were not required under the law (Code 1883, § 752; Revisal 1905, § 1388) to publish any statement for the year ending first Monday in December, 1904, and that such duty devolved upon the successors of the defendant and his associates, who qualified as the board of county commission-

ers on the first Monday in December, 1904, and that, therefore, the defendant is not liable for the penalty sued for, the plaintiff admitting in open court that the defendant went out of office as a member of the board of county commissioners on the first Monday of December, 1904, and that the other members of the old board likewise went out of office on the same day. This motion was by the court overruled, and the defendant excepted. Under the instructions of the court there was a verdict for the plaintiff. Defendant excepted and appealed, assigning as error the court's refusal to dismiss the action for the causes set out in the motion.

Smathers & Morgan and Norwood & Norwood, for appellant. H. R. Ferguson, W. B. Ferguson, and W. T. Crawford, for appellee.

CONNOR, J. (after stating the facts as above). The statute (Revisal 1905, § 1388) provides "that the board shall cause to be posted at the courthouse within five days after each regular December meeting and for at least four successive weeks" certain statements fully set forth in the statute. It being conceded that the term of the board, of which defendant was a member, expired on the first Monday of December, 1904, the question is presented whether the failure to publish the statement required by the statute within five days after the expiration of his term subjects the defendant to the penalty. It would seem to be too clear for discussion that, after the expiration of the term of the board of commissioners, the members thereof cease to constitute the corporate entity known as the board of commissioners. Their corporate capacity came to an end at the expiration of their term, and the corporation known as the "board of commissioners" is composed of their successors. How, then, is it possible for the defendant to be liable for the penalty for failing to discharge a duty imposed upon the board of commissioners after he ceases to be a member of such board? Is it not manifest that the duty to publish a statement is imposed upon the board in its corporate capacity; that is, to those persons who constitute the board during the five days after the regular December meeting?

The plaintiff relies upon the case of Roberts v. Southern Pines, 125 N. C. 172, 34 S. E. 268. It will be observed that the facts in that case are different from those presented upon this record. The statute there required the board of town commissioners to publish annually, fixing no time subsequent to any monthly meeting, a statement of the amount expended by them. Hence there was no reason why at the last meeting on the first Monday in May they should not make the publication, and their failure to do so could not be thereby shifted to their successors; whereas, the statute under which defendant is sued prescribes that they shall have five days after the regular December meeting within which to publish the statement. The distinction between the two cases is obvious. It is suggested that the purpose of the Legislature was to require each board to make publication of its own official acts in connection with the public revenues. However that may be, we have no power to read into the statute any other meaning than that which is clearly ascertained from its language. This being a penal statute, it is elementary that it must be construed strictly, or, at least, so construed as to give effect to all of its terms, and not to extend them by implication or suggestions as to the legislative intention. The policy of the law is to require the publication of the receipts and disbursements of the public revenues. This is secured by imposing the duty upon the in-coming board to whom the record made by their predecessors is turned over as effectually as by the outgoing board, who have no further control of the record, or duties in connection therewith. It may be suggested that the policy of the law would be best met by requiring a new board to make the publication, as its members would have no possible motive for suppressing any facts, or making other than a truthful statement. However this may be, the language of the act is perfectly plain that the board shall make the statement "within five days after each regular December meeting." This can only be done by the board which shall be in existence during the time within which the statement is to be published.

We are of the opinion that the defendant was entitled to have his motion allowed, and in refusing to do so there was error.

Error.

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(146 N. C. 403)

## RUDISILL v. WHITENER.

(Supreme Court of North Carolina. Dec. 14, 1907.)

SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—MISREPRESENTATION.

Defendant should not be compelled to specifically perform his contract to sell his home to plaintiff, where he would not have entered into the contract if he had known he could not get, for a home, land belonging to S., on which plaintiff had an option, and though plaintiff merely agreed that, "if" he decided not to buy the S. land, he would turn over the option to defendant, he had an understanding with others, who were to assist him, that he would take the S. land, but by his acts and declarations induced defendant to believe that defendant was to get it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 160–171½.]

Appeal from Superior Court, Burke County; Guion, Judge.

Action by M. R. Rudisill against A. A Whitener. Judgment for plaintiff. Defendant appeals. Reversed, and new trial ordered.

This was an action to compel specific performance of a contract to sell land. The plaintiff alleged that on the 6th day of October, 1905, the defendant executed and de-

livered to him the following paper writing: "Received of M. R. Rudisill ten dollars, part payment on my farm, which I agree to sell him for two thousand dollars and to make him a good and lawful deed on or before January 1, 1906, upon payment of balance of two thousand dollars. This October 6, 1905. [Signed] A. A. Whitener." Plaintiff alleged that he had tendered the balance of the purchase money within the time named and demanded a deed for the land. The defendant declined to accept the money or execute the deed. He demands judgment, etc. Defendant admits the execution of the receipt, and alleges that he was induced to execute the same by the promise of plaintiff to transfer and deliver to him an option which plaintiff then held to buy a tract of land known as the "Sigmon Land"; that plaintiff at the time, and in consideration of the execution of said receipt, executed and delivered to him the following paper writing: "I hereby agree to turn over to Dolph Whitener the option I have on the Sigmon land before the 20 days run out, if I decide to have nothing to do with the buying it, and in case I turn over the option, then Dolph Whitener agrees to let M. R. Rudisill have the roughness on my place free of charge, otherwise the roughness is not turned over to Rudisill. This October 6, 1905. [Signed] M. R. Rudisill." Defendant alleges that "he is a man of considerable age and cannot read writing at all without the use of glasses, and, being an illiterate man, cannot read well even with the aid of glasses; that the paper was not read correctly to him, but was so read as to induce him to believe that it was an absolute and unconditional agreement to transfer to him the option on the Sigmon land; that he accepted the sum of $10 and signed the receipt by reason of the positive agreement with plaintiff that he would transfer to him the Sigmon option. Defendant testified that he agreed to sell his land to plaintiff, only with the understanding that plaintiff would surrender to him the option on the Sigmon land; that plaintiff said he would send the defendant the option in a few days, "in plenty of time for me to get my deed from Sigmon." Defendant was corroborated by his wife. He said that he was willing to convey the land if plaintiff would transfer the Sigmon land to him. Plaintiff testified that he had an option to buy the Sigmon land, at the price of $2,500. He says that defendant wanted the Sigmon land if he sold his own. "On the day the papers were signed, I said: 'I will tell you what I will do. I will turn it over unless I conclude to buy.' He said: 'No, then you want to take my place and not let me have the Sigmon place.' I said: 'Well, the best I can do is to agree that, if I don't decide to buy, I will turn it over to you.' And we then had the papers drawn up and signed. He took one, and I the other. He seemed satisfied when he got the agreement. He seemed to think I would not take the Sigmon land, and I would take $100 for the option. I rather thought I would buy, but I had not made up my mind. We had never fully decided to take the Sigmon land that day. I think it was understood we should take it." Mr. Aderholt, witness for plaintiff, who wrote and witnessed both papers, testified that he read them correctly to defendant. "At the time the papers were signed, we all knew that Whitener wanted the Sigmon land, and that he would give $100 for the option." He further testified: "It was understood between plaintiff, M. E. Rudisill, and me that, if plaintiff bought both Sigmon and Whitener tracts, M. E. Rudisill and myself would become partners with him in the trade, as he said he could not buy both places without help. This (was) understood before the papers were signed." There was other testimony, but the foregoing is sufficient for the purpose of passing upon the single exception in the record.

His honor submitted the following issues: "(1) Did defendant, in violation of his contract, fail to execute and deliver to plaintiff a deed for the lands described in the complaint? Answer: Yes. (2) If so, what damage has plaintiff sustained by reason thereof? Answer: None. (3) Did plaintiff wrongfully fail to transfer to defendant the option on the Sigmon land referred to in the answer? Answer: No. (4) If so, what damage has defendant sustained by reason thereof? Answer: None." Defendant in apt time requested his honor to charge the jury that, "if they should be fully satisfied from the evidence that, when the defendant signed the agreement to convey, he was reasonably induced by the words and acts of the plaintiff to believe that the plaintiff was going to transfer to defendant the Sigmon option, and on account of such belief signed the contract sued on, they should answer the first issue, 'No.'" The court declined to give this instruction, holding that the inquiry was limited to whether or not Aderholt read the papers to defendant as they were written, as alleged in the answer and upon the evidence before the jury. Defendant excepted. There was judgment upon the verdict that defendant execute a deed to plaintiff for the land upon the payment of the balance of the purchase money. Defendant appealed.

Self & Whitener and S. J. Ervin, for appellant. Avery & Ervin and M. H. Yount, for appellee.

CONNOR, J, (after stating the facts as above). His honor inadvertently failed to note the distinction between a suit brought to rescind and set aside a contract on the ground of alleged fraud in the factum, or in the treaty, and one in which defendant is resisting a bill for specific performance, without drawing into question the validity of the contract. He unduly narrowed the scope of the defense. If, for instance, Whitener had sued plaintiff to rescind the contract for that

his signature was obtained by fraud, in that it was read to him incorrectly, and its true contents suppressed, the instruction asked could not have been given. The defendant, it is true, makes that charge; but, in one aspect of his answer, his defense is based upon the contention that, taking the contract as written, he was induced to sign the receipt and the agreement to sell his land upon the express promise and assurance by the plaintiff that he would, in consideration and as a part of the transaction, transfer to him the option which plaintiff held on the Sigmon land. The two papers constituted but one transaction, or agreement, and should be read together. They were written, signed, and delivered simultaneously. Thus read, they constitute mutual covenants. The defendant agrees to sell his land, and the plaintiff agrees to transfer the Sigmon option if he decides not to buy himself. The paper writing read in the light of the treaty, clearly represents that plaintiff is uncertain whether he will buy the Sigmon land—that, in good faith, he is considering the question. If in truth he had, at the time he signed the paper, determined in his own mind that he would buy the land, and did not intend to let defendant have it, and that he induced defendant to believe that he was considering the question of buying, certainly a court administering equitable relief, upon well-settled equitable principles, would not interfere, but leave plaintiff to his action for damages. While it is true that a provision to do something in the future is not a misrepresentation of a fact, it is equally true, both in morals and equity, that if one make a promise which he knows, at the time, he will not perform, has no intention of making good, he acquires no enforceable right against another who honestly relies upon the promise. This is true when the contract is partially executed.

If one, being insolvent, conceals his condition and promise to pay for goods with a preconceived purpose not to do so, no title will pass to him. Wilson v. White, 80 N. C. 280. In Des Farges v. Pugh, 93 N. C. 31, 53 Am. Rep. 446, Ashe, J., says: "It matters not by what means the deception is practiced—whether by signs, by words, by silence, or by acts—provided that it actually produce a false and injurious impression of such a nature that it may reasonably be supposed that, but for such deception, the vendor might never have entered into the contract." While it is difficult to show the state of a man's mind, if by his acts and conduct it can be ascertained, it is as much a fact as the state of his digestion. Hill v. Gettys, 135 N. C. 373, 47 S. E. 449. If, therefore, at the time plaintiff signed the paper by which he agreed to transfer the option on the Sigmon land to defendant if he concluded not to buy it himself, he had determined to buy it, or, as he says, "it was understood" that he would buy it, we think that, whether or not it was sufficient to rescind an executed contract, such fact is available to defendant in this action, wherein the plaintiff is invoking specific performance. The defendant is not driven to the proof of actual fraud, but may, by parol, show that he was induced, by the words and acts of the plaintiff, to believe that he would transfer to him the Sigmon option. This was a question for the jury. It is well settled, and we have no disposition to trespass upon the principle, that "when the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its parts, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award damages for its breach." 4 Pom. Eq. § 1404. "This right, however, is controlled by other equities." Bispham, Eq. § 364. It will not be enforced "where the complainant does not come with clean hands, or when equities exist on the other side which would render it unjust to grant the relief." Id. 376. "Or it is not clear that the minds of the parties have come together. The contract must be free from any fraud or misrepresentation, even though not fraudulent, mistake, or illegality. The contract must be perfectly fair, equal, and just in its terms and in its circumstances." Pom. § 1405. That actual fraud need not be shown to resist a decree for specific performance is established by abundant authority. Romilly, M. R., in Baskcomb v. Beckwith, 8 L. R. Eq. Cas. 100, said: "Specific performance of a contract will not be enforced when defendant has contracted under a mistake to which plaintiff has, by his acts, even unintentionally, contributed." The learned judge says: "It is of the greatest importance that it should be understood that the most perfect truth and the fullest disclosure should take place in all cases where the specific performance of a contract is required, and that, if this fails, even without any intentional suppression, the court will grant a relief to the man who has been thereby deceived, provided he has acted reasonably and openly." Prof. Eaton says: "When the aid of a court of equity is sought by way of specific performance, the principles of ethics have a more extensive sway than when a contract is sought to be rescinded. When a party calls for specific performance, he must, at every stage of the transaction, be free from imputation of fraud or deceit, and show that his conduct has been honorable and fair." Eq. 270. In Woolam v. Hearn, 7 Ves. 211, 2 White & Tudors L. C. 491, Sir William Grant says: "When equity is called upon to exercise its peculiar jurisdiction by decreeing a specific performance, the party to be charged is let in to show that, under the circumstances, the plaintiff is not entitled to have

the agreement specifically performed, and there are many cases in which parol evidence of such circumstances has been admitted. * * * Where the terms of a written agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the plaintiff did not contemplate, the court has, upon that ground only, refused to enforce the contract." Calverley v. Williams, 1 Vesey, Jr., 201. "Nor will a court of equity enforce a contract according to its terms, when to do so would violate the real object of the contract in the minds of the parties when the contract was made, and produce a result not contemplated at the time of the execution of the agreement." 26 Am. & Eng. Enc. 68. The decisions of this court are in harmony with the doctrines of equity in this respect. In Leigh v. Crump, 36 N. C. 299, Gaston, J., discussing a bill for specific performance, says: "We entirely acquit the plaintiff of intentional misrepresentation. And we hold that defendant has not shown that the plaintiff made any representation * * * variant from that which is set forth in the written contract." He further says that there is nothing in the evidence which would bar an action for damages where the actual damage could be recovered. "But he has preferred to ask the aid of a court of equity to carry the contract into execution. The specific execution of a contract in equity is not a matter of absolute right in the party, but of sound discretion in the court. An agreement, to be carried into execution, then, must be certain, fair, and just in all its parts. Although it be valid at law, and if it had been executed by all the parties could not be set aside because of any vice in its nature, yet if its strict performance be, under the circumstances, harsh and inequitable, a court of equity will not decree such performance, but leave the party to his legal remedy." In Lloyd v. Wheatly, 55 N. C. 267, Battle, J., citing Leigh v. Crump, says: "Even the mere fact that the contract is a hard one, and would press heavily on the defendant, will induce the court to withhold its aid and leave the plaintiff to his remedy at law. * * * We do not declare that it was obtained from the defendant by fraud. * * * The agreement is not, in our opinion, certain, fair, and just in all its parts, and we cannot therefore declare its enforcement in this court." In Cannaday v. Shepard, 55 N. C. 224, Nash, C. J., discussing a bill for specific performance, says: "The contract was not fair. The defendant was made to believe that the agreement, as to the purchase of the land, was binding upon him. The contract was hard and oppressive on the defendant. There is no equity in the claim of the plaintiff." Love v. Welsh, 97 N. C. 200, 2 S. E. 242; Ramsay v. Gheen, 99 N. C. 215, 6 S. E. 75. Numerous cases may be found in the reports in which relief has been denied upon the ground that the contract is harsh, uncertain, unjust, oppressive, regardless of actual fraud.

An examination of the testimony of both plaintiff and defendant discovers ample evidence that Whitener never intended to sell his home, unless he got the Sigmon land near by. Mr. Aderholt, plaintiff's witness who wrote the papers and witnessed them, and who, although not told to Whitener, was to have an interest in the land, says: "We knew that day that, if Whitener sold his tract, he wanted the Sigmon land and the option; but I do not know that he understood that day that he would get it. That Rudisill told him that he would have to go home and decide before he could tell him if he would turn over the option." Plaintiff says: "We had never fully decided to take the Sigmon land that day. I think it was understood we should take it. They (M. E. Rudisill and Aderholt) said that day they would help me buy it, and I thought that day we would buy it." M. E. Rudisill, who was present and heard the conversation, said that plaintiff positively refused to sell the option. "Brother, Aderholt, and myself own one-third each in the Sigmon land, and are to be equally interested in the Whitener land." Defendant says: "They knew that day that I wasn't going to sell my place unless I could get the Sigmon place, and the agreement was that I was to have the option. They knew I wouldn't trade unless I got the Sigmon place. * * * I told them afterwards that I was still willing to sell if I could get the Sigmon land." His wife says that she heard her husband say: "'You have got your hands on the only land my wife will go to.' Then Aderholt said: 'What will you give us for the option on the Sigmon land?' My husband answered: '$100, or the roughness on my place.' Aderholt was drawing the papers, and then it was my husband came in and said we were to get the Sigmon land. I am willing to stand by the agreement if they will." There is evidence on the part of the plaintiff tending to show that plaintiff, M. E. Rudisill, his brother, and Mr. Aderholt, his brother-in-law, had, at the time the papers were signed, an understanding that they were to buy both the Sigmon and Whitener land. We do not hold that, in order to make a valid contract, they were under any legal obligation to tell this to Whitener; but it is manifest that they knew that, if they did tell him the exact state of their minds, their understanding and purpose, he would not have entered into the agreement. It is not necessary to suggest that the paper was not correctly read to defendant. The evidence does not create the impression on our minds that it was incorrectly read, but the entire evidence strongly tends to show that defendant was induced by the acts and declarations of plaintiff to believe that he was to get the Sigmon option, and thereby secure another home, if he parted with the one which he then had. If, upon an appropriate

issue, the jury so find, he should not be compelled to convey his home to plaintiff. The jury may well say, as was said by Judge Gaston: "We acquit the plaintiff of actual misrepresentation." But we find that the contract, in the light of the status of the parties, their acts and declarations, was not "certain, fair and just in all its parts." If they so find, the court, administering equity in accordance with an enlightened standard of morals applied to the daily transactions of men, will not compel performance on one part, and permit the plaintiff to refuse to transfer the Sigmon land. The true principle is well stated by defendant's wife, when she says: "I am willing to stand by the agreement if they will." The jury find that no damage is sustained by the refusal of defendant to execute the deed. An impression has prevailed to some extent that, because "the distinction between actions at law and suits in equity is abolished" by the Constitution, equitable rights and remedies are thereby destroyed. This court has uniformly held that no such result follows the change in the forms of procedure. Ely v. Early, 94 N. C. 1; Boles v. Caudle, 133 N. C. 528, 45 S. E. 835; and many other cases. It is sometimes difficult to so frame issues for the jury that equitable rights and principles are presented. The purpose of the reformed procedure certainly was not to destroy, or impair, those rights and remedies which the experience of the ages had shown to be essential to a system of enlightened jurisprudence. Prof. Pomeroy, in his admirable work on Code Remedies, says that the difficulty of administering legal and equitable remedies in one form of action has been experienced in the "Code states," and that the same difficulty presented itself to the advocates of the new procedure in England, while the measure was pending in Parliament. It was obviated by inserting in the "Supreme Court of Judicature Act" the following clause: "Generally, in all matters in which there is any conflict between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity shall prevail." In this case the issues do not very clearly present the matters of fact in controversy and upon which the judgment of the court should rest. It cannot be that the question whether the contract is one which a court of equity will enforce specifically is to be decided by the jury. The ultimate decision of the case is to express, not the arbitrary discretion of the judge, but the sound judicial discretion, guided by the principles and rules which have heretofore been adopted and applied by chancellors in similar cases. The judgment is, of course, subject to review by this court. We would suggest that, upon another trial of this cause, the question presented by defendant's prayer for instruction be submitted in the form of an issue, or question of fact.

There must be a new trial.

(145 N. C. 585)

## STATE v. LEWIS.

(Supreme Court of North Carolina. Dec. 14, 1907.)

1. CRIMINAL LAW — APPEAL — STATEMENT OF CASE.

No statement of the case on appeal having been served on or tendered the solicitor, and no case appearing in the record proper, judgment will be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3204.]

Appeal from Superior Court, Columbus County; Moore, Judge.

W. G. Lewis was indicted for seduction. There was verdict and judgment against him, and he excepted and appealed. Affirmed.

H. L. Lyon, for appellant. The Attorney General, for the State.

PER CURIAM. No statement of case on appeal having been served on the solicitor or tendered, and no copy of the defendant's case on appeal having been served on him or accepted by him, and no case appearing in the record proper, the judgment is affirmed on authority of the case of State v. Cleny, 133 N. C. 662, 45 S. E. 525, and State v. Cameron, 121 N. C. 572, 28 S. E. 139.

Judgment affirmed.

(146 N. C. 395)

## ALVEY et al. v. CITY OF ASHEVILLE.

(Supreme Court of North Carolina. Dec. 14, 1907.)

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENT FOR BENEFIT—ABUTTING OWNERS.

A street in the defendant city, 125 feet wide, had in the center thereof an uninclosed area, known as "P. Square," which was decorated and maintained without expense to the city or its citizens, and which was dedicated to free and unobstructed public use, except for wheel vehicles. The street outside P. Square was 60 feet in width, part lying between the curb on the north side of the street and P. Square, and the other part between P. Square and the southern curb of the street. *Held*, that P. Square was properly a part of the street, and that the two parts of the street on either side of the square constituted but one street, so that in the paving of them it was proper to charge one-third of the entire cost to the abutting property owners on the south side of the street and one-third to those on the north side.

Appeal from Superior Court, Buncombe County; O. H. Allen, Judge.

Action by C. B. Alvey and others against the city of Asheville. Judgment for defendant, and plaintiffs appeal. Affirmed.

Tucker & Murphy and Moore & Rollins, for appellants. Davidson, Bourne & Parker, for appellee.

CLARK, C. J. The judge found that Market Square, or Market street, was one of the streets in Asheville, and that in the middle of the street, which is a wide one, there is an unenclosed area or parallelogram known as "Pack Square." This parallelogram has been paved, or otherwise adorned, by private

munificence, without any expense to the plaintiffs or to the city, and is held and "dedicated to free and unobstructed public use" in connection with a monument there placed in honor of one of the state's greatest citizens—Zebulon B. Vance. There is a 12-foot walkway for foot passengers through the center of said strip, and cross-walks. The court finds as a fact that Pack Square is a part of Market street. That part of Market street which was left to be paved by the city and the abutting property holders is only so much thereof as is still left for street use by wheeled vehicles, to wit, 60 feet, of which part lies between the curb on the north side of Market street and the reserved area known as Pack Square, and the other part lies between Pack Square and the southern curb of Market street. Pack Square itself, which the judge finds is a part of Market street, has not been paved at public expense. Of this 60 feet of Market street, which has been paved for public use, the cost of one-third thereof has been charged against the abutting property on the north side of Market street, one-third against the abutting property on the south side of Market street, and the cost of the other one-third has been charged up to the city treasury—the usual apportionment of the cost in street paving. Market street is a wide street over 125 feet wide, and, if one-third of paving its whole width had been assessed upon the abutting property on each side, it would have been much heavier than now. But by reserving the strip in the middle, known as Pack Square, for the patriotic purposes aforesaid, there is no cost assessed for paving that part of the street. The plaintiffs who are assessed for one-third of the paving of that 60 feet of the street, which is still kept for roadway, are called on to pay only $5.35 per front foot, or about $160 on a lot of 30 feet front in the heart of the progressive and growing city of Asheville, such lots being worth, as stated in the argument, over $10,000 each. This would seem sufficiently moderate and reasonable.

The sole contention of the plaintiffs is that that part of Market street lying on the north side of the reserved area should be treated as one street, and the property abutting thereon should pay one-third the cost of paving that only and the city one-third, and that the city should pay another one-third, on the theory that the reserved area is the unoccupied south side of this narrow street, and the same contention is made as to that part of Market street on the south side of the reserved area; that is, if Market street is 125 feet wide, instead of the abutting property holders on each side paying for paving one-third of said 125 feet and the city one-third, the plaintiffs contend that though they are exempted from paving 65 feet in the center of the street which is reserved for purposes aforesaid, that the remaining 60 feet should be divided into two very narrow streets, leaving the abutting owners to pay for one-third of paving those narrow streets, say for 10 feet each (if the two narrow streets were of equal width) and the city to pay for two-thirds, or 40 feet. The court, however, has found as a fact that there is but one street; that the reserved area known as Pack Square (which is used by the public except for wheel purposes) is a part of Market street; that the cost of paving the 60 feet of the street outside of this strip, which is reserved for pedestrians, is to be paid one-third (or 20 feet) by the property on the north side of Market street, one-third by the property on the south side of Market street, and the remaining one-third by the city.

In this judgment we find no error; and it is affirmed.

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(146 N. C. 397)

## KINSLAND v. GRIMSHAWE.

(Supreme Court of North Carolina. Dec. 14, 1907.)

1. BROKERS — RIGHT TO COMMISSIONS — PERFORMANCE OF SERVICES — PROCURING PURCHASER.

Plaintiff, in an action for commissions, was employed by defendant in April, 1903, to procure a purchaser for defendant's land. On May 27th defendant gave to a person introduced to him by plaintiff a cash option for 30 days. Later defendant extended the option to August 20th and on August 21st defendant again extended the option two months. On December 16th defendant executed a contract with such person, reciting the former options and extensions, and again extending the time to complete the period to February 20, 1904. The contract provided that, if any providential hinderance should prevent the completion of the trade, further time was to be given. On February 19, 1904, another contract extending the time to April 20th was entered into referring to the option of May 27th and the contract of December 16, 1903, and reciting that "providential hinderances had intervened." The person to whom the option had been granted transferred his interest to another, who paid defendant the consideration agreed upon, and defendant thereupon executed a deed to such person. *Held*, that the option or contract entered into on May 27th was continued in force, and the sale of the lands was made pursuant thereto, so as to entitle plaintiff to his commission for procuring a purchaser.

2. SAME—ANTAGONISTIC CONTRACTS OF BROKER.

A broker introduced to his principal a person, to whom the principal granted on option for the purchase of certain lands, for the sale of which he had employed the broker. The party introduced contemplated buying the land only for the purpose of selling at a profit. On employing the broker, the price for which the lands were to be sold was agreed upon, and on such price the broker was to be paid his commission. The broker also entered into an agreement with the prospective purchaser by which he was to procure a person to take the lands out of such purchaser's hands at a profit. *Held*, that the contract between the broker and the person introduced by him to the broker's principal was not antagonistic to the principal's interest, so as to preclude the broker from recovering his commissions upon a sale being made to a person to whom the person introduced transferred his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 48–50.]

Appeal from Superior Court, Transylvania County; Guion, Judge.

Action by C. S. Kinsland against C. Grimshawe. From a judgment for plaintiff, defendant appeals. No error.

The defendant, during the month of April, 1903, entered into an agreement with plaintiff, by the terms of which plaintiff was to find a purchaser for a large body of land belonging to defendant at the price of $3.50 per acre. For his services, if a sale was made to a purchaser who should be found by plaintiff, he was to receive a commission of 10 per cent. on the cash payment and 5 per cent. on deferred payment. Plaintiff introduced to defendant one Bourne, representing H. E. & S. T. Graves, who were engaged in the business of buying and selling land. After some negotiation, defendant on May 27, 1903, gave to Bourne for Graves a cash option for 30 days. Later on the defendant extended the option to August 20, 1903. On August 21, 1903, defendant again extended the option two months. On December 16, 1903, defendant executed a contract with Graves reciting the former options and extensions, again extending the time to complete the trade to February 20, 1904. At this time Graves accepted the option, and contracted to comply with its terms. They agreed to deposit in the Battery Park Bank at Asheville $5,000, as a guaranty that they would comply with the contract. It was agreed that a survey of the land was to be made and the title investigated, all of which was to be completed by February 20, 1904. It was further stipulated that, if any providential hinderance should prevent the completion of the trade, further time was to be given. On February 19, 1904, another contract was entered into referring to the option of May 27, 1903, reciting the contract of December 16, 1903, and further reciting that "providential hinderances had intervened." The time was again extended to April 20, 1904, when the transaction should be closed. Graves transferred his interest to one Wood, who paid defendant $12,000 cash, and gave him a short-time note for $8,000, which he afterwards paid, and defendant executed a deed for the land to Wood. While these negotiations and extensions were being made, plaintiff entered into a contract with Graves, the terms of which are set forth in a paper writing. "This is to certify that for, and in, consideration of your having rendered us certain services in the sale of the Grimshawe lands, we, H. E. & S. T. Graves, agree and bind ourselves to pay you, C. S. Kinsland, ten per cent of all net profits and commissions received from said sale and the same to be paid you as we receive our payments," dated January 14, 1904. By an arrangement made with one Aiken, with the consent of defendant, plaintiff agreed to divide the commission with Aiken. This agreement was made at the time the original contract was entered into. It is not material to the decision of this appeal, and is only noticed to explain the amount of plaintiff's recovery. The defendant resists payment of the commissions upon four grounds: (1) That plaintiff abandoned defendant's employment. (2) That he failed to find a purchaser within the limitations of his contract. (3) That on December 16, 1903, plaintiff revoked his contract with defendant. (4) That, by entering into the contract with Graves, he assumed antagonistic relations towards the defendant and undertook to serve two masters. To meet these contentions the following issues were submitted to the jury, his honor instructing them that, if they believed all of the evidence, to answer as set out in the record. "(1) Did the defendant contract with the plaintiff to sell the defendant's land for the commission as alleged? Answer: Yes. (2) Was the option or contract originally entered into by the defendant with H. E. and S. T. Graves for a valuable consideration continued in force by the defendant and a sale of the said lands made pursuant thereto? Answer: Yes. (3) In what amount, if any, is the defendant indebted to the plaintiff? Answer: $800, with interest from June 1, 1904. (4) Did the plaintiff, by treachery and double dealing, prevent the defendant from making a more advantageous sale of his said lands than that actually made? Answer: No. (5) Was the extension of the option by the defendant an extension of the agency? Answer: Yes." Defendant excepted. There was a judgment upon the verdict, and defendant appealed.

Gash & Galloway, for appellant. Geo. A. Shuford and Womack, Hayes & Pace, for appellee.

CONNOR, J. (after stating the facts as above). His honor could not have directed judgment of nonsuit. The testimony presented questions for the jury. There was ample evidence to show the contract as found by the jury. This is not seriously controverted by defendant; his defense resting upon other grounds. In regard to the second issue, the defendant says that he extended the option of May 27, 1903, to August 20, 1903. He says that on August 21, 1903, plaintiff and Bourne asked for an extension of two months, "which I made it." It is true that at the expiration of that time, October 20, 1903, Graves failed to take the land, and, unless renewed by defendant, the option was at an end, and defendant was under no further liability to Graves and plaintiff, but on December 16th he entered into a written contract of sale with Graves, expressly referring to the option of May 27, 1903, and its extension, which Graves accepts. This sale is made as an acceptance of the option, and Graves deposits in the bank $5,000 as a guaranty of his performance of the contract. He is given until February 20, 1904, not to accept the option, but to have survey made and title investigated. Graves thus becomes

a purchaser at the price, and in accordance with the terms of the option of May 27th. The contract provides for further time if, for "providential reason," it is not consummated. On the 19th day of February, 1904, another contract was entered into referring to the option of May 27, 1903, and the time was again extended on account of "providential reasons" to April 20, 1904. This contract, after reciting several stipulations, concludes: "The same shall be conveyed to H. E. and S. T. Graves, or their assigns, at the price and in accordance with the terms of May 27, 1903." The written evidence clearly sustains his honor's instruction in respect to the second issue. The transaction was finally closed upon the terms of the option of May 27, 1903, which was the result of the contract made between plaintiff and defendant, in April, 1903.

The defendant, however, insists that plaintiff lost his right to commissions because the agency was terminated in December, 1903. Defendant says that plaintiff asked him if he was going to pay him the commissions, and that he said he was not because defendant had become Graves' agent. It is not contended that plaintiff released defendant by any express terms or assented to the termination of the agency; otherwise than by the contract which he made with Graves. Did this contract place plaintiff in a position antagonistic to defendant? It seems that Graves was buying for the purpose of selling at a profit. The terms of the contract between Graves and defendant were fixed at the beginning of the negotiation. There was never any question as to the price which Graves was to pay, or which defendant was to take. The only effect of the agreement between Graves and the plaintiff was to stimulate Graves to take the land by aiding him in selling at a profit. This was, in no sense, antagonistic to defendant's interest. If plaintiff succeeded in selling the option for Graves, it secured to defendant its acceptance and a sale of the land. We are unable to see how there was any treachery or double dealing which was calculated to prevent defendant from making a more advantageous sale. He had contracted to sell to Graves at his price, and it seems was, at all times, willing to do so. This is shown by the several extensions of the option. Instead of plaintiff's contract with Graves preventing a sale, it was conducive to it. He was, in a certain sense, "serving two masters," but both were working to a common end. Defendant wished to sell to Graves at a price agreed upon. Graves wanted to buy if he could sell at a profit. Plaintiff's interest was to bring about both results; and it seems that this was done. Defendant insists that his contract was to pay plaintiff a commission if he made a sale within 30 days. It is true that defendant had the right to put an end to the option and the relation of agent at the expiration of the 30 days from May 27, 1903, if he had chosen to do so. It may be that, if on June 11, 1903, when plaintiff and Bourne went to see him to get the extension, defendant had not consented to it, Graves would have raised the money and taken the land by June 27, 1903, the day upon which the option expired, in which case plaintiff would have been entitled to his commission. By extending the option and retaining the opportunity to sell upon the terms of the original option and finally selling and receiving the money, we think that the finding of the jury that the agency continued was correct. It is undoubtedly true, as contended by defendant, that a person cannot act as agent for both buyer and seller when their interests are antagonistic, or when the terms of the purchase are unsettled. The authorities cited in the excellent brief of defendant's counsel fully sustain this position. The answer to the contention is that plaintiff, having brought Graves and defendant together and made a sale for an agreed price, had a perfect right to accept a commission from Graves to aid him, not in buying, but in selling, the same property. That defendant recognized plaintiff was entitled to compensation for his services is shown by his testimony that, when he completed the sale and got the money, he left $500 with Graves "as a present to Kinsland."

This amount plaintiff never took.

Upon a careful examination of the whole evidence, we think that there is no substantial controversy about the facts. His honor correctly charged the jury that, if they found the facts to be as testified by all the witnesses, they would answer the issues as set out in the record. This was not directing a verdict, but instructing the jury in regard to the law, leaving to them the decision of the facts upon all of the testimony. As plaintiff had agreed with the consent of defendant to give one-half his commissions to Aiken, he was entitled to only $800, the amount awarded him by the jury.

There is no error.

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(146 N. C. 415.)

## DAVIS v. REXFORD et al.

(Supreme Court of North Carolina. Dec. 18, 1907.)

1. REMOVAL OF CAUSES—DECISION—BASIS.
A petition to remove a cause must be decided upon the pleadings and record as they are when the petition is filed.

2. SAME—SEPARABLE CAUSE OF ACTION.
That plaintiff might have sued defendants separately is immaterial on a petition to remove the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 95–99.]

3. PARTIES — DEFENDANTS — JOINDER—SEPARATE DEFENSES.
That defendants have separate defenses does not affect plaintiff's right to sue them jointly, if he has a cause of action against them in which they may be properly joined.

4. REMOVAL OF CAUSES—WHEN ALLOWED.
Plaintiff, in his complaint for breach of contract, stated a cause of action against one resi-

dent and two nonresident defendants, disclosing a joint liability and defeating a removal of the cause, where he set up a joint agreement with defendants, whereby the nonresident defendants agreed to furnish the money for a joint venture, the resident defendant was to pass upon the titles to land purchased, and plaintiff was to give his service in making purchases, it being intended that the mutual contributions to the venture should result in the common benefit of all the parties, and the promises being mutual, and where it is alleged that defendants and each of them refused to carry out the agreement, and that one of the nonresidents notified him to discontinue work under the contract, and that defendants would not further comply with it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 96.]

5. SAME—DEFENSES TO MOTION—STATUTE OF FRAUDS.

That the contract sued on is void under the statute of frauds is not open to defendants on a motion to remove the cause.

6. SAME — FRAUDULENT JOINDER — QUESTION FOR FEDERAL COURT.

On petition to remove a cause, it is for the federal court to pass upon the allegation of fraudulent joinder of defendants to prevent removal; any finding thereon by the state court not binding the federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 193.]

Brown, J., dissenting.

Appeal from Superior Court, Buncombe County; Guion, Judge.

Action by S. P. Davis against C. H. Rexford and others. From an order removing the cause, plaintiff appeals. Reversed.

Plaintiff alleges: "That on December 10, 1903, the defendant J. H. Tucker was, and for a long time prior thereto had been, a duly licensed attorney at law, residing and practicing his said profession at Asheville, N. C. That on the before-mentioned date the defendants C. H. Rexford and W. A. Rexford were capitalists, trading and seeking investments in mineral and timber lands in North Carolina and other states, as the plaintiff is informed and believes. That on and before the 10th day of December, 1903, the plaintiff controlled by options certain kaolin properties in Swain county, N. C. That on or about said 10th day of December, 1903, the plaintiff and the defendants entered into a contract between themselves, by which the plaintiff was to undertake to purchase said properties and certain other kaolin properties which the parties deemed necessary to complete the mining boundary which they desired to control. That, so soon as the plaintiff secured the necessary deeds and contracts for the purchase of said properties, the defendant J. H. Tucker should investigate the title to all said properties, and should do and perform all other legal services necessary in the premises. That, upon the approval of the titles to said properties by the said Tucker, the said defendants C. H. Rexford and W. A. Rexford should furnish and pay all such sums of money as might be required to complete the purchase of said properties. That thereupon the titles to all said properties should be vested in the plaintiff, who should hold the same for the use, profit, and advantage of all said parties in equal shares; that is to say, one-fourth for each of said parties. Thereupon the said defendant, J. H. Tucker, prepared a brief and informal written memorandum of said contract, which was duly executed by the plaintiff, and which was then and there delivered to and retained by said Tucker, and which, as the plaintiff is informed and believes, is still in the possession or under the control of the said Tucker or his codefendants. The plaintiff was not furnished with, and did not retain, a copy of said memorandum of contract, but on or about the ——— day of ———, 1907, said Tucker furnished the plaintiff what purported to be a copy of said memorandum of contract, and which the plaintiff upon the information so furnished him by the said Tucker hereby alleges to be a substantially correct copy of said memorandum of contract, and which is in words and figures as follows: 'It is agreed that S. P. Davis shall act as agent of C. H. Rexford, J. H. Tucker, W. A. Rexford, and himself in the purchase and option of kaolin properties on Larkey creek, and between that and the Tuckaseigee river in Swain county. The said Rexfords agree to furnish the money necessary to buy all the said property necessary to complete the mining boundary, and, when the same is completed, the said Davis shall execute a deed in fee simple as follows: One-fourth to C. H. Rexford, one-fourth to W. A. Rexford, one-fourth to J. H. Tucker, and one-fourth to himself. This December 10, 1903. S. P. Davis. [Seal.]' That very shortly after the making of the contract set out in the preceding paragraph hereof, to wit, on or about the ——— day of December, 1903, and pending the completion of the purchase of said kaolin properties, the scope of said contract was, by mutual parol agreement of all said parties, enlarged and extended so as to include the purchase of timber lands in the western part of North Carolina and the northern part of Georgia, at the then prevailing prices of such lands, approximately, to the amount or area of not less than 25,000 acres, and as much more than said amount or area as the plaintiff might be able to secure at the prices aforesaid, and with the further provision that the said C. H. Rexford and W. A. Rexford, in addition to paying all the purchase price of said lands, should advance and pay all expenses proper and necessary to be incurred by the plaintiff in and about the option and purchase of said lands, including monthly payments to the plaintiff of $100 for the support of himself and family, while he was engaged in said work, and that all amounts so advanced and paid by them should be added to and deemed a part of the purchase price of said lands, and that, in consideration of such advancements and of the enlarged scope of the enterprise, the said C. H. Rexford and W. A. Rexford should be entitled to be reimbursed, from the proceeds of the sale of such

timber lands or of the timber on said lands, all moneys advanced by them for expenses as aforesaid, and for the purchase money of said lands, and that the profits arising from the purchase of said timber lands, whether by resale of such lands or by marketing the timber thereon, should be divided in the proportions named in said contract, to wit, one-fourth to each of said parties, so that the contract between the plaintiff and the defendants, after the same was amended as aforesaid, was, in substance, as follows, to wit: That the plaintiff should act for C. H. Rexford, J. H. Tucker, W. A. Rexford, and himself in the option and purchase of the kaolin properties on Larkey creek and between that and Tuckaseigee river in Swain county, and in the option and purchase of timber lands in the western part of North Carolina and the northern part of Georgia, to the amount or area of not less than 25,000 acres, and as much more than said amount as he might be able to secure at the then prevailing prices for such lands, approximately; that the said J. H. Tucker should examine the titles and do all necessary legal work in connection with the purchase and conveyance of said kaolin properties and timber lands; that the defendants C. H. Rexford and W. A Rexford should pay all the purchase price of said kaolin properties, and should advance and pay all expenses proper and necessary to be incurred by the plaintiff in the option and purchase of said timber lands, including $100 a month for the support of the plaintiff and his family while the plaintiff was so engaged, and should further pay all the purchase price of said timber lands; that the titles to said kaolin properties should be taken in the name of the plaintiff, and should be by him conveyed to said parties in fee simple, as follows, one-fourth to C. H. Rexford, one-fourth to W. A. Rexford, one-fourth to J. H. Tucker, and one-fourth to himself; that the title to all said timber lands should be taken in the name of the plaintiff, and he should hold the same for the joint account, benefit, and profit of all the parties; and that the same should be held for a reasonable time, and thereafter realized upon the best advantage of all parties in interest, either by a resale or by marketing the timber on said lands, as the parties might deem most advantageous, and after reimbursing the said C. H. Rexford and W. A. Rexford for all moneys advanced by them for expenses as aforesaid, and for the purchase price of said lands, the balance remaining, whether in lands or timber or in the proceeds thereof, should belong to said parties, as follows, one-fourth to C. H. Rexford, one-fourth to W. A. Rexford, one-fourth to J. H. Tucker, and one-fourth to the plaintiff. That the contract set out in the fourth paragraph hereof was superseded by and merged into the amended contract set out in this paragraph. That immediately after the making of the contract set out in the fourth paragraph of this complaint, to wit, on or about the 10th day of December, 1903, and acting under said contract and in full compliance therewith, the plaintiff secured deeds in his own name to all said kaolin properties. That the said deeds were delivered to the plaintiff in advance of the payment of the purchase money for the properties conveyed thereby. That immediately following the making of the amended contract set out in the second paragraph hereof, to wit, on or about the ——— day of December, 1903, and upon the faith thereof, the plaintiff gave up his said position and regular and permanent employment as a traveling salesman for Slayden, Fakes & Co., and devoted his entire time and attention faithfully and industriously to the discharge of the duties devolved upon him by said contract, and continued so to do for the period of five months or thereabouts, and until he was prevented from the further performance of said contract by the breach thereof by said defendants, as hereinafter alleged. That acting under said contract, and in full compliance therewith, the plaintiff secured options and contracts for the purchase of such timber lands, to an amount or area in excess of 25,000 acres, to wit, 26,022 acres, or thereabouts, as nearly as the plaintiff can ascertain the same, at prices not exceeding the then prevailing prices of such lands, and was successfully prosecuting the work of securing other such lands to a large amount and area, and was faithfully, fully, and in all respects carrying out and performing his part of said contract, until he was compelled to discontinue work thereunder, and to abandon further performance of said contract, by the breach thereof by the defendants, as hereinafter alleged. That the defendants, and each and every of them, failed and refused to carry out and perform said contract, and on or about the ——— day of May, 1904, the defendant W. A. Rexford notified the plaintiff to discontinue work under said contract, and that the defendants had abandoned, and would not further comply with, said contract, and the plaintiff believes, upon information received by him since the filing of the complaint in the former action between the same parties, hereinafter referred to, and avers the fact to be, that, in the giving of said notice to the plaintiff, said W. A. Rexford was acting for and on the behalf of all the defendants and with the full knowledge, acquiescence, and approval of his codefendants, J. H. Tucker and C. H. Rexford."

Plaintiff set out a second cause of action, which it is not necessary to set forth herein. Defendant J. H. Tucker filed a demurrer. Defendants C. H. and W. A. Rexford filed a petition for the removal of the cause into the federal court upon the ground of diverse citizenship. The petition complies with the statute. It is conceded that defendant J. H. Tucker is a resident of this state, and that petitioners are nonresidents. The petition alleges that, if any cause of action is set

out against defendant Tucker, it is separable from that set out against petitioners. The petition further alleges that the defendant Tucker is fraudulently joined as party defendant for the sole purpose of defeating petitioners' right to remove the case into the federal court. Plaintiff filed an answer to the petition; his honor, Judge Guion, ordered that the cause be removed in accordance with the prayer of the petitioner. Plaintiff excepted and appealed.

Frank Carter and H. C. Chedester, for appellant. Merrimon & Merrimon and Moore & Rollins, for appellees.

CONNOR, J. (after stating the facts as above). It is well settled, by uniform decisions, that the motion for removal is to be decided upon the pleadings and record as they are when the petition is filed. Does the complainant disclose a removable cause of action? Tobacco Co. v. Tobacco Co., 144 N. C. 352, 57 S. E. 5, and cases cited. The only question, therefore, open to us, is whether the plaintiff has, in his complaint, stated a cause of action against the resident and nonresident defendants disclosing a joint liability. That he may have sued them separately is not material in disposing of the petition for removal. Plaintiff is entitled to pursue his remedy in his own way, provided he does so in accordance with the rules of pleading and practice. That defendants have separate defenses does not affect the right of the plaintiff to sue them jointly, if he has a cause of action against them in which they may properly be joined. The complaint sets forth a joint agreement on the part of defendants to further a common purpose to the accomplishment of a common end. The defendants Rexfords agreed to furnish the money, defendant Tucker was to investigate and pass upon titles, and plaintiff was to give his time and service in purchasing the properties, and these mutual contributions to the scheme, or venture, were to result in the common and equal benefit and profit of the parties to it. The premises were mutual; each constituting a consideration for the other. This being true, the cause of action is stated: "That the defendants and each and every of them failed and refused to carry out and perform said contract, and on or about the ——— day of May, 1904, the defendant W. A. Rexford notified plaintiff to discontinue work under said contract, and that defendants had abandoned and would not further comply with said contract." This is a clear allegation of a breach of the joint contract by all of the defendants. It is true that the plaintiff, it would seem unnecessarily, specifies that the petitioning defendants did certain acts, etc., and that defendant Tucker "was particeps in said last-mentioned breach, by having sanctioned, approved, and actively aided in said breach." We are not quite sure that we correctly understand this portion of the complaint. If it is correctly construed by defendant's counsel, we concur with him that the defendants cannot be joined. It would seem that the plaintiff seeks to charge defendants Rexfords with breaking their contract, and defendant Tucker with actively aiding them in doing so. It is clear that these causes of action are, in every respect, separate and distinct. One is for breach of contract; the other for a tort. However this may be, eliminating this portion of the complaint, there is left a cause of action against all the defendants for jointly breaching the contract. The authorities are cited in Hough v. Railroad, 144 N. C. 692, 57 S. E. 469, and Tobacco Co. v. Tobacco Co., supra. The suggestion that the contract set out is void by reason of the statute of frauds is not open to defendant on the motion for removal. We do not understand that his honor passed upon the allegation of fraudulent joinder of the defendant to prevent the removal, nor do we do so. As we construe the decisions, this is a matter for the federal court. In no event would our finding be binding upon that court. Wecker v. Enamelling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430. It does not follow that we are compelled to take the charge as true. Our ruling is confined to the facts as they appear in the complaint.

There is error.

BROWN, J., dissenting on the ground that he is of opinion that no cause of action is set out against defendant J. H. Tucker, and that the cause of action is separable.

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(146 N. C. 477)

## FRAZIER v. EASTERN BAND OF CHEROKEE INDIANS.

(Supreme Court of North Carolina. Dec. 18, 1907.)

LIMITATION OF ACTIONS—RECOVERY OF LAND.

Plaintiff claiming land, possession of which he never had, under a grant, issued subsequent to Priv. Laws 1889, p. 889, c. 211, validating against the state and all persons claiming under it, all titles and deeds previously executed to defendant, which amounts to a legislative grant, is barred by limitations from asserting right thereto, not having done so till more than 10 years after the passage of said act, the prior registering, in the country where the land lies, of a deed thereof to defendant, and the issuance of the grant to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 73–85.]

Brown, J., dissenting.

Appeal from Superior Court, Swain County; O. A. Allen, Judge.

Action by W. W. Frazier against the Eastern Band of Cherokee Indians. Judgment for defendant. Plaintiff appeals. Affirmed.

A. M. Fry and Shepherd & Shepherd, for appellant. Bryson & Black and Geo. H. Smathers, for appellee.

CLARK, C. J. Action for recovery of land of the defendant, the "Eastern Band of Cherokee Indians." Besides other claim

of title (the controversy as to which we do not find it necessary to consider), the defendant set up a deed from William Johnson October 9, 1876, to the Eastern Band of Cherokee Indians for the Qualla boundary of land, which, it is admitted, covers the land in controversy, which deed was executed in pursuance of a decree of the United States Circuit Court for the Western District of North Carolina, entered at November term, 1874, in a cause therein pending, "Eastern Band of Cherokee Indians v. W. H. Thomas and Others." Section 4, c. 211, p. 889, Priv. Laws 1889, entitled, "An act incorporating the Eastern Band of Cherokee Indians," reads as follows: "In all cases where titles or deeds have been executed to the said 'Eastern Band of Cherokee Indians' or any person or persons in any capacity in trust for them under that name and style by person or persons either collectively, individually, officially or in any capacity whatever, such deeds or titles are hereby declared valid against the state, and all persons or any person claiming by, through or under the state by virtue of any grant dated or issued subsequent to the aforesaid deeds or titles to the said 'Eastern Band of Cherokee Indians.'"

The plaintiff claims title under eight grants issued to D. Lester, assignee of S. Everett, November 4, 1891, based on entries made March 15, 1880, surveyed May 18, 1880, and purchase money paid June 27, 1883. The grants under which plaintiff claims were issued subsequent to the above act, which was, in effect, a legislative grant, passing to the defendant the legal title as fully as the state could have conveyed it if the statute had directed the Secretary of State to issue a grant to defendant and this had been done. This act did not impair, it is true, any rights of Lester, under whom the plaintiff claims. He had an equity by virtue of his entry and payment of the purchase money to call for a grant to perfect his claim by the legal title. The relation was that of "vendor and vendee, with all the rights and equities, incident thereto." Frasier v. Gibson, 140 N. C. 278, 52 S. E. 1035, in which it is further held by Connor, J., that a delay to call for the grant within 10 years after the entry would presume an abandonment. As the entry under which the plaintiff claims was made March 15, 1880, and the grant was not issued till November 4, 1891, it would seem that the plaintiff's assignor was then barred of the right to call for a grant, especially in view of the legislative grant by chapter 211, p. 889, Priv. Laws 1889, of the land to the defendant. But, however that may be, the Johnston deed to the defendant was registered in Swain county, where the land lies, July 8, 1880, the title thereto was confirmed by aforesaid act March 11, 1889, and the plaintiff took no steps to recover the land or otherwise assert his equity till the summons was issued in this action July 13, 1903, more than 23 years after his equity had been acquired by the entry made by Everett March 15, 1880, nearly 20 years after the payment of the purchase money June 27, 1883, more than 14 years after the legislative grant of the land March 11, 1889, and even more than 11 years after the plaintiff took out his grant November 4, 1891. The plaintiff has the junior grant, and not the legal title. In no view has he had any other right than an equity to call for the title, and in any aspect he is barred from now asserting this by unreasonable delay, as well as by the lapse of 10 years. Revisal 1905, § 399, which statute is duly pleaded. "Leges subveniunt vigilantibus non dormientibus."

What good reason caused the plaintiff and those whose rights he has acquired not to take steps to assert them during all those years we know not. The law conclusively presumes that they were good and sufficient, and that those reasons could have been shown by the defendant if the plaintiff had taken action in the reasonable time contemplated by the law, for men are not usually slow to assert claim to property if well founded. In the lapse of time witnesses die or move away, evidence is lost, facts are forgotten, documents are destroyed or mislaid. Therefore the law places time itself in place of that which it has destroyed. If time carries in one hand the sythe to destroy the muniments of our titles, he carries in the other the hour glass to measure out the period of our protection. In McAden v. Palmer, 140 N. C. 258, 52 S. E. 1034, the defendant not only made the senior entry, but had the land surveyed, and paid the purchase price before the plaintiff even made his entry, but, as the latter obtained his grant and registered it first, it was held by Brown, J., that the delay of the defendant to assert his equitable right to have plaintiff declared a trustee for his benefit, for 10 years after the registration of plaintiff's grant had vested the legal title in him, was a complete bar by virtue of Code 1883, § 158 (now Revisal 1905, § 399), to the assertion of such equity—citing Ritchie v. Fowler, 132 N. C. 790, 44 S. E. 616. To same effect Johnson v. Lumber Co., 144 N. C. 717, 57 S. E. 518. The defendant's deed from Johnson, covering the locus in quo, was registered in Swain county July 8, 1880, and was validated by the act of the General Assembly March 11, 1889, and the plaintiff is barred by failure to assert his rights within 10 years from the latter date. The plaintiff has at no time been in possession of the premises.

No error.

BROWN, J., dissenting.

HOKE, J. (concurring in the result). I concur in the disposition made of this case, and for the reason that in a trial free from error, both in the charge of the court and its rulings on questions of evidence. It has evidently been shown that at the time plain-

tiff's entries were made and his grants issued there were older grants of the state outstanding, covering the land in controversy, and rendering same no longer the subject of entry. As the opinion of the court decides the case on other grounds in defendant's favor, I do not care to make further statement concerning it, and concur in the result.

NOTE BY CLARK, C. J. As a matter of both legal and historical interest as well, it may not be amiss to note here the uniform kind treatment by this state of the Cherokees in her borders, of which the above act of March 11, 1889, in confirming their titles, is in keeping. Long before the treaty making power was surrendered by the states to the general government by the Constitution of the United States, North Carolina set apart to the Indians a large territory as a hunting ground, and forbade the entry and grant of the same. In 1777 the Blue Ridge was made their boundary line. Then, in 1783, the territory described in the act brought forward as section 2346 of the Code of 1883 was set apart to the Cherokees. This territory originally included a very large part of what is now the state of Tennessee. The next section of the act of 1783 forbade the entry and grant of these lands. Section 2347 of the Code of 1883. The courts held this reservation sacred to the Indians until the Indian title was extinguished by treaty with the United States. Strother v. Cathey, 5 N. C. 162, 3 Am. Dec. 683. Under the terms of the treaty of New Echota of December 29, 1835, purporting to have been made between commissioners appointed by the United States and the Chiefs and headmen of the Cherokee Nation (though it is now generally believed that, in fact, there was no treaty at all, but it was enforced by the United States to avert war between the state of Georgia and the Cherokees in Georgia) the bulk of the Cherokee Indians east of the Mississippi were forced to move west under display of arms made by Gen. Winfield Scott. The history of this treaty is given by Jno. W. Powell, Director of Smithsonian Institute, in a volume issued by the government. There was a remnant of the Cherokees, however, left in North Carolina without any organization. North Carolina, realizing the helpless and dependent condition of this remnant of a once powerful tribe, enacted legislation for their benefit. Among others was the enactment which avoided all contracts made since May 18, 1838, for an amount equal to $10 or more, between Indians and white persons, unless reduced to writing and signed in presence of two witnesses. This is now Revisal 1905, § 975, and was cited Rollins v. Cherokees, 87 N. C. 248. The North Carolina Cherokees were entitled to certain moneys after the war, and the United States refused to pay it over to them unless they moved to the Indian Territory, or secured an act of the Legislature of North Carolina allowing them to remain permanently in this state. Such act was promptly passed by the Legislature. Laws 1866, p. 120, c. 54. During the year 1868 the North Carolina Cherokees endeavored to effect a tribal organization or constitution to live under. This was held invalid by the decision of the Supreme Court of the United States in case of Eastern Band of Cherokee Indians v. United States and Cherokee Nation West, 117 U. S. 288, 6 Sup. Ct. 718, 29 L. Ed. 880. The court held in this case that the North Carolina Cherokees who refused to go with the tribe west were not a nation, in whole or in part, and could not have a tribal organization as they were citzens of North Carolina, and bound by her laws. This has been cited in State v. Wolf (at this term) 59 S. E. 40. About that time it was found that a great many of the title papers of the Indians to the Qualla boundary and other lands had been lost or destroyed without having been recorded. Under the decision of the United States Supreme Court, supra, it was doubtful whether these Indians had any capacity as an organization to sue and be sued or to hold lands conveyed to them as such. The Legislature of North Carolina again came to their relief and passed the act (Priv. Laws 1889, p. 889, c. 211) above quoted. See, also, chapter 166, p. 234, Priv. Laws 1895, and chapter 207, p. 418, Priv. Laws 1897, amendatory of chapter 211, p. 889, Priv. Laws 1889, supra.

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(146 N. C. 475)

## McINTYRE v. CITY OF ASHEVILLE.

(Supreme Court of North Carolina. Dec. 18, 1907.)

INTOXICATING LIQUORS—ADOPTION OF LOCAL OPTION—RENEWAL OF LICENSE.

Revisal 1905, § 2073, makes it unlawful for the governing body of a city or town, in which prohibition of the sale of intoxicating liquor has been adopted, to grant license to sell it, but provides that liquor dealers in such a city or town holding a license at the time of the adoption of prohibition shall have six months after the election in which to close out their stock on hand at the time of such election, if their license remain so long in force. *Held* that, where the license of a person expired within six months after the election, the city authorities had no power to renew it for the remainder of the six months.

Appeal from Superior Court, Buncombe County; Gulon, Judge.

Mandamus by Patrick McIntyre to compel the board of aldermen of the city of Asheville to renew a liquor license. Judgment for defendant, and plaintiff appeals. Affirmed.

Merrick & Barnard (Jones & Williams, Adams & Adams, and Thos. Settle, on the brief), for appellant. Tucker & Murphy and H. B. Carter, for appellee.

CLARK, C. J. At a local option election held in Asheville October 8, 1907, the city voted for the prohibition of the sale of spirituous, vinous, or malt liquors. The plaintiff is the holder of a license to sell liquor in said city issued July 1, 1907, to continue till December 31, 1907. He applied to the board of aldermen for renewal of his license to April 7, 1908, on the ground that under the statute he was entitled to six months after the adoption of prohibition before closing up. The board refused an extension of his license after December 31, 1907, on the ground that it had no power to grant it. The plaintiff brings this action to obtain a mandamus to compel a renewal of his license after its expiration on December 31, 1907.

Revisal 1905, § 2073, makes it unlawful for the county commissioners of any county or the governing body of any town in which prohibition of the sale of spirituous, vinous, or malt liquor has been adopted to grant license to sell it. The plaintiff rests his case upon the proviso to said section 2073 that "liquor dealers in such cities or towns holding license at the time of the election shall be allowed six months after such election in which to close out their stock in hand at the time of such election, if their license remain so long

in force." It will be noted that there is no exception to the provision making it unlawful to issue license after the vote in favor of prohibition is adopted. The proviso merely allows the liquor seller six months in which "to close out his stock in hand," if his license remain so long in force. Here the license expires in less than six months, i. e., on December 31, 1907, and it was rightly held that the board of aldermen had no power to renew it.

The judgment is affirmed.

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(146 N. C. 484)

TUTTLE et al. v. TUTTLE et al.

(Supreme Court of North Carolina. Dec. 18, 1907.)

1. TRIAL—SUBMISSION OF ISSUES.

The exact form of the issues submitted is immaterial, if under them each party has an opportunity to present evidence of the facts relied on, and the privilege of having the same applied fairly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 840–845.]

2. SAME.

Where, in a suit to set aside for fraud a sale in a partition suit and to charge the purchaser at the sale as trustee, the court submitted the issue whether there was an understanding between the party instituting the partition suit and the purchaser that the party should share in the profits of any future sale of the premises, and the court charged that, if the purchaser acted in good faith and had no notice of the fraud of the party, his title was good, the refusal to submit as a separate issue the question whether the purchaser was a bona fide purchaser for value and without notice was proper.

3. PARTITION—SALE—SETTING ASIDE—FRAUD—EVIDENCE—SUFFICIENCY.

In a suit by tenants in common to set aside a sale in a partition suit instituted by a co-tenant, and to charge the purchaser at the sale as a trustee, on the ground of a fraudulent arrangement between him and the co-tenant, it is not necessary to prove that the purchaser was guilty of a crime or a dishonorable transaction, but proof that he aided and abetted the co-tenant in committing a fraud on the tenants in common is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 365.]

4. SAME—PERSONS WHO MAY PURCHASE.

A tenant in common suing to partition the premises controlled by him as agent for the co-tenants cannot, on being appointed commissioner to sell the premises, purchase them at the sale nor procure any one to do it for him, and he cannot speculate for his own benefit or do any act detrimental to the interest of his co-tenants.

5. FRAUD—EVIDENCE—SUFFICIENCY.

Fraud need not be established by direct proof, but evidence of circumstances which will reasonably satisfy the mind of the judge or jury of its existence is sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 55–59.]

6. PARTITION—SALE—SETTING ASIDE—FRAUD—EVIDENCE—SUFFICIENCY.

In a suit by tenants in common to set aside a sale in a partition suit instituted by a co-tenant on the ground of his fraud, evidence *held* to show fraud, justifying relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 365.]

7. SAME—ADMISSIBILITY OF EVIDENCE.

In a suit by tenants in common to set aside a sale in a partition suit instituted by a co-tenant, and to convert the grantee in the commissioner's deed into a trustee on the ground of a fraudulent arrangement between him and the co-tenant, evidence that the co-tenant was the agent in charge of the premises; that he formed the design to acquire them for his own profit at less than their real value; that he instituted the partition suit; that he procured his appointment as commissioner with a view of controlling the sale; that he procured a third person to bid off the land for his benefit; that he negotiated a transfer of the bid to the grantee that he might share with the grantee in the profits—was competent as against the grantee.

8. SAME—SUFFICIENCY.

In a suit by tenants in common to set aside a sale in a partition suit instituted by a co-tenant and to charge the purchaser at the sale as trustee on the ground of fraud, evidence *held* to show fraud of the grantee justifying relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 365.]

9. SAME—BURDEN OF PROOF—PREPONDERANCE OF EVIDENCE.

In a suit by tenants in common to set aside a sale in a partition suit instituted by a co-tenant, on the ground of fraud perpetrated by the co-tenant and the purchaser at the sale, the burden of proof is on plaintiffs to satisfy the jury of the fraud by a preponderance of the evidence only.

10. FRAUD—EVIDENCE—SUFFICIENCY.

Fraud need not be established beyond a reasonable doubt, but is sufficiently shown by a preponderance of the evidence strong enough to overcome the presumption that men are honest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 55–59.]

11. PARTITION—SETTING ASIDE SALE—REMEDY.

The remedy of tenants in common seeking to set aside a sale in a partition suit instituted by a co-tenant, and to charge the purchaser at the sale as trustee, is by civil action against the co-tenant and purchaser, and not by motion in the partition suit; the purchaser not being a party thereto.

12. LIMITATION OF ACTIONS—FRAUD.

A suit by tenants in common to set aside a sale in a partition suit instituted by a co-tenant, and to charge the purchaser at the sale as trustee, based on the fraud perpetrated by the co-tenant and the purchaser, is not within the 10-year statute of limitations, but is controlled by Revisal 1905, § 395, subsec. 9, requiring the commencing of an action for fraud within 3 years after the discovery thereof.

13. SAME—BURDEN OF PROOF.

One suing for fraud after the expiration of three years has the burden of proving that he discovered the fraud within three years from the commencement of the action, or the action will be barred by Revisal 1905, § 395, subsec. 9, limiting actions for fraud to three years after discovery thereof.

14. SUNDAY—RENDITION OF VERDICT—VALIDITY.

A verdict rendered in open court on Sunday is valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Sunday, § 82.]

15. APPEAL—DISPOSITION OF CAUSE—REVERSAL—NEW TRIAL—SCOPE.

When the issues in a cause are distinct and one was properly submitted and the other not, the court on reversal will grant a new trial on the latter issue alone.

Appeal from Superior Court, Transylvania County; O. H. Allen, Judge.

Action by L. H. Tuttle and others against R. M. Tuttle and others. From a judgment for plaintiffs, defendants appeal. Reversed in part, and partial new trial granted.

Civil action brought by the plaintiffs against the defendants to set aside, upon the ground of fraud, the decree of sale and orders entered in a special proceeding for partition of certain lands in which the plaintiffs and the defendant R. M. Tuttle were tenants in common. The court submitted the following issues affecting the appellants: "(1) Was there an arrangement and understanding at or before the time of executing the deed to L. E. and C. E. Corpening between the grantor and grantees that the bid of Welch Galloway was to be assigned and the land conveyed to said L. E. and C. E. Corpening, and that defendant R. M. Tuttle was to share with them in the profits of any future sale, or was to receive any compensation individually for its execution? Ans. Yes. * * * (4) Is this action, barred by the statute of limitations, as to the plaintiffs or any of them; if so, as to which of them? Ans. No." From the judgment rendered upon the issues, the defendants R. M. Tuttle, C. E. and L. E. Corpening appealed.

Geo. A. Shuford and Shepherd & Shepherd, for appellants. Avery & Avery, Zachary & Breese, W. A. Smith, and Robert Gash, for appellees.

BROWN, J. The plaintiffs and the defendant R. M. Tuttle were tenants in common of five tracts of land in Transylvania county containing some 3,200 acres. R. M. Tuttle owned an interest of one twenty-seventh and was the general agent of his co-tenants, his brothers and other near relatives, in the management and control of the land. In April, 1901, R. M. Tuttle caused a special proceeding to be commenced in the superior court of Transylvania county for the purpose of selling said lands for partition, to which his co-tenants were made co-petitioners and parties of record. A decree of sale was duly entered, and R. M. Tuttle was appointed commissioner to make the sale. On August 7, 1901, the lands were sold and bid off by Welch Galloway, Esq., for the sum of $2,100, and upon recommendation of the commissioner the sale was confirmed. On September 10, 1901, said Galloway assigned his bid to E. H. and S. L. Tuttle, sons of R. M. Tuttle, who, in turn, transferred the bid to C. E. and L. E. Corpening, to whom the commissioner R. M. Tuttle executed a deed in consideration of $2,100 purchase money on December 22, 1902. On February 22, 1906, the plaintiffs commenced this action to set aside said special proceeding, and the sale and deed made in pursuance thereof, upon the ground of fraud, and to convert the defendants Corpening into trustees for their benefit.

1. On the trial the defendants tendered certain issues, and duly excepted to those submitted. We think the issues submitted fully present every phase of the controversy. The exact form of the issues is immaterial, if under them each party has an opportunity to present evidence of the facts relied upon. The issues submitted in this case arise upon the pleadings, and intelligibly present to the jury the contention of the parties. Shoe Co. v. Hughes, 122 N. C. 296, 29 S. E. 339. The true test is: Did the issues afford the parties opportunity to introduce all pertinent evidence and apply it fairly? Black v. Black, 110 N. C. 398, 14 S. E. 971; Pretzfelder v. Insurance Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424. Measured by that test, the issues are sufficient. The form of the first issue rendered it unnecessary to submit the separate issue tendered by the defendants Corpening, as to whether they were bona fide purchasers for value and without notice of the alleged fraud. Under the first issue his honor submitted that contention clearly to the jury when he charged them that "if the bid was assigned to the Corpenings in good faith on their part, and they had no notice of the facts of the bid being by Galloway for R. M. Tuttle, then their title is good." The theory upon which the plaintiffs rest their case against the Corpenings, as embodied in that issue, is that they were participants in a legal fraud, perpetrated upon his co-tenants, these plaintiffs, by R. M. Tuttle. Failing to establish that, they would not be entitled to recover. It is not necessary, in order to set aside the deed and decrees of sale herein impeached, that the Corpenings should be convicted of a crime or of a dishonorable transaction, as such terms are commonly understood. R. M. Tuttle occupied a fiduciary relation to his co-tenants, both as their general agent in the control and management of the land, and also as a commissioner appointed by the court to make sale of it. It is elementary that he could not lawfully purchase at his own sale nor procure any one else to do it for him. He could not lawfully speculate in the land for his own benefit, or do any other act detrimental to the interest of those whom he had undertaken to serve. His duty was to make the land bring the best price obtainable, and to act for plaintiffs and advance their interests. If the Corpenings, knowing the relation which Tuttle, as commissioner in the special proceeding, bore to the parties thereto, aided and abetted him in purchasing the land for him and his sons, and for their joint benefit, with a view to speculate in it on joint account, they would be particeps criminis in a legal wrong, however ignorant they may have been of the unlawful character of such transactions. If such facts are true, they could not possibly be classed as "innocent purchasers" under

any known definition of the term. They would be guilty, at least, of constructive fraud, such as the law infers from certain circumstances, regardless of actual dishonesty of purpose. In aiding and abetting the commissioner trustee, in committing such fraud upon his fiduciaries, they could not occupy any better position than the commissioner himself.

That brings us naturally to the consideration of the sufficiency of the evidence, a point raised by the motion to nonsuit, and argued with much earnestness by the learned counsel for defendants. The nature of fraud is such that it can seldom be established by direct or positive proof. In the nature of things, resort must be had to the evidence of circumstances. It is well settled now that such evidence will support the finding of fraud, if it is sufficient to reasonably satisfy the mind of the judge or jury, as the case may be. Rea v. Missouri, 17 Wall. (U. S.) 532, 21 L. Ed. 707; Reed v. Noxon, 48 Ill. 323; Sears v. Shafer, 6 N. Y. 268. As to the evidence against the defendant R. M. Tuttle, there can hardly be a serious controversy as to its sufficiency. It is most plenary. It tends to prove that he was the trusted agent of his co-tenants in charge of these lands, and fully acquainted with their character and value, and that, taking advantage of his position, he formed the design to acquire these lands for his own benefit, at much less than their real value. Without consulting some of the owners, he caused the special proceeding to sell for partition to be instituted, and he kept them in ignorance of the pending sale. He had himself appointed commissioner, although a party to the proceeding, so that he could control the sale and easily secure its confirmation, if desirable in his own interest to do so. He procured Galloway (who in this matter appears to be innocent of any wrongful purpose) to bid off the land for his, Tuttle's benefit, and he negotiated the transfer of the bid through his two sons to the Corpenings, in order that he and his sons might take advantage of a "good thing" and share in the profits, and, as a part thereof, he and his sons received a lot of machinery and the $1,000 note of the father. The evidence offered by plaintiffs tends, we think, to establish such facts. While the evidence, competent as against the Corpenings, is not of the same probative force as that against Tuttle, it is fully sufficient to have warranted his honor in submitting the question to the jury as to their wrongful complicity with Tuttle, the commissioner. There is evidence tending to prove that they are nearly related by marriage, and that the two sons of R. M. Tuttle are the nephews of the Corpenings. That they knew of the fiduciary relation which R. M. Tuttle occupied towards plaintiffs can scarcely be denied, for they took their title deed from him as commissioner, and paid him the sum for which the land was bid off. There are facts and circumstances in evidence from which a jury might well infer that Galloway had bid off the land for R. M. Tuttle's benefit, and at his request, and that the Corpenings must have been aware of it. From these facts and circumstances a more important inference is warranted, to the effect that an understanding existed between the Corpenings and their two nephews, looking to a division of profits in which they and their father were to share. There is evidence tending to prove that, on account of this venture, the Tuttles received from the Corpenings a lot of machinery and the note of R. M. Tuttle which he owed for $1,000. Declarations of one of the Corpenings to M. H. Tuttle tend to show that R. M. Tuttle was believed by them to be guilty of some breach of trust in this matter, which might necessitate his leaving for Canada. The Corpenings employed to represent them the same attorney who bid off the land for Tuttle, and, in addition, there is some evidence of the withholding of certain deeds belonging to plaintiffs, and necessary to their chain of title, with a view to shutting off suit, indicating a purpose, if possible, to prevent investigation. There is evidence tending to prove that $2,100 is a very inadequate price for the land, that there is some 3,200 acres of it, and worth, in the estimate of some witnesses, from $6,000 to $15,000, and that the Corpenings were acquainted with its true value. There was much evidence submitted by defendants in rebuttal and tending to prove that the Corpenings acted in good faith in the purchase of the land. The charge of his honor appears to us to have put the issues before the jury fairly and clearly, and, while it may not be entirely free from error, they are of such a character as were evidently harmless, and do not constitute reversible error so as to warrant us in granting a new trial upon the first issue.

In charging that the burden of proof was on the plaintiffs to satisfy the jury by a preponderance of the evidence the judge committed no error. This is not an action to convert the defendants into trustees because they purchased the legal title in trust for plaintiffs, or to correct a mistake in a deed and the like cases, where the law requires much more than a preponderance of evidence. The plaintiffs seek to set aside the sale, deed, and decrees upon the ground that they are fraudulent, and were made at the instance of R. M. Tuttle, the commissioner, with purpose and intent to defraud plaintiffs of their property. "It is not, however, necessary, in order to establish the fraud, that direct, affirmative, or positive proof of fraud be given. In matters that regard the conduct of men the certainty of mathematical demonstration cannot be expected or required. Like much of human knowledge on all subjects, fraud may be inferred from facts that are established." Kerr on Fraud and Mistake, p. 384. The distinction between

that class of cases wherein clear, cogent, and convincing proof is required, and that class where a preponderance of the evidence is sufficient, is clearly drawn in the learned opinion of Mr. Justice Avery in Harding v. Long, 103 N. C. 1, 9 S. E. 445, 14 Am. St. Rep. 775. The Encyclopedia states that, according to the overwhelming weight of authority, fraud need not be established beyond a reasonable doubt, but that "a preponderance of the evidence, as in any other civil case, is sufficient, provided the proof is clear and strong enough to preponderate over the general presumption that men are honest and do not ordinarily commit frauds, and reasonable to satisfy the understanding and conscience of the judge or jury. If it does, then it is sufficient both at law and in equity

2. The remedy of the plaintiffs is the one they have pursued; and not by motion in the cause as contended by defendants. The Corpenings are no parties to the special proceeding, and, if they were, the proper method to impeach judicial proceedings for fraud is by a civil action, and not by motion. Peterson v. Vann, 83 N. C. 118; McLaurin v. McLaurin, 106 N. C. 334, 10 S. E. 1056.

3. His honor charged the jury that, "if the said Corpenings took as trustees, the statute of limitations would not bar the plaintiffs from bringing action until 10 years after the rendition of said decree in said special proceeding." In this we think his honor mistook the character of the action and the relation of the Corpenings to the plaintiffs. There was never any contractual relations between them, and the Corpenings have never voluntarily assumed any relation of trust or confidence towards plaintiffs. The legal title has never vested in them by the voluntary act of the plaintiffs, but solely in consequence of the defendant's own wrongful and tortuous acts. They are trustees ex maleficio, not ex contractu. The legal title which vested in the Corpenings by virtue of the sale, deed, and decree of confirmation has been destroyed and made void ab initio by the finding of the jury and the decree of the court. Consequently there is no legal title to attach a trust to, because, unless this action is barred by the statute, all those proceedings are void, and the title never vested. The case therein differs materially from that class of cases where a trustee or mortgagee holding the legal title bought at his own sale has the title conveyed through another to himself and takes possession. In such cases the legal title has never been out of him, and he has continued to hold it in trust during his occupancy, and a mortgagor or cestui que trust may bring him to account within 10 years. Bruner v. Threadgill, 88 N. C. 366; Jones v. Pullen, 115 N. C. 471, 20 S. E. 624. The gravamen of the complaint is that the sale, decree, and the deed were made by reason of a fraudulent agreement to deprive the plaintiffs of their property, and are therefore void. It follows that the action must be instituted within three years after actual discovery of the fraud by plaintiff. Revisal 1905, § 395, subsec. 9; Day v. Day, 84 N. C. 408. This action originally applied to cases of fraud cognizable only in a court of equity under the former system which would embrace this case. By amendment the scope of the section has been extended to all cases of fraud cognizable at law or in equity. The statute only runs against those not under disability, and as to those only from the date of the discovery of the fraud. The fact that the commissioner made a deed to the Corpenings on December 22, 1902, if registered, would not even put the plaintiffs upon inquiry, much less fix them with notice that a fraud had been committed, as there is no evidence of that upon the face of the deed. The statute having been completed, the plaintiffs should reply setting out by way of avoidance the time when they aver the fraud was discovered; the burden being upon them to prove the facts necessary to repel the statute. Stubbs v. Motz, 113 N. C. 458, 18 S. E. 387. The plaintiffs will be allowed to file such replication, to the end that proper issues may be submitted to the jury, bearing upon the plea of the statute of limitations.

4. The verdict in this case was rendered Sunday morning in open court, and recorded. By consent of counsel, the court continued the motion for judgment to be heard at Asheville on September 14, 1906, when and where judgment was signed. Defendants excepted. There is no merit in the exception. The rendition of the verdict on Sunday was valid. Rodman v. Robinson, 134 N. C. 507, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877.

We have examined with care all the other assignments of error not herein commented on, and think that they are without merit. As the two issues are distinct and not at all connected, we award a new trial on the one issue which relates to the statute of limitations. Let the costs of this court be equally divided between the plaintiffs and defendants.

Partial new trial.

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(146 N. C. 382)

## BURNS v. McFARLAND.

(Supreme Court of North Carolina. Dec. 14, 1907.)

1. APPEAL—REVIEW—SCOPE—ACTIONS FOR INJUNCTION—FINDINGS OF FACT.

On appeal from an order refusing or continuing an injunction, the Supreme Court can review the findings of fact made by the trial court.

2. CONTRACTS—RIGHTS ACQUIRED BY—ABANDONMENT OF.

Rights under a contract may be abandoned either by agreement or by conduct clearly indicating such purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1151.]

3. APPEAL—REVIEW—REASONS FOR DECISION.

Irrespective of the reasons of the trial court, its judgment will be affirmed where the Supreme

Court finds sufficient reasons in the record to sustain the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3408–3430.]

Appeal from Superior Court, Buncombe County; Moore, Judge.

Action by Earnest S. Burns against John F. McFarland for breach of contract to sell certain furniture. From a judgment for defendant, plaintiff appeals. Affirmed.

Merrimon & Merrimon, for appellant. Glenn & Sale, for appellee.

WALKER, J. The plaintiff alleged in his complaint that the defendant agreed to sell him certain furniture in the Stoner Hotel, situated in Asheville, the price to be ascertained as soon as an inventory could be taken and the invoices examined; and that, when this was done, the defendant would assign to him an unexpired lease he then had of said hotel and a new lease which the defendant would get from Stoner, the owner of the hotel, for the next year. On June 10, 1907, the defendant gave the plaintiff a receipt for $1 "on account of the sale of the Stoner Hotel." Without setting out the evidence, it appears therefrom to us that the plaintiff failed to comply with his part of the contract, and clearly abandoned the same, and that thereafter the defendant sold a one-third interest in the furniture to one J. L. Page for a valuable consideration; Page having no notice of the prior contract between the defendant and the plaintiff. The latter applied for an injunction to restrain the defendant from exercising any control over the premises and from conducting the business of a hotel thereon, and also prayed for a specific performance of the contract. The defendant and Page are now partners engaged in conducting the hotel business in the Stoner building. The lease by Stoner to the defendant contained a stipulation that it should not be assigned or transferred without the written consent of Stoner, and he has never consented in writing to any assignment or transfer of the same; nor has the plaintiff even applied to him for one. The motion, upon the pleadings and affidavits, was denied, and plaintiff appealed.

This court on appeal from an order refusing or continuing an injunction to the hearing, can review the findings of fact made by the court below. Jones v. Boyd, 80 N. C. 258; Evans v. Railroad, 96 N. C. 47, 1 S. E. 529; Roberts v. Lewald, 107 N. C. 305, 12 S. E. 279. His honor held that Page was a purchaser for value and without notice, and therefore acquired a good title as against the plaintiff, and that, consequently, the defendant could not be compelled to specifically perform his contract, as he could not convey the title (Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827), and that the plaintiff's remedy is by an action for damages for a breach of his contract. Winders v. Hill, 141 N. C. 694, 54 S. E. 440; Sprinkle v. Wellborn, supra. Without reciting the facts in detail, we are convinced, by the clear weight of the evidence, that the plaintiff not only failed to comply with his contract, if he had one, but that he abandoned, and intended to abandon, the same. Rights acquired by contract may be relinquished or abandoned either by agreement or by conduct clearly indicating such a purpose. Falls v. Carpenter, 21 N. C. 237, 28 Am. Dec. 592; Faw v. Whittington, 72 N. C. 321. See, also, Redding v. Vogt, 140 N. C. 567, 53 S. E. 337, and cases there cited. We are not concluded here by the reason given in the court below for its decision. If there is any valid and sufficient ground supporting the judgment and appearing in the record, we will adopt it and affirm the judgment. The order of the court below was right upon the facts of the case, and we approve it. The plaintiff is not estopped by this decision from proceeding against the defendant to recover damages for any breach of the contract, if he can show that he made one and has disabled himself from performing it or otherwise has committed a breach of it. We are only passing on the facts ascertained from ex parte affidavits, for the purpose of reviewing the interlocutory order of the judge upon the motion of the plaintiff to continue the injunction to the hearing and to appoint a receiver. Carter v. White, 134 N. C. 466, 46 S. E. 983, 101 Am. St. Rep. 853; Soloman v. Sewerage Co., 142 N. C. 439, 55 S. E. 300, 6 L. R. A. (N. S.) 391. It is not necessary to examine the reason assigned by the learned judge who presided at the hearing for the purpose of passing upon its correctness, as we find abundant reasons, apart from it, for approving the ruling.

Affirmed.

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(146 N. C. 374)

## TISE v. WHITAKER-HARVEY CO.

(Supreme Court of North Carolina. Dec. 14, 1907.)

1. HIGHWAYS — ESTABLISHMENT BY USE — LENGTH OF TIME NECESSARY.

The right to a public way cannot be acquired by adverse user alone in less than 20 years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 8.]

2. DEDICATION — EFFECT — WHEN RIGHT TO PUBLIC WAY ARISES.

A right to a public way arises at once upon a dedication by the owner and acceptance by the public, or persons in a position to act for them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 1–11.]

3. SAME—MANNER—NECESSITY OF INTENT.

A dedication of a public way may be in express terms, or implied from the owner's conduct, and, while intent to dedicate is usually required, conduct of the owner may, under certain conditions, work a dedication on his part, even in the absence of an intent to dedicate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 13, 15–19.]

4. SAME—EVIDENCE—ADMISSIBILITY.
On the issue as to the dedication of an alley, the moving back of the fence, and throwing out of the alley, so that it could be and was used by the public generally, the conversation and acts of the owners respecting it, the nature and extent of improvements being made at the time by plaintiff, an abutting property owner, the kind of access required for their proper enjoyment, and the use of the alley by the public in passing and in working it, if any, to the knowledge of the owners, or under circumstances where such user must have come under their observation, are all admissible in evidence.

5. SAME—INTENT—MOTIVE.
Where one who moves his fence back has the intent to dedicate the space set free to the public for passage, it is immaterial that his motive was to accommodate another person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 13.]

6. SAME—QUESTIONS FOR JURY.
In an action to enjoin the obstruction of an alleged public way, whether a certain writing shows that no dedication was understood or intended by the parties *held* for the jury.

Appeal from Superior Court, Forsyth County; Moore, Judge.

Injunction by J. C. Tise against the Whitaker-Harvey Company. From an order sustaining a motion for nonsuit under the statute, plaintiff appeals. Reversed, and new trial ordered.

See 57 S. E. 210.

At the close of plaintiff's evidence in chief, and again at the close of the entire evidence, there was motion for nonsuit under the statute. The latter motion was allowed by the court, and plaintiff excepted.

A. H. Eller and Lindsay Patterson, for appellant. Watson, Buxton & Watson and Manly & Hendren, for appellee.

HOKE, J. This is an action by plaintiff to obtain a permanent injunction restraining defendant from obstructing an alley, alleged to be a public way, and thereby causing special damage to plaintiff as an abutting owner. The case was before us at the last term on an appeal by defendant from the refusal of the court below to discharge a preliminary restraining order, which had been issued in the cause, and it was sent back on a ruling that there were serious questions raised as to the existence of facts making for plaintiff's recovery, and evidence tending to show that the alley in question was a public way, and that its obstruction, as intended and undertaken by defendant, if allowed to go on, would cause special damage to plaintiff, as one of the abutting owners. The cause coming on for hearing below, on the issues indicated as material in the former opinion, on motion by defendant, entered regularly under the statute, the action was dismissed; the court holding that there was not sufficient testimony to carry the case to the jury, and in this we think there was error.

It is well understood with us that the right to a public way cannot be acquired by adverse user and by that alone, for any period short of 20 years. It is also established that, if there is a dedication by the owner, completed by acceptance on the part of the public, or by persons in a position to act for them, the right at once arises, and the time of user is no longer material. The dedication may be either in express terms, or it may be implied from conduct on the part of the owner, and while an intent to dedicate on the part of the owner is usually required, it is also held that the conduct of the owner may, under certain circumstances, work a dedication of a right of way, on his part, though an actual intent to dedicate may not exist. These principles are very generally recognized, and have been applied with us in numerous and well-considered decisions. Milliken v. Denny, 141 N. C. 224, 53 S. E. 867; State v. Fisher, 117 N. C. 733, 23 S. E. 158; Kennedy v. Williams, 87 N. C. 6; Boyden v. Achenbach, 79 N. C. 539; Crump v. Mims, 64 N. C. 767; State v. Marble, 26 N. C. 318; Elliott on Roads & Streets (2d Ed.) §§ 121–123, et seq. In treating of this subject, this last author says: "An implied dedication is one arising, by operation of law, from the acts of the owner. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written." And further, on the question of intent, in section 124: "It is essential that the donor should intend to set the land apart for the benefit of the public, for it is held, without contrariety of opinion, that there can be no dedication unless there is present the intent to appropriate the land to the public use. If the intent to dedicate is absent, then there is no valid dedication. The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent. If the acts are such as would fairly and reasonably lead an ordinarily prudent man to infer an intent to dedicate, and they are so received and acted upon by the public, the owner cannot, after acceptance by the public, recall the appropriation. Regard is to be had to the character and effect of the open and known acts, and not to any latent or hidden purpose." And again, in section 126: "A misconception of the true meaning of the rule that the intent to dedicate must be clearly shown has, it seems to us, carried some courts to erroneous conclusions. While it is true that this intent must always appear to exist, it is not true that it must always in fact exist in the mind of the owner. * * * These familiar examples serve to show that in many instances it is the apparent, and not the real, intent that the law regards. In one of the familiar maxims of the law is expressed a principle that should be applied in cases of dedications, and that is that a man is presumed to intend the usual and natural consequences of his acts. There is no reason why sound general principles, found to be wise

and salutary in other instances, should not apply to dedications."

It is not considered desirable, in an appeal of this character, to dwell upon the testimony relevant to the issue which makes for plaintiff's position, nor to state it in detail; but, speaking in general terms, we are of the opinion that a proper application of the principles stated to the facts and attendant circumstances, require that the question of dedication in this case should be determined by the jury. And on this question the moving back of the fence and throwing out of this alley, so that it could be and was used by the public generally, the conversation and acts of the owners in respect to it, the nature and extent of the improvements being made by Tise at the time, the kind of access likely to be required for their reasonable and proper enjoyment, the use of the alley by the public, both in passing and in working same, if there was such working, to the knowledge of the Ogburns, or under circumstances where such user must have come under their observation—these and other considerations may be submitted as relevant to the inquiry. For if the intent on the part of the Ogburns, in moving back the fence and making place for this alley, was to appropriate the same to the public, such an intent would be allowed its proper and pertinent force, though the motive may have been to oblige and accommodate Tise. As stated in the former opinion, there is much evidence on the part of defendant contradicting that of plaintiff, and tending to show that there has never been any dedication of this alley to the public, and that any and all user of the same, either by individuals or the public, has been permissive and never adverse. And it is especially urged upon the court that the written paper, under which Tise makes his present claim, gives clear indication that no dedication to the public was understood or intended by either party. This and other pertinent matter tending to sustain defendant's claim should be submitted for the consideration of the jury on some issue determinative of the rights of the parties litigant; but they do not justify the action of the court in dismissing plaintiff's case, under the statute.

For this error there will be a new trial, and it is so ordered.

New trial.

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(146 N. C. 353)

## LUMBERTON IMPROVEMENT CO. v. BOARD OF COM'RS OF ROBESON CO.

(Supreme Court of North Carolina. Dec. 14, 1907.)

1. STATUTES—PASSAGE—RECORD.

The record of the House of Representatives showed that a bill, No. 1483, authorizing Robeson county to issue bonds, was read the first and second time, and also showed that a bill, No. 1483, authorizing Washington county to issue bonds, was read a third time, and that Bill No. 1483 was enrolled and ratified for the issuance of bonds by Robeson county. There was no bill pending authorizing the issuance of bonds by Washington county. The same bill under the same House number passed the Senate under the proper title, and was duly enrolled under such title with the proper Senate and House number. *Held*, that a record for the third reading would be deemed a clerical error in reciting Washington for Robeson, and that the passage of the bill was valid under Const. art. 2, § 14, providing for the reading and record of bills.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 42.]

2. SAME—DETERMINATION OF VALIDITY.

An act authorizing a county to issue bonds exempt from taxation is not void on account of the exemption, as the question whether they are exempt from taxation can only be tested when a citizen of the state in possession of the bonds refuses to list and pay taxes on them.

Appeal from Superior Court, Robeson County; E. B. Jones, Judge.

Submission of controversy without action to determine the validity of bonds between the Lumberton Improvement Company and the commissioners of Robeson county. From the judgment rendered, both parties appeal. Judgment affirmed on plaintiff's appeal, and reversed on defendant's appeal.

This is a controversy without action to test the validity of certain bonds issued by defendant for the purpose of building a courthouse in the county seat of said county. From the judgment rendered, plaintiff and defendant appealed.

E. M. Britt, for appellant. McIntyre, Lawrence & Proctor, for appellee.

BROWN, J. As the matters excepted to by plaintiff and defendant in their respective appeals are so closely connected, we will consider the entire case in this opinion.

1. The plaintiff contends that the act of the General Assembly authorizing the issue of the bonds was not passed in accordance with article 2, § 14, of the Constitution. It is admitted that the bill passed the Senate under its proper title, and in strict accord with the constitutional requirements; but it is averred that on one of its readings in the House it is not recorded under its proper title, although the "ayes" and "noes" were duly recorded. The record of its passage through the House of Representatives is as follows:

"House of Representatives, February 23, 1907. Bills and resolutions are introduced, read the first time and disposed of as follows: By Mr. McRae, H. B. 1483. A bill to be entitled an act to authorize the commissioners of Robeson county to issue bonds to build a courthouse. Placed on the calendar."

"House of Representatives, February 25, 1907. Bills and resolutions on the calendar are taken up and disposed of as follows: H. B. 1483. A bill to be entitled an act to authorize the commissioners of Robeson county to issue bonds to build a courthouse, passed its second reading by the following vote, and takes its place on the calendar. Those vot-

ing in the affirmative are [here follow the names of 72 members voting aye. Those voting in the negative none]."

"House of Representatives, February 27, 1907. Bills and resolutions on the calendar are taken up and disposed of as follows: H. B. 1483. A bill to be entitled an act to authorize the commissioners of Washington county to issue bonds to build a courthouse passes its third reading by the following vote and is ordered sent to the Senate without engrossment. Those voting in the affirmative are [here follow the names of 67 members who voted aye. Those voting in the negative none]."

"House of Representatives, March 4th, 1907. Mr. Byrd from the committee on enrolled bills reports the following bills and resolutions properly enrolled, and they are duly ratified and sent to the office of the Secretary of State: H. B. 1483. S. B. 1316. An act to authorize the commissioners of Robeson to issue bonds to build a courthouse."

It is apparent that the words "Washington county" were intended for Robeson county, and are mere clerical errors. The number of the bill in its passage through the House, and the fact that the same bill, bearing House number 1483, passed the Senate under its proper title, and was duly enrolled under said title and its proper House and Senate numbers, clearly proves that the words "Washington county" are intended for "Robeson county." In addition, it is admitted that no bill whatever was introduced during that session of the General Assembly providing for the issue of bonds for Washington county.

2. It is contended by defendants that his honor erred in declaring the act void because the bonds are exempted from taxation. In this view we fully concur. The act is not void on that account, and the bonds are not thereby invalidated. On the contrary, they are perfectly valid. Whether they can be exempted from taxation can only be tested when some portion of them may be found in the possession and ownership of some citizen of this state who refuses to list and pay taxes on them. The judgment of the superior court upon the plaintiff's appeal is affirmed, and the costs of that appeal are to be taxed against the plaintiff.

The judgment of the superior court upon the defendant's appeal is reversed, and the costs of that appeal shall be taxed against plaintiff.

In plaintiff's appeal, judgment affirmed; in defendant's appeal, reversed.

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(146 N. C. 455)

## BECK v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 18, 1907.)

1. MASTER AND SERVANT — PRECAUTION AGAINST INJURY—RAILROAD EMPLOYÉS.

Where a large number of railroad employés cross the company's tracks in going to and from their work, and it has been the custom for 10 years, with the knowledge of the company, to go through, under, or between the cars when they block the tracks, the company is guilty of negligence in not providing some precaution to guard against accidents from the moving of the cars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 269, 270.]

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Where it has been a custom for 10 years, with knowledge of a railroad, for its employés to pass from their place of work to their homes across a large number of the company's tracks, and, when necessary, to pass through, over, or under cars blocking the way, an employé, who in taking the customary way home was killed while passing between two cars which blocked the way, was not negligent as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089–1132.]

Brown, J., dissenting.

Appeal from Superior Court, Rowan County; Moore, Judge.

Action by H. H. Beck against the Southern Railway Company. From a judgment of dismissal, plaintiff appeals. Judgment set aside, and new trial granted.

Action to recover damages of defendant for the negligent killing of plaintiff's intestate, who was an employé of defendant in the capacity of tool carrier in its machine shops at Spencer, N. C. Said intestate was a boy about 16 years old, and worked for defendant of nights in the capacity aforementioned. Defendant's shops, and about 40 tracks, are between the two towns—Spencer and East Spencer—and several thousand people live on each side of these tracks, and about 1,300 people work for defendant in its shops and on its yards. It was the custom for the people, with the knowledge and by permission of defendant, working for the defendant and those living in said towns, to pass over these tracks at their pleasure and in the performance of their duties. Defendant provided two walkways or crossings over its tracks for said persons to cross, and for the past 10 years permitted people to cross thereover in large numbers—several hundred per day—and when these crossings or openings were closed or blockaded by trains or cars, defendant permitted them to cross said tracks by climbing over, under, or between cars, and this has been the custom since the shops were built in 1896. Said intestate lived in East Spencer, and his usual and customary way home, together with all persons living in East Spencer, was to cross over these tracks. The night employés got off of duty about 7 o'clock a. m., and if the tracks were blockaded with cars, and the crossings were blockaded, intestate and others went to their homes by passing between, over, and under cars across said openings or crossings. On the morning in question when said intestate was injured, a string of cars was standing on one of these tracks known as the lead track, and had been standing there for several hours, and to this string of cars were other cars attached by a chain which left a space of sev-

eral feet. The first car which was chained to the string of cars was over one of said crossings, which made it necessary for the intestate, carrying out the usual custom, to pass under, between, or over, in order to go his usual way home. This string of cars did not have any engine attached to it, as it was standing still, and there was no watchman or sentinel at said crossing or at any place on said cars, or near there, to give warning or notice of the cars being put in motion, and as said intestate was attempting to pass between the two cars that were chained together, without warning or signal, defendant caused one of its engines to be suddenly and violently shoved back against said cars, and intestate to be caught therebetween and injured and mashed, from which injuries he died. The car that was chained to the string of cars had no bumper or drawhead, so that, when the string of cars was shoved back against it, there was no space left between said cars where intestate was attempting to pass through. At the close of the evidence, the motion of defendant to dismiss was granted, and the plaintiff appealed.

R. Lee Wright and P. S. Carlton, for appellant. T. C. Linn, for appellee.

CLARK, C. J. The plaintiff was entitled to have this cause submitted to a jury.

There are 30 to 40 tracks in Spencer, which are almost continuously filled with cars, more or less. The railroad company has 1,300 operatives working in its shops and yards, and living on both sides of the railroad, many of whom have to cross these tracks daily in going from their homes to their work and returning. The defendant's operatives and their families and attendant population constitute several thousand people. These operatives and people, or many of them, have to cross these tracks necessarily very often. The witness whose evidence must be taken as true on this motion says that several hundred people cross these tracks daily, and for 10 years the custom has always been to go through, under, or between the cars, or over them, whenever the tracks are blocked. The defendant, knowing this fact, was guilty of gross negligence, in that it did not provide either subway or overhead bridges, or at least lifting bars, with a guard at each passway. The latter course was ordered (Brown, J.) in Hickory v. Railroad, 143 N. C. 451, 55 S. E. 840, where there was only one track. Here there are 40. This is a necessary precaution, and, no precaution of any kind being provided, accidents such as this must necessarily occur. It was also negligence, as this court has over and again declared, to attach the engine to this dead string of cars, and suddenly run them backwards, without warning or signal or any one on the rear of the train to give notice. Ray v. Railroad, 141 N. C. 84, 53 S. E. 622; Hudson v. Railroad, 142 N. C. 202, 55 S. E. 103. There being no bumper or drawhead when the plaintiff's intestate was caught between the cars, by the sudden pushing back of the dead string of cars, he could not possibly escape.

This being a nonsuit, it is not necessary to set out all the testimony, but only so much as will show, "with the most favorable inferences which a jury would be authorized to draw from it," that there was enough evidence to entitle the plaintiff to his constitutional privilege of a trial by jury. The following are verbatim extracts from the testimony:

The plaintiff testified, in part: "There are two towns at Spencer; one on the east and one on the west side of the railroad tracks. And the shops are between the two towns. I worked at the shops. About 1,300 people are employed there. I guess 400 or 500 of the employés live on the east side of the railroad tracks. About 800 live on the west side. The population of East Spencer is about 500. The custom of those who live on the east side of the railroad, in going to the shops, is to cross the tracks to get to the shops to work. There are between 30 and 40 tracks there. I have seen people going to and coming from their work across these tracks in great numbers. I know about where Grubb was injured. There is an opening leading from the carpenter's shop as far as the shed goes. There is a plank walkway that leads to the carpenter's shop. It is used by people to walk across and to roll hand cars across the tracks. The opening runs north and south. If cars are on the tracks across this opening, people have to climb over or under or through or go around the cars."

Lee Ketchie testified, in part: "I lived on the east side of the railroad during the 3 years and 11 months preceding November 25, 1905. I had to cross the lower end of freight yard, and also shop yard, in order to get to my work. I know what the custom of the defendant's employés in going to and from their work was. This custom has existed ever since the shops were built in the spring of 1896. The custom was to cross the freight yard and to go through, under, or between the cars, or over the top of them. As a general thing, people going from East to West Spencer go across the yard. This custom has prevailed since the shops were built. Several hundred people went backward and forward daily at the time the intestate was hurt and before. The defendant's employés have to cross through between the cars, or over them, to get to their work. My duties often required me to work in the yard; others were required to work in the yard. We had to go from the carpenter shop to the yard down through the opening to the carpenter shop. There was another opening south of the opening to the carpenter shop. It leads from the car shops across the other tracks. The tracks of the opening are laid the same distance apart as the railroad tracks. Both

of these openings run east and west through the sheds. The railroad tracks cross these openings and run north and south. When the openings are filled with cars or trains, the workmen go to their work by crossing the cars, or going over or between them. This is so to a great extent. The crossings are constantly blocked mornings and evenings and several times a day. They were usually blocked in the mornings when we went to work. They were frequently blocked about quitting time in the afternoon. The men, to get to their homes, had to cross the line of cars, or go a considerable distance around them. Those who went home to dinner had to cross these tracks and go out across the freight yard. People could not have gone around and gotten their dinners and gotten back in time to work. I have seen the foremen crawl through cars and under cars numbers of times. November 25, 1905, I was at the shops right near where the intestate was injured. It would not exceed 50 or 60 feet from where I was to where the intestate was injured. He was between two of the cars standing on the shop lead track. He was going toward East Spencer, east from the carpenter shop. The intestate was injured on track No. 8, called the 'shop lead track.' Before he started to cross going east, there was a string of cars on this track. They were there that morning as I went to work at 7 o'clock. He was injured just a little after 8 o'clock. Between 7 o'clock and the time the intestate was injured the cars stood still. If there was an engine to the cars I did not see it. An engine was finally attached to the north end of the string of cars. The string of cars stood across the opening. About four of the cars were south of the opening. The opening was shut up and impassable, unless you went between the cars or under them. The middle of the car was on the crossing (opening). Cars were attached to each end of that car. The intestate was caught between the cars about one-half car length north of the opening. I suppose he went to the nearest place to go between the cars. The place where he was caught was 15 or 20 feet from the crossing (opening). I saw where the cars were when the engine was attached to them. I was on track No. 9, two car lengths from where Grubb was hurt. It was about 60 feet from where he was hurt. I was about 40 feet nearer the engine than he was. I could not see the engine when it was attached to the cars. It was down in the lower (north) part of the yard around a curve. The tracks east of the lead track which run into the lead track were filled with cars. They went out to within a short distance of the lead track. They could not see the engine from their side. It was impossible for Grubb to see the engine from where he stood. I saw the cars he was caught between. One of them had the drawhead out, and they were chained together. The one farthest north had the drawhead and bumpers out. It was chained to car behind it. There were between two and three feet between the cars as they were chained together. The cars came together when the engine pushed cars back, Grubb was between two cars passing over, and was caught. The cars could not have come together if the cars had had a drawhead. They would have been about two feet apart. There was no flagman on the rear of the train before the cars were shoved back together. There was no flagman or sentinel on the ground to give signals. There was no watchman nor sentinel at either of these openings or crossings. No signal was given that I heard. If the bell of the engine had been ringing as it was attached to the cars, it could have been heard where Grubb was."

As this witness stated: That this "string of cars" had been on the track since 7 o'clock. That, "if there was an engine to the cars, I did not see it." And, further, "an engine was finally attached to the north end of the string of cars." That "I (witness) was about 40 feet nearer the engine than he (the deceased) was. I could not see the engine when it was attached to the cars"—it is an inference the jury might have reasonably drawn (and is therefore to be considered on a nonsuit) that this string of cars which had been standing on the track since 7 o'clock, and to which he did not see any engine, was a dead string of cars, and that the sudden attachment of the engine and being run back without notice or signal was the causa causans of the death of plaintiff's intestate.

The plaintiff's intestate was a boy working on the night shift, in the defendant's shops on the west side of these 40 tracks. His tour of work ended at 7 a. m. He then had to return home over these numerous tracks, as he lived on the east side. He had to wash up, and possibly may have remained to breakfast or for other purposes, so that it was after 8 o'clock when he started home across these tracks, as he and others residing on the east side were accustomed to do. There is no evidence that his delay made it any more dangerous than if he had crossed sooner, after 7 o'clock. He found a string of dead cars standing still on one of the tracks, the rear car of which was exactly across his usual road home. Between the end of this car and a disabled car, attached to the rear car by a chain, there was an interval of several feet. The intestate attempted to pass through this interval. He thus went probably a third of one car's length out of the direct road—one witness says 15 feet—to clear the car standing in the road. The string of cars were dead cars, we take it, with no engine attached. The sudden attachment of the engine, which was done around a curve so that the intestate did not see it attached, and pushing back the cars, without signal or any one on the rear to give notice, it would seem was the proximate cause, and not the conduct of the boy, who was getting across these numerous tracks the best he could, as he and

so many others were daily required to do. If there was any contributory negligence, whether that or the negligence of the defendant was the proximate cause of the death of the boy was a matter which should be passed on by the jury, not by the court.

This renders it unnecessary to consider the other exceptions for exclusion of evidence.

The judgment dismissing the action is set aside.

New trial.

CONNOR, J. (concurring). I concur in the opinion of the court that this case should have gone to the jury. While there are some portions of the evidence not entirely clear in respect to the several tracks and the different uses to which they were put, I think that it appears, with sufficient certainty, that for 10 years the custom had prevailed for the employés who lived on either side of the system of tracks at Spencer to pass under, over, and between the cars in going to and returning from their homes. While some provision seems to have been made for walkways, it appears that they were usually, and on this occasion, blocked by cars standing on and across them, and that the employés were accustomed to go under or between the cars. It was the duty of defendant to provide a sufficient number of safe and clear walkways for the use of its employés. If it is impracticable to keep them at all times open, guards should be provided to protect persons passing under or between the cars, and to flag engines and see that no one was passing before they moved. In failing to make some safe way, thus endangering the lives of more than a thousand people whose duty and employment subjected them to danger, there was negligence, or, at least, evidence thereof fit for the consideration of the jury. I, of course, concede that ordinarily it is gross negligence to go between cars with an engine attached, and, in the absence of some satisfactory explanation, will bar a recovery; but the evidence here tends to show that the plaintiff's intestate, a young boy, in going between the cars, did as all others similarly situated; that he was acting in accordance with a general custom which had existed for 10 years. I do not think that, under the circumstances, it can be said that, as a conclusion of law, he was negligent. The question is for the jury. I forbear discussing the evidence, for the reason that, as the case goes back for a new trial, other evidence may be produced. I would not care, with my limited knowledge and observation, to express an opinion in regard to the manner in which a safe way should be provided for the employés to pass over the tracks in the defendant's yard at Spencer. It is to be regretted that more attention is not given by both employer and employé to secure in the largest practicable degree the lives and limbs of employés in the service of railroads. Both humanity and interest demand that the danger to which men engaged in this useful, and in a large sense public, service, shall be reduced to the lowest possible point. Necessarily, there are dangers incident to work upon a large train yard like this; but it would seem that, if hundreds of men are to continue to pass under, over, and between cars, in the discharge of their duties, some precautionary method should be found to protect them from the danger of the cars being suddenly moved without warning.

WALKER, J., concurs in this opinion.

BROWN, J. (dissenting). Being fully convinced that his honor, Judge Moore, who tried this case below, committed no error in granting the motion to nonsuit, I feel it my duty to withhold my consent to the judgment of the majority in overruling him. As the facts are not fully stated in the opinion of the court, I will state them by quoting from the testimony of plaintiff himself and his witnesses. The plaintiff's intestate was a tool boy 17 years of age employed at night in defendant's shops at Spencer. He came off duty at 7 o'clock a. m., November 25, 1905, and a little after 8 o'clock started across defendant's repair yards. Finding a train of crippled cars in his way, he attempted to climb over the connecting chains which fastened one car to another, and just then the engine backed, and he was crushed and killed. The repair shops at Spencer, according to the map filed in the record, consist of a very long building constructed parallel with the tracks laid through the yard. There are some 30 or 40 railway tracks in front of this building, between it and East Spencer. There are two towns at Spencer, one on the east and one on the west side of the tracks, and they are called East Spencer and West Spencer. The "shops," as the long building and its appurtenant buildings are called, are between the two towns and on the west side of the tracks. There are 1,300 employés in the shops. About 500 of them live in East Spencer and 800 in West Spencer. The custom of those living in East Spencer is to cross the tracks at nearest place to get to the shops to work. The plaintiff testifies: "I have seen people going to and coming from their work cross these tracks in great numbers." He further says: "I know about where Grubb was injured. There is an opening leading from the carpenter's shop as far as the shed goes. There is a plank walkway that leads to the carpenter's shop. It is used by people to walk across and to roll hand cars across the tracks. The opening runs north and south. If cars are on the tracks across this opening, people have to climb over or under, or through, or go around the cars." In reference to this custom of crossing the yard tracks, another of plaintiff's witnesses testified: "People crossed the yard most any place where they got to it. The carmen crossed in front of the carpenter

shop, and others at other places. People who were not employed by defendant crossed the yard wherever they came to it. I don't know what the plaintiff's intestate was doing there that morning. The night men got off at 7 o'clock in the morning." The witnesses all concur in the statement, overlooked in the majority opinion, that defendant has constructed a good plank walk all around the repair yard for the use of their operatives, by which it is perfectly safe, although a very little further in distance, to go from East Spencer to West Spencer and to and from the shops. The evidence also shows that the employés who live in East Spencer will not take the extra trouble to use this walk, but cross the yards at no particular place, but wherever they happen to come to them, regardless of walks or openings. Witness Rufty says: "It is a customary rule, and has been for a long time, for people who work for the defendant, also for employés of the defendant, to cross the tracks there. They go the nearest way to their work. I suppose 200 people cross the tracks daily." The same witness further says: "There is a perfectly safe way to go to the depot and cross outside of the fence." It seems that the railroad depot is in East Spencer.

1. As the entire evidence, as I shall attempt to show, presents a "bald case" of contributory negligence, it is unnecessary to discuss the alleged negligence of the defendant in not ringing the engine bell and not having a man on the end of the train or a guard at the crossing. The boy was not killed by the end of the train backing on him on the crossing, but by climbing in between two crippled cars of the train which were coupled together by chains, some four or five cars from the end, rather than walk the short distance around the rear of the train. Had a watchman been at the crossing, he could have done no more than tell the intestate exactly what was before his eyes, viz., that a train of cars blocked the crossing, and that it was dangerous to climb between them. The watchman was not required, nor had he the legal authority, to catch the intestate and hold him to prevent his crossing. The evidence shows that he was an intelligent, smart boy. He was not on duty at the time, nor going to or returning from his work; but, assuming that he was, I can see no reason why the defendant's other servants should have been on the lookout for him or required to anticipate so dangerous an act. As to the custom of the employés to go to and from their homes by crossing the tracks wherever they came to them, I fail to see by what means the defendant can break it up or guard against injury or any evidence that defendant assented to it. We should bear in mind that these tracks are not crossed by public crossings, nor traversed by regular passing trains. They are the multitudinous switch tracks of the defendant's repair yards. The crossings must necessarily be blocked by crippled cars, and those cars just out of the shops, and, when they are so blocked, the employés can easily see it, and it is their plain duty to take the somewhat longer plank walk around the yard provided by the company for just such conditions, and which is not intersected by these numerous but necessary tracks, and which is admittedly free from all danger. The evidence shows that the workmen do not cross the yard tracks at any particular places, but wherever they happen to come to them, and, as witness Rufty says: "They go the nearest way to their work." This is human nature, and others, besides the plaintiff's intestate, have unfortunately come to grief by taking short cuts in order to save a few minutes' time. I do not see what the company could do to break up this imprudent habit of 500 employés, unless it could put each one under guard, and force him to follow the "safe and narrow way" that leads to safety, and this it has no power to do. Crossing the repair yard of a great railway system, at any point, with its network of tracks, and labyrinth of cars and engines, is a dangerous venture at best, and no one knows it better than its employés. The trouble is they become so habituated to their hazardous but necessary work that they become indifferent to danger, and sometimes incur needless risks which no one else would think of taking. My observation is that railway men, as a class, are a very fine type of our race, gifted with as much good sense and natural prudence as most of us; but, from constant familiarity with danger, the best of men became inured to and careless of it. The railway company cannot correct this tendency, and, under the ruling in this case, it has to pay for the consequences, however unable to prevent them.

2. The conduct of plaintiff's intestate, as proven by plaintiff's own witnesses, shows such a reckless disregard for his own safety that, under the well-settled principles of law, he ought not to recover on his own showing. There are cases where the court must, as matter of law, declare that an act constitutes negligence. When the facts are undisputed, and lead to but one inference, the question whether there was or was not negligence is one of law. This is such a case. According to witness Ketchie, the plaintiff's intestate was injured on track No. 8, called the "shop lead track" while he was going east. There was a string of cars on this track, and some of the cars were across the opening, rendering it impassable unless by going between, under, or around the cars. An engine was attached to the north end of the cars. When the boy Grubbs came along, he did not look for any opening, and would not take the trouble to walk 100 feet around the end of the train, which all the evidence shows he could easily have done; but, instead of doing what was so obviously his duty, with any sort of regard for his own safety, he went to the nearest place to go between the cars, without seeking to ascertain if an engine was attached to

the train. Ketchie testifies: "I suppose he went to the nearest place to go between the cars. The place where he was caught was 15 or 20 feet from the crossing (opening). I saw where the cars were when the engine was attached to them." Again: "The string of cars stood across the opening. About four of the cars were south of the opening." Ketchie further states that the yards and tracks were frequently crowded with cars about "quitting time," and "the employés had to cross the line of cars or take the longer route home by the plank walk."

There is a cinder path made for the use of workmen alongside this "lead track," in crossing which Grubb was hurt, and in reference to which plaintiff, who was himself a workman at the shops, testifies: "I don't know whether the intestate was going in or coming out when he was hurt. It is not safe to cross the railroad anywhere. It would have been safer for Grubb to have walked down the cinder path than to have crawled between or climbed over the cars. There was a safer way for him to get out of the yard than to crawl between or under the cars. I don't know whether Grubb worked during the day or during the night. He was a tool carrier in the machine shop. There are two walkways. I don't know the distance apart. If the walkways were not blocked with cars, it would have been safer to go by them. People do go under and between the cars. It would have been safer to go around them." On redirect examination, this witness testified as follows: "Opening that crosses the track is the width of the railroad tracks. There is a plank walkway there for people to walk on going to and from work across the lead and other tracks. People use this." The intestate, being a workman, was fixed with knowledge of the dangers attending crossing this lead track, especially, for Ketchie testifies: "They are constantly shifting cars on the lead track, and defendant will not allow cars to be flagged on the lead track. They flag cars on the other tracks to indicate that they are not to be moved." Again: "They run crippled cars in on the lead track for the purpose of shifting them to the other tracks to be repaired. They are usually loaded cars. The drawhead was pulled out of the car, and when the cars came together the drawhead on the other car went between the draft timbers of the crippled car, and the cars came close together. Any one could see that they would come close together. Grubb could see this." Again: "I suppose it would have been safer for Grubb to have crossed over the top of a car. It was not as dangerous to go over the top as between the cars." I quote these extracts from the testimony to show that it was perfectly obvious to the intestate that he was incurring an extra and extremely dangerous risk in attempting to cross between crippled cars connected by chains only, without bumpers to keep them apart and on a track where necessary shifting was constantly going on. He knowingly took his life in his hands when he did it, and rushed on danger with his eyes open. To show that Grubb had a perfectly safe way which a rational being of ordinary prudence should have taken, I quote again from Ketchie: "There was a plank walk all around the yard. It would have been safer to go around the yard than through it. * * * Grubb would have had to walk 100 feet around this string of cars to have gone a perfectly safe way." Again: "If Grubb had gone to the rear (south) of the line of cars, and around them, he would have had a perfectly safe way to go." Again: "If Grubb had gone around the rear of the string of cars, there were no cars between the sheds which he would have had to go between." Again same witness reiterates: "There was a perfectly safe way for Grubb to have gone." The only witnesses examined in the case, except one character witness, were the witnesses whose testimony I have quoted from. The defendant offered no evidence.

It is manifest that the plaintiff's intestate had two safe ways to get to his home; one by the plank walk leading around the end of the yard tracks, provided by defendant for his use, and used by many workmen, and the other by taking the trouble to walk 100 feet around the south end of the train of cars then standing across the lead track. At common law the master is required and impliedly agrees to provide reasonably safe premises and places in and about which the servant is required to work and reasonably safe and suitable machinery and tools to work with; but it is equally well settled, as said by Justice Connor for this court unanimously, "that where there is a safe and a dangerous method available for the performance of the work in hand, and the servant selects the latter method with actual knowledge of the fact that it is dangerous, he cannot recover." Covington v. Furniture Co., 138 N. C. 378, 50 S. E. 761; Horne v. Power Co., 141 N. C. 50, 53 S. E. 658. And, as again said by the same learned judge: "He should not have taken chances in the presence of an obvious, apparent, and well-known danger. If he did so, and was hurt, he cannot cast upon his employer the blame or responsibility." Elmore v. Railway, 132 N. C. 865, 44 S. E. 620. In Whitson v. Wrenn, 134 N. C. at page 86, 46 S. E. 17, Justice Walker states the law to same effect. The master is, of course, required only to provide means and premises as reasonably safe as the nature of the employment will permit. One who works in railroad shops, repairing yards, or in a powder mill, cannot be made as safe as he who clerks in a store or works on a farm. The evidence shows that the defendant met all the requirements so far as providing a safe way of ingress and egress, which the intestate deliberately declined to use, but pursued a course of the most obvious danger. It is said that such was the custom. I answer that no reasonable per-

son is ever justified in following a custom which is attended with such imminent danger to life and limb, and it ought not to protect him from the consequences of his own act. It is a custom the defendant cannot justly be said to countenance because it had no means to stop it. And, again, there is no evidence that any other employé ever went between two crippled cars which were chained together on this lead track without bumpers; the absence of such bumpers rendering him liable to be crushed in an instant—much less that there is such a custom in vogue among all the servants of defendant. We have held that, where a servant chooses to do his work by a dangerous method, contrary to the directions of his master, the master is not liable for injury sustained, whether the danger be obvious or not. Whitson v. Wrenn, 134 N. C. 86, 46 S. E. 17. With how much greater force should that rule apply to a case like this, where the danger of the act stared the servant in the face. In a similar case to this, where the injured party passed between the cars of a train at the direction of a brakeman, the Supreme Court of Indiana declared it to be an act attended with such obvious and extreme danger as to bar a recovery. The court says: "It will not avail the plaintiff that he was not fully aware of his danger, for a plaintiff is bound to know the extent of the danger in cases like this, where the hazard is apparent to a reasonably prudent man. A man must use his senses, and is not excused when he fails to discover the danger if he has made no attempt to employ the faculties nature has given him." Railroad v. Pinchin, 112 Ind. 595, 13 N. E. 677. The principle is laid down in innumerable cases, with undeviating uniformity, that one who attempts to cross the track between the cars of a train, which he either knows, or might know by observation and use of his natural faculties, is likely to move at any moment, is guilty of such gross negligence, if not recklessness, that he cannot recover if injured. Railroad v. Pinchin, supra; Railroad v. Henderson, 43 Pa. 449; Railroad v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Beach, Cont. Neg. 40–258. "It is a danger so immediate and so great that he must not incur it." Rauch v. Lloyd, 31 Pa. 358, 72 Am. Dec. 747; Railroad v. Copeland, 61 Ala. 376; Stillson v. Railroad, 67 Mo. 671; Lewis v. Railroad, 38 Md. 588, 17 Am. Rep. 521; Haldan v. Railroad, 30 U. C. C. P. 89. The case of Rumpel v. Railroad, 4 Idaho, 13, 35 Pac. 700, 22 L. R. A. 730, is so very pertinent that I quote from the opinion: "There was nothing to hinder the plaintiff passing around the cars at either end at any time, except that it was inconvenient, and took too much time. He could have passed around the train by walking 100 to 185 yards and back. Plaintiff was an adult and in possession of all his faculties." The Supreme Court of Georgia, in an opinion by that eminent jurist Chief Justice Bleckley, holds that, though a train be an unauthorized obstruction of a public highway, a person attempting to pass between the cars, if injured, is barred from recovery. The court says: "Nevertheless, instead of waiting for the train to get out of the way, or attempting to go around it, he voluntarily, and without warning any one of his intention, exposed himself between the cars," etc. In Lewis v. Railroad, supra, the Supreme Court of Maryland declares an act, somewhat similar to the one we are considering, "such a glaring act of carelessness as to amount in law to contributory negligence."

It is urged that the train of cars had been backed across the crossing, and therefore plaintiff's intestate was excusable for his attempt to pass. We must remember that the crossing was in the private switching yards of depot and across the main lead track, where switching was constantly going on day and night, so much so that "flagged cars," intended to remain stationary for awhile, are not allowed on that track. Under such conditions, blocking the crossings is inevitable. But suppose it had been a public crossing, the act of plaintiff's intestate was unwarranted. In a case almost identical, the Supreme Court of Iowa says: "The actual use of a railroad company of its tracks, so long as in use, is a suspension of the right of the public to cross, and one injured in attempting to cross during such occupancy cannot recover." Wagner v. Railroad, 122 Iowa, 360, 98 N. W. 141. In Railroad v. Rylee, 87 Ga. 491, 13 S. E. 584, 13 L. R. A. 634, the Supreme Court of that state says: "The placing of stationary cars in its yards on the tracks where people are accustomed to pass is notice to them not to attempt to pass while the cars remain, and, if a person undertakes to pass under the cars, he does it at his peril." Again: "In a railroad yard in which there are several tracks in continuous use for the purpose of storing and switching cars and making up trains, and the like, and where the dangerous character of the place is manifest and obvious, there can be no implied license to cross the tracks either through open spaces casually left between the cars, or under or above the cars." In Railroad v. Copeland, 61 Ala. 376, Chief Justice Stone characterizes the attempt to pass between cars of a train coupled together as negligence bordering on recklessness, which bars recovery for injuries received.

There are some discrepancies between the facts stated in the opinion and the record as I read it, which I will note. It is stated that the injury occurred "on one of these tracks known as the dead track." All the evidence shows it occurred on the lead track, a "live track" in constant use for switching day and night, where no dead or flagged cars were allowed. It is further stated that the first car which was chained to the string of cars was immediately over the crossing, which made it necessary for the intestate to pass

between them. The testimony of Ketchie and the other witnesses distinctly declares that four cars were south of the crossing, and all the others north of it, and that the intestate did not cross at the crossing, but 20 feet from it, and that by walking 100 feet he could easily have gone around the end of the train. It is said that no engine was attached to the cars, and that they were dead cars; that is "flagged cars," forbidden to be moved. The evidence shows they were disabled loaded cars, recently run in the yards for repairs with no flags on them, and on the lead or live track in constant use, and that the engine was attached, but around the curve, and not visible to deceased. The ruling of this court that it was negligence to have no bumper or drawheads on these cars to keep them apart, on account of which plaintiff was crushed, entirely ignores the fact that the drawheads had recently pulled out, and the cars were then brought in the yards for repairs. It is a proposition somewhat novel, to say the least, that the defendant is negligent for bringing its crippled cars into its repair yards without drawheads, to have them replaced, and that, if the absence of drawheads causes injury to a workman in the yards, the company is liable. It is not contended that the engineer saw the deceased as he backed his engine, or that he could have seen him. The deceased attempted to cross at a place where he knew the engineer could not see him, and where he could not see the engineer. He made no effort to ascertain whether an engine was attached to the train or not. Instead of looking to see or waiting for the train to be moved, or going around it, he voluntarily, blindly, and needlessly exposed himself between the cars where the danger was open, visible, and threatening, with full knowledge that the bumpers were gone, and that the connecting chains could not keep the cars apart.

To sum up the matter, the undisputed evidence is that the injury occurred, not at a station where passengers were received or discharged, but in the shifting yard of defendant, a place filled with tracks and cars, and a place not for visitors or the public, and on a track in constant and continuous use for shifting purposes. The track was also used to place crippled cars so as to shift them to other tracks to be repaired, and cars were never allowed to be flagged on this track, showing that defendant intended this track to be open for constant use. A safe and secure way was provided to go from one side of the yard to the other. Cinder paths were on each side of the tracks, a plank walk had been built all the way around the yard, affording an absolutely safe passway for employés, a fact entirely ignored in the opinion of the court. In addition, by walking 100 feet around the end of the string of cars, deceased would have had a perfectly safe way to cross the yard; but, instead of taking a safe course, he attempted to cross between two cars chained together, where any one could see that the least movement from either end of the train would cause the cars to come together and crush him. The dangerous character of the place was manifest and obvious to any one.

The unwavering line of authorities declare such conduct to bar recovery for injury sustained. As the majority of this court think otherwise, it is to be regretted that no authority is cited to sustain their view.

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(146 N. C. 429)

## HARTON v. FOREST CITY TELEPHONE CO.

(Supreme Court of North Carolina. Dec. 16, 1907.)

1. TELEPHONES — POLES — REPAIR — NEGLIGENCE.

It is negligence for a telephone company to fail to repair a pole after six or seven days' notice of its dangerous condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 9.]

2. SAME—DUTY.

A telephone company must exercise a high degree of care to select sound poles and to place them securely to prevent their fall under ordinary conditions, having regard to the effect of rain and frost loosening the ground, and prevailing winds blowing them down, and must exercise like care in maintaining and inspecting the poles; the duty as to inspection being affected by the character of soil, weather, seasons, and such other conditions as may affect the security of the poles and the traveling public's safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 9.]

3. SAME—NEGLIGENCE—QUESTION FOR JURY.

Where a telephone pole on a public road was secure before a road overseer plowed near it, the company was not negligent, as a matter of law, in failing for 8 or 10 days to inspect the pole; notice of its dangerous condition being absent.

4. TRIAL—DIRECTION OF VERDICT—EFFECT.

Defendant's request for an instruction that, if the jury believed the entire evidence, plaintiff could not recover, assumes the truth of plaintiff's evidence, and that, taking defendant's evidence to be true, entitles defendant to a verdict.

5. TELEPHONES — FALLING POLE—ACTION FOR DEATH—INTERVENING CAUSE.

A telephone company is not liable for the death of one passing along a public road, caused by the fall of a pole, where the pole had previously fallen through the removal of its support by the road overseer and through a rain, and was propped up by other persons not connected with the company, who passed along the road shortly before the accident.

6. TRIAL—QUESTIONS FOR COURT AND JURY.

When the facts are controverted, or more than one conclusion of fact may be drawn, there is a jury question; but when the facts are admitted, or found by the jury, and the conclusion is clear and certain, the question is for the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 318–320.]

Appeal from Superior Court, Cleveland County; Ward, Judge.

Action for negligent death by H. H. Harton against the Forest City Telephone Company. From a judgment for plaintiff, defendant appeals. New trial granted.

See 54 S. E. 299.

Action by plaintiff administrator for damages sustained by death of his intestate, which he avers was caused by the negligence of the defendant corporation. It is alleged and admitted that defendant, pursuant to authority conferred by its charter, erected, and prior to March 1, 1903, maintained, a telephone line consisting of poles and wires strung thereupon along the public road from Forest City to Caroleen, in the county of Rutherford. It was in evidence, without controversy: That some 8 or 10 days prior to March 8, 1903, the overseer of the public road plowed along the side of the road within 8 or 10 inches of one of defendant's poles, "leaving it in a dangerous condition." That before this time the pole was in a secure condition—that it was "all right." That the overseer notified defendant's lineman of the condition in which the pole was left after he had plowed near it. There is no evidence showing when the notice was given. That on Sunday night, March 7, 1903, a heavy rain fell, washing the earth away from the pole, and, by reason thereof, it fell across the road. One J. C. Carpenter, a witness for defendant, says: That he passed along the road on Sunday, March 8, 1903, at about 2 o'clock in the afternoon. That the pole was "flat down across the road." He was in a hack with two other persons. Two poles were down. That they were the first persons who passed after the pole fell—this was shown by the wheel tracks. That he, with the assistance of those with him, lifted one pole and passed under it. The other pole they straightened up, set it in the ground "right back in the old hole," and propped it up with a pine stick from six to eight feet long. The lower end of the prop was in the edge of the road extending into the road about four feet. They got the prop from Mr. Morrow's wood pile. Four persons propped the pole. "We could have driven under it like we did the other one. It could not have been removed without breaking the wire." The prop could have been struck by a buggy passing. The road hands had worked close up to the pole. The witness met plaintiff and his daughter between the pole and Forest City. They were going towards the pole. "We propped it up to get it out of the way." One witness testified that he drove by the pole and saw that it was propped. "The prop was sticking out in the edge of the road. I drove around it. I had to do so to keep from hitting against it. If I had kept straight in the road, I would have hit the prop. The pole was right at the edge of the road, and the lower end of the prop was sticking out in the road. The prop was out where, if any one went along in the usual driving place, he would hit it." Mr. Morrow, for plaintiff, testified that he went to the pole just after the accident, found the pole on the side of the road, and a prop lying with it. "The prop was between five and seven feet long. I noticed where the buggy was driven. The prop was not long enough to reach into the rut." On Sunday, March 8, 1903, between 2 and 3 o'clock in the afternoon, plaintiff, in a buggy with his daughter, passed along the road from Forest City to Caroleen. He says: "She (my daughter) was sitting on the side next to the pole. She had a bank statement in her hand. I was not looking. The pole fell and struck her on the head and hurt her. There was one pole back of us, 10 or 20 steps from us. It fell at the same time. The base of the pole was from 6 to 8 feet from the rut of the wheels. Our buggy was in the center of the road when the pole fell. The wheels were in the current or middle of the road. When the pole fell, the mule ran 40 or 50 yards. I then went back to the place, and found the pole across the road, and also a prop by the side of the road. The prop was 4 or 5 or 6 feet long, and as large as my arm. There was a place where the end of the pole stuck 3 or 4 feet from the rut. I was just driving along the road, and my daughter was looking at a bank statement, when the pole fell." There was other testimony, but, in the view taken by the court, the foregoing only is material. The court submitted the following issue: "Was the death of the plaintiff's intestate caused by the negligence of defendant, as alleged?" Defendant requested the court to instruct the jury that, if they believed the evidence of the witnesses, both for the plaintiff and the defendant, they should answer the issue, "No." The request was denied. Defendant excepted. There was a verdict and judgment for plaintiff. Defendant appealed.

Webb & Mull, for appellant. Pless & Winborne and Ryburn & Hoey, for appellee.

CONNOR, J. (after stating the facts as above). Before discussing the principal question involved in this appeal, it is important to note a difference, in an important respect, between the testimony certified to us in this and the former appeal. 141 N. C. 455, 54 S. E. 299. In that appeal, Alexander Mayes, a witness for plaintiff, after testifying in regard to the condition in which the pole was left by the overseer of the road, eight or ten days before the accident, says: "I told the lineman about the dangerous condition of the pole two or three days after we had worked the road. I told him it was the pole near Morrow's stable. In a few days I noticed a stob had been driven by the pole, but that did not appear to make it any safer." Rec. p. 13. In this record the same witness says: "I made report to the lineman of defendant company. I told him the pole was dangerous, and if it rained, and the ground got wet, that it would fall. I told him which one it was." The first testimony, if true, showed negligence, either in failing to repair the dangerous condition in which the road overseer left the pole, or in doing so negligently. If the lineman was told of its dangerous condition "two or three days" after the work on

the road, it was at least six or seven days before the injury was sustained by plaintiff's intestate. To fail to repair the condition and make it secure after six or seven days' notice was manifest negligence. His honor, Judge Allen, so regarded it. From the testimony in this appeal, it does not appear how long, prior to the accident, notice was given the lineman. It is clearly the duty of a telephone company to exercise reasonable care—and "reasonable care" is, in this respect, a high degree of care—to select sound poles, and to place them securely in the earth to prevent them falling under ordinary and usual conditions, having due regard to the effect of rain and frost loosening the earth, and prevailing winds blowing them down. The duty of reasonably careful construction is followed by like care in maintenance and inspection. Joyce, Elec. Law, 605. The duty of inspection, in regard to its frequency, cannot be made definite; but regard must be had to the character of the soil, the condition of the weather, the season of the year, and such other conditions as may affect the security of the poles and the safety of the traveling public.

It is conceded that the defendant had discharged its duty in regard to construction of its line. Plaintiff's witnesses say that, before the road overseer ploughed near to it, the pole was secure, "all right." We cannot say that a failure to inspect, in the absence of any notice of trouble for eight or ten days, was negligence. In the absence therefore of evidence of the time the lineman was notified of the dangerous condition of the pole, we think there was no evidence of negligence. The mere fact that the pole fell on Sunday, following a heavy rain the night previous, would not constitute evidence of a failure to repair within a reasonable time after notice; there being no evidence when notice was given. In view of the fact that this case has been twice tried, and a new trial upon this point would prolong an expensive litigation, and in view of the further fact that the cause was tried below and argued in this court upon its merits, we deem it our duty to express the opinion to which we have arrived. When the case was here upon a former appeal, a majority of the court thought that plaintiff should have gone to the jury, under Judge Allen's instructions. The case, as now presented, enables us to pass upon the right of plaintiff to recover upon his own, and such portions of defendant's, evidence as is not contradicted, and which the jury may find to be true. Defendant requested his honor to instruct the jury that, if they found the entire evidence to be true, plaintiff was not entitled to recover. This request assumes the truth of plaintiff's evidence, and that, taking the defendant's evidence to be true, entitles the defendant to a verdict. In this respect it differs from a motion for judgment of nonsuit. Before stating the case thus presented, we will eliminate the question whether plaintiff's buggy wheel struck the prop placed by Carpenter to support the pole, and thereby caused it to fall. More than one conclusion may be drawn from the testimony upon this point. Hence we must, in discussing the request for instructions, assume that the wheel did not strike the prop. We do not think that there is any evidence of negligence on the part of plaintiff. We also assume, for this purpose, that defendant's lineman was guilty of negligence in failing to repair the condition of the pole, and that it fell by reason of such negligence, thus eliminating the heavy rainfall on Saturday night.

Thus considered, the case comes to this: The pole, having fallen by reason of defendant's negligence, was lying on the ground across the road on Sunday. Carpenter and several others came along and put the pole back in the hole from which it had fallen, by reason of the support being removed by the overseer of the road and the rain. He, and those with him, for the purpose of making it secure, went to a wood pile near by and got a pine stick or pole of the size and length described by them, and propped the pole in the manner described. They propped it up to get it out of the way. They could have held it up and driven under it, as they did another pole not far away. Carpenter had no connection with, and did not act in behalf of, defendant. In less than an hour after Carpenter put the pole up, the plaintiff and his daughter, riding in a buggy and driving a mule, came along the road, and just as they passed, without any suggestion of the immediate cause, other than inherent weakness in the support which it had, the pole fell, the mule ran, and, in some way immaterial in this connection, but difficult to understand, the daughter received a severe concussion of the brain without being hit by the pole, became unconscious, and in six weeks died. The question is thus presented, whether the act of Carpenter, or the original negligence of defendant, in legal contemplation, was the proximate cause of the injury sustained by plaintiff's intestate.

We think it manifest that Carpenter negligently—that is, insecurely—placed the pole in the hole from which it had recently fallen. The dangerous condition in which it was left by the overseer was the result of plowing near to it, removing or loosening the earth by which it was supported. This, followed by the heavy rain, caused the pole to fall. This was manifest to Carpenter—all of the evidence is to this effect. Carpenter, and those aiding him, recognized it by going to a wood pile and getting the pine stick with which to prop it. That it fell within a short time, less than an hour, shows that it was left by Carpenter in an insecure and dangerous condition. His motive, purpose, was doubtless to restore the pole, and serve the defendant and its patrons; but the act was unauthorized. He could not impose upon defend-

ant any new or different duty, or liability, from that which it assumed by its original negligence. If the pole had struck plaintiff's intestate when it fell the first time, or if, after being down across the road, she had, without contributory negligence, driven against it and was injured, the defendant would have been liable. It was liable for all such damages as resulted or flowed, in ordinary, natural sequence, from the negligent omission to repair the dangerous condition of the pole after a reasonable opportunity to do so; the reason being, as said by Pollock, probably the most accurate writer on the subject, "that a person is expected to anticipate and guard against all reasonable consequences of his negligence, but that he is not expected to anticipate and guard against that which no reasonable man would expect to occur." Torts 40, citing Greenland v. Chaplin, 5 Ex. 248; Ramsbottom v. Railroad, 138 N. C. 38, 50 S. E. 448. Discussing this question, Mr. Justice Walker, in Drum v. Miller, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528, quotes, with approval, the language of Judge Cooley: "When the act or omission complained of is not, in itself, a distinct wrong, and can only become a wrong, to any particular individual, through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected, by averment and evidence, with the act or omission, as to appear to have resulted therefrom, according to the ordinary course of events, as a proximate result of a sufficient cause." Cooley on Torts, p. 74. This principle would have been illustrated and applied if plaintiff's intestate had been injured by the first falling of the pole, or by driving against it while down across the road. Carpenter's act introduces a new element in the case, and renders it necessary for us to seek another principle by which to determine defendant's liability. It is manifest that, but for Carpenter's act, the pole could never have fallen upon plaintiff's intestate. So far as the dangerous condition of the pole, which imposed upon defendant the duty of securing it, was concerned, when it fell, its power to injure, by falling, was exhausted. No one having been injured in the falling, the case was damnum absque injuria. The duty thus imposed upon the defendant was to remove the obstruction from the highway, and for a failure to do this promptly, under the circumstances, rendered it liable for injuries sustained by any person traveling the highway. The pole was down across the highway by reason of defendant's negligence, because, for the purpose of this discussion, we eliminate the heavy rain as a causal element in producing the condition. Assuming that defendant knew the pole was in a dangerous condition and liable to fall, either with or without the heavy rain, it is fixed with notice that it had fallen; that is, that the probable result of its negligence had occurred.

In this condition of the case, we find a satisfactory statement of the law in Wharton on Neg. 138. He says: "Suppose that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff; is the defendant liable to plaintiff? This question must be answered in the negative, for the general reason that causal connection between the negligence and damage is broken by the interposition of defendant's responsible human action. I am negligent on a particular subject-matter. Another person, moving independently, comes in, and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable." The rule as announced by Justice Strong in Railroad v. Kellog, 94 U. S. 469, 475, 24 L. Ed. 256, is usually regarded as sound in principle and workable in practice. He says: "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

In many of the cases found in the Reports, in which it is claimed that intervening agencies have broken the causal connection between the wrong and the injury, it will be noted that the intervening agencies are either natural or conventional conditions—as when a house is negligently burned, whereby the fire is communicated to other houses, more or less remote from the original, and winds, or other natural causes, have changed or controlled the course of the flames. Here the intervening agency is free, intelligent, and independent, in the sense of a self-controlled person, who interposes and changes the conditions which he found existing when he enters upon the scene. The liability, if any exist, for his conduct, is vicarious. Adopting either view of causation as the basis of liability—that of "natural and probable consequences," or "what ought reasonably to have been anticipated and guarded against"—we think the same conclusion follows in this case. Dr. Wharton says: "Reserving for another point the consideration of consequences resulting from the indefinite extension of vicarious liability, we may now ask whether, on elementary principles, the action

of an independent, free agent, taking hold unasked of an impulse started by us, and giving it a new course productive of injury to others, does not make him the juridical starting point of the force so applied by him, so far as concerns the person injured? For the spontaneous action of an independent will is neither the subject of regular, natural sequence, nor of accurate precalculation by us. In other words, so far as concerns my fellow beings, their acts cannot be said to have been caused by me, unless they are imbeciles, or act under compulsion, or under circumstances produced by me, which gave them no opportunity for volition." This language excludes nonliability for the acts of one under compulsion, by reason of conditions produced by the original wrongdoer, as in the squib case the throwing of the squib by the intervening persons was for their protection from a danger to which the defendant gave the first impulse. They were not "free agents." Scott v. Shepherd, 2 Black. 892; 1 Smith, L. C. 549. Of course, if Carpenter had been defendant's servant, acting wthin the scope of his employment, the liability would have attached upon the doctrine of qui facit per alium, etc.

When the cause was before us on the other appeal, the majority of the court conceded that Carpenter's act "intervened and was the efficient cause of the injury" (141 N. C. 462, 54 S. E. 299); but the doubt was expressed whether it was a "new and independent cause." Citing the language of Barrows on Negligence, it is said: "If, however, the cause, the intervening cause, be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the intervention." Conceding this to be true, we have in the evidence a striking illustration of the dividing line between liability and nonliability. Defendant knew that the pole was in a dangerous condition; that the probability of its falling was increased by rain. That it might rain was reasonably probable. Therefore, although the pole may not have fallen if it had not rained, and, in a certain sense, the "heavy rain" caused the pole to fall, yet, because it was an intervening cause which would naturally and ordinarily have occurred, and one which ordinary foresight ought to have "anticipated and guarded against," the defendant, by reason of its original negligence, is not permitted to escape liability upon the suggestion of broken causal connection between the "wrong and the injury." But can it be said that, in addition to this, Carpenter, and his associates, a free, intelligent agent, coming along and seeing two poles down across the road, would lift up one and pass under it, and would undertake to put the other back in the hole from which it had just fallen, and, further, would go to a wood pile near by and get a pine stick with which to prop the pole? Can it be that all of this on the part of Carpenter was a natural, orderly, usual sequence from the original negligence, or that his action was a subject of ordinary precalculation or foreknowledge? "Can we regard the independent action of intelligent strangers as something that is in conformity with ordinary natural law, or as something that can be foreseen or preascertained?" The fact that Carpenter disposed of the two poles in the same situation in an entirely different manner—lifting one up and passing under, and putting the other back in the hole—is a practical demonstration of the difficulty of following the argument of prevision to the length claimed by plaintiff. Assuming that defendant knew that the pole had fallen, is it reasonably probable that it would, or could, foresee that some one would come and negligently put it back in the hole, in plain view of its condition?

It is an entirely reasonable conclusion that the first traveler along the road would either push, pull, or lift it out of his way, and if, in doing so, he left it in a dangerous condition, whereby plaintiff was injured, the case would come within the principle of Clark v. Chambers, 3 Q. B. D. 327, 47 L. J. Q. B. 427, 19 Eng. Rul. Cas. 28, relied upon by plaintiff. In that case defendant had obstructed the highway with a hurdle and two wooden barriers armed with spikes. Some one came along and removed one of the chevaux de frise hurdles from the place where it stood, and placed it across the footpath. Plaintiff, passing there in the dark, ran against it and was injured. The court held that defendant was liable. Pollock says that the decision, or at least the ground upon which it is put, is not in harmony with other cases. He says: "However, their conclusion may be supported, and may have been, to some extent, determined by the special rule imposing the duty of what is called 'consummate caution' on persons dealing with dangerous instruments." Torts, 49. In Sharpe v. Powell, 7 L. R. (1872) 253, Bovill, C. J., says: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are liable to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shown that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person." Pollock says: "Whether Chambers v. Clark can stand with it or not, both principle and the current of authority concur to maintain the law as declared in Sharpe v. Powell." We have examined a number of decided cases in which the doctrine involved here is discussed. It is uniformly conceded that, while the principle is clear, the application is difficult, and variant combinations of fact render decided cases of but little value as authorities. When the facts are in controversy, or more than one conclusion of fact may be drawn, the question is submitted to the jury. When the

facts are admitted, or found by the jury, and the conclusion is clear and certain, it is a question for the court.

After more than usual reflection and investigation, with the aid of exhaustive argument by able counsel, we are of the opinion that the defendant was entitled to have the court instruct the jury that, if they believed the evidence, they should answer the first issue, "No."

We have not discussed the several instructions given by his honor, because our opinion renders it unnecessary. It is but just, however, to say that his honor followed the rule laid down in the opinion of the court. There is some difference in the testimony to which sufficient weight was not given.

For the error pointed out, there must be a new trial.

HOKE, J. (concurring). My opinion as to the general principles applicable to a case of this character was stated, at some length, on a former appeal, and will be found reported in 141 N. C. 455, 54 S. E. 299. I think, too, the judge below conducted the present trial according to the general views expressed in that opinion. The case, even then, was a source of much perplexity, and the fuller statement of the conduct of Carpenter, as it appears in the present record, has led me to the conclusion that his acts on the occasion were those of an independent agent which intervened, and so broke the sequence of events as to "insulate" the original negligence of defendant and prevent it from being correctly considered as a proximate cause of intestate's death.

I therefore concur in the opinion of the court.

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(146 N. C. 443)

## OGDEN et al. v. APALACHIAN LAND & LUMBER CO.

(Supreme Court of North Carolina. Dec. 18, 1907.)

1. JURY — RIGHT TO JURY TRIAL — DENIAL — EXCEPTION TO — SUFFICIENCY.

An exception to an order of reference in the words, "Defendants' counsel except to the above order of reference," while general, was sufficient to save the right of defendants to a trial by jury.

2. SAME — WAIVER.

Though defendants reserved their right to a jury trial by exception to an order of reference, they waived such right by failure to properly assert it in their exception to the referee's report.

3. SAME — EXCEPTIONS TO REPORT OF REFEREE — SUFFICIENCY.

A mere statement, in reference to defendants' exception to a referee's report, that, "as to the matters and issues embraced in said finding, they and each of them demand a jury trial," was insufficient to save their right to a jury trial, where it did not specify the particular facts controverted upon which defendants claimed an issue should be submitted to the jury, nor tender an issue upon each finding of fact against them to which they excepted.

Appeal from Superior Court, Cherokee County; O. H. Allen, Judge.

Action by J. L. Ogden and others against the Apalachian Land & Lumber Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Dillard & Bell, for appellant. Merrimon & Merrimon, E. B. Norvell, and Axley & Axley, for appellees.

WALKER, J. This appeal embraces several creditors' bills filed for the purpose of winding up the affairs of the defendant company. The actions were consolidated by order of the court, and then referred to Mr. Dewees, clerk of the court, to find and state the facts and his conclusions of law. We have read that report with great care, and, in the light of the evidence upon which the findings of fact and the conclusions of law are based, it has impressed us most favorably as having been prepared after a thorough and painstaking investigation of all the evidence, and as being the result of an intelligent and impartial consideration of the case. Its conciseness, and yet its comprehensiveness, are its prominent merits. The defendants, when the reference was ordered by Judge Justice, entered a general exception to the same, in the following words: "Defendants' counsel except to the above order of reference." We are of the opinion that this exception, while very general in its terms, is sufficient to save the right of the defendants to a trial by jury. What could an objection to an order of reference mean, unless it was a challenge of the power of the court to take away from the objector his right to a trial by jury? In Driller Co. v. Worth, 117 N. C. 515, at page 520, 23 S. E. 427, the leading case upon this subject, the court says: "Where a party omits at an opportune moment to declare his purpose to claim his constitutional protection, and thereby so misleads his adversary as that to insist upon it at a later stage of the proceeding would place the opposing party at a disadvantage by delaying the adjudication of his rights, it is competent for the courts to so far restrict and regulate the right as to prevent needless or wanton infringement upon the rights of others. Therefore, though it is error to order a compulsory reference until a trial is first had, and a finding adverse to the pleader returned, upon an issue raised by a plea in bar, the failure to object when the order is made is deemed a waiver of the right. Silence, under such circumstances, is inconsistent with the purpose to insist upon the settlement of an issue decisive of the whole controversy by any other tribunal than the referee, and to allow a party to do so would be to give him the chance of prevailing by a second mode of trial after his adversary had been induced by his silence to incur costs, often very heavy, in meeting him in another

forum, to which he had not objected. Clements v. Rogers, 95 N. C. 248; Grant v. Hughes, 96 N. C. 177, 2 S. E. 339." And again, and for the purpose of showing how the right to a jury trial may be asserted by a mere exception to the order of reference, the court proceeds to decide how it must be preserved, as follows: "For a like reason, where a party promptly insists upon reserving his right, and causes his objection to be entered of record, when the compulsory order of reference is made, he may still waive by failing to assert it in his exceptions to the referee's report. Harris v. Shaffer, 92 N. C. 30; Yelverton v. Coley, 101 N. C. 248, 7 S. E. 672. The law implies that the party objecting will give timely notice of the specific points, upon which he elects to demand a trial by jury, instead of submitting to the findings of the referee, in order that the opposing party may know how to prepare to meet him by summoning the material witnesses, if necessary. Any other ruling would authorize the perversion of a provision of the organic law to the purpose of subjecting others to delay and needless expense. It is the duty of the courts, on demand properly made, to enforce a constitutional guarantee of right, but not in such a manner and to such an extent as to unnecessarily inflict injury on others."

In this case there are 31 exceptions to the referee's report, and, as each exception was made, the defendants merely stated that, "as to the matters and issues embraced in said finding, they and each of them demand a jury trial." The defendants do not specify the particular fact controverted, upon which they think an issue should be submitted to the jury, nor do they formally tender an issue upon each finding of fact against them to which they excepted. A party is entitled to the right of trial by jury under the Constitution, but he may waive his right if he chooses so to do, and this may be done not only by express agreement entered of record as required by the statute, but by such conduct on his part as indicates that he does not intend to avail himself of it, and as is inconsistent with his right to assert it. We are not quite sure if the better practice would not be for a party excepting to a reference to expressly reserve his right of trial by jury. But we will not decide this now to be essential to the preservation of his right, as it is not necessary to do so, for, if the defendants formally asserted their right to have the issues thus tried, they clearly waived it afterwards by not pointing out the questions or issues of fact they raised by the exceptions, and presenting such issues as they deemed necessary to cover all of the controverted facts. The law provides that the issues arising upon the pleadings, material to be tried, shall be made up by the attorneys appearing in the action and reduced to writing, or by the judge presiding upon or during the trial. The attorney must take the initiative, and, when issues have thus been framed, they are, of course, subject to revision by the judge, and subject also afterwards to exception by the party who may allege that he is aggrieved by the ruling. In Yelverton v. Coley, 101 N. C., at page 249, 7 S. E., at page 673, the court says: "The issues of fact thus joined by the pleadings, report, and exceptions shall be submitted if demanded in apt time." And at page 230 of 101 N. C., at page 673 of 7 S. E.: "That the exceptions must be definite, and present distinctly each finding of fact by the referee to which exception is taken." This is a safe and a sound rule, and, moreover, can be easily complied with. "Apt time" means sufficient time to enable the parties to prepare for the trial, and in cases like this one it is the time at which the exceptions are filed. We think this was contemplated by the court in Driller Co. v. Worth, and the cases which have followed it. Yelverton v. Coley, supra, Wilson v. Featherstone, 120 N. C. 446, 27 S. E. 124, and Roughton v. Sawyer, 144 N. C. 766, 56 S. E. 480. The easiest and most practical way of stating the particular controverted fact, which the party desires to have submitted to a jury, is by formulating an issue upon each exception embodying the fact itself. His honor was right in his ruling upon the demand of the defendants for a jury trial, and we think that in other respects there was no error in the ruling and judgment of the court. Indeed, the point we have decided was the one upon which Mr. Bell laid all the stress of his very able argument.

No error.

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(146 N. C. 235)

## LATTA v. CATAWBA ELECTRIC & POWER CO. et al.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. TRUSTS — RESULTING TRUSTS — NATURE OF RIGHT OF CESTUI QUE TRUST.

Where H. owned certain mill property and water rights, and paid for certain other property purchased from B., but the title was taken by J. at H.'s direction, H. had no title or estate in the B. property, but a mere right to call upon J. to execute the resulting trust, and a subsequent conveyance of the mill property, etc., by H. could not carry as appurtenant any easement in the B. property which he did not own.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 188.]

2. DEEDS—OPERATION—PROPERTY CONVEYED—LAND AS APPURTENANT TO LAND.

Land cannot pass as appurtenant to land, for only incorporeal rights can pass as appurtenances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 337, 338.]

3. WATERS—EASEMENT—CREATION.

The mere fact that H., an owner of mill property, caused a third person to purchase other property, because at some future time he might wish to raise his dam so as to back water upon it, does not ipso facto create an easement in the other property for that purpose, even though H. paid for the property purchased.

4. SAME—CONVEYANCES—APPURTENANCES.
Where H. owned mill property, and paid for other property which was taken in the name of another by his direction, but H. had not backed any water upon such other tract at the time he sold his mill, and the description by which he sold it was confined to the water rights, etc., which he had received in acquiring it, his deed to the mill property cannot be construed to pass as appurtenant to the land an easement in the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 171.]

5. SAME—EXTENT OF EASEMENT.
Where land on which a mill is situated is sold, an easement to pond the water above the mill to the extent that it was done at the time of the conveyance will pass with the mill property as appurtenant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 171.]

6. SAME—CONSTRUCTION OF COVENANT.
Where a deed, after describing the property by metes and bounds, provided that the grantee should have all water rights and privileges on the premises, and the right to erect dams in the river for the purpose of utilizing the full flow of the river embraced in said boundaries, and should not be liable for any resulting damages to other lands, etc., provided the dams or other obstructions may be placed in said river at a certain place designated in the plat, or at any other place, etc., the covenant was expressly confined to dams which might be placed in the river on land within said boundaries.

7. EASEMENT—TRANSFER.
A right or easement does not pass as appurtenant without mention, unless it is an easement actually appurtenant by use and occupation at the time of the conveyance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 66.]

8. MORTGAGES—RIGHT OF MORTGAGEE—AFTER-ACQUIRED PROPERTY—EASEMENTS.
When property is mortgaged, and subsequently an easement is acquired, necessary and essential to the full enjoyment of the property, it will inure to the benefit of the mortgagee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 255.]

9. WATERS — EASEMENT—ACQUISITION UNDER TRUST DEED.
Where a power company gave a mortgage, which covered mill property owned by it, and subsequently it purchased other land, the deed for which included certain flowage rights under a right to place dams within the property conveyed, and this land with the same rights came into the hands of plaintiff by subsequent conveyances, the trust company, to which the deed of trust was given and those holding under it, did not have an easement to back water from the milldam onto the plaintiff's property.

10. JUDGMENT—RES JUDICATA.
Where B. received certain land, etc., of a power company of which he was a director, in payment for a pre-existing debt, and a previously executed trust deed by the power company of other property was foreclosed in an action commenced after the sale to B., but B. was not a party to that action in which the insolvency of the power company was established, B. and his grantees were not affected by the decree, or by declarations of the president of the company made in that case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1203; vol. 20, Evidence, §§ 846–848.]

11. ESTOPPEL — PLEADING — RECORD OF ANOTHER CASE.
By making a record in another case a part of his pleading, a party is not estopped from denying the facts adjudicated therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 2–5.]

12. CORPORATIONS — INSOLVENCY — FRAUDULENT CONVEYANCES — ACTIONS — QUESTIONS FOR JURY.
In an action involving the validity of a certain deed of a company to a director thereof, in settlement of a pre-existing debt, whether certain bonds were the valid indebtedness of the company, and whether the company was insolvent at the time of the execution of the deed, was for the jury.

13. SAME—BURDEN OF PROOF—INSOLVENCY OF DEBTOR—VALIDITY OF BONDS.
In an action involving the question whether a company was insolvent, because of certain outstanding bonds,, at the time of executing a deed to a director of the company in payment of a pre-existing debt, it was incumbent upon the creditors to prove that the company received value for the bonds or that the holders thereof were bona fide purchasers.

14. SAME.
An issue of the insolvency of a company involves the validity of its debts and assets.

15. HOLIDAYS — NOTICE — OPENING DEPOSITIONS.
A notice of opening depositions is not void because the time set for opening them is on a legal holiday.

16. SAME—WHAT MAY BE DONE ON HOLIDAYS.
Whatever the statute does not prohibit from being done on a legal holiday may be done, and the legality of such acts cannot be measured by the legal status of Sunday.

17. SAME—OPENING DEPOSITIONS—EFFECT.
Where notice was given that depositions would be opened on a legal holiday, even if a party could not be compelled to attend, he could, under the statute, have filed exceptions and had a hearing on the next day, and where he failed to attend on either day, he cannot complain, especially when he was afterwards given time and opportunity to file exceptions.

18. CORPORATIONS — ACTIONS—RIGHT TO FILE PLEADINGS.
Where a corporation is made a party defendant to an action to quiet title, it has a right to file an answer therein even, though one who owns the majority of the stock in the corporation was plaintiff's vendor.

19. SAME — FRAUDULENT CONVEYANCE BY PRESIDENT—DUTIES OF OFFICERS.
If the president of a corporation fraudulently disposes of its property, it is the duty of the officers to sue for and recover it for the benefit of its creditors.

20. SAME—RIGHTS OF CREDITORS—RECEIVERS.
If, during the existence of a corporation its officers fraudulently or unlawfully disposed of any of its property, creditors are entitled to have a receiver appointed to sue for and recover it.

21. SAME—DISSOLUTION BY SALE OF PROPERTY UNDER MORTGAGE.
Under the direct provision of Code 1883, § 697, where a sale is made under a deed of trust or mortgage, executed by any corporation on all its works and property, upon conveyance to the purchaser the corporation is ipso facto dissolved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2404.]

Appeal from Superior Court, Gaston County; Ward, Judge.

Action by E. D. Latta against the Catawba Electric & Power Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was brought by plaintiff against defendants, Catawba Electric & Power Co., Fidelity & Deposit Co., Alceas Hooper and another, trustees of estate W. E. Hooper, the Woman's College of Baltimore, and others,

pursuant to Revisal 1905, § 1589, for the purpose of quieting title to the lands described in the complaint. The plaintiff claimed three tracts of land and showed title thereto: (1) Bissell tract, by deed from Emily Bissell to W. T. Jordan, bearing date July 13, 1893. This deed, after describing the land by metes and bounds, conveys all water rights and privileges on said premises, with the right to erect dams in the Catawba river for the purpose of utilizing the fall of said river, embraced in the boundaries, free from any claim for damages to any land of the grantors, provided the dam, or dams, may be placed in said river at what is designated in the plat as the "lower bench mark" or at any other place, and that the dam shall not, wheresoever placed, raise the water at said mark more than 4½ feet above the iron peg in the rock, being the "lower bench mark," and located at the upper end or just above the upper end of the Rumfelt Island. This land, except a small portion, is covered by water. (2) The Sample tract, by deed from Hugh Sample to W. T. Jordan, dated March 6, 1899. (3) The Lineberger tract by deed from R. E. Lineberger to W. T. Jordan dated March 28, 1899. These deeds convey certain water rights not necessary to be set out here. The jury find (Rec. 59, 60) that the said Jordan purchased these tracts of land, with the water rights attaching thereto, for W. J. Hooper, and paid for same with money furnished by said Hooper, who was carrying on business in the name of the W. J. Hooper Manufacturing Company. It was admitted that the title to said lands was in the grantors at the date of the deeds. (4) On May 29, 1900, said Jordan, by direction of said W. J. Hooper, and for a nominal consideration, conveyed the three above-named tracts of land, with all of the water rights which he acquired by said deeds, to the Catawba Electric & Power Co. (5) On February 4, 1901, said power company conveyed the said three tracts of land, with the water rights, to William Barbour. The consideration of this deed was that said Barbour should credit the original cost of said lands, amounting to about $7,000, on a note held by him against the said power company, indorsed by said W. J. Hooper and the Wm. J. Hooper Manufacturing Co. This was done by and with the consent of said W. J. Hooper, who, together with said Barbour, was, at the date of said deeds, a director of said power company. (6) On September 11, 1901, Barbour, for a recited consideration of $5, but an actual consideration of $7,220, being the amount paid by Barbour and interest, conveyed said three tracts of land, with the water rights, to plaintiff, E. D. Latta. Defendant power company and its assignee showed title to a tract of land known as "the Mountain Island," on the Catawba river, containing 1,150 acres: (1) By deed from Davidson to Pegram May 28, 1883. (2) Pegram to Tate April 8, 1884. (3) Tate to W. J. Hooper April 9, 1884. This deed conveys, by metes and bounds, the Mountain Island property on the Catawba river, including certain water rights described in the deeds from Davidson to Pegram and Pegram to Tate. It appears from the map filed herein that neither of these deeds describe nor cover any part of the three tracts claimed by plaintiff. The map shows, and it was otherwise in evidence, that the Bissell tract is immediately above the Mountain Island land. The deed from Bissell to Jordan calls for the beginning point at "a hickory on the old corner on the Catawba river between the Hooper and Bissell lands." The deed from Tate to Hooper calls for the beginning "at a hickory near the river bank." An examination of the plat shows that the hickory marked the corner of both tracts. (4) On November 20, 1894, W. J. Hooper conveyed to the said power company, in consideration of $25,000, the Mountain Island property, including all of the lands and water rights conveyed to him by Tate, to whose deed reference is made. (5) On May 1, 1895, said power company conveyed by deed, in trust to the Fidelity & Deposit Co., the same lands, with the water rights, including all other property thereon. The purpose of this deed was to secure the payment of: First. Sixty-five coupon bonds of $1,000 each to be issued by said power company and known as Class A. Second. Eighty-six coupon bonds of $1,000 each and known as Class B, to be issued by said company. (6) On June 24, 1901, said deposit company and the alleged owners of the said bonds, the defendants herein, instituted an action in the superior court of Mecklenburg county against said power company for the purpose of foreclosing said deed in trust, and subjecting the property conveyed therein to sale to pay said bonds and the accrued interest thereon. The proceeding was duly prosecuted to judgment. The power company, by answer, admitted the allegations in the complaint, including the insolvency of said company. The property was brought to sale on September 11, 1901, when the defendants herein, other than the said power company and the said deposit company, purchased said property for the sum of $175,000. The sale was duly reported, confirmed, and, on September 21, 1904, the said deposit company, pursuant to the order of the court, executed a deed to said purchasers conveying said property with all water rights and other property, franchises, etc., which passed under the deed in trust. (7) On June 29, 1905, the said purchasers, grantees in said deed, conveyed said property to the Catawba Manufacturing & Electric Power Company, which was made defendant herein.

The defendants contend, first, that Jordan acting for, and under the direction of W. J. Hooper, purchased the Bissell tract for the purpose of securing the right to raise the dam across the river, to develop the Mountain Island power to its full capacity; that the

said Jordan held title to said land in trust for Hooper, he having furnished the money to pay therefor, and that by reason of these facts and the peculiar relation of the Bissell tract to the Mountain Island land, Jordan, for Hooper, held same as appurtenant thereto, creating an easement or privilege in the owners of the Mountain Island property to pond water back upon it. They contend that the Sample and Lineberger tracts were purchased and held in the same way and subject to the same easement; that, by virtue of the deed from Hooper to the power company, November 20, 1894, his equitable title attaching to the water rights in the Bissell land passed to said power company, and that they passed to the Fidelity & Deposit Co. by the deed of May 1, 1895, and by the successive conveyances vested in the defendant Manufacturing Power & Electric Company. As to the Sample and Lineberger tracts, two miles up the river from the Mountain Island property, they make the same contention. Defendants tendered issues for the purpose of presenting its contentions in this respect, which his honor declined to submit. Defendants excepted. His honor held, as a matter of law, that the Lineberger, Sample, and Bissell lands did not pass with the Mountain Island land under the sale of September 11, 1901. That only such easement passed as existed, by ponding water on the Bissell land, at the date of the deed from Hooper to the power company. Defendant excepted. They further contend that at the date of the deed from Bissell to Jordan, July 13, 1893, and the deed from Hooper to the power company November 20, 1894, the dam over the Catawba river backed water upon the Bissell land. The jury find that on neither of these dates, nor before, did the dam, as it then existed, back water on the Bissell tract. (Rec. 59–60; Issues 4–5.) The defendants further contend that the "lower bench mark," referred to in the deed from Bissell to Jordan, was below the Bissell land and on the Tate land. The jury find otherwise. (Rec. 60, Issue 10.) The defendants, other than the deposit company and the Manufacturing & Electric Co., contend that if the three tracts claimed by plaintiff, or easements thereon, did not pass as appurtenant to the Mountain Island land, then, and in that event, the deed from the power company to Barbour February 4, 1901, was fraudulent and void, for that the said power company was, at that time, insolvent; that both Barbour and Hooper were directors in said company, and that plaintiff on September 11, 1901, the date of his deed from Barbour, had notice of these facts; that the consideration of the deed to Barbour was a pre-existing debt due Barbour and that was known to plaintiff. Plaintiff denies each and every of these allegations, except that Barbour was a director in said company. He further alleges that he was a purchaser from Barbour for value and without notice of any of the alleged vitiating facts. Appropriate issues were submitted to the jury to present these several contentions, and found for the plaintiff. Defendants presented a number of prayers for special instructions, and duly noted exceptions to his honor's refusal to give them. These exceptions are discussed in the opinion. There was judgment for plaintiff. Defendants excepted, and appealed.

Armistead Burwell, F. I. Osborne, R. C. Lucas, and Maxwell & Keerans, for appellants. W. B. Rodman, O. F. Mason, and C. W. Tillett, for appellee.

CONNOR, J. (after stating the facts as above). The plaintiff having shown a complete chain of title to the Bissell, the Lineberger, and Sample properties was, in view of the admissions in the answer that defendants were claiming to own said properties, or an easement in them, entitled to judgment quieting his title, unless the defendants made good either of their contentions referred to in the answer as counterclaims. The cause was well and carefully tried in the court below, and argued, in this court, with more than usual learning and ability. The record contains 40 assignments of error. The real merits of the controversy, however, following the orderly arrangement of the briefs, are reduced to but a few propositions. It will be convenient to discuss them in the order in which they were argued. Defendants' first contention is thus stated in the brief: "That the Fidelity & Deposit Co., and its assigns, have an easement, privilege, or right to erect on the Mountain Island shoal a dam sufficient in height and extent to enable it, or its assigns, to use the full power of the Catawba river at that place." This right, privilege, or easement alleged to have vested in the power company, it is claimed, passed to the deposit company by the deed in trust of May 1, 1895. His honor held, as a matter of law, against defendant's contention. The exception to this ruling, therefore, presents the question whether, upon the entire evidence considered most favorably for defendants, any such burden or easement is imposed upon the properties for the benefit of the Electric & Manufacturing Power Co., the present owner of the Mountain Island, or Tate, land. It will be well to discuss the questions as they affect the Bissell property, first, because in some aspects it differs from the Lineberger and Sample properties. The defendants' claim is based upon the following facts: Prior to May 28, 1883, Jas. M. Davidson owned certain water rights in the Catawba river which he conveyed to Miles Pegram, who, on April 8, 1884, conveyed the same water rights, etc., to James T. Tate and others, who were, at that time, operating the Mountain Island Mills. These water rights are described in the deed, and located by the testimony of the surveyor, Fichte. They do not cover any portion of the Bissell property. Prior to April 8, 1884, Jas. T. Tate and others were

the owners of a tract of land lying on and going to the center of the Catawba river, containing 1,150 acres. The Mountain Island Mills, including a valuable water power, were located on this land. On April 9, 1884, Tate and others conveyed this land, by metes and bounds, to W. J. Hooper of the city of Baltimore. The water rights acquired by Tate from Pegram are conveyed by this deed. The first call in the deed is "a hickory near the river bank." The habendum of the deed is in the following language: "To have and to hold the same and all mills, machinery, and fixtures thereon or appertaining thereto, also the right, power, and privilege to build upon, or annex to, the east bank of the river, at any point or points, place or places, any dam or dams as far thereupon or into said bank as may be necessary to control, use, and enjoy to the full extent the full, entire available water power of the whole river between the points, and within the boundaries hereinbefore, and as set out in the deed from Davidson to Pegram." The Catawba Electric & Power Co. was incorporated March 6, 1893 (P. L. 1893, p. 462, c. 307). On Nov. 20, 1894, W. J. Hooper, by deed referring to and adopting the description in the Tate deed, conveyed the same property known as the "Mountain Island Mills" to said Catawba Electric & Power Co. It is conceded that all of the right, title, privileges, or easements to or in said property which passed to the power company, have, by the deeds set out in the statement of facts herein, passed to and vested in the Catawba Manufacturing Electric & Power Co., by deed dated June 29, 1905. It is further conceded that neither of these deeds convey, nor do they include in the description therein, the Bissell property.

Prior to July 13, 1893, Mrs. Emily Bissell and others were the owners of a tract of land, a very large portion of which was covered by water, lying on and constituting a portion of the bed of the Catawba river. This land adjoins the Mountain Island property, the beginning point being the hickory called for as the beginning of said land. On July 13, 1893, W. T. Jordan was manager, etc., and W. J. Hooper was president of the Catawba Electric & Power Co. Jordan says: "I bought the Bissell property and took title in my own name. I took it in that way under instructions from W. J. Hooper, the president of our company. I purchased it because it was necessary to the Mountain Island property. The Bissell property and the Mountain Island property adjoin." He further testified that the W. J. Hooper Manufacturing Co. paid for it. The deed from Bissell to Jordan of July 13, 1893, describes the property by metes and bounds —beginning at the "hickory and old corner on the Catawba river bank between the Hooper and Bissell lands or properties." Following the description are the words: "It being the same land which was surveyed for the parties by John C. Fichte in July, 1893, plats or diagrams of which survey are hereto annexed, and marked respectively 'A' and 'B,' and made a part of this deed." Certain covenants, in regard to water rights, are set forth in the deed to which further reference will be made.

On May 29, 1900, Jordan, as found by the jury (Issue 14), conveyed the Bissell property to the power company by direction of Hooper. The consideration recited is $1. This deed refers to the deed from Bissell and concludes as follows: "It is the purpose of W. T. Jordan, by this deed, to invest the Catawba Electric & Power Co. with the title to all the lands, water rights, and other easements acquired by the said Jordan by said deed," etc. It will be observed that this deed bears date six years subsequent to Hooper's deed to the power company, November 20, 1894, and five years subsequent to the deed in trust from the power company to the Fidelity & Deposit Co., May 1, 1895. The legal title to the Bissell property was, therefore, in Jordan at the date of Hooper's deed to the power company and of the deed from the power company to the deposit company. The defendants contend that Hooper having paid the purchase money for the property, and Jordan, having bought by his direction, held the property in trust for him—that Hooper's purpose in buying through Jordan was to hold the Bissell property and the water rights attached thereto as appurtenant to the Mountain Island property, and that thereby the Bissell property, or at least an easement therein, became appurtenant to the said property to the extent set forth in the answer. The jury find that Hooper paid for the Bissell property, and that Jordan took title thereto by his direction. Hooper had no title to, or estate in, the Bissell property, but a right to call upon him to execute the resulting trust by conveying the property. This, as said by Pearson, J., in Thompson v. Thompson, 46 N. C. 430, "is a mere right and not an estate," therefore his deed to the power company could not carry as appurtenant any easement in the Bissell property which he did not own. The jury found that the dam of the Mountain Island Mills did not, at the date of the deed from Hooper to the power company, back water upon the Bissell land. This finding eliminates the suggestion that any such easement was in existence at that time. The fact that Hooper describes the Tate or Mountain Island land by an express reference to the Tate deed to himself, and that this deed confines the water rights "between the points and within the boundaries hereinbefore, and as they are set forth in the deed from Davidson," etc., leaves no room for construction in respect to the property and water rights expressly conveyed by the deed. Of course the land covered by water did not pass either by way of description, or as appurtenant, for the manifest reasons that it is not within the

description, and that land can never pass as appurtenant to land. "Only incorporeal rights pass as appurtenant to land or under the description of 'appurtenances.' Land cannot pass as appurtenant." Jones, Easement, § 20. "A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." Coke, Litt. 121b. While it is unquestionably true that an incorporeal right may pass as appurtenant, without being specifically named, it is equally true that the incorporeal right must be in existence before it can pass as appurtenant. The difficulty which confronts the defendants is in the failure to show that any easement in the Bissell land had been created, used, or enjoyed by the owner of the Mountain Island land at the time of, or before, the conveyance to the power company. Certainly, the mere fact that Hooper, the owner of the Mountain Island property, caused Jordan to purchase the Bissell property because at some time in the future he might wish to raise the dam on his own property and back water upon it, does not ipso facto create an easement in the Bissell property for that purpose. For some reason Hooper had the title taken to Jordan and held by him. This conduct on his part indicates a purpose to keep the two properties separate. Again, when he conveys the Mountain Island property he carefully excludes the suggestion that he intends to convey any rights which he might have in the Bissell property by confining the water rights, privileges, etc., to those which he acquired from Tate. As Hooper had not subjected the Bissell land to any burden, or backed water upon it, while he owned the Mountain Island land, and carefully excluded it from his deed, it would be doing violence to both the language used and his manifest intention to so construe the deed as to pass as appurtenant to the land, an easement which had no existence. It is settled by decisions of this court that, if one sell land on which a mill is located, an easement will pass with it, as appurtenant, to pond water above the mill, to the same extent as was done at the time of the conveyance. In Kestler v. Verble, 52 N. C. 185, Manly, J., said: "It seems entirely clear to us, upon the sale of the parcel of land, including the lower mill, to the defendant Verble, that an easement in the lands passed by implication to defendant, to the extent, at any rate, held by the judge below. The defendant purchased as appurtenant to his mill the right to keep the water power in the condition it then was, for the purpose of propelling his machinery." So, in Bowling v. Burton, 101 N. C. 176, 7 S. E. 701, 2 L. R. A. 285, Merrimon, J., says that the deed conveying a mill carried the right to erect dams across the river at the mills mentioned, to the extent claimed and exercised by the vendor at the time he executed the deed. A large number of cases cited in plaintiff's brief recognize the principle with its limitation. In Lammott v. Ewers, 106 Ind. 310, 6 N. E. 636, 55 Am. Rep. 746, it is said: "The doctrine is too familiar to justify elaboration that, when the owner of an estate, during such ownership, has, by artificial arrangements, made one part subservient to the other, thus enhancing the value of one by burdening the other, the conveyance of that, the value of which is thus enhanced, will carry the right to an easement in the other, to the extent necessary to the enjoyment of that granted in the same condition in which it was enjoyed before. * * * As applicable to water rights, in a case where such rights are granted without being otherwise specifically defined, since they are, in a measure, at least, incorporeal and invisible, they are measured and limited, as against the grantor, by the extent to which they were designed to be used, and had actually been made available for and applied to use." To the same effect is Taylor v. Hampton, 4 McCord (S. C.) 96, 17 Am. Dec. 710. In Hathorn v. Stinson, 10 Me. 224, 25 Am. Dec. 228, it was held that the grantee of a mill "acquired a right to continue the dam so as to raise the same head of water as the grantor had been accustomed to raise previous to the grant, provided that was necessary for the useful operation of the mill." The authorities cited by defendants are to the same effect. "Property conveyed passes with all the incidents then rightfully belonging to it, or actually or usually enjoyed with it at the time of the conveyance, so far as they are necessary to the full benefit and perfect enjoyment of the property without any specifications of them." Dunklee v. Wilton Ry. Co., 24 N. H. 489; Tiedeman, Real Prop. § 842. It appears from the deeds and the testimony that Tate and his associates, prior to April 8, 1884, had erected a dam over the river, and built a mill. This dam is referred to by Fichte, defendants' witness, as the "old Tate dam," thus showing that, at the time Hooper purchased (1884) and conveyed to the power company (1894), there was a dam across the river which did not back water on the Bissell land. It further appears that Tate acquired and conveyed to Hooper certain water rights adjoining the Bissell land. The defendants, however, contend that the Bissell deed "shows that it was bought for the Mountain Island property, and that the privilege therein was conveyed for the Mountain Island Water Power to back water upon the same." The deed, after describing the property by metes and bounds, contains the following covenant: "It is expressly covenanted and agreed that the said W. T. Jordan shall have all water rights and privileges on said premises, and shall have the right to erect a dam, or dams, in the said river for the purpose of taking up and utilizing the full fall in said river embraced in the said boundaries, and shall not be liable for any resultant damages to any of the lands of the parties of the first part or any

one claiming under them, provided the dam, or dams, or other obstruction may be placed in said river at what is designated in the plat hereto annexed as the 'lower bench mark,' or at any other place, and provided that the said dam, or obstruction, wherever placed, shall not raise the water at said lower bench mark more than four and a half feet above the iron peg in the rock, the iron peg being the lower bench mark and located at the upper end or just above the upper end of the Rumfelt Island." We find nothing in this language indicating that it has any connection with or relation to the Mountain Island property. The evident purpose of the grantor was to give to the grantees certain defined water rights, in respect to other lands limiting such right to 4½ feet at the lower bench mark. The defendants contended that this mark was on the Tate land. His honor submitted the question to the jury, and they found against defendant. The covenant is expressly confined to dams which may be placed in the river on the lands "within said boundaries." There is no evidence that Mrs. Bissell knew that Jordan was purchasing for Hooper. We concur with his honor that no easement to flood or back water upon the Bissell land passed to the power company by Hooper's deed, for the two-fold reason that he had no title to, or estate in, the land at the time of the conveyance, and that his deed expressly confines the water rights to those conveyed in the deed from Tate to himself. "A right or easement does not pass as appurtenant without mention, unless it is an existing easement actually appurtenant by use and occupation at the time of the conveyance. It must actually belong to the estate conveyed in order to pass by implication." Jones, Easements, § 25. Defendants however insist that, conceding that no easement passed by Hooper's deed, when Jordan conveyed the Bissell land to the Electric & Power Co. in 1900, the rights to back water upon it thus acquired inured to the benefit of the Fidelity & Deposit Co., the trustee. It is unquestionably true that when property is mortgaged, and after the execution of the mortgage an easement is acquired necessary and essential to the full enjoyment of the property, it will inure to the benefit of the mortgagee. Swedish, etc., Bank v. Ins. Co., 83 Minn. 377, 86 N. W. 420. The deed from Jordan to the power company expressly confined its operation to the limitation contained in the deed from Bissell to him. Of course, no easement passed to the power company, because the land itself covered by water was conveyed. The power company could not own the land and easement therein at the same time. When it acquired the land, of course it had the right to subject it to any use which it saw proper, subject to the rights of the adjoining owners. If it had, after acquiring the title, raised the dam on the Mountain Island, and thereby backed water over the Bissell property, thus subjecting it to a burden, it may be that upon a sale of the property by the deposit company, the purchaser would have taken title with the easement, as was held in Whitehead v. Garris, 48 N. C. 171. The fact is, however, that on May 29, 1900, Jordan conveyed to the power company, and at that time it is not claimed that the power company had acquired an easement otherwise than by the Hooper deed, and on February 4, 1901, the power company, for a valuable consideration, conveyed the same properties to Barbour. The deed contains this language: "It is the purpose of the said parties of the first part, by this deed, to invest the said party of the second part with the title to all the lands, water rights and easements acquired by the said parties of the first part, under the aforesaid deeds, and reference is made to these said deeds for a more particular description of the lands, water rights and easements hereby conveyed." The deed refers to the deed from Jordan, and, as we have seen, he conveyed only the water rights which he acquired from Bissell. Barbour, therefore, took the title to the Bissell property free from any burden or easement to back water upon it. No easement was ever granted by Jordan, the holder of the legal title, or Hooper who had the equity, or right to call for it, and none could be otherwise acquired against them, except by adverse user for 20 years. There is no evidence that Latta had any knowledge of the fact that Jordan held subject to any right in Hooper to call for the legal title. It is true that the dam had been extended, and, at the time Latta purchased, backed water on the Bissell land, but it does not appear how long it had done so—it could not have exceeded seven years. The Electric & Power Co. held the Bissell property in the same plight and subject to the same easements, and none other, expressly conferred by the deed from Bissell to Jordan. The deed to the Fidelity & Deposit Co. conveyed such rights as the power company had, and no more. The mere fact that the power company five years thereafter acquired the Bissell land did not prevent it from conveying it to a purchaser for value in the same plight and condition as it was conveyed to said company. We therefore concur with his honor in holding that the defendant Electric Manufacturing & Power Co. did not acquire an easement to erect and maintain a dam of sufficient height to back water upon the Bissell land.

The Lineberger and Sample lands lie two miles up the river, and consist largely of land covered by water. Their chief value consists in their water power and rights. On March 28, 1899, Jordan, by direction of Hooper, purchased them, and paid the purchase money by drafts on the Hooper Manufacturing Co. The jury find that they were not purchased for the Catawba Electric & Power Co. Jordan held them until 1900, when, by direction of Hooper, he conveyed them, together with

the Bissell property, to the power company. There is no suggestion that the Mountain Island dam has backed water upon them. We can see no reason why the same conclusion reached in regard to the Bissell land does not apply to these properties. We concur with his honor's ruling in regard to them. The defendants, other than the power company and the Fidelity & Deposit Co., claim that the deed from the Electric & Power Co. to Barbour was invalid, for that at the time it was executed the company was insolvent; that the consideration was a pre-existing debt due Barbour indorsed by Hooper; that Hooper was president and Barbour director in said corporation. Plaintiff denies all of these averments, except that Barbour was director, and for further defense alleges that he purchased for full value and without notice of any of the facts relied upon to invalidate the deed of February 4, 1901. His honor submitted the following issue: "Was the Catawba Electric & Power Co. insolvent in the months of January and February, 1901?" The defendant requested the court to instruct the jury to answer the issue, upon the evidence, in the affirmative. This was refused, and defendants excepted. Under the instructions given, the jury answered the issue in the negative. The exception presents the question whether the uncontradicted testimony showed that the corporation was insolvent at the date of the deed to Barbour. It appears that, on May 1, 1895, the deed in trust was executed to the Fidelity & Deposit Co. to secure 65 coupon bonds known as "Class A." These bonds were issued and sold for cash. There is no controversy in regard to their validity. The same deed secured 86 coupon bonds known as "Class B." The bonds included in class A were given priority of lien in said deed. The plaintiff contends that the bonds in class B were never issued and sold to bona fide holders, and that no money was received by the company from them. When the Mountain Island property was sold September 11, 1901, by the Fidelity & Deposit Co. to Theodore Hooper and others for $175,000, the court directed the clerk to give notice for the bondholders to file their bonds and to report to the court the amount of the indebtedness and interest on account of them. From the report made by the clerk, it appears that the bonds described as class A, with accumulated interest, amounted to $88,844 February 15, 1902, the date of the report—deducting two years' interest, $7,800, they amounted on February 4, 1901, to $81,044. It is conceded that the corporation owed Barbour $80,000. If the 86 bonds, class B, constituted a valid indebtedness, the corporation was, on February 4, 1901, insolvent; otherwise, it was solvent. The plaintiff insists that the defendants Theodore Hooper and others do not allege that they are creditors. An inspection of the answer setting up the counterclaim does not disclose very clearly an allegation that the defendants are creditors, but, as the cause was tried by his honor upon the assumption that the pleadings raised the issue, we will so treat them. The burden of proof was upon the defendants to show that the company was insolvent, and that they, as creditors, are in a position to attack the deed to Barbour. The plaintiff insists that the defendants have failed in both respects. No bonds were produced on the trial. The only witness examined in regard to the 86 bonds was defendant Alceas Hooper. He says that the bonds in class A were paid for in cash—of this he has personal knowledge. In regard to class B he says, "So (far) as I remember correctly, the history of the second mortgage bonds was that Mr. William J. Hooper owed to my father, at the time of his death, a certain amount of money, and the trustees, in settling father's estate, received from W. J. Hooper, of class B, 86 bonds. How he got them I do not remember. I think you will find what I am now telling you is substantially correct. I paid no money for these bonds (class B), except in the way of crediting him on account of indebtedness to my father's estate."

W. F. Jordan, the secretary and treasurer, testified that, so far as he knew, the company got no money from these bonds. The other evidence relating to insolvency of the company in February, 1901, was conflicting. Alceas Hooper says that it was insolvent. Jordan says that, eliminating the debt to Barbour, the company was solvent, if it could get $200,000 for its property. If this is correct, eliminating the 86 bonds, class B, the same result would follow including the Barbour debt. The defendants insist that the judgment in the suit brought by the Fidelity & Deposit Co. fixed the validity of the bonds and the insolvency of the company. We do not perceive how, as against the plaintiff, the judgment in that action is relevant. Barbour's deed was executed February 4, 1901. The summons in that action was issued June 24, 1901. Barbour was not a party to the action. The answer was filed admitting the indebtedness by W. J. Hooper, president. It was, of course, to his interest to fix upon the company the 86 bonds delivered by him to the trustees of his father's estate, to pay his indebtedness. His acts and declarations subsequent to the date of Barbour's deed are not competent to invalidate the deed, nor could the judgment in that suit affect Barbour or his grantee. Defendants say, however that may be, plaintiff, by making the record in that case a part of his reply to the counterclaim, is estopped from denying the truth of the facts adjudicated therein. We do not perceive how this result follows. In making the record a part of his pleadings, plaintiff can add nothing to, or take anything from, its force and effect. We do not perceive any good reason for his doing so, nor do we think he thereby, in any manner, changed his relation to the record. Defendants also insist that plaintiff, as agent for Barbour, filed with

the clerk in that suit, proof of claim for nine of the bonds in class B and that he thus recognized their validity. They also call attention to the fact that plaintiff made a contract with Barbour to buy these nine bonds. All of this was competent as acts and declarations of plaintiff and his grantor prior to the conveyance to him, but we do not see that they have any element of an estoppel. It does not appear that these acts and declarations were made to any one for the purpose of buying the bonds, or that any one did buy, or in any manner deal with them by reason of such acts and declarations. Defendants further insist that, taking the testimony of Alceas Hooper as true, it does not show that the company did not receive value for the bonds; that the company may have owed money to Hooper; that a short time before the bonds were issued it purchased the Mountain Island Mills from W. J. Hooper and that it may have owed him the purchase price. These were all matters for the jury upon the issue of insolvency. The burden was on the defendants to show that the company was insolvent at the date of Barbour's deed; and the court could not, in the light of the fact that no bonds were produced—no one of the defendants who claimed to be creditors testified in regard to the alleged debts, except Alceas Hooper, who gives an account of the manner in which he came into possession of the bonds—have directed the jury to answer the issue in the affirmative. His honor left the question to the jury, under instructions, whether the bonds were a valid indebtedness of the company. In the light of the testimony of Alceas Hooper, in regard to the receipt of the bonds for the individual indebtedness of W. J. Hooper, the president of the company, it was incumbent upon the defendants to show either that W. J. Hooper paid value to the company for them, or that they were purchasers for value, and without notice of any defect in them by reason of Hooper's using them to pay his debts. Defendants insist that no issue was raised by the pleadings in regard to the validity of the 86 bonds. The issue of insolvency involved the question of indebtedness and assets. How, otherwise, could that issue be decided?

The only way in which the financial condition of a person, or corporation, can be ascertained is to fix the amount of its valid indebtedness and its available assets. We have examined the entire charge upon this issue and the exceptions thereto, and find no error therein. The question was fairly left to the jury. The verdict upon this issue renders it unnecessary to pass upon the exceptions to his honor's ruling and instruction upon those relating to notice. The plaintiff testified that he did not know, at the time of his purchase, that Barbour was one of the directors of the power company. He says: "I paid Col. Barbour in full for the property in controversy about $7,220, and he delivered the deeds to me which have been exhibited here. At the time the money was paid, and at the time the deeds were delivered to me, I did not know, or have any notice, that Col. Barbour was a director or officer of the Catawba Electric Co." He says that he learned it in 1903. He further says that at the time he took the deeds he did not know any thing of its financial condition except that it owed Col. Barbour a great deal of money. The jury found with the plaintiff in regard to notice, etc.

It is not necessary, nor practicable, to discuss each of the exceptions in the record. We have, however, examined them. The exception to his honor's ruling upon the issues tendered by defendants cannot be sustained. The issues submitted clearly present the controverted question of fact. The defendants assign as error the refusal of the court to exclude certain depositions. The facts in regard to them are: The depositions were taken upon notice, and duly returned by the commission to the clerk who issued notice, on May 8, 1905, that he would open them on May 10, 1905, at 10 o'clock a. m. Service of the notice was accepted by counsel May 9, 1905. On May 10th, in accordance with the notice, the clerk opened the depositions passed upon, and allowed them pursuant to Code 1883, § 1357, Revisal of 1905, § 1652. On May 15, 1905, the defendants filed exceptions to the clerk's order, for that: (1) They were opened without notice; (2) they were opened on a legal holiday. The defendants appealed to the judge holding the courts of the district, etc. The clerk certified the record made by him to the judge, showing that on May 10, 1905, pursuant to notice in the presence of one of plaintiff's attorneys, no one being present representing defendants, he opened and allowed the depositions. The judge held that the notice was insufficient, and reversed the clerk's order. Defendants thereupon moved that the depositions be quashed. This motion was refused. The judge thereupon made an order "allowing the defendants until Thursday morning, in which to file exceptions to said depositions. It is now ordered that the depositions of William Barbour, J. N. Steele, and A. R. Turner, Jr., now on file in the clerk's office of this court, in this case be and are hereby allowed, and said depositions are adjudged to be legal evidence." Defendants excepted. Upon the trial his honor admitted the depositions, and defendants excepted. The exception is based upon the proposition that the notice that the depositions would be opened on a legal holiday was a nullity, and that the action of the clerk was invalid. The learned counsel, who argued this exception, based the conclusion to which he invited the court, upon the proposition that a legal holiday has the same status in respect to legal proceedings as Sunday. If he is correct in this, the conclusion is irresistible that the deposition could not lawfully be opened on May 10th, being a legal holiday. Revisal 1905, § 2838

This court held, in Sloan v. Williford, 25 N. C. 307, that a deposition taken on Sunday should be rejected. Without pursuing the discussion as to whether the deposition could be lawfully opened on Sunday, it is sufficient to say that a legal holiday is not, in this respect, dies non juridicus. The statute simply declares that May 10th, and other days named, are "public holidays." In Glenn v. Eddy, 51 N. J. Law, 255, 17 Atl. 145, 14 Am. St. Rep. 684, Magie, J., discussing the question, says: "The statutory declaration that these days shall be legal holidays does not indicate an intent to assimilate their status to that of Sunday. 'Holiday' in its present conventional meaning is scarcely applicable to Sunday. * * * When the statute declares them to be legal holidays, it does not permit a reference to the legal status of Sunday to discover its meaning." The universally accepted principle is that what the statute fails to prohibit may be done. Page v. Shainwald, 169 N. Y. 246, 62 N. E. 356, 57 L. R. A. 173; 21 Cyc. 442. If defendant's contention is correct, that they could not be compelled to attend on May 10th, the statute provides that they would have been entitled to file exceptions and have a hearing on the next succeeding day. They failed to attend on either day. We find nothing in the statute prohibiting the opening of depositions on legal holidays, and we would not be justified in writing it therein. It is well known that the courts of this state frequently sit and transact business on the several public holidays. It appears that defendant's counsel were present and cross-examined the witnesses. Again, Judge Justice in passing upon the appeal from the clerk, gave the defendants time and opportunity to file exceptions. We are of the opinion that his honor properly allowed the depositions to be read. The defendants noted an exception to the order of Judge Allen permitting the Electric & Power Co. to file an answer. This answer was filed at September term, 1904. It seems that Col. Barbour was the owner of a majority of the stock of the Electric & Power Co., and that A. R. Turner, Jr., was elected its president succeeding W. J. Hooper. The corporation was made party defendant in this action, and if it had any existence, we can see no good reason why it should not file an answer. Of course its answer did not affect defendants' rights. The case was brought and tried upon the theory that the Catawba Electric & Power Co. was a going concern—an existing corporate entity. If this is correct, it is not easy to see how Alceas Hooper and the other defendants were in a position to litigate the counterclaim. If Hooper, as president, had fraudulently disposed of the property of the corporation to Barbour, it was the duty of the officers of the corporation to sue for and recover it for the benefit of its creditors. If they refused to do so, the creditors may, upon proper allegation and proof, have had a receiver appointed who would sue for the property and bring it into court to be applied to the debts. It is evident from the answer of Turner, president, that new and antagonistic forces had come into control of the corporation. The Hooper interest was supplanted. We think, by virtue of sections 697 and 698 of the Code of 1883, then in force, the sale of the property, franchises, etc., of the Catawba Electric & Power Co., under the decree of the court, dissolved the corporation. If, during its existence, its officers had fraudulently or unlawfully disposed of any of its property, the creditors were entitled to have a receiver appointed to sue for and recover such property. Coal & Ice Co. v. R. R., 144 N. C. 732, 57 S. E. 444. The parties having litigated all of the questions which would be open to a receiver, and the cause having, at much expense, been tried upon its merits, we have discussed and decided the questions presented upon the record, and only call attention to the effect of the statute to show that we have not overlooked it. It is evident that the controversy involves valuable property rights, upon which industrial development is dependent.

After a careful examination of the record, aided by full and exhaustive briefs, we find no reversible error. It must be so certified.

No error.

WALKER, J., did not sit.

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(146 N. C. 366)

## HOLSTEIN et ux. v. PHILLIPS & SIMS.

(Supreme Court of North Carolina. Dec. 14, 1907.)

1. INNKEEPERS—PROPERTY OF GUEST—LOSS—COMMON-LAW LIABILITY.

An innkeeper, at common law, is liable as an insurer for the loss of goods and money of the guest when placed infra hospitium, and which he has with him for the purposes of the journey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, §§ 17–30.]

2. SAME — LIABILITY OF BOARDING HOUSE KEEPER.

The keeper of a boarding house—that is, one who reserves the right to select and choose his patrons, and takes them in only by special arrangement, and usually for a definite time—is not responsible for the goods of the boarder as an insurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, § 21.]

3. SAME—GUEST AS BOARDER.

A guest in a hotel, who holds the position of a regular boarder or lodger, can only hold the proprietor liable to the exercise of ordinary care on the part of himself and his employés as to the goods and money of the guest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, § 20.]

4. SAME—"INN" DEFINED.

An "inn," or "hotel," is a public house of entertainment for all who choose to visit it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, §§ 3–5.

For other definitions, see Words and Phrases, vol. 4, pp. 3624–3626.]

5. SAME—"GUEST" DEFINED.

A "guest" is a transient person, who resorts to and is received at the inn for the purpose of obtaining accommodations which it purports to afford.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, §§ 12–13.

For other definitions, see Words and Phrases, vol. 4, pp. 3188–3191; vol. 8, p. 7676.]

6. SAME—"BOARDER" DEFINED.

A "boarder" is distinguished from a guest as one who abides at a place; the relation arising by special contract, and usually for a definite time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, §§ 12–13.

For other definitions, see Words and Phrases, vol. 1, pp. 814, 815.]

7. SAME—SUMMER RESORT—STATUTORY PROVISIONS.

A woman came to a summer resort from another state, and entered into an agreement with the "proprietors of the Imperial Hotel," running a general hotel business during the summer as a summer resort, that she would stop there at $10 per week (a reduced rate); no definite time being fixed. *Held*, that the relation of innkeeper and guest was created, so that the hotel was liable as insurer for the loss of money and jewelry stolen from a trunk in the guest's room during her temporary absence, the keys of the room being either in her possession or in the possession of the clerk all the time she was away from the room, since, under the express provisions of Revisal 1905, § 1913, by a failure of the innkeeper to comply with its provisions as to the posting of notices of the provisions of the chapter in the hotel office and rooms, the rule of the common law applied.

Appeal from Superior Court, Henderson County; Guion, Judge.

Action for loss of goods and jewelry at a hotel by J. D. Holstein and wife against Phillips & Sims. From a judgment for plaintiffs on an agreed statement of facts, defendants appeal. Affirmed.

Civil action, tried on appeal from a justice's court, before his honor, Guion, J., at May term, 1907, of the superior court of Henderson county.

A jury trial having been formally waived, the facts were agreed upon, and it was made to appear: "That in 1905 the defendants were the proprietors of the Imperial Hotel, where they were running a general public hotel business during the summer as a summer resort, under the firm name of Phillips & Sims. While they were so engaged, the feme plaintiff stopped at said hotel under the facts, circumstances, and conditions as set out in her testimony and the testimony of her husband, and it is agreed that the entire facts in controversy are as set out in the following depositions, which are admitted by the defendants to be true: 'That on or about the 9th day of August last, I was stopping at the Imperial Hotel, in the town of Hendersonville, N. C., in room No. 63. I had been previous to that time in room No. 106, but a few days before the robbery occurred I moved to room No. 63. On the evening of the 9th day of August, 1905, just before supper time, I put my purse in my hand satchel, the said purse containing $6 in money, being a $5 bill and a silver dollar. There was also in the purse New York Exchange for $30, payable to my order. There was nothing else in the purse of any value. After placing the purse in the hand satchel, I placed the hand satchel in the tray of my trunk in room No. 63 in the Imperial Hotel at Hendersonville, N. C. There was also a jewelry case in the tray of the trunk by the hand satchel, then and there, and the jewelry case contained several valuable pieces of jewelry, and among others one diamond ring, consisting of a cluster of 13 diamonds arranged in the shape of a diamond. With these things in the trunk, I shut the trunk, locked it, then went out of the room No. 63, and locked the door to it, taking the room key and the trunk key, which I had attached together on a key ring and chain, went downstairs, and went to the office of the hotel and delivered the said keys, ring, and chain to Mr. H. G. Lawrence, the night clerk then and there in charge of the office of the said hotel, who took charge of the keys. I then went into the dining room, ate supper, stayed in the dining room about one-half an hour, and went from there to the front porch, stayed out there until about 9 o'clock, then went to the office, called for my keys, which were delivered to me by the said Mr. H. G. Lawrence. I then went back to my room on a small errand, and came back downstairs, locking the door after me, and bringing the same keys, including the trunk and door keys, in my hand down into the ballroom, where I remained until about half past 10 o'clock, holding the keys in my hand all the time. I did not participate in the dancing, but remained in my seat as a spectator, and never for one moment parting with the possession of my keys, since receiving them from the clerk. After leaving the ballroom, I went back to my room about half past 10 o'clock to retire. I unlocked the door, which I found locked. I then undressed, after having taken the keys from out the door on the outside, and putting the door key in the lock on the inside of my room, locking the same. Just before retiring, I opened my trunk, which I found locked just as I had left it locked, in order to get the valuables to put under my pillow. I then discovered that my purse had been stolen from the trunk, containing the $6 and the New York Exchange. I then looked into the jewelry case, and found the said diamond ring above described had been stolen and taken away from said trunk and room. * * * I never received any notice from any source, and saw no notice, for me to place my valuables in the safe or elsewhere for safe-keeping, until after the loss of my property, when Mr. Phillips informed me of the existence of such notice on the register, when I had informed him of his liability, which was some time after I had informed him of the loss.'" On cross-examination, the witness said: "That, when she first reached the hotel, Mr. Phillips, one of the defendants, agreed to board her at $10 per week, and

she was to stay two or three weeks; but that no agreement was made for any particular time, and after the robbery the witness moved to another place. That witness never deposited any money or valuables in the office of the hotel before the robbery, and was not aware of the fact that it was her duty to do so, and witness never saw any card in the room or elsewhere, giving notice that this was required, and never said so to defendants, or any other persons. It was not shown that any copy of the statute regulating the liability of innkeepers was posted in the plaintiff's room, or elsewhere in the hotel. Revisal 1905, c. 42. There was an agreement to the effect that, in case defendants were liable for plaintiff's loss, judgment should be entered for $141, with interest from September 15, 1905. On the facts stated, the court, being of opinion with plaintiffs, rendered judgment for the amount agreed upon, and defendant excepted and appealed.

Chas. French Toms, for appellants. Smith & Schenck, for appellees.

HOKE, J. The decisions of this state are to the effect that, in the absence of statutory regulation, the keeper of a public inn, or hotel, which is the modern and more frequently used term, is responsible to his guest for the safety of the latter's goods, chattels, and money, when placed infra hospitium, and which he has with him for the purposes of his journey. The proprietor is held to be an insurer to the extent that he must make good to the guest all loss or damage arising from any cause, except the act of God or the public enemy, or the fault of the guest himself, or his agents or servants. Quinton v. Courtney, 2 N. C. 40; Neal v. Wilcox, 49 N. C. 146, 67 Am. Dec. 266. This exacting requirement of the common law, established in a ruder time from reasons of public policy, in many instances and under modern conditions, may operate with great harshness, and the matter has been very generally made the subject of legislation, by which the landlord's obligations have been limited, both in kind and amount. It is so with us. Revisal 1905, c. 42, § 1909 et seq. The statute, however (section 1913), itself provides as follows: "Every innkeeper shall keep posted in every room of his house occupied by guests, and in the office, a printed copy of this chapter and of all regulations relating to the conduct of guests. This chapter shall not apply to innkeepers, or their guests, where the innkeeper fails to keep such notices posted." This provision not having been complied with by defendant, the principle of the common law obtains, and if, on the facts agreed, the relation between these parties was that of guest and proprietors of a public inn or hotel, defendants are responsible for the loss of the goods.

The counsel for defendants, in his learned argument, contended: That the principle stated does not apply to the facts presented here, because, as he insists, they show that his clients were not at the time proprietors of a public inn, but were the keepers of a boarding house at a summer resort; second, that if this were not true, the plaintiff's position, at the time of the loss, was not that of guest, but a boarder. And he argues that in either case defendants could only be held responsible for the loss of goods occasioned by the negligence of defendants or their employés, and, no such negligence having been shown or suggested, the recovery had by plaintiff cannot be sustained. The doctrine is sound. The keeper of a boarding house—that is, one who reserves the right to select and choose his patrons, and takes them in only by special arrangement, and usually for a definite time—is not responsible as an insurer, and even at a public inn or hotel one who holds the position as a regular boarder or lodger can only hold the proprietor to the exercise of ordinary care on the part of himself and his employés. But we are of opinion that the facts do not bring the present case within the principle. An "inn" or "hotel" has been properly defined as a public house of entertainment for all who choose to visit it. It is this publicly holding a place out as one where all transient persons, who may choose to come, will be received as guests for compensation, that is made the principal distinction between a hotel and a boarding house, in many well-considered decisions, and the above definition is given, with approval, in Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657, and Walling v. Porter, 35 Conn. 183; both cases citing the decision of Wintermunte v. Clark, 5 Saunders, 247.

We think the facts in the case agreed bring the defendant's house clearly within the definition. It is so stated, in express terms: "That defendants were proprietors of the Imperial Hotel, where they were running a general hotel business, during the summer as a summer resort." And the attendant circumstances support this statement and show, too, that being a hotel for the general reception and entertainment of all who might choose to come, the position of plaintiff, at the time, was that of guest, giving her the right, unless the statute on the subject had been complied with, to hold defendants as insurers. A "guest" is defined as a "transient person who resorts to and is received at an inn for the purpose of obtaining the accommodations which it purports to afford." Whereas, a "boarder," in reference to the distinction we are discussing, is one who abides at a place. The term carries with it the idea of residence, and partaking to some extent of the nature of one's home for the time being. The relation arises by special contract, and usually for a definite time. Thus, in 16 Amer. & Eng. Ency. (2d Ed.) it is said: "The essential difference between a boarder and a guest at an inn lies in the character in which the party comes—

that is, whether he is a transient person or not—and, accordingly, one who stops at an inn as a transient is a guest, with all the rights, privileges, and liberties incident to that station. On the other hand, one who seeks accommodation with a view to permanency as to make the place his home for the time being is not a guest, but a boarder. The length of his stay, however, is not of itself ordinarily decisive, for he will continue to be a guest as long as he remains in the transitory condition of that relation." An application of these definitions to the facts will clearly establish, as heretofore stated, that the position of feme plaintiff, on this occasion, was that of guest. She came to the hotel from her home in South Carolina for a short stay, she was a stranger to the parties defendant, and entered as a guest so far as appears, without any prearrangement as to terms or time, but on the implied invitation held out to the public generally. She was there for no definite time, and in our opinion she was transient in every sense of the term, and within every reason that gave her the right to the protection on which she insists. And, where this is true, all the authorities, certainly those having the better reason, are to the effect that the mere fact that she was to pay board by the week, or even at a reduced rate, does not alter her position as guest, or deprive her of the right to hold defendants as insurers. Fay v. Improvement Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; Beale v. Posey, 72 Ala. 323.

These facts are entirely different from those which appear in Meacham v. Galloway, 102 Tenn. 415, 52 S. W. 859, 46 L. R. A. 319, 73 Am. St. Rep. 886, an authority much relied upon by defendants. In that case, McAllester, J., delivering the opinion of the court, thus stated the facts regarded as essential, upon which the ruling was predicated: "(1) Plaintiff was a neighbor. (2) He came at a fixed rate. (3) He came for a definite time"—and specified that he should be located with the families who were regular boarders, and not as transient. And, further on in the opinion, the judge quoted with approval from Horner v. Harvey, 3 N. M. (Johns.) 197, 5 Pac. 329: "When he ceases to be a traveler, or a transient, or a wayfaring man, and takes up a permanent abode, even in an inn, he ceases to be an object of the laws special solicitude, and is no longer a guest, but a boarder; no longer a traveler, but a citizen." As we interpret this authority, it is not in conflict with the decision we make in the case before us. And the same may be said in regard to the case in our own court of Neal v. Wilcox, supra, some citations from which case are made by counsel as militating against plaintiff's right to recover. That decision involved the question as to whether mules in a drove could be considered as goods and chattels of a guest infra hospitium, and so entitled to the protection belonging to such property. The eminent judge placed his decision on correct grounds, and the comments in his opinion, cited by counsel, are not relevant to any facts existent here. And so as to the doctrine sometimes stated in general terms, and referred to by defendant in support of his position, that the common-law obligation of landlord does not apply to keepers of hotels at summer resorts and watering places. This general statement is a deduction from decisions on facts widely varying from those presented here.

In Bonner v. Welborn, 7 Ga. 307, this being one of the decisions relied on to support the position, Nesbitt, Judge, delivering the opinion, defining an "inn," thus refers to the facts of the case before the court: "Now, under this (it is submitted) correct legal view of innkeepers, was the plaintiff in this case, an innkeeper? Was that his business? His business was to rent his houses to families or persons who might contract with him for their occupancy. They are not his guests. They are, beyond dispute, his tenants, and he their landlord. His business was to furnish board, lodging, and attention. But to whom? To the wayfaring world? No. But to persons who might resort to his healthful fountains and salubrious locality, for a season; that is, for the fall and summer months. They were not his guests for a day, or night, or week, but his lodgers or boarders for a season." Thus, it will be seen that this doctrine insisted on by defendants, in reference to keepers of hotels at summer resorts and watering places, applies only to boarding houses proper at such places, and exists by reason of the fact that the persons received were taken by express arrangement for entertainment and at a certain rate, and usually for a protracted stay, and does not, and was never intended to, apply to one who conducted, as in this instance, a general hotel business. Such a house of public entertainment does not lose its character as such by reason of its being located either at a summer resort or a watering place. The views we have expressed, and which we hold to be controlling, will be found approved and sustained in well-considered decisions of other courts of supreme jurisdiction. Washington v. Johnston, 4 Wash. 593, 30 Pac. 672; Beale v. Posey, 72 Ala. 323, supra; Hall v. Pike, 100 Mass. 495; Norcross v. Norcross, 53 Me. 163; Hancock v. Rand, 94 N. Y. 1, 46 Am. Rep. 112; Pullman Car Co. v. Lowe, 28 Neb. 239, 44 N. W. 226, reported also in 6 L. R. A. 809, 26 Am. St. Rep. 325, and generally in 16 Amer. & Eng. Ency., supra; 22 Cyc. 1069 et seq.; Beale on Hotels & Innkeepers, etc. These authorities are decisive against the defendants' position, and establish that the judge below made a correct ruling in holding that defendants were responsible for plaintiffs' loss.

There is no error, and the judgment of the court below for the amount agreed is affirmed.

Affirmed.

(146 N. C. 414)

## WEAVER et al. v. LOVE.

(Supreme Court of North Carolina. Dec. 14, 1907.)

1. TRIAL — INSTRUCTIONS — APPLICABILITY TO EVIDENCE.

In an action to quiet title to land, claimed by defendant by adverse possession under color of title of a grant from the state, regular on its face, obtained under Revisal 1905, § 1692, authorizing residents and citizens to enter upon lands of the state, an instruction that limitations would not run against the plaintiff as defendant has been ever since he obtained his grant a nonresident, is properly refused, where the only evidence as to nonresidence is defendant's own evidence that he lives now in Tennessee, and that he came into the state to remove timber, etc., as the burden of proof is on one attacking the grant to show facts not appearing on its face.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

2. ADVERSE POSSESSION—POSSESSION OF CO-TENANT.

Where land is claimed by the adverse possession of tenants in common claiming under a grant under Revisal 1905, § 1692, authorizing the entry of lands by residents and citizens, the fact that one tenant is a nonresident is immaterial where the other tenant is a resident; the possession of one tenant in common being the possession of both.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 116.]

3. ADVERSE POSSESSION—DEFENSES.

Where, in an action to quiet title to land claimed by defendants by adverse possession under a grant obtained by the entry of lands of the state under Revisal 1905, § 1692, authorizing residents and citizens to enter state land, the evidence shows that the land was occupied by an unbroken line of tenants, it is no answer to defendant's claim of adverse possession that the grantee was a nonresident, since the plaintiff could have taken action to turn the tenants out and stopped the running of limitations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 435.]

4. ADVERSE POSSESSION — COLOR OF TITLE — GRANT FROM STATE.

Though a grant from the state covers the same land included in an older grant, yet, title being no longer in the state, the junior grant is nevertheless color of title which will ripen into complete title by adverse possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, § 435.]

5. SAME—STATUTES—CONSTRUCTION—RETROACTIVE OPERATION.

Revisal 1905, § 1699, providing that a junior grant shall not be color of title so far as it covers land previously granted, under the express terms of that section, does not apply to grants issued before March 6, 1893.

Walker and Connor, JJ., dissenting.

Appeal from Superior Court, Yancey County; Guion, Judge.

Action to quiet title by W. T. Weaver and others against I. R. Love and another. From a decree for defendants, plaintiff appeals. No error.

The grant to defendants was obtained under Revisal 1905, § 1692, authorizing bona fide residents and citizens to enter upon lands of the state.

Adams & Adams, E. F. Watson, and G. E. Gardner, for appellants. H. B. Carter and W. R. Whitson, for appellee.

CLARK, C. J. Action to remove cloud on title and for damages for trespass in cutting timber and asking an injunction. The defendants plead seisin and title in themselves. The plaintiffs claim under a grant issued in 1796, and a chain of title from that source. The defendants, J. W. Higgins and I. R. Love, claim under a grant to themselves February 3, 1891, and continuous adverse possession thereunder for seven years by building houses thereon, and cutting timber and also by tenants occupying the houses and cultivating land. The court instructed the jury, at plaintiff's request, that the cutting timber from time to time would not constitute possession to ripen title, and that the statute would not bar minors and those under the disability of coverture. This action was begun January 5, 1906, less than seven years after the repeal of the suspension of the statute as to married woman. Chapter 78, p. 209, Pub. Laws 1899. Besides, the defendants are not appealing.

The court properly refused the plaintiff's prayer "that, according to the undisputed evidence, * * * the defendant Love has been a resident of the state of Tennessee (ever since the grant issued to defendants), and therefore the statute of limitations has never run against the plaintiff in favor of the defendant Love, and he is not the owner of any land mentioned in the answer." The burden was on the plaintiff to attack the grant for anything not appearing upon its face. Dosh v. Lumber Co., 128 N. C. 87, 38 S. E. 284. The only evidence of Love's nonresidence is his own evidence that he lives now in Tennessee, and that, when he comes over to cut, he has stayed on the land several months at a time and gotten timber. He testifies to having houses built and his keeping them continuously rented, and says that for the past 10, 12, or 15 years he has used the land as his own, and for the only purpose it is good for, that he has had tenants on the land continuously for 10 years, etc. There is no "undisputed evidence" that Love was a "nonresident" at the time when the grant issued in 1891, and the court could not so charge. Besides, there is no evidence whatever that Higgins was a nonresident, and the possession of one tenant in common is the possession of both. Tenants put there by Love held possession equally for Higgins. Furthermore, the evidence, if believed, is that from 1891 there has been an unbroken succession of tenants living on the land. The plaintiffs could have taken action to turn these out, whether Love was a resident or not, and his claim of adverse possession could not have ripened into title. The grant of 1891, if covered by the grant of 1796, conveyed no title, but it was color of title, and, the title being out of the state by plaintiff's grant (Gilchrist v. Middleton, 107 N. C. 679, 12 S. E. 85), the seven years' notorious, open, and adverse possession by the defendants ripened their color of title, except as to those

of plaintiffs protected by coverture or infancy (Asbury v. Fair, 111 N. C. 251, 16 S. E. 467). Revisal 1905, § 1699, providing that a junior grant shall not be color of title so far as it covers land previously granted, applies by the terms of that section only to grants issued since March 6, 1893. The defendants' grant was issued February 8, 1891.

No error.

WALKER, J. (dissenting). I am of the opinion that, upon the facts of this case, as I understand them, it being an action to remove a cloud from the title, the plaintiff's cause of action is not defeated by the statute of limitations or by any adverse possession sufficient to bar their right of entry.

CONNOR, J., concurs in this dissent.

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(146 N. C. 340)

## WHITE v. SOUTHERN RY. CO. et al.

(Supreme Court of North Carolina. Dec. 11, 1907.)

1. TORTS—JOINT LIABILITY—PLEADING.

In an action against a railway company and two of its section masters for causing the death of a flagman, the complaint charged that it was the duty of the railway company to keep its tracks and right of way in reasonably safe condition by the exercise of proper care, that it failed to do so, and by reason thereof plaintiff's intestate was at a certain place struck by a tunnel warner, which by the negligence of the defendants had been placed too near the track, so as to endanger the intestate and other employés, that the section masters were employés of the defendant railway company, had charge of the section in which the pole was placed, and as such were charged with the duty of placing and keeping the pole in proper position which duty they neglected, and that the joint negligence of defendants caused the intestate's death. *Held*, that the complaint clearly charged a joint tort.

2. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

A plaintiff may sue tort-feasors jointly or severally, and, if he elects to sue them jointly, he has the right to have the case tried as for a joint tort, and no separable controversy is presented within the removal act (Act March 3, 1875, c. 137, § 2, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509]).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 97.]

Appeal from Superior Court, Buncombe County; Cooke, Judge.

Action by Alice L. White against the Southern Railway Company and others. From an order removing the case to the federal court, plaintiff appeals. Reversed.

The plaintiff brings this action, and alleges that her intestate was killed by the negligence of the defendant Southern Railway Company and its codefendants, D. H. Biddix and S. E. Berry; that it was the duty of the defendant Southern Railway Company to keep its track and right of way in reasonably safe condition by the exercise of proper care, and this it failed to do, and that, by reason thereof, the plaintiff's intestate, who was at the time of his death in the employ of the defendant as flagman and in the careful discharge of his duties on one of the passenger trains of the defendant railway company, was struck by a "post or pole," commonly called a "tunnel warner," which was standing at the west end of "Point Tunnel," near the town of Old Fort, and which by the negligence of the defendants had been placed too near the track, so that it was dangerous to the plaintiff's intestate and other employés of the said company while in the proper performance of their duties; that the defendants D. H. Biddix and S. E. Berry were section masters in the employ of the defendant railroad company, and had charge, at the time of the intestate's death, of the section within which the said pole was placed, and they were, as such section masters, charged with the duty of placing and keeping the pole in proper position, which duty they neglected. It is charged that the joint negligence of the defendants caused the intestate's death. The defendant Southern Railway Company filed a petition for the removal of the case into the Circuit Court of the United States for the Western District of North Carolina, and filed a sufficient bond for that purpose. The petitioner, after making the formal allegation as to diverse citizenship as between it and the plaintiff, alleges that the defendants D. H. Biddix and S. E. Berry were improperly joined as defendants, as they are not necessary or proper parties to the action; that it is perfectly solvent and fully able to pay any judgment recovered in the action; and that its codefendants were wrongfully and unlawfully joined with it as defendants for the fraudulent purpose of preventing a removal of the cause by it to the federal court, and it further alleges that, even if its codefendants are necessary or proper parties, there is a separable controversy as between the plaintiff and the petitioner which entitles it to the removal. No answer was filed. It appears that the petition for a removal of the case to the federal court was filed before the complaint. The court upon the complaint and petition ordered the cause to be removed into the Circuit Court of the United States. The plaintiff excepted and appealed.

Frank Carter and H. C. Chidester, for appellant. Moore & Rollins, for appellees.

WALKER, J. (after stating the facts as above). This case is governed by the principles stated in Hough v. Railway (at the last term) 144 N. C. 692, 57 S. E. 469. The only difference between the two cases is to be found in the fact that the complaint in this case states with clearness and precision a cause of action against the defendants for a joint tort, and specifically alleges in what the negligence which caused the death of the intestate consists. A plaintiff, as we decided in that case, may sue tort-feasors jointly or severally, at his election, and, if he elects to sue them jointly, he has the right to have

the case tried as for a joint tort, and no separable controversy is presented within the meaning of the removal act (Act March 3, 1875, c. 137, § 2, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509]). In Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331, the court said: "There is here, according to the complaint, but a single cause of action, and that is the alleged malicious prosecution of the plaintiffs by all the defendants acting in concert. The cause of action is several as well as joint, and the plaintiffs might have sued each defendant separately or all jointly. It was for the plaintiffs to elect which course to pursue. They did elect to proceed against all jointly; and to this the defendants are not permitted to object. The fact that a judgment in the action may be rendered against a part of the defendants only does not divide a joint action in tort into separate parts, any more than it does a joint action on contract." The cases sustaining this view are all cited in Hough v. Railway, supra, and it is not necessary to prolong the discussion of the question. The order of his honor was made on April 24, 1907, and the decision in Hough v. Railway was not published until May 27, 1907. The court did not, therefore, have that case before it when the order in this case was made. We then decided that a case of a joint tort was not removable.

Reversed.

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(146 N. C. 356)

## WHARTON v. CITY OF GREENSBORO.

(Supreme Court of North Carolina. Dec. 14, 1907.)

1. MUNICIPAL CORPORATIONS—PUBLIC DEBT—POWER TO CONTRACT — STATUTORY PROVISIONS—REPEAL.

The amended charter of Greensboro, enacted by the General Assembly of 1907 (section 100), provides that the board of aldermen may issue bonds only after they have passed an ordinance by a three-fourths vote of the entire board at two separate regular meetings, and submitted the question to the vote of the people, etc. By an amendment to the section, adopted at the same session, the board should not have the power to create any indebtedness unless authorized to do so by an election called in a specified manner, provided that nothing therein contained should be construed to prevent or forbid the board to incur reasonable liabilities, which might be discharged out of current revenues, etc. Revisal 1905, § 2977, prohibits any city from contracting any debt for special purposes exceeding in the aggregate 10 per cent. of the assessed valuation of the property therein. *Held*, that the statutes are not inconsistent, and the limitations of the general law were not repealed by the charter provision.

2. SAME—ABRIDGMENT OF POWER—AUTHORITY OF LEGISLATURE.

Municipal corporations are but instrumentalities of the state for the administration of local government, and their powers may be enlarged, abridged, or entirely withdrawn, at the pleasure of the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 156.]

3. SAME — CONSTITUTIONAL AND STATUTORY PROVISIONS—CONFLICT.

Const. N. C. art. 7, § 7, providing that no municipal corporation shall contract any debt except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein, does not conflict with the limitation imposed by Revisal 1905, § 2977, providing that municipal corporations shall not contract any debt for the construction of railroads or the support and maintenance of internal improvements, or for any special purpose whatsoever, to an extent exceeding 10 per cent. of the assessed valuation of the property therein.

4. SAME — ISSUE OF BONDS — FUNDING VALID INDEBTEDNESS.

Bonds issued by the board of aldermen of a city, to fund a floating debt contracted for legitimate necessary expenses of the city government, are not issued for a special purpose, within the meaning of Revisal 1905, § 2977, prohibiting a city from contracting any debt, etc., for any special purpose to an extent exceeding 10 per cent. of the assessed valuation of the property therein, and are valid notwithstanding Const. N. C. art. 7, § 7, prohibiting municipal corporations from contracting debts except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1905.]

Appeal from Superior Court, Guilford County; Long, Judge.

Action by H. W. Wharton against the city of Greensboro to enjoin the issue of bonds. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

A. M. Scales, for appellant. Thos. J. Shaw, for appellee.

BROWN, J. The allegations of fact set out in the complaint are all admitted by the answer, and from these it appears that the bonded indebtedness of the city of Greensboro, exclusive of the proposed issue, is $700,000; in addition to a floating indebtedness of $125,000; that the present assessed tax valuation of all real and personal property within said city is $7,736,490; that at the time of the election authorizing the issue of bonds the total tax valuation was $6,500,000. It appears that the board of aldermen, on December 28, 1906, passed an ordinance in the manner required by the city charter, authorizing the issue of $30,000 of bonds for the special purpose of "equipping, altering and furnishing a school building or buildings for the city." This bond issue was duly approved by a majority of the qualified voters at an election held March 12, 1907. On July 13, 1907, the board duly adopted an ordinance authorizing the issue of $125,000 in bonds, which issue was duly approved at an election held according to law on October 8, 1907. It is admitted that the purpose of issuing the $125,000 in bonds is to pay off the floating debt of the city. This floating debt, it is admitted, is evidenced by notes issued by the board without an election, for the building of streets, improvement of waterworks already owned by the city, and other actually necessary expenses of running the municipal government. It is admitted that the proposed issue of bonds exceeds the limit fixed by law upon the cities and towns of the state as embodied in the Revisal of 1905, which reads as follows: "Sec. 2977. Limited to ten per cent.

of assessed values. It shall be unlawful for any city or town to contract any debt, pledge its faith or loan its credit for the construction of railroads, the support or maintenance of internal improvements or for any special purpose whatsoever, to an extent exceeding in the aggregate ten per cent. of the assessed valuation of the real and personal property situated in such city or town."

The defendant contends that its amended charter, enacted by the General Assembly of 1907, repeals by implication the above restriction upon its power to contract debts, and the following clauses in said charter are cited as sustaining defendant's contention: "Sec. 100. That among the powers hereby conferred on the board of aldermen, they may issue bonds only after they have passed an ordinance by a three-fourths vote of the entire board, at two separate regular meetings, submitting the question of issuing the bonds to a vote of the people, and a majority of the qualified registered voters have voted in favor thereof; thirty days' notice shall be given of such election in some newspaper published in Greensboro, at which election those who favor creating the debt shall vote 'Approved' and those who oppose it shall vote 'Not approved.'" The above section was amended at the same session by adding the following: "The said board shall not have power to create any indebtedness unless authorized to do so, by an election called and held in the manner hereinbefore specified, provided that nothing herein contained shall be so construed as to prevent or forbid said board to incur reasonable liabilities by way of contract, which may be paid off and discharged out of the current revenues to accrue during the term of office of said board, or to borrow reasonable sums of money, when necessary to anticipate the collection of taxes or the revenues to accrue during the said term of office as aforesaid."

1. We will consider first the $30,000 bond issue to be devoted to a special purpose, admittedly not a necessary municipal expense. We are unable to agree with the learned counsel for the defendant that the sections of the defendant's charter quoted herein, and enacted two years after the Revisal, repeals the latter so far as the defendant is concerned. It is not contended that it does so in express terms, but only by implication. We fail to find any repugnancy between the general law and the defendant's charter. The two statutes are entirely consistent, and may easily stand together. Simonton v. Lanier, 71 N. C. 498; State v. Railway, 141 N. C. 853, 54 S. E. 294. Section 2977 of the Revisal is a general law of great wisdom, intended to prevent municipal corporations from plunging headlong into debt. The sections quoted from the charter do not confer an unlimited power to contract debts upon the defendant, but prescribe the method to be pursued. The limitation imposed by the general law is still binding upon the defendant so far as indebtedness contracted for a special purpose is concerned. A special purpose, within the meaning of the act, embraces all forms of debt not within the legitimate necessary expenses of the municipality. There can be no doubt that the General Assembly may thus restrict the powers of municipal corporations to contract debts. They are but instrumentalities of the state for the administration of local government, and their powers may be enlarged, abridged, or withdrawn, entirely at the pleasure of the Legislature. Lilly v. Taylor, 88 N. C. 490; Jones v. Commissioners, 137 N. C. 592, 50 S. E. 291. In the well-considered opinion of Mr. Justice Hoke, in the latter case, the authorities are collated, and the powers and duties of municipal corporations fully discussed. Article 7, § 7, of the Constitution does not conflict with the limitation imposed by section 2977 of the Revisal. The former is itself in the nature of a limitation upon the powers of municipal corporations to contract debts, except for necessary expenses, and does not confer upon them the right to contract debts ad libitum, independent of the supervisory power and control of the General Assembly. Broadnax v. Groom, 64 N. C. 249; Jones v. Commissioners, supra.

2. As to the issue of bonds to pay the floating debt of the city, a different question is presented. It is admitted that the floating debt was contracted for the legitimate necessary expenses of the city government. Issuing bonds to pay it is but exchanging one form of indebtedness for another, and is but an extension of the indebtedness at possibly a lower rate of interest. These bonds are not issued for a special purpose, within the meaning of section 2977 of the Revisal, but to pay off and discharge a present valid indebtedness of the city contracted to pay its necessary expenses, as the board was empowered to do by section 7, art. 7, of the Constitution. Broadnax v. Groom, supra; Fawcett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825; Wilson v. Commissioners, 74 N. C. 748; Tucker v. Commissioners, 75 N. C. 274. We are of opinion that this issue is valid.

The cause is remanded; that an injunction may be granted enjoining the issue of the $30,000 in bonds mentioned in the first section of this opinion. Let the costs be equally divided between the appellant and appellee.

Error.

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(146 N. C. 385)

## BOWEN v. HARRIS et al.

(Supreme Court of North Carolina. Dec. 18, 1907.)

1. REPLEVIN — PARTIES — POSSESSION OF DEFENDANT.

An action to recover possession of personal property lies only against one in possession of the property at the time the suit is instituted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 81.]

2. JUDGMENT—MERGER AND BAR—SPLITTING CAUSE OF ACTION.

After obtaining possession of property by an action of claim and delivery, plaintiff was entitled to maintain an action for damages, caused by defendant's wrongful detention of his property, though such damages could have been assessed in the first suit.

3. ATTACHMENT — PROPERTY SUBJECT TO — MORTGAGED PROPERTY — POSSESSION OF MORTGAGOR.

In the absence of statutory provisions, the interest of the mortgagee in personal property while the mortgagor remains in possession, having also an interest therein, is not the subject of levy by direct seizure, either under attachment or execution, and hence a person, who, under attachment, seizes property in the possession of the mortgagor for the debt of the mortgagee, without complying with the statutes relating to such seizures, is liable to the mortgagor for damages caused thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 189.]

4. DAMAGES — TORTS — CONSEQUENTIAL DAMAGES.

In a case of pure tort, the wrongdoer is responsible for all the damages directly caused by his misconduct, and for all indirect or consequential damages which are the natural and probable effect of the wrong under the facts as they exist at the time the same is committed, and which damages can be ascertained with a reasonable degree of certainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 55–57.]

5. REPLEVIN — CONSEQUENTIAL DAMAGES — RULE FOR ESTIMATING.

Where, in an action for the wrongful detention of some teams, a wagon, and a lot of feed, for 18 days, which were restored to the owner uninjured, plaintiff established the fact that the seizure of his teams had the necessary effect of interrupting his operations in getting out lumber for a definite time, and that he could, during the time he was wrongfully deprived of his property, have delivered as much as 300,000 feet at a profit of $2 per thousand, and that no other employment was open to him, the profit which he would have obtained except for the detention of the property should be the rule adopted for estimating his loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 305, 306.]

6. SAME.

In an action for damages from an interruption of plaintiff's work in delivering logs, as a result of defendant's wrongful detention of some teams, a wagon, and some feed, plaintiff could not recover for the interruption unless he proved that it was the necessary result of defendant's wrong, under the conditions existing at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 305, 306.]

7. SAME — REDUCING DAMAGES — DUTY OF PLAINTIFF.

In an action for the interruption of plaintiff's work in delivering logs, as a result of defendant's detention of some teams, a wagon, and some feed, plaintiff, on showing that the interruption was a necessary result of defendant's wrong under the conditions existing at the time, could only recover to the extent that it could not have been avoided or diminished by reasonable diligence on his part, under the rule that the injured party must exercise reasonable diligence to lessen the consequences of the injury, and for any loss incident to a failure to use such diligence no recovery can be had.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, §§ 305, 306.]

8. ATTACHMENT—CLAIMS OF THIRD PERSONS—PROPERTY WRONGFULLY ATTACHED.

A person whose property while in his own possession was wrongfully attached as the property of another was entitled to replevy the same from the officer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, § 1069.]

9. REPLEVIN—EXCESSIVE DAMAGES.

In an action for the wrongful detention of some teams, a wagon, and a lot of feed belonging to plaintiff, for a period of 18 days, as a result of which plaintiff's work of delivering logs was interrupted, and certain logs were lost, it was incumbent on plaintiff to show that he could not at once have replevied the property, that he could not in the exercise of reasonable effort have procured other feed, and that the logs which were lost could not have been secured and saved by proper effort on his part, and in the absence of a showing of such facts a verdict for $1,250 was excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 301.]

10. SAME—DIRECT DAMAGES—CONSEQUENTIAL DAMAGES—LOSS OF PROFITS.

In an action for the detention of certain teams and feed belonging to plaintiff, whereby he was unable to deliver certain logs, plaintiff was not entitled to recover damages both for the loss of profits which could have been made while his work was interrupted, and, as direct damages, the value of the use of his teams.

11. SAME—ATTACHMENT—WRONGFUL ATTACHMENT—DAMAGES.

Where, in an action for the wrongful attachment of plaintiff's teams, whereby it was claimed that certain logs were lost, which loss occurred more than 30 days after the seizure, and more than 12 days after the return, of the property to plaintiff, plaintiff did not show that the logs could not have been saved by proper effort on his part, no reasonable or natural connection was shown between the loss of the logs and the seizure of the teams, and hence the loss of the logs should be excluded from the consideration of the jury.

12. APPEAL—PREJUDICIAL ERROR—EFFECT OF VERDICT.

In an action for the wrongful detention of property belonging to plaintiff, the submission to the jury in one part of the charge of a question not presented by the evidence, which question was properly excluded from the jury's consideration in another part of the charge, was prejudicial error, where the amount of the verdict could not have been reached except by consideration of the question erroneously submitted.

13. DAMAGES — SPECULATIVE DAMAGES — ANTICIPATED PROFITS.

Damages, which cannot be established with reasonable certainty, or which are contingent or speculative, cannot be allowed, and anticipated profits in the ordinary sense of the term are usually within the prohibition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 65–68.]

14. SAME — EVIDENCE — SUFFICIENCY — DEGREE OF PROOF.

In proving damages, caused by the wrongful act of another, absolute certainty is not required, but both the cause and probable amount of the loss must be shown with reasonable certainty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 502.]

15. REPLEVIN — CONSEQUENTIAL DAMAGES — LOSS OF PROFITS.

Where, in an action for the wrongful detention of property, whereby plaintiff was interrupted in delivering certain lumber, it was

shown that plaintiff's business was necessarily interrupted for a definite time and to an extent which plaintiff could not have lessened by reasonable effort, and that during such time plaintiff could, with the means at his disposal, have delivered a definite amount of lumber at a certain profit, such loss would be sufficiently certain for consideration, and would be a proper basis for consequential damages.

Appeal from Superior Court, Transylvania County; O. H. Allen, Judge.

Action by J. O. Bowen against C. J. Harris and another for damages from wrongful seizure of property belonging to plaintiff. From a judgment for plaintiff for $1.250, defendants appeal. Reversed, and a new trial ordered.

The cause of action and orders made therein, in reference to amendment of pleadings, are stated in case on appeal, as follows: "The action was originally brought by the plaintiff against defendants, alleging that he was the owner of one team of mules, one team of horses, one four horse wagon, four sets of harness, one car load of cotton seed meal and hulls, and about three hundred poplar logs, of the value of $700. During the progress of the trial, the plaintiff asked to be allowed to amend the first paragraph of his complaint by striking out the words 'three hundred,' and inserting in lieu thereof the words 'eight hundred and forty,' making the said paragraph read, eight hundred and forty poplar logs, instead of three hundred poplar logs. The court in the exercise of its discretion allowed the amendment, to which order the defendants objected and excepted." There was evidence tending to show that defendants, having an account against the Benedict Love Company, sued out an attachment, and had same levied on two mules, two horses, a four horse wagon, some harness, and a lot of feed, as the property of said company, and held same for 18 days; that plaintiff, claiming to own the property, had obtained possession of same before this action was brought. How this was done does not distinctly appear, but by fair intendment it was brought about under order of the court in some former action of claim and delivery against the officer having charge and control of the property. On the issue as to damages, and over the defendants' objection, pointed by exceptions duly noted throughout, there was evidence offered, tending to show that, at the time of the seizure, plaintiff had a contract to deliver logs at the mill of the Benedict Love Company, at the rate of 500,000 feet per month, and was engaged in proper performance of his contract. That he had 65 steers and 75 or 100 hands at a logging camp some miles distant from a railroad station, and the feed was a part of his necessary supplies, and the teams were engaged in hauling the feed to his camp, and he was unable to procure other teams or feed within the period of 18 days specified, and as a result of the seizure his hands became demoralized and left. His steers were necessarily idle during the time and unemployed, and, if his work had not been so interrupted, he could have delivered at the mill, during this period, as much as 300,000 feet of lumber, at a profit of $2 per thousand, and that he had the lumber accessible for the purpose of the contract. Plaintiff was further allowed to state over defendants' objection, and with exceptions duly noted, that he was engaged in building a splash dam to carry the logs to defendants' mill, some distance below on the river, and had deposited seven or eight hundred logs on the river ready to be moved, and that the building of the dam was likewise interrupted, and in about 30 days thereafter, owing to a flood in the river, the logs which had been put in position were washed away and lost, to the value of seven or eight hundred dollars.

Issues were submitted and responded to by the jury, as follows: "First. Was the plaintiff, Bowen, the owner of the personal property described in his complaint, and entitled to the possession thereof? Answer. Yes. Second. Was the property wrongfully taken from the plaintiff's possession by the defendants and wrongfully detained by them? Answer. Yes. Third. What damage has the plaintiff sustained by reason of the wrongful taking and detention of the said property by the defendants? Answer. $1,250."

Exceptions to the charge were also noted, and referred to in the opinion. There was judgment on the verdict for plaintiff, and defendants excepted and appealed.

W. W. Zachary, for appellants. Welch Galloway and Geo. A. Shuford, for appellee.

HOKE, J. (after stating the facts as above). The court was asked to hold that, unless defendant had possession of the property at the time the present action was commenced, plaintiff could not recover. The position is correct as applied to actions brought to recover the possession of the property itself. Such action only lies against the one who has possession of the property at the time the same was instituted. Webb v. Taylor, 80 N. C. 305; Haughton v. Newberry, 69 N. C. 456. While the allegation of the complaint may be broad enough to constitute a demand for the possession, it is evident, from a perusal of the entire pleadings, that the demand was not intended to be for the possession which the plaintiff undoubtedly had when the action was commenced but was to recover damages caused by reason of the wrongful seizure and detention of the property. As heretofore stated, it does not definitely appear how plaintiff reacquired possession of the property, but assuming—and there are statements from some of the witnesses tending to show this—that the possession was restored by means of a former action of claim and de-

livery, while plaintiff could have had his damages assessed in the former action (Revisal of 1905, § 570), the authorities seem to be to the effect that he was not required to take this course, but, after obtaining possession could, in another action, recover damages for the injury done, by the wrongful seizure and detention of his property. Woody v. Jordan, 69 N. C. 189; Asher v. Reigenstein, 105 N. C. 213, 10 S. E. 889.

Again, the court was requested to charge that defendant could not be held liable in the present case, because of the existence, at the time of the seizure, of an unsatisfied mortgage in favor of their debtor, the Benedict Love Company, and against which the attachment had been issued. This prayer for instructions was correctly refused by the court. In the absence of statutory provision, the interest of a mortgagee in personal property, while the mortgagor remains in possession having also an interest therein, is not the subject of levy by direct seizure, either under attachment or execution. Freeman on Executions, §§ 118–184; 20 Amer. and Eng. Ency. 974. The right of the mortgagee in the property, on the facts presented, was simply that of a creditor, and his interest as creditor could only be levied on as directed by provisions of Revisal of 1905, § 767, to be collected and applied under the direction and supervision of the court.

On the issue as to damages, we think there was error. It is well established that, in a "pure tort," the case presented here, the wrongdoer is responsible for all the damages directly caused by his misconduct, and for all indirect or consequential damages, which are the natural and probable effect of the wrong, under the facts as they exist at the time the same is committed, and which damages can be ascertained with a reasonable degree of certainty. Johnson v. Railroad, 140 N. C. 574, 53 S. E. 362; Shark v. Powell, 7 L. R. (1892) 253; 8 Amer. and Eng. Ency. p. 598; Hale on Damages, 34, 35, et seq. This last author, in substance, says: "That a wrongdoer is liable for all damages which are the proximate effect of his wrong, and not for those which are remote." "That direct losses are necessarily proximate, and compensation, therefore, is always recoverable." "That consequential losses are proximate when the natural and probable effect of the wrong." A well-recognized restriction, applying in cases of tort and contract, and as to both elements of damages, is to the effect that the injured party must do what he can in the exercise of reasonable care and diligence to avoid or lessen the consequences of the wrong; and, for any part of the loss incident to such failure, no recovery can be had. This limitation was approved by us in a case of contract, in Tillinghast v. Cotton Mills, 143 N. C. 268, 55 S. E. 621, and directly applied to a case of tort in Railway v. Hardware Co., 143 N. C. 54, 55 S. E. 422. A full consideration of the facts, and the charge of the court, leads us to the conclusion that the defendants have not had the benefit of this limitation in the trial of the present case. A verdict of $1,250 damages for the detention of two mules, two horses, a wagon, and a lot of feed for a period of 18 days, when they were all restored to the owner uninjured, so far as the facts show, is an unusual amount of consequential damages, to be sustained, if at all, only under very exceptional circumstances. We are inclined to the opinion that if plaintiff should establish that the seizure of his teams had the necessary effect of interrupting his operations in getting out lumber for a definite time, and he should show that, the lumber being obtainable and accessible, he could, during the time he was wrongfully deprived of his property, have delivered as much as 300,000 feet of lumber at a profit of $2 per thousand, that this profit is the most definite and satisfactory rule for estimating his loss that could be adopted, on the facts presented, the evidence being to the effect that no other employment was open to them; but such an interruption would only be natural and probable, if it should be established as the necessary result of the defendants' wrong under exceptional conditions existing at the time, and then, only to the extent that it could not have been avoided or diminished by reasonable diligence on the part of plaintiff. There is evidence tending to show that some of the property, the teams and wagon, was replevied from the officer under court proceedings. This was allowable to plaintiff when his property had been wrongfully seized as that of another. Mitchell v. Sims, 124 N. C. 411, 32 S. E. 735. And there is no claim, and no testimony tending to show, that this course could not have been at once taken, all the property replevied, and almost the entire loss claimed by the plaintiff prevented. This was held to be incumbent on the party injured, if same could have been done by reasonable effort, in Railway v. Hardware Co., supra, and we think the defendants were entitled to have this view presented to the jury. Or if the plaintiff, under the circumstances, and in a shorter time, and in the exercise of reasonable effort, could have procured other feed, and have it hauled by ox carts and other means, he should have taken this, if a reasonable and prudent course by which his loss could have been reduced. And it may be well here to note that, if the jury should award plaintiff damages on the basis of the profit he could have made during the time his work was necessarily interrupted, he should not have, in addition, the direct damage arising from a fair value for the loss of the use of the teams, because, in the event suggested, the use of the teams is required in making the alleged profit. He can recover for the value of the use of the teams—this is direct damages—but both should not be allowed. And as to the logs, which had been placed on the river preparatory to being floated down by the completion and operation of the splash

dam, the loss occurred more than 30 days after the seizure, and more than 12 days after the teams had been recovered, and the plaintiff had resumed business. There is no testimony or suggestion that the logs could not have been secured and saved by proper effort on the part of plaintiff and his employés, and we are of opinion that, on the facts presented, this loss had no reasonable or natural connection with the seizure of plaintiff's teams, and all consideration of it should have been excluded from the jury. The court did do this in one part of the charge, but in another he charged the jury as follows: "If plaintiff was prevented from floating lumber, which was his, during the 18 days, by reason of not having a team to prepare it, etc., and that was the direct cause of damage, and the logs lost in the meantime by flood, which would have been prevented, then the jury will give actual damages resulting from such loss." There was no evidence, whatever, of such loss during the 18 days when plaintiff claims his teams were wrongfully withheld from him. And in another part of the charge, the court, in substance, told the jury that the loss by reason of logs carried away by the flood, was too remote for recovery. This conflict in the charge, has, however, evidently operated to defendants' prejudice, for it is only by allowing for the loss that the jury could have awarded the sum given in the verdict.

We are referred by defendants to the case of Sledge v. Reid, 73 N. C. 440, as authority for the position that, on the facts in this case, only direct damage should be allowed—that is, a fair price for the use of the teams while wrongfully withheld. But consequential damages were refused in Sledge's Case, because there was no evidence that plaintiff could not have procured another horse by reasonable effort with which to make his crop, and there was intimation, too, that the results of any given crop year were too uncertain to be regarded as the proximate result of plaintiff's wrong. It is the general rule that damages which cannot be established with reasonable certainty, or which are contingent or speculative, cannot be allowed, and anticipated profits, in the ordinary sense of that term, are usually within the prohibition. As said in Hale on Damages, however, page 70, "Absolute certainty is not required, but both the cause and probable amount of the loss must be shown with reasonable certainty." And, accordingly, it is held "that profits which would certainly be realized but for defendant's default are recoverable." A good illustration of this distinction will be found in Johnson's Case, supra, where, on negligent destruction of plaintiff's factory for the maufacturing of baskets, crates, etc., it was held that profits on sales already made, and which plaintiff would have had the present ability to complete but for the wrong done him, were allowed as proximate; but anticipated profits which might otherwise arise from continuance of the business, on the facts there presented, were regarded as speculative and contingent, and therefore too remote for recovery.

We think in the present case that if it should be properly shown that plaintiff's business was necessarily and wrongfully interrupted for a definite time, and to an extent which plaintiff could not have lessened by reasonable effort, and that, during such time, plaintiff could, with the means at his disposal, have delivered a definite amount of lumber at a certain profit, that, under the principle of Johnson's Case, such a loss would be sufficiently certain for consideration, and could be properly made the basis of the jury's award of consequential damage.

For the error pointed out, there will be a new trial on all of the issues, and it is so ordered.

New trial.

BROWN, J., concurs in result.

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(145 N. C. 570)

## STATE v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Dec. 18, 1907.)

1. CRIMINAL LAW—PROVINCE OF COURT AND JURY.

In a criminal prosecution, if there is any phase of the evidence from which the jury might infer that the defendant was not guilty, the defendant is entitled to go to the jury on it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1718.]

2. SAME—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In a criminal prosecution, an instruction that, if the jury "believed the evidence," they would return a verdict of guilty, is erroneous as on the weight of evidence under the provisions of Revisal 1905, § 535, providing that no judge shall give an opinion whether a fact is fully or sufficiently proven.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1731.]

Clark, C. J., dissenting.

Appeal from Superior Court, Franklin County; Neal, Judge.

The Seaboard Air Line Railway was convicted of running a freight train on Sunday, and appeals. Reversed.

Day, Bell & Allen and T. W. Bickett, for appellant. Assistant Attorney General Clement, for the State.

BROWN, J. The court instructed the jury that, if they believed the evidence, they would return a verdict of guilty. To this instruction the defendant excepted, and we think the exception is well taken. Section 535 of the Revisal of 1905 provides that: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and

explain the law arising thereon." This section of the Revisal has been on the statute books of this state since the year 1796 (Code, § 413), and has often been construed by this court in relation to just such a charge as was given in this case. In State v. Matthews, 78 N. C. 537, Rodman, J., speaking of the duty of a judge in charging the jury in a criminal case, says: "We think he is required, in the interest of human life and liberty, to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be the true one. To do otherwise is to fail to declare and explain the law arising on the evidence, as by the act of assembly he is required to do." In State v. Mooney, 61 N. C. 435, Judge Reade says: "His honor's charge that, 'in any view of the case, the defendant was guilty,' is so broad as to entitle the defendant to a new trial, if there is any view consistent with his innocence." Judge Henderson says, in Bank v. Pugh, 8 N. C., at page 206: "The jury are the constitutional judges, not only of the truth of the testimony, but of the conclusions of fact resulting therefrom." In considering a charge similar to that given in this case, Mr. Justice Walker well says: "The evidence may, in the opinion of the court, have been ever so strong against the defendant, yet it was for the jury to find the ultimate fact of guilt without any suggestion from the court, direct or indirect, as to what the finding should be. The presumption of innocence and the doctrine of reasonable doubt require that method to be pursued, and it is clearly enjoined by the statute we have cited (Code, § 413), the restraining words of which define clearly the respective functions of court and jury in the trial of causes." State v. Simmons, 143 N. C. at page 619, 56 S. E., at page 703.

The expression, "if the jury believe the evidence," has been often condemned by this court, and we have repeatedly held that the proper way to instruct the jury is that, if they find from the evidence a certain fact or facts to be true, then the defendant is guilty or not guilty, as the case may be. Sossaman v. Cruse, 133 N. C. 470, 45 S. E. 757; Wilkie v. R. R., 127 N. C. 203, 37 S. E. 204; State v. Barrett, 123 N. C. 753, 31 S. E. 731. In State v. Green, 134 N. C. 658, 46 S. E. 761, the court instructed the jury that, if they believed the evidence, they should convict the defendant. A new trial was granted for error in this charge, and Judge Connor says: "Section 413 of the Code prescribes the duty of the judge in charging the jury: 'He shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon.' We feel sure that the error of the learned and careful judge who tried this case was an inadvertence. The testimony strongly tended to show the defendant's guilt, and doubtless so impressed his honor. In the administration of the criminal law, it is wise to observe the 'landmarks' and preserve the well defined rights and duties of the court and jury."

The evidence in the case before us is indefinite and uncertain, and the facts to be found therefrom and the inferences to be drawn were matters peculiarly within the province of the jury. If there was any phase of the evidence from which the jury might infer that the defendant was not guilty, the defendant was entitled to go to the jury on it. State v. Lilly, 116 N. C. 1050, 21 S. E. 563.

New trial.

CLARK, C. J. (dissenting). When the intent is an essential ingredient of an offense, then it is error to charge the jury, "if you believe the evidence, you will find the defendant guilty," for the jury, not the court, must draw the inference of intent. To this class of cases belongs every case cited by the court. But when, as here, the doing the act condemned by the statute makes the offense, then if, as here, the evidence is plain and uncontradicted, that the defendant willfully did that act, the court can properly discharge its duty to "apply the law to the facts" only by instructing the jury, as his honor did here, "if you believe the evidence, the defendant is guilty." There is nothing else he could say. The distinction is drawn in State v. Railway, 122 N. C. 1061 30 S. E. 133, 41 L. R. A. 246 (the "free pass" indictment), with citation of numerous authorities, where the court said "this has been settled law for a long time." We have a case exactly in point, and on this very statute; the facts being as here. The judge there charged, as the judge has charged here, that "if the jury believed the testimony, the defendant was guilty." The defendant excepted, but this court unanimously affirmed the judgment. State v. R. R., 119 N. C. 821, 25 S. E. 862, 56 Am. St. Rep. 689. There is no reason shown to overrule that case. Indeed, from immemorial time in our state, in the other states of the Union, and in England, such instructions have been sustained where the evidence is uncontradicted, and no inference of intent has to be drawn as an element of the offense. The North Carolina Reports show numbers of cases affirmed on exactly such instruction by the judge.

Acts 1879, pp. 182, 359, cc. 97, 203, amended by Acts 1897, p. 179, c. 126, now Revisal 1905, § 3844, provides: "If any railroad company * * * shall permit any car, train of cars or locomotive to be run on Sunday on any railroad, except such as may be run for the purpose of transporting the United States mails, and passengers with their baggage, and ordinary express freight in an express car exclusively, and such as may be run by law, such railroad company shall be guilty of a misdemeanor in each county in which any

such car, train of cars or locomotive shall run"—with a proviso that "Sunday" shall embrace only from sunrise to sunset, and that freight trains, in transitu, which have started on Saturday, may be run not later than 9 o'clock a. m. on Sunday, but only for the purpose of reaching the terminus or shops. The statute is plain, clear, explicit. The indictment followed the statute. The state could not be required to charge more facts than the law making the offense prescribed as constituting it. The evidence, if believed, and the jury have said they did believe it, proved conclusively, and it was not contradicted, every fact prescribed by the statute and charged in the indictment. W. J. Ballard, living at Franklinton, N. C., testified: That at 2.30 p. m. on Sunday last year he saw No. 41, a freight train, pass that place. That he noticed all the cars. There were 18 cars empty, and all the doors open. Train was going north. That another freight train passed about the same time, also going north. This train contained 15 empties, 5 cars of lumber, and a car of pig iron; all doors open. That the doors of the first train were wide open. That he looked in the cars of the first train (18 empty cars) and could see in one end, as they passed, but not in the other. That the second train, which stopped at Franklinton for another train to pass it, was composed of 15 empties, 5 cars of lumber, and a car of pig iron. That he examined that train, and there was nothing on it except the lumber and pig iron, as above described. The doors were standing wide open. That this was between first of May and last of July of last year. There is nothing doubtful or uncertain about this evidence. If Mr. Ballard swore to the truth, no mortal man could draw any other conclusion but that on a certain Sunday, about 2.30 in the afternoon, in May, June, or July last year, and therefore within two years, the defendant did run "a car, train of cars, or locomotive" on its road, which was "not run for the purpose of transporting the United States mails, and passengers and express car." That is the offense which is prescribed in Revisal 1905, § 3844 and charged in the indictment. If there was any matter of defense, outside that section, the burden was on the defendant to prove it, and he did not. State v. Long, 143 N. C. 676, 57 S. E. 349; State v. Railroad, 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689. The whole case turned upon whether the state of facts which the witness Ballard described was true or not, for, if true, it was the identical state of facts, verbatim, which the lawmaking body decreed should be a misdemeanor. Necessarily, therefore, "if the jury believed the evidence," the defendant was guilty.

In the Free Pass Case (State v. Railroad, 122 N. C. 1070, 30 S. E. 133, 41 L. R. A. 246), attention was called to the fact that that was the first indictment against a railroad company for violation of the law against issuing free passes, though the law had been enacted seven years previously. But the statute now before us was enacted in 1879, now nearly 29 years ago, and it may well be doubted (if it is, indeed, a subject of any doubt) whether a single Sabbath day in all those years has passed in which this statute has not been openly and notoriously violated in North Carolina. Yet only once before has an indictment for its violation been presented here. (State v. Railroad, 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689) for review. The law was passed to insure rest from 9 a. m. to sunset on the Sabbath day for a most deserving and hard working body of men, who daily and almost hourly risk their lives. They have had no powerful lobby to represent them before the Legislature, and this small enactment in their favor has not been enforced. It is to the public interest that they should have this short weekly cessation of rest (only about one-third of that allowed by the Mosaic dispensation), not only for their own benefit and the benefit of those dependent upon their continuance in life and health, but also for the benefit of the public at large, whose lives and limbs are put in jeopardy when railroad operatives, on any train which may collide with a passenger train, are worked 365 days a year, with no Sabbath interval of rest, which is accorded for 24 hours to other vocations of men. It has not been suggested that the Legislature had no power to pass the act. If (as the judge charged) the witness Ballard swore the truth, the law has been violated. State v. Railroad, 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689. Why should this defendant not pay the fine prescribed by law for this act?

The railroad corporations are officered by educated, intelligent men. In State v. Railway, 122 N. C. 1063, 30 S. E. 136, 41 L. R. A. 246, Montgomery, J., says: "It is not too much to say in a judicial opinion that the defendant is represented in its legal department by many of the best equipped lawyers in the country, and it would be a most violent presumption to say, or even to think, that they were not thoroughly posted as to the laws, state and federal, concerning the interests and liabilities of their clients." The railroads are not only not poor and ignorant, but of all they are most beholden to respect and obey the law. They are beneficiaries of the state. Their reports, published as official records by the state, and of which hence we have often taken judicial notice, show that they collected from the people of North Carolina last year $28,000,000, of which more than $9,000,000 were net profit. In all their immense work in gathering up this profit and these receipts, and over every foot of their extensive properties, and as to every dollar of their holdings, they are guarded and protected by the might and majesty of our law, maintained and executed at the cost of the public. They are safe behind the terrors of the law, whose weight will be surely and unerringly felt by whoever shall dare to vio-

late that protection. Yet when, for the second time only, in the more than 28 years elapsed since the passage of this law for the protection of railroad employés, an indictment for its violation is presented in this court, when the uncontradicted evidence, if believed, makes the defendant guilty of the very act prescribed by the statute, and the judge so tells the jury, and it cannot be denied that such is the law, counsel argue to us that there is reversible error because the judge said, "if you believe the evidence," instead of, "if you believe from the evidence," that the defendant did the act described by the witness, i. e., run a freight train on a Sunday afternoon. None of the cases cited by the court condemn the phrase here used by the judge, which has been sanctioned by immemorial usage. In State v. Barrett, 123 N. C. 753, 31 S. E. 731, the court criticised, in a case of larceny involving intent, the expression, "if you believe such to be the facts," on the ground that the jury might believe such to be the facts, otherwise than from the evidence (as from their own knowledge, for instance), and therefore they should be told, "if they found such facts from the evidence." This does not apply here, where the judge told the jury, "if they believed the evidence." Wilkie v. Railroad Co., 127 N. C. 213, 37 S. E. 204, repeats what is said in State v. Barrett, supra, and gives the same reason that the jury should not take their own knowledge, but base their verdict on the evidence which the judge in this case told them to do. Exactly the same was held in Sossamon v. Cruse, 133 N. C. 472, 45 S. E. 757. In State v. Green, 134 N. C. 658, 46 S. E. 761, the court did not hold that the expression, "if you believe the evidence," was error (though it said it was open to criticism), except for the fact that in that case there were two aspects of the evidence, in one of which, if found by the jury, the defendant was not guilty. In the case before us, there was only one possible aspect, if the evidence was believed, for there was no conflict, and only one witness. The defendant did or did not run its freight train by Franklinton on a Sunday afternoon, within two years previously. The judge expressed no opinion on the evidence, but simply told the jury, if they believed the evidence of the witness (Ballard), the defendant was guilty; and "beyond all controversy" the facts testified to by Mr. Ballard were the facts which the statute says constitute a misdemeanor. In State v. Riley, 113 N. C. 648, 651, 18 S. E. 168, 169, where the whole subject is fully discussed, the court said that in a criminal case, if the testimony is uncontradicted, and no inference of intent is to be drawn, the court can "charge the jury that, if they believe the evidence, the defendant is guilty." This charge has been upheld in State v. Railroad, 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689, above cited, which was an indictment for this offense, and in a very great number of other cases; the point not being headnoted because deemed elementary law. In State v. Journigan, 120 N. C. 569, 26 S. E. 696 the court said that such a charge would be error if "the intent is a material element." In State v. Woolard, 119 N. C. 779, 25 S. E. 719, and State v. Neal, 120 N. C. 621, 27 S. E. 85, 58 Am. St. Rep. 810, the court held that it was not error to charge that, "if the jury believe the defendant's testimony, he is guilty." Such instruction as was given in this case is very different from "directing a verdict," which cannot be done in a criminal case in which the credibility of the evidence must be left to the jury, as was done in this case. State v. Riley, supra. The three cases cited as criticising, not condemning, this form of charge, do not apply, as will be seen by examining them as above.

Why send this case back for a new trial, when, if the jury believe the uncontradicted evidence, the defendant must be again convicted?

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(62 W. Va. 442)

## HANNIS DISTILLING CO. v. BERKELEY COUNTY COURT.

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907. Rehearing Denied Jan. 7, 1908.)

1. PROPERTY—TITLE TO PERSONALTY.

The title to personal property is always presumed to be with the possession thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Property, § 9.]

2. TAXATION—POSSESSION OF PROPERTY—OWNERSHIP.

The joint custody and control of a bonded warehouse by the federal storekeeper and the warehouse proprietor, as provided by sections 3271–3275, Rev. St. U. S. [U. S. Comp. St. 1901, pp. 2122–2124], does not constitute such a change of possession of the liquor stored therein as to destroy the presumption of ownership thereof by the distiller.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 178.]

3. SAME—EVIDENCE OF OWNERSHIP.

In a proceeding before the county court to correct an alleged erroneous assessment, a petitioner who is in possession and control of the property and seeks relief from such assessment on the ground of want of ownership must establish his want of ownership, and title in those for whom he claims to hold the property in possession, by such legal and sufficient proof as would be required in a contest between him and a claimant of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 928.]

4. SAME.

These principles applied to a case in which the petitioner failed to establish by sufficient evidence want of title and ownership in the property assessed against it.

(Syllabus by the Court.)

Error to Circuit Court, Berkeley County.

Action by the Hannis Distilling Company against the Berkeley County Court. Petition dismissed, and judgment affirmed on appeal to the circuit court, and petitioner brings error. Affirmed.

Faulkner, Walker & Woods and P. Lewis Anderson, for plaintiff in error. H. B. Gilkeson and A. B. Noll, for defendant in error.

MILLER, P. The Hannis Distilling Company in January, 1906, presented to the county court of Berkeley county a petition praying correction of an assessment against it for 1905 of 30,000 barrels of whisky, situated on April 1st of that year in its bonded warehouse at Martinsburg, at $240,000. It is alleged in said petition that of this property 6,312 barrels belonged to petitioner on April 1, 1905; that the balance thereof belonged to owners unknown to the company or its agents, and was not held by it under any mortgage or pledge or in any representative or fiduciary capacity; that the same was merely kept by it in storage for and at the risk of the owners, subject to withdrawal at any time, the title thereto being in the latter and represented by negotiable warehouse receipts, mere delivery of which transfers title to the whisky described therein; that in fact it does not have the care and custody thereof; that such care and custody is in the United States government, through its storekeeper, with a lien for the internal revenue taxes thereon; that the petitioner has no property of the owners of said whisky out of which it could be reimbursed, should it pay the tax so assessed. The petitioner admits that it made no return for taxation of said 6,312 barrels belonging to it on April 1, 1905, and stored in the same warehouse, in control of the same government official. It excuses this omission by the representation that it had repurchased this whisky in the open market from the owners, and that this fact was unknown to the agent who made the return. This petition is verified by the general manager of the company, who made the original return. We find printed in the record along with the petition, but without apparent identification, what purports to be an amended or supplemental return by the petitioner of its personal property for the year 1905, addressed to the assessor and sworn to on the same day the petition was presented, returning said 6,312 barrels of whisky for taxation, containing the representation that the company's ownership thereof on April 1, 1905, was unknown to the agent who made the original report for assessment, but had since been ascertained from the records of the company in Philadelphia. This report does not purport to be made by the agent therein referred to, but by counsel for the petitioner, whose place of business the record shows is not in Philadelphia, but in the city of New York, and who in the language of his oath says that "the foregoing is to the best of my knowledge and judgment true in all respects." Is it not possible that the better knowledge and judgment of the officers of this company whose duty it was to make proper return of its property for taxation would have disclosed either that it still owned or had purchased in the open market a larger portion or all of said whisky, or the names of the persons to whom it belonged? The case was heard in the county court January 9, 1906, upon the petition and the evidence of the assessor and the general manager of the petitioner, and the petition dismissed. Upon appeal to the circuit court the judgment of the county court was affirmed.

On the assumption that it was proven in the trial before the county court that 23,688 barrels of the whisky assessed were not the property of petitioner, the ingenious argument is here made—based on the provisions of the federal statutes relating to bonded warehouses, the legal rights and liabilities of warehousemen and holders of its receipts, and the construction placed by counsel upon the statutes of this state respecting assessment of personal property—that this particular whisky cannot be lawfully assessed to the petitioner, so as to impose upon it payment of taxes on property belonging to others, without means of reimbursement. In the view we take of the case as presented, we are not called upon to challenge the correctness of the conclusions of counsel based upon such assumed premises; for we do not think the record justifies the assumptions upon which the argument is based. Section 3271, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2122], provides: "Every distiller shall provide, at his own expense, a warehouse, to be situated on and to constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid; but no dwelling house shall be used for such purpose, and no door, window or other opening shall be made or permitted in the walls of such warehouse leading into the distillery or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper assigned thereto by the Commissioner." Such bonded warehouse is not in the exclusive control of the federal officer, any more than the distillery itself; for sections 3273, 3274, and 3275 provide: "The storekeeper assigned to any distillery warehouse shall also have charge of the distillery connected therewith. * * * Every distillery warehouse shall be in the joint custody of the storekeeper and the proprietor thereof. * * * No fence or wall of a height greater than five feet shall be erected or maintained around the premises of any distiller, so as to prevent easy and immediate access to such distillery. And every distiller shall furnish to the collector of the district as many keys of the gates and doors of the distillery as may be required by the collector, from time to time, for any rev-

enue officer or other person who may be authorized to make survey or inspection of the premises, or of the contents thereof; and said distillery shall be kept always accessible to any officer or other person having such key." The federal control contemplated by these statutes is for the sole purpose of securing the payment of the internal revenue taxes imposed on manufactured liquor while stored in bonded warehouses. The joint custody of the storekeeper and proprietor is for this purpose and none other. The title of the property is not affected thereby; if so, it could not be passed by warehouse receipts. There is a lien thereon, it is true, for the federal tax, made secure by the federal control of the property provided for. The title to personal property is always presumed to be with the possession. 2 Schoul. Per. Prop. §§ 2, 3, 4. This authority says that the person out of possession of personal estate must usually bring an action and establish his own rights by proof. The federal control, and joint custody of the storekeeper and the proprietor of the distillery warehouse, are not competent to destroy this legal presumption of ownership by the distillery of the whisky in its bonded warehouse, which under the law is devoted exclusively to whisky of its own manufacture. As between it and the state authorities who would subject the property in its possession to taxation, if the distillery denies its ownership and asserts title in another for whom it pretends to hold the same as warehouseman, it should be required to establish its disclaimer of ownership by the same character of proof required in a contest between it and a claimant of the property. In this case the petitioner represents, not that it has parted with the possession, but that it has parted with title and holds possession as warehouseman for the alleged holders of its warehouse receipts. This is a question of fact, which should be established by competent evidence of the same dignity required in any other legal proceeding.

This proceeding has passed the incipient stage of the return by petitioner of its property for assessment, where the report of its proper returning officer might be accepted by the assessor as sufficient. The petitioner is contesting an assessment of its property already made in a lawful manner. It applies to the state for relief therefrom. The burden is upon it to make out its case by legal and sufficient proof, or it will not be entitled to the relief asked. How has it sought to do this? But two witnesses were examined, the assessor and the general manager of petitioner. The assessor's testimony relates solely to the unsuccessful efforts of himself and the state tax commissioner to get proper information from petitioner of the ownership of this whisky. He gives no evidence to establish title in any one other than the petitioner. It is true he says he went to the distillery and could get no satisfaction there about it; and in his examination by counsel for the petitioner he was called upon to produce, and did produce, a self-serving letter from petitioner' counsel in New York, dated July 8, 1905 (in reply to a letter of his of July 5th), in which it is stated that "the Hannis Distilling Company does not know the names of the owners of the whisky in its said warehouse and has no means of ascertaining the names or whereabouts of such owners." This is the same counsel who on the day the case was heard before the county court verified the supplemental report of the petitioner to the assessor that 6,312 barrels of the whisky did belong to his client on April 1, 1905. His letter of July 8th was a solemn affirmance, not of his knowledge and judgment respecting the same, as was his affidavit attached to said supplemental report, but of the fact that the company did not know the names of the owners of the whisky at the time he wrote that letter. This counsel was present at the hearing before the county court. If he was the proper returning officer, and was possessed of the requisite knowledge to make return of the property of petitioner for taxation, why was he not sworn to give evidence before the court?

What effect shall be given to the evidence of the general manager of the petitioner? When applied to by the assessor, this general manager could give him no satisfaction. He had pretended to make a return of petitioner's property for taxation for the year 1905, but he omitted to include any of the whisky in bond; and the petitioner's counsel, not its general manager, excuses the latter's omission on the ground that at the time of making said return he did not know of the ownership by his company of the whisky thus omitted. It was the duty of the petitioner to give the assessor proper information. The testimony of the general manager before the county court was of little more consequence than his return to the assessor. His testimony did not relate particularly to any of the whisky in controversy. He made no positive statement that this particular whisky did not belong to the petitioner. The substance of his testimony related solely to what he says was the usual business method of selling whisky by his company. He says: "We make whisky on orders, and the main office sends us each month a statement of what they want manufactured and for whom. Then the certificates are made out and transmitted by mail to the Philadelphia office, and that is all we have to do with it. We don't keep the accounts here. We don't keep any books here, except we merely act as a branch." Respecting the warehouse receipts he says: "We issue them in accordance with the orders we get." He exhibits with his testimony, not the originals or copies of any of the receipts actually issued for the particular whisky in controversy, but says there is a regular form issued as follows:

"No. 9,405. Martinsburg, West Virginia.

United States Bonded Warehouse. Hannisville Distillery. Internal Revenue Warehouse Certificate. The Hannis Distilling Company hereby acknowledge to have received on the ——— day of ———, 190—, from ———, ——— bbls. Hannisville pure rye whisky, which were deposited in our bonded warehouse on the ——— day of ———, 190—, and will deliver the same upon presentation of permit, payment of storage and other charges, and the surrender of this certificate, which is transferable by delivery. It is expressly agreed that the Hannis Distilling Company are not liable for injury to or destruction of said merchandise, unless by gross neglect of the said Hannis Distilling Company or their agents. Lot No. ———. S. N. ———. Hannis Distilling Company.

"(a) Canceled.

"(b) Notice: When whisky is ordered to be tax-paid, warehouse certificate must be presented at our Philadelphia office at same time to have number of bbls. canceled. We will ship at low valuation unless otherwise ordered.

"(c) Storage from date at eight cents per barrel and four cents per half barrel a month. Bills rendered January 1st and July 1st and when whisky is withdrawn or transferred."

He further says that before the issue of these receipts the serial numbers stamped on the barrels by the United States gauger are placed in the certificates or receipts, and that when the order comes to withdraw the whisky the barrels are drawn out by the serial numbers called for. He says the company in giving orders never furnishes the address, but only the name, of the person for whom the whisky is to be manufactured. He does not know whether the company carries any insurance on the property, but knows it is customary for insurance to be carried on whisky by the owners. When referred to a provision in the warehouse receipt for the "payment of storage and other charges" upon surrender of the receipt, and asked as to the meaning thereof, he says: "It covers expenses like drayage, driving of barrels, and generally applies to gauger's charges for reducing." In reply to the question whether it included state taxes, he says: "Not that I know of. I might say positively no. I had better say positively no, because it is something new to me." He says that this whisky had never been taxed before. As to whether the whisky in the warehouse is not held until these charges have been paid before permitting it to leave the premises, the witness says: "We draw it out as I told you. They are not paid till the draft is honored. We make the draft." Frequently he says their drafts are dishonored, a statement somewhat inconsistent with paragraph "c" on the face of the receipt. He was asked whether this form of receipt was the only contract his company had with the purchasers of whisky, and answered: "Yes, sir; so far as I know. I don't suppose there is anything else." Asked whether his company held this whisky in pledge or by mortgage for payment of the purchase price, he replied: "It does not to my knowledge."

This, in substance, is all the evidence offered by the petitioner. In our opinion it is insufficient to establish its claim. Not a single officer or agent of this company produced any original record of the sale and transfer of the particular whisky involved in this controversy. The general manager was not called upon to produce the orders received from the Philadelphia office for this particular whisky; nor does he pretend to state for whom, according to these orders, the same was manufactured, or to whom warehouse receipts were issued; nor are any records brought from the company's principal office in Philadelphia (where, according to the testimony of this witness, the records are kept), which, in the absence of the original receipts, if unable to produce them, would be the best evidence of the material facts called for. The general manager does not know, so far as the record shows, whether the name given him, if in fact given, was not that of some agent or officer of the company, or even the office boy in the Philadelphia office. He does not know that the name or names given him were of bona fide purchasers of the liquor. He does not say that, as a matter of fact, he ever issued warehouse receipts for this particular whisky. He does not, nor does any other witness, give in evidence the serial numbers stamped on the 6,312 barrels, or the serial numbers stamped upon the other barrels. Paragraph "b" on the face of the receipt referred to provides that "when whisky is ordered tax-paid, warehouse certificate must be presented at our Philadelphia office at same time to have number of bbls. canceled," showing that, where whisky in bond is sold and held by the seller in the warehouse, the record of the company is complete with respect to these serial numbers at least; and we have no doubt the records of the company are complete with respect to all such warehouse sales and receipts, including the name of the persons to whom the certificates may have been issued. All such competent and legal evidence was withheld by petitioner; and the court below upon this evidence was asked, and this court is now asked, to adjudge the petitioner not taxable with this large amount of property.

This we decline to do, and therefore affirm the judgment of the court below.

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(62 W. Va. 407)

## HANNIS DISTILLING CO. v. BERKELEY COUNTY COURT.

(Supreme Court of Appeals of West Virginia. Oct. 29, 1907. Rehearing Denied Jan. 7, 1908.)

TAXATION—OWNERSHIP OF PROPERTY.

The syllabus in the case of Hannis Distilling Company v. County Court (decided at the present term) 59 S. E. 1051, approved.

(Syllabus by the Court.)

Error to Circuit Court, Berkeley County.

Action by the Hannis Distilling Company against the Berkeley county court. Judgment for defendant was affirmed in the circuit court, and petitioner brings error. Affirmed.

Faulkner, Walker & Woods and P. Lewis Anderson, for plaintiff in error. H. B. Gilkeson and A. B. Noll, for defendant in error.

McWHORTER, J. This was a petition filed by the Hannis Distilling Company to the county court of Berkeley county for the correction of an erroneous assessment against it in Martinsburg district of a certain item of personal property valued at $182,784, the taxes on which amounted to $1,434.86 for the year 1906; the said item of $182,784 of personal property being some 20-odd thousand barrels of whisky in the bonded warehouse of the petitioning company. The county court refused to allow the claim of the petitioner, the distilling company appealed the case to the circuit court of Berkeley county, and on the 18th of April, 1907, the matters in controversy arising upon the appeal were submitted to the court, when the court was of the opinion that the petitioner, the Hannis Distilling Company, was not entitled to the relief prayed for, and the judgment of the county court denying the application of the petitioner was affirmed.

The questions arising upon the record in this proceeding are the same as those involved in a similar writ of error concerning the taxes on like property assessed for the year 1905, which writ of error is decided at the present term of this court, the opinion of the court being prepared by President MILLER, to which opinion reference is here made for a discussion of the principles involved; and for the reasons therein given the judgment of the circuit court of Berkeley county, rendered in this case, is affirmed.

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(63 W. Va. 215)

## HENRY MARCUS & SON v. McCLURE.

(Supreme Court of Appeals of West Virginia. Dec. 17, 1907.)

1. NONSUIT—JUDGMENT — FAILURE TO PROSECUTE.

If a defendant appear and file his plea, concluding with a verification, and the plaintiff does not appear to reply to it, or do what is necessary to bring the cause to issue, there is properly judgment against him non prosequitur.

2. SAME—WHAT CONSTITUTES.

Such judgment is a nonsuit, within the comprehensive meaning of that term as understood and applied in the Virginias.

3. WRIT OF ERROR—JUDGMENT OF NONSUIT.

A nonsuit is not a final judgment, as regards appealability, and no writ of error lies to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 721.]

(Syllabus by the Court.)

Error to Circuit Court, Pendleton County.

Action by Henry Marcus & Son against John McClure. Judgment for defendant, and plaintiff brings error. Dismissed.

Price, Smith, Spilman & Clay, for plaintiff in error. H. M. Calhoun, for defendant in error.

ROBINSON, J. This action of assumpsit for the recovery of $294.64 arises from the following transaction: The plaintiffs were wool buyers, and, through the agency of another, purchased all the wool which defendant had at the price of 26 cents per pound; and, it being estimated that the same would amount to about $1,000, the agent made his draft on plaintiffs, his principals, for said sum, in favor of defendant, and the same was duly honored. Afterwards, when the wool was weighed, the value thereof amounted to only $750.36, leaving in defendant's hands the said sum demanded. A special plea was tendered by defendant, to the effect that the action should not be maintained because the plaintiffs, before the institution thereof, had sued said agent for the sum of $6,173.67, and obtained judgment therefor, which included, among other items, the very sum herein sued for, and alleging that such judgment against the agent is a merger therein of any action which plaintiffs had against defendant. There was objection to the filing of this plea, and exception to the action of the court in permitting it to be filed, and then demurrer to the plea, which was overruled and exception reserved. Thereupon, plaintiffs "declining further to prosecute said action," it was considered that the cause "be dismissed, with recovery of costs on behalf of defendant." No objection to this judgment was made. This writ of error is prosecuted to the action of the court in permitting said special plea to be filed, in overruling the demurrer thereto, and in rendering judgment for defendant.

It is noted however, that this case never progressed to issue. The defendant's plea, concluding with a verification, being pronounced good, the plaintiffs declined to join issue thereon, and the suit was dismissed because of their failure to further prosecute. Can they complain by this writ of error? Is there a final judgment against them—an appealable one? In Buena Vista Freestone Co. v. Parrish, 34 W. Va. 652, 12 S. E. 817, it is said: "According to the practice in courts of record at common law, if the defendant appear and file his plea, and the plaintiff does not appear to reply to it, or do what is necessary to bring the cause to issue, there is judgment against him by non prosequitur." Further therein it is said: "Such judgment is not regarded as one on the merits, but only as a nonsuit, and, while final in the particular case, not conclusive upon the matter of action." And so is such judgment treated in 4 Minor (3d Ed.) 958; and Pinner v. Edwards, 6 Rand. (Va.) 675. And in Henry v. Ohio River R. R. Co., 40 W. Va. 234, 21 S.

E. 863, it is held: "There cannot be an issue where there is plea of new matter, concluding with a verification, without a replication"; and it is there stated: "A suit may not reach an issue. It may be cut short by failure of one of the parties to pursue his litigation. As to the defendant, if he appears and fails to demur or plead to the declaration, or if, after plea, he fails to maintain the course of pleading required of him by the law of pleading, judgment called judgment by nil dicit (he says nothing) is given against him. This would be a judgment quod recuperet, both final in the cause and conclusive in a second suit. On the other hand, judgment may be given against the plaintiff for not declaring, replying, surrejoining, or surrebutting, and this is called judgment by non pros. (non prosequitur—he does not prosecute). This judgment of non pros. is a species of nonsuit, and does not bar another suit." Blackstone says: "Therefore, in the course of pleading, if either party neglect to put in his declaration, plea, replication, rejoinder, and the like, within the time allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be nonsuit, or not to follow and pursue his complaint, and shall lose the benefit of his writ; or, if the negligence be on the side of defendant, judgment may be had against him for such default." 3 Comm. 316. The petition for this writ of error and the brief of counsel for plaintiffs in error say that the plaintiffs, not being able to dispute the facts set up in said special plea, did not prosecute their action further. Just so "the nonsuit is resorted to in our practice when the plaintiff finds himself unprepared with evidence to maintain his cause, either in consequence of his being ruled into trial when he is not ready or for any other reason." 4 Minor, supra.

From the foregoing we observe that the judgment of which plaintiffs complain is, in fact, a nonsuit. The plaintiffs simply lost the benefit of their writ. Where there is no issue joined, there can be no judgment on the merits. It seems an application of the poetical adage: "The man who fights and runs away will live to fight another day." But most surely his confessed timidity, for whatever cause, precludes him from entering again, in any arena, the battle that he has voluntarily deserted. He may begin a new fight, and carry it boldly to the end; but he cannot be now in, then out, and in the end complain of the advantage accorded his adversary by his voluntary desertion of the field, or his failure to strike. There having been, as we have seen, no adjudication on the merits, and the plaintiffs not being deprived of their cause of action, of what have they to complain, especially since the determination by a nonsuit was caused wholly by them, and without protest on their part? What error has been committed to their prejudice by the suit taking the course it did by reason of their own inaction in pursuing the litigation according to the rules of law? Can suitors cause or direct a certain determination of a case and then have remedy by writ of error against their own act? The proceedings in the record are entirely consistent with the proper course to be pursued in such a case, as we see by authorities above quoted, and it cannot be said that there was error in the action of the court in the premises. No writ of error lies, for as held in Thornton, Ex'r, etc., v. Jett, 1 Wash. (Va.) 138: "If the court direct the plaintiff to be nonsuited, and he submit to it (which he is not bound to do), he deserts his cause, and cannot by an exception avail himself of any legal objection to the opinion of the court." The judgment is not final in the sense of finality that operates as a base for writ of error. "A nonsuit is not a final judgment, but the opposite." Mallory v. Taylor, 90 Va. 848, 18 S. E. 438.

And in the case last cited a writ of error to a judgment of nonsuit was dismissed as improvidently awarded, as must be done with the one now before us. It will be so ordered.

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(62 W. Va. 609)

## HALE v. HALE.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907. Rehearing Denied Jan. 7, 1908.)

1. DEEDS—CANCELLATION — FRAUD — NEGLIGENCE.

Mere failure to read a deed or other instrument before signing it, by a person who is able to read and understand it, being only negligence of the injured party, not importing fraudulent conduct on the part of him who obtains the benefit of it, is not ground for setting the instrument aside. Equity never relieves a party from his own deliberate acts, done with full knowledge of the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 181.]

2. CANCELLATION OF INSTRUMENTS—FRAUD—NEGLIGENCE.

But failure to read an instrument, before signing it, does not bar relief therefrom in equity, on the ground of negligence or estoppel, when the circumstances attending the transaction were such as to lead the party to believe he was signing a paper of entirely different character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 1.]

3. DEEDS—VALIDITY—FRAUD.

A husband, having a contingent estate by the curtesy in his wife's lands, who, for several years, has been in the habit of executing deeds, prepared by his son, conveying small town lots out of the same, without reading them, on the representation of the son as to what was conveyed and to whom, in each case, may set aside, as having been fraudulently procured, a deed so prepared conveying to the son all of the wife's real estate, in consideration of $1 and natural love and affection, and executed by him, without reading it, on the son's representation that it conveys a mere town lot.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 181.]

4. CANCELLATION OF INSTRUMENTS—LACHES.

In such case, delay in suing for a period of less than a year, after the discovery of the fraud, explained by showing difficulty in secur-

ing the services of counsel and the impression that a suit to set aside the deed could not be maintained until after the death of the wife, does not bar relief on the ground of laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 51.]

5. SAME—EVIDENCE.

When, in a suit by the grantor in a deed to set it aside for fraud in the procurement thereof, the oral evidence of the parties relating directly to the execution thereof is flatly contradictory and wholly irreconcilable, the circumstances bearing on the issue must be allowed unusual prominence and effect, and their controlling force depends more upon their character and power to create mental impression than their number and variety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 102.]

(Syllabus by the Court.)

Appeal from Circuit Court, Lewis County.

Bill by P. M. Hale against Thomas W. Hale. Decree for plaintiff, and defendant appeals. Affirmed.

W. W. Brannon and E. A. Brannon, for appellant. W. G. Bennett and Thos. R. Hornor, for appellee.

POFFENBARGER, J. The circuit court of Lewis county having set aside, at the instance of P. M. Hale, as fraudulent, a certain deed, executed by Eliza Hale and said P. M. Hale, her husband, conveying all the real estate of the former to Thomas W. Hale, and thereby relinquishing the contingent life estate by the curtesy of the latter therein, said Thomas W. Hale has appealed from the decree.

The deed in question was executed on the 4th day of August, 1902, and the bill to set it aside was filed at rules held on the first Monday in January, 1905. The lapse of time, thus shown on the face of the bill, about two years and four months, intervening between the date of the deed and the institution of the suit, was urged upon the demurrer as laches, barring the suit, and the overruling of the demurrer is assigned here as error. The bill, however, avers ignorance of the contents of the deed on the part of the plaintiff for a period of nearly two years after the execution and recordation thereof, in addition to the fraudulent procurement of the same. It also avers, by way of excuse for the further delay of about four months, plaintiff's inability to obtain the services of the counsel he desired to employ for the purpose of prosecuting the suit. It says one man whom he wished to employ was confined to his bed with an attack of typhoid fever, another not in condition to act until within a few days before the institution of the suit, and another a candidate for office, who, had he been elected, could not have acted. He had also been advised by counsel that, as his interest in the estate was contingent only, it being an estate by the curtesy, dependent upon his surviving his wife, whose property the subject-matter of the deed was, he could not maintain a suit until after her death. It also alleges that plaintiff's possession of the premises had not been disturbed. We think these averments of the bill sufficiently explain the delay and excuse the same.

On the demurrer, the averments of the bill must be taken as true. So regarding them, the plaintiff did not know for nearly two years that he had executed any deed which conveyed the property in question, and, after the expiration of said period, and the discovery of the fraud, he instituted his suit within a reasonable time, a period of only a few months. While ignorance of law does not, as a rule, excuse wrongful action or failure to act, assuming that plaintiff was wrongfully informed respecting his ability to institute and maintain a suit prior to the death of his wife, the erroneous information and advice so given bears upon the question of the intent and purpose of the delay, showing absence of intention to relinquish or abandon the right or interest set up by the bill. Under some circumstances, ignorance of law and erroneous advice of counsel might not be sufficient to excuse delay, but what constitutes laches almost invariably depends upon the peculiar circumstances of the case. Jackson v. King, 12 Grat. 499, 510, et seq.; Bell v. Wood, 94 Va. 677, 27 S. E. 504; 18 Am. & Eng. Ency. Law, 119. Often the principle of estoppel enters into, and is operative in, the case. There, it is apprehended, ignorance of law and erroneous advice would not avail the plaintiff. The rights of other persons, to whom fraud or mistake is not imputable, have intervened. Under such circumstances, the lapse of time ought not to be great. Familiar illustrations of the application of this principle are found in the decisions of all courts. If a man stand by and see property sold in which he has an interest, disclaiming any interest therein, with the intention that the purchaser shall rely upon the statement and be so influenced to part with his money and take the property, he is estopped thereafter to assert any interest in it. Despard v. Despard, 53 W. Va. 443, 44 S. E. 448; N. & W. Ry. Co. v. Perdue, 40 W. Va. 442, 21 S. E. 755. This is not laches, it is true, and, though it is what is known in law as estoppel, it enters into the doctrine of laches, reducing the period of time which would otherwise be necessary to bar the right or remedy. Even when the rights of third parties have not intervened, circumstances and conditions often become so changed as to make it inequitable and unjust to allow the plaintiff to avail himself of rights and remedies fully known to him which he has neglected to assert. Thus, if one who has, by mistake or fraud, obtained property of which he could be deprived by the establishment of the fraud or mistake, be permitted to hold it for a long period of time, until it has greatly increased in value, or he has made expensive improvements upon it, these circumstances will shorten the

period of time necessary to constitute laches. Gish v. Jamison, 96 Va. 312, 31 S. E. 521; Connely v. Rue, 148 Ill. 207, 35 N. E. 824; Horr v. French, 99 Iowa, 73, 68 N. W. 581; 18 Am. & Eng. Ency. Law, 102. So if an injured party delay proceedings until the alleged wrongdoer is placed at a great disadvantage by reason of the death of witnesses. Again, if the circumstances are such as to show intention on the part of the complainant to reserve to himself a right of election to affirm or repudiate a contract, according to the event thereof, and this delay is attributable to nothing other than a desire to await the event and repudiate it, if it turn out to be a bad contract, and claim the benefit of it, if it turn out to be a good one, equity will not lend him any aid. Booten v. Scheffer, 21 Grat. 474, 497; Anthony v. Leftwich, 3 Rand. 238; Gish v. Jamison, 96 Va. 312, 31 S. E. 521; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501.

A court of equity is a court of conscience and will not tolerate unfairness, inequitable conduct, or corruption in a complainant, however strong and clear his equitable right against the other party. He must come to her door with clean hands, respecting the matter in controversy. There is a vast difference, too, between the status of one who has received nothing for that with which he has parted, and as to whom the transaction was wholly fraudulent, and that of a man who has made a contract by which he has not only parted with something, but received something in exchange, and in which the fraud operated only partially, reaching the substance to be sure, but not constituting the basis of the entire transaction. In the latter class of cases, the principle of election operates more widely. There is a voidable contract, not one wholly and absolutely void, while in the former, if the transaction be not absolutely void, courts see less reason for the application of the doctrine of election. When the fraud is a mere incident of the contract, equity gives a right of rescission of which the party must avail himself promptly. On the other hand, the want of any consideration or advantage, inuring to the injured party, is a circumstance arguing strongly against the view of a fast and loose policy on his part; and, in such case, if the rights of no third parties have intervened, and the lapse of time has been comparatively short, and the defendant has not been put at any serious disadvantage in respect to his evidence, the element of estoppel does not enter into the case, and it becomes largely a question as to whether the complainant intended to abandon his right and led the defendant to believe he had done so. In the case of a mere fraud, the question is one of pure waiver or abandonment of a right, not of election to stand by a voidable contract. It must be apparent from the great variety of circumstances which the courts must consider in determining what amounts to laches, in the numerous cases decided, that no general rule respecting the lapse of time has been, or could have been, fixed. Some complainants are held to have been barred by the lapse of only a few months. Sieveking v. Litzler, 31 Ind. 13. Others have been allowed to sue after the flight of many years Aylett v. King, 11 Leigh, 486; Jameson v. Rixey, 94 Va. 342, 26 S. E. 861, 64 Am. St. Rep. 726. And still others have been admitted and rejected, practically without reference to time between these two extremes, according to the peculiar circumstances of each case.

Here, according to the allegations of the bill, the plaintiff received nothing for the right given up by the deed, and as to him it was wholly and absolutely fraudulent. No third parties have acquired rights in any considerable portion of the property, and, in so far as they have, the property has been severed and cut off by conveyances, and as to it the plaintiff asks no relief. Nor does it appear that the defendant is placed at any disadvantage in respect to his evidence. All the witnesses to the alleged agreement, relating specifically to this transaction, himself and his wife, are still living, and their testimony has been taken. His mother, one of the grantors in the deed, is dead, it is true, but it is not claimed that the conversation took place in her presence. On the contrary, it clearly appears to have taken place elsewhere. Hence we do not perceive any injury or prejudice resulting to the defendant from the slight delay complained of, and nothing in the case calls for the application of any rule of laches. This being true, it is wholly immaterial that the complainant deferred action on the advice of counsel, or from ignorance of law. In the absence of any circumstance rendering the delay inexcusable, such advice, though erroneous, or ignorance, if there was any, would strengthen the position of the injured party. Berry v. Wiedman, 40 W. Va. 41, 20 S. E. 817, 52 Am. St. Rep. 866; Cranmer v. McSwords, 24 W. Va. 595. In the case last mentioned, this court held as follows: "While ignorance of law will not prevent the operation of the statute of limitations, the rule is different in equity, a court of conscience. In such court moral as well as legal grounds may be considered, and a satisfactory moral excuse may be entertained, although it resulted from ignorance of law." It may be that the delay has been long enough to raise a presumption of abandonment or acquiescence, and so necessitate averment of matter excusing the delay or rebutting the presumption; but the circumstances here disclosed satisfy the court that the delay was due to something other than an acquiescence in the matter complained of, or a desire to relinquish the right of repudiation. Berry v. Wiedman, 40 W. Va. 36, 20 S. E. 817, 52 Am. St. Rep. 866; James River, etc., Co. v. Littlejohn, 18 Grat. 53; Mayo v. Carrington, 19 Grat. 74; Irvine v.

Greever, 32 Grat. 411; Baker v. Morris, 10 Leigh, 284; Com. v. Lilly, 1 Leigh, 525. Our conclusion, based upon the principles and facts stated in the bill, is that the demurrer was properly overruled; and it will further appear from the facts developed by the answer and evidence on the final hearing that they do not bring the case within the principles governing laches, wherefore the decree cannot be reversed on that ground, either for defect in the bill or on the merits, and further discussion of this phase of the case will be unnecessary.

The inquiry as to whether the deed was fraudulently procured involves the consideration of many facts and circumstances not seriously controverted, and the evidence relating to many others as to which there is controversy; and the case involves practically the history of the plaintiff and his family. Prior to 1858, he was a widower having certain children. In the year 1858, he married Eliza Butcher, a daughter of Jacob Butcher, and by her there was born to him one child, a son, the defendant, Thomas W. Hale, about the year 1859. In July, 1876, Jacob Butcher died, leaving as his heirs Eliza Hale, wife of the plaintiff, and two grandsons, E. M. Vandervort and J. S. Vandervort, children of his daughter Nancy, who had married James G. Vandervort and died prior to the date of the death of her father. Jacob Butcher owned a considerable estate and died intestate. Just how much personal estate he left in the form of money, notes, and bonds is not very clearly shown, nor does it appear how much other personal property he had; but he seems to have had between $2,000 and $3,000 in money and securities. On his decease, the wife of the plaintiff, Eliza Hale, was appointed administratrix, and the estate was not settled up for a period of about five years. On the settlement, it seems that Mrs. Hale was indebted to the Vandervort grandchildren in a small sum which she paid out of money derived from the sale of some of her land. As to this personal estate, there is great controversy and conflict between the plaintiff and defendant. The former denied that he had ever received or used any money from his wife's estate, other than that which he expended on her property in the erection of buildings, and the latter charges that he used, or attempted to use, in his own business practically all of her personal estate. In fact, he charges that his father, by improper and covetous interference with his wife's portion of the Butcher estate, delayed the settlement thereof, which could have been made within a year; there being no indebtedness to pay for a period of about five years. At the time of the death of the grandfather, the defendant was about 16 years old, and he claims that he then, and from that time forward, resisted his father's interference with his mother's estate. He, together with one of the Vandervort boys, gathered up the papers, notes, and securities of the grandfather and deposited them in a certain bank for safe-keeping, for which act his father punished him severely. On the contrary, the plaintiff says he punished his son not for taking the papers, but for his disobedience in doing so; he having forbidden his meddling or interfering with them on account of his youth and inexperience and his permitting the other boy to handle them. From this time forward, as appears from the evidence of both parties, there was an estrangement between father and son, and, at times, the deepest bitterness and hatred existed between them. Disinterested witnesses testify to expressions of mutual contempt, bitterness, and hatred of each other, and the son is charged with having applied to his father, not only bitter and vituperative, but profane, epithets. Notwithstanding all this, they continued to reside together in the house built by the plaintiff on his wife's farm, and a good many years ago the son married, and brought his wife there, where all continued to live until after the date of the deed in question and the death of Mrs. Hale, wife of the plaintiff and mother of the defendant.

The plaintiff had been an active business man all his life. For some years prior to the War, he had been engaged in the manufacture of hats, boots, and shoes and clothing, and in the manufacture of brick and the construction of buildings. During the war he was engaged, among other things, in the mercantile business, and claims that, at that time, he had accumulated about $28,000, of practically all of which he was deprived by the raids of three successive armies into the town of Weston. He attempted to retrieve his fortunes by engaging more extensively in in the business of contracting and erecting buildings. He claims to have been successful and made money in this way until about the year 1887, when he took a contract, under disadvantageous conditions, for the building of a courthouse and jail in Weston in which he failed. Though he claims not to have been greatly indebted at this time, it is apparent from his testimony, as well as from that of the defendant, that he was thereby reduced to very straitened circumstances. He did not make an assignment, but practically all of his property was swept away without satisfying all his debts, but he nevertheless seems to have continued in business as a butcher and to have carried on a little business in fresh meats, and claims that he now owes practically nothing. He says himself that, at about this time, the taxes on his wife's property as well as his own were in arrears, and charges that his son caused the officers to sacrifice, for a mere pittance, practically all the property he had, and so cripple him in his business and prevent the payment of a portion of his debts. The defendant admits the sale of a portion of his father's property for this purpose, but denies that it was sacrificed, and also that it was of the ex-

tent and value claimed by the plaintiff. By the admission of the plaintiff, as well as the claim of the defendant, the former had little to do with the wife's property from and after the date of the misfortune that overtook him, in consequence of his having contracted to build the courthouse and jail. Her business was conducted by the defendant, with whom she advised, and upon whose advice she acted. She had obtained from her father's estate a tract of about 90 acres of land, which, by reason of its proximity to the town of Weston, has become very valuable, and is now within the corporate limits of the town. Plaintiff claims that it is now worth about $75,000, and that the annual income from it would amount to $2,500 or $3,000. But for this deed, he would now have a life estate by the curtesy in all of said property that has not been sold.

Some years ago, Mrs. Hale had a portion of the property, if not all of it, laid off into town lots, and had, prior to the date of the deed in question, conveyed a great many of these lots to numerous persons. The defendant, having entered upon the profession of law, was intrusted by her with the preparation of all deeds and contracts relating to the leasing and sale of these lots. The plaintiff, of course, joined in all the deeds and contracts, but the defendant says he did so reluctantly and was contrary about it, wherefore it became necessary for him, in each instance, to go to his father in advance of the preparation of the deed or contract, and explain to him the proposed sale or lease and obtain his agreement to join his wife in the execution thereof. The plaintiff, on the other hand, denies his unwillingness at any time to execute such deeds, and says it was the practice for his son to prepare them and bring them to him in his meat shop or about the stable, or wherever he happened to be, and obtain his signature upon the mere statement of the son as to what was conveyed and to whom. He says it was not his practice to read these deeds, either at the time of signing them or at the time of acknowledgment. The son swears that the father always read them or heard them read, either by him or the officer before whom they were acknowledged, and sometimes by both. On the 4th day of August, 1902, two deeds were executed by the plaintiff and his wife, by one of which a small lot was conveyed to Hale Sherrard, a grandson of the plaintiff, a child of a daughter by his first wife, for the recited consideration of $600, which it is admitted was not paid nor intended to be paid. By the other deed, all the residue of the property of Mrs. Hale was conveyed to the defendant, Thomas W. Hale, her son. Plaintiff says the defendant obtained his signature to, and the acknowledgment of, this last deed, by which, if valid, he relinquished his contingent life estate in all of his wife's property, by representing that it was a deed conveying a small lot to somebody. He denies that he read either of the deeds, and says the defendant brought them to him outside of his place of business away from his room, together with pen and ink, and so obtained his signature, and that the officer who took his acknowledgment did not read either of them to him, and that about a year and a half afterwards he learned from his grandson, Hale Sherrard, the report or rumor that such a deed was on record in the clerk's office of the county court of the county, to which place he immediately went and found the deed. He denies that the matter of such a conveyance was ever mentioned or intimated to him by the defendant or any one else. The defendant, however, claims this conveyance was a matter of deliberate and solemn agreement entered into before the deed was executed, and that his father's assent was obtained by the agreement of his mother to convey to Hale Sherrard, a grandson of the father, but not related to Mrs. Hale by blood, a small lot, of which mention has been made. This grandson, a young married man at the time, was a favorite of the plaintiff, who had gone to Pennsylvania and there married and was not doing well, and had been brought by the plaintiff to Weston in the hope of bettering his condition by taking him into the meat business as a partner and providing him a home. Plaintiff admits that he applied to his wife for the conveyance of this lot, and says she willingly assented, saying it was no more than right and just, inasmuch as she had already conveyed to Hale Sherrard's sister another lot of like kind and value. He denies that she required of him, in consideration of this conveyance to his grandson, the relinquishment of his interest in the balance of her estate. The defendant claims the negotiations were conducted through him; that it was arranged that he was to see his mother about it and communicate to the plaintiff, at the room of the defendant in the residence of the parties on the morning of Sunday, August 3, 1902, his mother's decision respecting the matter; and that he had prearranged with his wife, Minnie E. Hale, that she should be present and hear the conversation. Both he and his wife swear that the plaintiff appeared on that Sunday morning, and was informed that Mrs. Hale would convey the lot to Hale Sherrard, if the plaintiff would join her in the conveyance of the residue of her property to the defendant; the plaintiff, however, to keep his room in the residence and remain there for the balance of his lifetime as he had previously kept and used it. They say his response to this proposition was "All right, that suits me first rate, for I am willing to do anything at all to relieve Haley in his distressed condition." All of this is denied specifically and absolutely by the plaintiff.

Certain circumstances are relied upon as confirming the testimony of the plaintiff and condemning that of the defendant. One of

these is the improbability that the complainant, a man well advanced in years, but strong and hearty, knowing his wife, who had been for years an invalid and was then in a very enfeebled condition, would very probably die in a short time, leaving to him a life estate in this valuable property, for his support in his declining years, would thus deliberately give away to a son whom he detested and had despised for years his interest in the property. The advantage inuring to the favorite grandson is set up in opposition to this argument, but the inadequacy of the inducement is replied; the value of the lot not amounting to more in value than one month's rental value of the property parted with. A year or more after the date of the deed, the plaintiff sued one Dr. Nichol for the rent of a stable which stood on the wife's premises near the house, and, to meet the objection that the property for the rental of which the action had been brought was that of Mrs. Hale, and not of the plaintiff, he obtained from his wife a written instrument, declaring the stable to be his, which instrument was read in the presence of the defendant, who was participating in the trial, and who did not then mention the deed of August 4, 1902, or intimate that the title of the property was in him, and was then filed as evidence in the case, and judgment for the rent was recovered. The clerk of the county court says Hale came and asked permission to see if there was a deed on record, such as the one in controversy, stating that he had heard there was, and that he showed it to him. These are practically all of the principal facts and circumstances that it is necessary to consider in reviewing the action of the trial court. Of course, there is a mass of conflicting testimony and a great many additional facts of minor importance which it would be impossible to set out here in detail.

Considerable argument against the decree is predicated upon the view that a grantor, who has signed a deed without having read it, is guilty of negligence so gross as to estop him from setting up his ignorance of its contents in avoidance thereof. Ferrell v. Ferrell, 53 W. Va. 515, 44 S. E. 187; Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830. Mere ignorance of the contents of an instrument, without more, would not suffice to open the doors of a court of equity, or sustain or defeat an action at law. It would amount merely to a complaint against one's self. It imputes no misconduct or wrong to any one else. If a man sees fit to give away his money or property, or throw it away, or abandon it to the world at large, both law and equity accord him the privilege of so doing. The reckless or negligent execution of a deed or other paper, without knowledge of its contents, is an act of a similar kind. The court cannot, in such case, be asked to lay its hand upon any person and compel him to right a wrong done by him, for there is no wrongdoer. The acceptance of the benefit of a reckless act is no wrong in the acceptor. Courts often grant men relief from their mistakes, but never from their deliberate acts, done with full knowledge of the facts.

But to say a man can never avoid his deed, merely because he signed and delivered it without having read it, would be greatly variant from the law. Kerr on Fraud & Mistake, 388, 389; Boyce v. Grundy, 3 Pet. 210, 7 L. Ed. 655; Holbrook v. Burt, 22 Pick. (Mass.) 346; Curlett v. Newman, 30 W. Va. 182, 3 S. E. 578. Circumstances often justify such action, even when there is no fiduciary relationship between the parties and they stand on an equal footing. There may be no such relation, and yet confidence reposed on the one side and abused on the other, as in the case of a verbal agreement, which one party relies upon the other to reduce to writing. If the latter takes upon himself that duty, and, in the pretended performance thereof, writes an entirely different agreement and obtains the other's signature thereto, representing that it is the verbal agreement reduced to writing, either by expressly saying it is, or by representing it as such, the failure to read it constitutes no estoppel. Medley v. Insurance Co., 55 W. Va. 342, 47 S. E. 101, syl. 3; Shepherd v. Henderson, 3 Grat. 367; Pulaski Iron Co. v. Palmer, 89 Va. 384, 16 S. E. 275. Though this illustration does not, in its circumstances, correspond with the case in hand, it declares the principle upon which the bill is founded. It says that, in previously signing deeds, upon the mere representation as to what was thereby conveyed, as a matter of convenience, in effecting the sale of numerous lots, deeds for which had been prepared by the defendant, a relationship and condition or method of transacting business had been established which justified the plaintiff in assuming that the defendant was presenting to him for signature a deed conveying only a lot or small portion of his wife's property, as he had been in the habit of doing for some years, and in relying upon the express representation made at the time that the deed in question was such a deed. No rule, prescribing all the conditions under which courts may set aside deeds for fraud in the procurement thereof, can be formulated. The conditions and circumstances attending the execution of the millions of such instruments in use are so different that no one rule can take them all in. Fraud assumes so many different hues and forms that courts are compelled to content themselves with comparatively a few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily on the conscience and judgment of the court or jury in determining its presence or absence. Generally, however, this latitude affects the probative force of the circumstances, rather than the relationship of the parties. The parties always stand either at arm's length on an equal footing, or in some

sort of confidential relation, and that need not be, and is not, always a trust or fiduciary relation in the full sense of the term.

That the defendant here did not sustain a trust relation to the plaintiff, such as prevented his taking from the latter a binding and indefeasible conveyance, is asserted by Curlett v. Newman, 30 W. Va. 182, 3 S. E. 578. If he had, the deed would be voidable at the option of the grantor. Lane v. Black, 21 W. Va. 617. Though he was not an agent having power and authority to convey the land, he was intrusted with the preparation of deeds, for both the plaintiff and his wife, and the case would not fall within the rule declared by Lane v. Black. He assumed a duty, responsibility, and relationship, which not only justified, but necessitated, reliance to a very considerable extent upon his honesty, fairness, and good faith toward the plaintiff. It is, at least, a circumstance sufficient to repel the charge of negligence, if it appear that the deed in question was not contemplated or intended, for it afforded an opportunity to obtain such a deed by abuse of the confidence reposed.

But if it be conceded that there was no agency, in any sense, and admitted on the other hand that the facts are as they appear from the plaintiff's bill and evidence, they put the defendant in a position which made it his duty, in fairness and justice to the plaintiff, to disclose to him the nature and contents of this deed. The latter had the right to rely upon the course and method of dealing, with reference to this land, which had been established between them and observed for several years. There is a vast difference between presenting a deed conveying a single town lot or several town lots out of a large tract of land, for the relinquishment of a contingent estate therein, and a deed calling for the relinquishment of such estate in the entire tract of 90 acres. The nature and extent of the previous transactions, most of which were conveyances to strangers and of small town lots, were such in their very nature and so numerous as necessarily to lead the plaintiff to expect and look for deeds of that character and no other. He knew his wife was disposing of small lots, but still retaining the bulk of her estate, and there was nothing in this to indicate intention to dispose of all of it by a single conveyance, nor to give it away instead of selling it. Under such conditions, it was inequitable and unjust, and in the nature of a trick or device, to present to him for execution a deed conveying to the man who prepared it, and who had prepared all the others, the entire tract of land, as a gift.

In view of the great conflict in the evidence, and our inability to see that the finding of the court below is contrary to the weight and preponderance thereof, it must be allowed to stand. It may well be regarded as proven that the plaintiff took very little interest in, and manifested very little concern about, the conveyances of the numerous small lots in which he joined prior to the execution of the deed in question, wherefore it is quite probable that he was not in the habit of reading the deeds, and did, as he states, execute them wherever he happened to be found, without reading them and on the representation of the defendant as to their contents. He appears to have been a very active and industrious man, and to have devoted almost every hour of every day to his business, just such a man as would likely not have given himself much concern about a matter in which he had no interest, or his interest in which he had determined to release. His wife had a considerable estate, from the management and control of which she had excluded him and a portion of which she could convert into personal property by advantageous sales. That was her business, not his. All he was called upon to determine was whether he would join her in the deeds. He got none of the money, except possibly a few small amounts given or loaned to him by the defendant, who says his mother gave him all, or about all, of the purchase money. Even if he had supposed his wife was merely changing the character of her holdings from real estate to personal property, and not shifting it into the hands of the son, it was still her business. He was not entitled to receive, at that time, a dollar of the purchase money. Why should he have exercised great care, unless he feared fraud and imposition on the part of the wife or son or both? He was neither asked nor permitted to do more than execute the deeds. All the balance was intrusted to the son, and how natural it is, when transactions are effected by the separate actions of several persons, for each to assume that the others have performed their parts properly, and stop with the performance of his own? Besides, the defendant himself says his father was always informed as to what the deed would convey before it was prepared, a circumstance, if true, strongly arguing that it was not the habit of the plaintiff to read the deeds. Are we to assume that he feared or had any reason to fear that both his wife and son would defraud him, or that the son would attempt to defraud both? It is also highly improbable that, in view of the approaching death of his wife, she being feeble at the time and having been an invalid for many years, he would relinquish his life estate in her property upon no inducement other than the conveyance of a small town lot to a grandson. It is urged that these two deeds must be read together as constituting a single contract, and the one regarded as the consideration for the other. They are not such in any legal sense. A deed made to Sherrard Hale was not a consideration moving to P. M. Hale for the conveyance made to T. W. Hale. It could have been nothing more than a fact or circumstance which might have induced him to exe-

cute the other deed. In so far as it was valuable, it went to a third party, not to him.

No time need be consumed in the settlement of this question, for the argument assumes the truth of the defendant's evidence and the falsehood of that of the plaintiff. The latter's case, as made by the bill and his evidence, is that the conveyance in question never was agreed upon nor intended. He assails the deed as a rank and unmitigated fraud, utterly precluding any consideration; and the existence of the two deeds in point of date, a mere circumstance which may be said to argue something in support of the defendant's contention, is not conclusive. It is relied upon by one party as having been seized upon by the other as the opportune occasion and time for the commission of a fraud, and by the other as the consideration for the alleged fraudulent deed. As to which of these contentions shall prevail, it depends upon the ultimate finding, involving the consideration of all the evidence.

The direct, positive testimony of the defendant and his wife to the alleged deliberate and specific agreement, in pursuance of which they say the deed was made and executed, is not unusual in cases of this kind. In most cases in which deeds have been assailed on the ground of fraud in the procurement thereof, similar testimony is found, and the courts are under the painful duty of allowing the facts and circumstances with which it conflicts to overcome it and brand it as false. Usually such evidence bears on its face indications of fabrication. It often attempts to prove too much, and it was the opinion of the court below that this is true of the evidence now under consideration. The defendant admits that he took the precaution to fix a date for the all important conference between himself and his father at which his wife should be present as a secret witness. Though it is said she did not eavesdrop, or secretly overhear what is said to have passed between the parties, it does appear that she did not sit down in the room with her husband and father-in-law as is usually the case in a friendly family conference. On the contrary, she came into the hall behind the father-in-law and stood at or near the door opening into the room, where she could hear and not be seen, if she chose to do so. Suddenly, and without previous notice, a proposition, monstrously disproportionate and unequal in respect to reciprocal advantages, is sprung upon Hale, and he, without a moment's hesitation, eagerly and joyfully accepts. He does not even ask for a modification. There is no parley or counter proposition, as is usual when a man is placed at a disadvantage and a hard bargain is thrust upon him. The trial judge said in plain terms he could not believe the story, and it does carry improbability on its face. According to the testimony of both, P. M. Hale then and there heard the hard proposition for the first time and eagerly accepted it. Then the two witnesses differ in respect to some matters, and the deed itself does not embody the whole of the alleged agreement. It does not reserve to the plaintiff the use of a room in the house or any portion of the estate. The only reservation made for the benefit of Hale is carefully omitted from the deed, so that he may be at any time ejected from the premises. It is charged that this reservation, as well as exception of the numerous lots previously sold, was omitted partly out of unusual haste incident to the striking of a blow at the opportune moment, and partly to avoid exciting suspicion or inquiry by the unusual length of the deed. Though these circumstances may be sufficient to cast some doubt upon the truth of the testimony of these two witnesses, they might not be sufficient to overthrow it, if they were unaided by others. But there are others affording almost irresistible refutation of this evidence. Long after the deed was executed, plaintiff went hurriedly to the clerk's office of the county court to see whether there was such a deed in existence, telling the clerk that he had heard so. Was this only for the purpose of making a witness of the clerk? Was it a mere attempt to manufacture evidence? If it stood alone, it might possibly be disposed of in this way, but there was another occasion on which he acted in the same manner. About a year after the date of the deed, he sued Dr. Nichol for rent, under the impression that he had the right to do so. At the trial of that case, the defendant was present as a witness. Without his knowledge, the plaintiff went to Mrs. Hale and obtained her signature to a paper, declaring that the stable belonged to him, and this was produced and read in the presence of the defendant, who did not then disclose his alleged ownership of the property, nor reveal the fact that he had a deed for it. What motive did he have in remaining silent on that occasion, when the production of his deed would have enabled his brother-in-law, Dr. Nichol, to defeat the action. Was he, too, manufacturing evidence for his antagonist? Such a conclusion would be an absurdity. This circumstance, as to which there can be no doubt, and as to which there is no controversy, argues strongly Hale's ignorance, at that time, of the existence of the deed in controversy, and tends to prove the sincerity of his inquiry at the office of the clerk of the county court. Concede that the production of the paper signed by Mrs. Hale was not essential to recovery against Dr. Nichol, that having rented from Hale he was estopped from denying the title of his landlord, and that T. W. Hale was only a witness in the case, the facts remain that he and Nichol were brothers-in-law, from which it may well be assumed that all were familiar with the status of the property, and that the defendant in this cause was then testifying against his father's right of recovery from his brother-in-law. Aside from his duty to

speak and any inference arising from his silence, the conduct of the plaintiff was consistent with his ignorance of the deed, and the circumstances preclude the view that he was fabricating evidence for use in this case. It was a step in any other action, the institution of which alone argues the same thing. Besides, T. W. Hale was under a sworn duty, as a witness, to disclose all he knew bearing on the question at issue.

In reaching this conclusion, we are not unmindful of the rule requiring clear and satisfactory proof to overthrow a deed. The flat contradiction of the direct and positive oral evidence, pro and con, brings into play the circumstances and necessarily gives them unusual prominence and force. To them the court must appeal for the truth, it having been effectually obscured by the testimony of the parties, and the duty of the court cannot be evaded or excused by the difficulty or painfulness of the task. Nor is its investigation or power to act limited by the mere number of the circumstances to be considered. Their intrinsic character and power to carry mental conviction as to the truth is always allowed to prevail. Circumstances, to which we have adverted, and the force of which is not impaired or resisted by anything but the contradicted parol testimony, weakened, as it is, by the improbability of the story it tells, say the plaintiff knew nothing of the contents of this deed for a long time after the execution thereof, and nothing is relied upon to contradict them but mere conjecture and suspicion. It is hardly necessary to say this court will not reverse the finding of the court below, on a question of fact, when it does not appear to be clearly wrong.

For the reasons stated, the decree will be affirmed.

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(63 W. Va. 218)

## HIGGINS v. ROUND BOTTOM COAL & COKE CO.

(Supreme Court of Appeals of West Virginia. Dec. 17, 1907.)

1. DEEDS—VALIDITY—CONSTRUCTION.
A deed or other instrument susceptible of two or more interpretations, and which would be invalid, as violative of some rule of law, if interpreted in one of the ways justified by its terms, should be so construed as to make it valid and effective; it being presumed in law that the parties thereto did not intend, in making the contract, to do a vain thing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 237.]

2. SAME—INTENTION.
A clause in a deed, unskillfully prepared, apparently making the vesting of a right, as to the intention to grant which the terms used leave no doubt, dependent upon a condition precedent so remote as to make the limitation obnoxious to the rule against perpetuities, but susceptible of a construction that will avoid such result, should be so construed as to make it valid and effectuate the intention of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 231-232.]

3. MINES AND MINERALS—DEEDS—CONSTRUCTION—EFFECT.
A deed granting, by metes and bounds, a small parcel of land out of the northeastern corner of a large tract, known to contain coal, and "also the privilege, should" the grantee, "his heirs or assigns, open a coal mine on said [granted] tract of land, of undermining southward beyond the lines of said tract of said land, so far as not to injure the tract of land of which this was a part, and now taken from," conveys title to the corpus of the coal in the residue of the tract of land lying southwest, as well as south, of the granted parcel, and withholds the right to make openings on such residue for mining purposes, by prescribing the mode of removal of the coal to be by means of an opening to be made on the parcel granted.

4. SAME.
Principles declared in List, Trustee, v. Cotts, Trustee, 4 W. Va. 543, approved and applied.

(Syllabus by the Court.)

Appeal from Circuit Court, Marshall County.

Suit by John Higgins against the Round Bottom Coal & Coke Company. From decrees sustaining demurrers to plaintiff's original and amended bills, he appeals. Reversed and remanded.

Robert White and D. B. Evans, for appellant. Simpson & Showacre and Charles McCamic, for appellee.

POFFENBARGER, J. John Higgins has appealed from two decrees of the circuit court of Marshall county, sustaining demurrers to his original and amended bills, seeking adjudication in his favor of title to the coal in a certain tract of land. David Roberts, being the owner of 400 acres of land bordering on the Ohio river, conveyed to Simeon B. Purdy 13 acres and 87 poles thereof, by a deed dated January 7, 1843, and describing the same as follows: "Beginning at a double lynn on the river bank; thence S. 15° W., 40 poles, to a beech immediately on top of the river hill; thence S. 86½° E., 58½ poles, to a stake in the line of a survey made for Abijah McClean; thence with said line N. 15¾° E., 36 poles, to a stake, corner to said survey and standing on the river bank; thence down the river, and binding thereon N. 83½° W., 57½ poles, to the beginning." The small rhomboidal lot so conveyed, lies in the northeastern corner of the 400-acre tract, and the lines run almost south, west, north, and east. As the lines of opposite sides are not quite equal in length, it is somewhat irregular in form, but the differences are so slight that it may be regarded as regular. Its form and situation make the residue of the tract lie south and west of it. This circumstance weighs heavily in the determination of the construction of the following clause of the deed to Purdy, making a further grant: "And also the privilege, should the said Purdy, his heirs or assigns, open a coal mine on said tract of land, of undermining southward beyond the lines of said tract of said land, so far as not

to injure the tract of land of which this was a part, and now taken from." It is on this clause that Higgins, the present owner of said small tract of land, founds his claim of title to the coal in the western part of the residue of the large tract, now claimed by the Round Bottom Coal & Coke Company, a corporation.

As bearing on the interpretation of this clause, under the rule of practical construction, and also on the defense of loss of title, by laches and nonuser, if any was passed by it, the parties have deemed it important to set forth the subsequent mutations of title of the several portions of the original tract. By a deed dated September 24, 1845, Roberts and wife conveyed 228½ acres of the residue to Elisha Lindsey. By a deed dated May 4, 1855, Purdy conveyed the tract containing 13 acres and 87 poles to John C. Snyder, "with the privilege of mining for coal as expressed in the deed from David Roberts and wife to said Purdy"; Snyder and wife having on the same day conveyed it to E. H. Caldwell, in trust to secure to Purdy payment of a certain sum of money, and afterwards made default, for which the trustee sold the property to Purdy, and the same, together with the mining privilege, was conveyed back to him by Caldwell, by a deed dated November 30, 1857. Purdy and wife conveyed it, with the mining privilege, to John M. Bell, by deed dated June 12, 1865, who, on the same day, conveyed it to John H. Smith, who, on the 16th day of March, 1868, conveyed it to Elisha Lindsey, the owner of the adjoining 228½-acre portion of the 400-acre tract, the conveyance of which has already been mentioned. By virtue of a judicial sale, made in July, 1881, confirmed in October of that year, both tracts were conveyed by Jacob B. Hicks, sheriff and special commissioner, to Wm. H. Lindsey, who conveyed them to John Higgins, plaintiff in this bill, by a deed dated March 3, 1897. Both of these deeds conveyed in express terms the mining privilege or coal in the remainder of the 400-acre tract. Meanwhile David Roberts, by a will dated July 6, 1874, to which he appended a codicil dated February 18, 1879, and which was probated August 16, 1879, devised the residue of the tract to his daughter Olevia A. Stockett. Afterwards, October 17, 1891, Blanch M. Potts became the owner of this land in severalty by a decree of partition, and later the coal under it was conveyed to the Round Bottom Coal & Coke Company. Alleging intention on the part of said mining company to take and carry away the coal in question under claim of title thereto, the plaintiff prayed an injunction inhibiting and restraining it from so doing.

As bearing on the question of the intention of the parties to the deed conveying the 13 acres and 87 poles tract, together with the right to undermine the adjacent lands southward, the bill avers substantially that the land granted was practically worthless for agricultural or any other purpose, except that a small portion thereof, bordering on a creek emptying into the Ohio river, was suitable for the erection of buildings, tipples, and other appliances necessary to the operation of a coal mine, and that at the date of the deed the only means of transporting coal from that neighborhood to distant markets was the Ohio river, and that just back of the river hill, on which the granted land lies for the most part, the land is suitable for agricultural purposes. The bill further shows that extensions of the northern and eastern lines of the small tract would include between them practically all the residue of the tract lying south, southwest, and west of the small parcel. All of the land, the coal under which is in question, lies nearly west of the small tract granted out of the northeastern corner of the original tract, but practically all of it would lie within the extended northern and eastern lines. If the clause, "should the said Purdy, his heirs or assigns, open a coal mine on said tract of land," states a condition precedent to the vesting of title to the coal in the adjoining lands, assuming, for the present, that the grant of the privilege of undermining amounts, in law, to a grant of the coal in place, the grant would no doubt fall within the rule against perpetuities; for, as no time is fixed, the coal mine might be opened in the remote future, 100 or 500 years hence, and so beyond the period of a life or lives in being, 10 months, and 21 years. Starcher v. Duty, 56 S. E. 524, 9 L. R. A. (N. S.) 913; London, etc., Ry. Co. v. Gomm, 20 Ch. Div. 562. If, however, the clause which, it is said, effected a grant of the coal in place, is susceptible of any construction which will pass title to something, either the coal, or a right to mine coal, the court is bound to give it such construction, to the end that the intention of the parties may be effected, and that the clause may not be invalid, agreeably to the maxim and rule of construction, "Ut res magis valeat quam pereat," meaning that the thing—the deed—shall avail rather than perish. Barbour, Stedman & Herod v. Tompkins, 58 W. Va. 572, 590, 52 S. E. 707, 3 L. R. A. (N. S.) 715. "An instrument intended to operate as a deed should so operate, if not legally impossible for it to do so." 13 Cyc. 604. This is a principle applicable to the construction of all instruments, and especially statutes, which are always so construed, if possible, as to avoid conflict with the Constitution. "Where the language of an instrument is susceptible of two constructions, one of which will render it valid and the other invalid, the former will be adopted. Likewise an instrument will be construed, if possible, as being made for a legal, rather than for an illegal, purpose." 17 Am. & Eng. Ency. Law, 17, 18. This text is well sustained by numerous decisions cited for its support. "When a contract is open to two constructions, the one lawful and the other unlawful, the former

must be adopted." Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940; United States v. C. P. R. R. Co., 118 U. S. 235, 6 Sup. Ct. 1038, 30 L. Ed. 173. We think the clause in question is susceptible of a construction which will make it valid. It does not necessarily mean that no right should pass, except on condition that a mine shall be opened on the small tract granted. In view of the phrase, "so far as not to injure the tract of land of which this was a part," it may be reasonably and consistently said that the clause, "should the said Purdy, his heirs or assigns, open a coal mine on said tract of land," was inserted for the purpose of restricting the opening of mines for the removal of the coal to the tract of land granted; the intention being to grant either the coal, or an incorporeal right to dig and carry away coal, but the removal thereof to be effected not otherwise than through an opening made on the land granted. The terms of the deed, it is to be observed, are informal and inartistic, importing that less depends upon the forms of expression, in its various parts, than the substance thereof and their relation to one another. If the grantor had said, "And also the privilege of undermining southward beyond the lines of said tract of said land, so far as not to injure the tract of land of which this was a part, and from which it is now taken, through and by means of a mine to be opened on the tract of land hereby granted," a reasonable agreement would have been disclosed. So expressed, the intention to grant and pass a present interest or right respecting the coal in the adjacent land would be obvious and indisputable, and so we think the clause must be construed. Otherwise, that portion of the deed would be invalid. The reports abound with illustrations of this principle as applied to contracts. In Haigh v. Brooks, 10 Adol. & El. 108, a guaranty said: "In consideration of your being in advance to Messrs. John Lees & Sons, in the sum of £10,000 for the purchase of cotton, I do hereby give you my guaranty for that amount on their behalf." It was urged against the validity thereof that the advance mentioned appeared to have been already made, and afforded no consideration for the promise; but Lord Denman said it should be read as if the guarantor had said, "In consideration of your becoming in advance," or "On condition of your being in advance." In Thrall v. Newell, 19 Vt. 202, 47 Am. Dec. 682, a written assignment of a note placed the words "for value received" in a connection which made them appear to be descriptive of the note assigned, rather than a recital of consideration for the assignment. The court said, in disposing of the question: "Where the meaning of the language used is doubtful, or susceptible of two senses, that is to be adopted which would give effect to the instrument as a legal contract, rather than that which would render it inoperative."

Though the deed does not expressly say the grantee shall have the right or privilege to mine, dig, and carry away coal from the adjacent land, the language obviously relates to coal, and nothing else. Coal is the subject-matter thereof, and the undermining contemplated could mean nothing other than the removal of the coal. The intention to grant a coal right or interest is so plainly indicated by the terms used that the contrary thereof cannot be supposed. The only limitations placed upon this right of undermining the adjacent land by removing the coal therefrom relate to the direction in which the mining shall be done and injury to the land. The limitation concerning direction is unimportant on the inquiry as to the nature of the right granted. That respecting injury to the tract of land cannot be taken in its literal sense, for the removal of any coal therefrom, even one ton, would work an injury to the land, viewed in the larger sense of the term, embracing everything from the surface to the center of the earth. Hence "land," as used in this clause, has a restricted meaning. As removal of coal from the tract, if done to such extent and in such manner as not to injure or destroy the surface, was contemplated by the parties, the right to injure the land to that extent is one of the things expressly granted; and the limitation must therefore be confined to injury to the surface of the land, and minerals, interests, and elements thereof other than coal. Subject to this limitation, the right granted is full, complete, and unconditional, and there is no reservation or stipulation in the deed importing any intention contrary to the hypothesis of an absolute grant of the right to mine and take away all of the coal in that portion of the land embraced within the very general and indefinite term relating to area—the words "southward." That it was the intention to grant something cannot be denied, and it remains only to be determined whether that was a mere right to go upon the land and dig and carry away coal, in common with the owner of the land, amounting to an incorporeal hereditament or a grant of the coal in place. Having carefully examined the authorities bearing thereon, our conclusion is that the deed passes title to the coal. A very similar clause was construed in List, Trustee, v. Cotts, Trustee, 4 W. Va. 543. That deed, after granting in fee a distinct parcel of a tract of land, said: "Also the right of digging for coal under the adjoining land lying east of said lot," the lot conveyed in fee-simple. The references, to this right, in the habendum and the covenant of warranty were not broader. Both clauses contained the phrase "with the right of digging for coal as aforesaid," no more and no less. Nowhere in the deed was it said that the right to dig should extend to all the coal or that the right granted should be exclusive. That there was no limitation in any form upon the granted right to dig for coal made it exclusive, and equivalent to an ex-

press and direct grant of the coal. In reaching this conclusion the court followed the decision of the Pennsylvania court in Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760, in which all the English cases and a number of American decisions bearing on the question of construction had been carefully reviewed and analyzed. The doctrine of Caldwell v. Fulton has been adhered to by the Pennsylvania court, and even extended, and the principles therein declared are recognized elsewhere as sound.

To repeat the reasons and argument advanced in support of the conclusion in that case and in our own case of List v. Cotts would subserve no good purpose, and it is doubtfull whether anything of value can be added. As tested by the principles and considerations upon which different conclusions have been arrived at in the construction of other deeds relating to title to coal and mining privileges, no weakness or vulnerability has been found in them; nor can these cases be brought within the reasoning of such other cases. A later Pennsylvania case, Gloninger v. Coal Co., 55 Pa. 9, 93 Am. Dec. 720, may be regarded, on hasty examination thereof, as being in conflict with that of Caldwell v. Fulton; but careful consideration of it results in the view that it is not. In consideration of $6.50 the grantor conveyed to the grantee, a blacksmith, his heirs, executors, administrators, and assigns, forever, "the free right to dig coal at the coal bed under the foot of the mountain on my lot, with the privilege freely to carry the coal from the said lot, as also the free ingress and egress to and from said coal bed through my lands at all times hereafter." The court held this to be a grant of an incorporeal hereditament and perpetual right to dig and carry away coal in common with the grantor, and not an exclusive right in the grantee to take all the coal to the exclusion of the grantor, equivalent to a grant of the coal itself. It is to be observed that the right was limited to the taking of coal from a certain designated coal bed, and was made to a blacksmith for a very small consideration; circumstances tending to show, in the opinion of the court, intention to give the right to obtain coal from the mine for blacksmithing purposes. A like conclusion was reached by this court in Chapman v. Coal Co., 54 W. Va. 193, 46 S. E. 262. The deed construed in that case excepted, in favor of the grantors, their heirs and assigns, forever, "the use and occupancy of any one of the coal banks on said land" that they might at any time thereafter select. In reaching this conclusion the court took into consideration the circumstances and conditions surrounding the parties at the tinme. On page 201 of 54 W. Va. and page 265 of 46 S. E., Judge Miller, speaking for the court, said: "We are further of the opinion that the exception of the deed, if good for any purpose, reserved only the right to take coal for the purpose for which it was then used in that section from any of the coal veins on the said conveyed tract of land, to be selected by the persons mentioned in the deed, and that the term, 'use and occupancy of any one of the coal banks on said land' must be restricted to the purpose of digging and removal of coal for the purposes aforesaid," namely, blacksmithing purposes, as will appear by reference to page 196 of 54 W. Va. and page 263 of 46 S. E. We have here no such index to the intention of the parties. The land lies in a region of country in which coal was then deemed a valuable commercial article, and in which means of transportation were at hand, and it does not appear that any mine or coal bank had then been opened on any portion of the land from which coal had been used for any specific purpose, which may have been within the contemplation of the parties; nor does the deed contain any term or expression importing intention to give only the right to take coal from some coal bed, bank, or mine, open and used at the time, or for any specific or limited purpose.

A clause in the will of David Roberts devising to his daughter Olevia A. Stockett the residue of the 400-acre tract as his hill farm, supposed to contain about 200 acres, for life, and directing it to be sold after her death, and further providing as follows: "And, when sold, one-half of the coal under the land to be reserved to pay Elisha Lindsey for a claim he holds against the coal under the land for about that amount, which must be attended to before the land is sold. The above order is canceled by giving her the four one-acre lots bought of A. D. Baker and the house"—is relied upon by both parties as reflecting light on the intention of the grantor. The last clause of the above quotation is rendered intelligible by an explanation made by the bill, showing that, between the words "sold" and the words "and this," the following provision was originally written, and then canceled, by drawing a pen through it: "And also I order that James and Jonathan, each of them, to give Olevia $600 apiece, and her mother give her $500, to build her a house." It is also claimed that by an agreement between David Roberts and one Isaac Hoge, made on the 9th day of June, 1866, in contemplation of a sale of the 200-acre residue, the former recognized the Purdy claim of title to the coal by the insertion therein of the following clause: "And the party of the second part further agrees to release the party of the first part of the contract made between S. B. Purdy and said Roberts, of mining for coal in Roberts' land, now owned by Elisha Lindsey, for which Hoge agrees to release said Roberts. * * * Should no sale be made by the 1st day of April, 1867, then this agreement is to be void." Presumably no sale was made as contemplated, and this agreement became by its terms ineffective and void, but remains as a circumstance supposedly tending to sustain the construction of the deed asserted by the

bill. It does not appear that a sale was made pursuant to the agreement. The clauses of the will and agreement relied upon seem to operate both for and against the plaintiff, and not to be decisive of anything. They indicate knowledge on the part of Roberts of the assertion of a claim of right under the Purdy deed, and recognition thereof by him, and the will seems to partially define that right as being, in his opinion, something other than title to the coal, but neither Purdy, nor any one claiming under him, was a party to the will. The agreement of June 9, 1866, defines it as a contract "of mining coal in Roberts' land," but not otherwise. What connection Hoge had with it does not appear, but the agreement indicates that he proposed to sell the land as agent on a commission, and hence the interpretation put upon the Purdy deed by him in his agreement with Roberts does not in any way bind Purdy or Lindsey, or indicate what estate or right they thought they held under it. We do not see in these papers anything bearing materially on the interpretation of the clause in question, or tending to raise an estoppel on the part of the defendants by conduct of their predecessor in title.

Indefiniteness of the language of the clause concerning the area or portion of the adjacent land covered by the grant of the coal has occasioned much argument and contention. The land in question lies more nearly west than south of the 13-acre tract. The northern end of it lies almost directly west, while the central and southern portions lie southwest. The southeastern corner would be slightly cut by a line running on bearing S. 60° W. from the northwest corner of the 13-acre tract. The northern line of said tract, extended, would cut off a portion of the northern part. To limit the conveyance to land directly south of the 13-acre tract would give the coal in only a very small portion of the original tract, and none of that part now claimed by the defendant, the Round Bottom Coal & Coke Company. The clause under consideration gives the right to undermine "southward beyond the lines of said tract." The use of the word "lines," instead of "line," in connection with the general and indefinite term "southward," and the fact that the residue of the land lay south and west of two lines of the granted tract, clearly indicate intention not to limit the grant to land immediately and directly south of the granted tract. The term "southward" must be considered with reference to its subject-matter, the residue of the land. Very little of it lay directly south, and a large portion of it—the great bulk of it—lay in a southwesterly direction. Some did lie south, and some west, but more southwest. If the grant had said south of the "line," the intention to grant only coal lying immediately south would have been reasonably clear; but the use of the term "lines" strongly imports intention to make a larger grant. The grantor owned land beyond only two lines of the 13-acre grant, the southern line and the western line. As the clause is informal and inartistic, and mentions land beyond the lines of the tract granted, this term "lines" must be given effect, in determining what was meant or intended, by the general term "southward," and the two words taken together, and read in the light of the subject-matter, can mean nothing other than a grant of coal lying southwestward, as well as southward, from the tract granted. In List v. Cotts the adjacent land did not lie directly east of the granted tract. On the contrary, it lay southeast thereof, as will appear from the courses of the deed construed in that case. The tract was irregular and rhomboidal in form, the lines running S. 44° W., S. 28° E., N. 44° E., and N. 28° E.—from which it appears that, strictly speaking, the adjacent land, in respect to which coal was granted, must have been northeast or southeast. In fact, it was southeast.

As the defense of nonuser rests upon the view that the right granted was a mere easement, the construction we have given the clause under consideration eliminates it. Such defense cannot be set up against title to corporeal property. Nor does the statute of limitations apply. Possession of the land by the grantor of the coal is not deemed in law adverse possession of the coal; no mine having been opened by him, nor any other act done indicating actual possession of the coal as a separate entity. Wallace v. Elm Grove Coal Co., 58 W. Va. 449, 52 S. E. 485.

What is here said is predicated on the allegations of the bill. The answer and evidence adduced hereafter, if any, may wholly alter the case. Having concluded that the deed, construed in the light of the facts and circumstances disclosed by the bill, carries title to the coal in the tract of land in question, it follows that the court erred in sustaining the demurrers to the bill and amended bill, and dismissing the same. Hence the decree complained of will be reversed and the cause remanded.

Reversed and remanded.

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(63 W. Va. 254)

## STATE v. STEPP et al.

(Supreme Court of Appeals of West Virginia. Dec. 17, 1907.)

1. DEPOSITIONS—MOTION TO SUPPRESS—TIME OF TAKING.

There is a consent order, while a case is pending before a commissioner in chancery, fixing a date for closing a party's depositions before the commissioner. That party fails to have his depositions taken by that date, but two days later asks the commissioner to take them, but he refuses. That party takes the depositions later, but before the commissioner completes his report. The depositions are not considered by the commissioner. After the report is returned there are exceptions to it for refusal to take such depositions, and the court suppresses the depositions, and makes a final decree without

considering them. *Held* error to suppress the depositions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, § 121.]

2. SAME—CONSENT ORDER.

A consent order, closing a party's depositions by a date, will not deny consideration of depositions taken and returned after that date before any decree, without special reasons to justify their exclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, § 121.]

3. SAME.

Generally depositions filed before a decree adjudicating the principles of a case must be considered. But if returned after a commissioner's report filed, they cannot be read to affect it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, § 121.]

(Syllabus by the Court.)

Appeal from Circuit Court, Mingo County.

Action by the state against John Stepp and others. Judgment for the state, and Sarah E. Young and Mike Young appeal. Reversed and remanded.

Douglas W. Brown, for appellants. Sheppard, Goodykoontz & Scherr, for appellee John A. Sheppard, trustee.

BRANNON, J. In a suit in Mingo county in the name of the state against John Stepp and others, to sell certain lands as forfeited to the state for taxes, John A. Sheppard, trustee, filed an answer and petition setting up ownership of two of the tracts, and acknowledging their forfeiture, and asking liberty to redeem them from sale. Said answer and petition stated that Mike Young and Sarah E. Young set up a claim to part of the said land, and denied that they had any title, and prayed that the pretended claim of Mike Young and Sarah E. Young be annulled and held for naught, and that the title of Sheppard be held superior to their claim. Mike Young and Sarah E. Young filed an answer to said Sheppard's petition and answer asserting a right to a part of said land, denying the forfeiture, denying Sheppard's title, and praying that his said petition and answer be dismissed, so far as it affected the land claimed by the Youngs. The case was referred to a commissioner to report what part of the land was liable to the sale, and when and for what cause forfeited, and who was entitled to redeem the land, and what part of the said tract was overlapped by the lands claimed by the Youngs, and what title they had thereto, and which was the superior title to the land overlapping, and who had superior title thereto, and whether it was liable to sale or redemption, and who had right to redeem. Afterwards a consent order was made, May 10, 1904, requiring the closing of depositions for the Youngs on June 15, 1904, and evidence in rebuttal on July 15, 1904; Sheppard's evidence was taken before the commissioner January 27, 1904. The Youngs took no depositions before June 15, 1904; but on the 16th or 17th June they appeared before the commissioner and asked him to take the depositions of their witnesses, but he refused to do so on account of the consent order closing the depositions for the Youngs on the 15th of June. On the 18th of July, 1904, the Youngs took a number of depositions. The commissioner did not read the depositions taken by the Youngs. His report was completed August 22, and filed September 7, 1904. The Youngs excepted to the report for the reason, among others, that the commissioner had refused to take evidence in behalf of the Youngs when presented to him on the 16th or 17th of June. Sheppard excepted to the depositions taken by the Youngs, because they were taken after the time fixed by said consent order, and because the commissioner had closed the evidence before the taking of those depositions. The court, by its decree September 23, 1904, sustained Sheppard's exception to the depositions taken by the Youngs, and refused to read them on the hearing, because not taken within the time required by the consent decree, and because they were not taken before the commissioner closed his report, as the decree states; but the report itself disputes this, as it says that the report was made up and completed August 22d. There had been as yet no decree. The decree declared that Sheppard had good title to the land, superior to any other claimant, and had right to redeem the same and allowed him to redeem it, and declared that the claim of the Youngs to the land should be removed and annulled. From this decree Mike Young and Sarah E. Young appeal.

The question is, did the court err in refusing to consider the depositions taken by the Youngs? It appears that a few days before the 15th of June the commissioner applied to the attorney for the Youngs and called his attention to the consent order and notified him that it was the intention of the commissioner to comply with that consent order as to the time of the taking of depositions. It thus appears that there was negligence on the part of the Youngs' attorney in taking the depositions. What is its effect, granting the existence of such negligence and delay? Does it take away from the Youngs the right to have the depositions read? The right to make defense is an inestimable right in a court of justice. Shall that consent order be held to debar the Youngs from making defense? Is it an estoppel against complaint? Reflect that it was only one or two days after the day fixed for the close of depositions when the Youngs appeared before the commissioner and asked him to take their depositions. True the date had passed, but what material harm could have been done to Sheppard by this short delay of a day or so? Why did not the commissioner take the depositions, consider them, and let the question go before the court? As yet the commissioner had not made up his report. He

did not make up his report till long afterwards. The depositions were taken July 18th, before the commissioner had made up his report, and long before the court acted upon the report. They were filed September 7th. Of what right would the reading of these depositions have deprived Sheppard, what legal right? The law gave the Youngs the right of defense, a right which Sheppard must recognize, because a litigant must recognize the right of his adversary to sustain his cause. He would not have been deprived of any legal right. If the Youngs had asked a continuance, that would be another question, but the depositions had already been taken, and the Youngs complain of their suppression. In Ward v. Ward, 40 W. Va. 623, 624, 21 S. E. 751, 29 L. R. A. 449, 52 Am. St. Rep. 911, it is stated that where, within the 10 days during which the report is required to lie in the commissioner's office, exceptions are made, depositions can be taken and considered. This shows that before the report is made they may be taken. After the report has been filed they cannot be considered, as that case says. But in the present case they were asked to be taken before the making of the report had been begun—before the commissioner had begun his consideration—and they were actually taken before that. Our statute says that "a deposition may be read if returned before the hearing of the cause, although after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree." Code 1899, c. 130, § 35 [Code 1906, § 3958]. The right to make defense in a court of justice when sued is a right of inestimable worth. "Audi alteram partem" (hear the other side) is a motto of impartial justice. That statute secures a valuable right. It seems to me that being a remedial statute securing the right to have evidence considered, it should receive a liberal construction—a construction which will carry out its manifest design. It says that depositions may be read, though taken after an interlocutory decree, if they do not relate to a matter thereby adjudged. This means that until that matter is adjudged by actual decree the party's evidence must be heard. That seems plain, especially when the section goes on to say that the deposition shall be read, if returned before a final decree. The statute does use the word "may," which is usually only permissive or discretionary. But I understand that that word is mandatory when there is involved a great right of a party. I understand that when it is used in a statute, where a person has a right involved, and the power to exercise a function is given a court or public officer, for the benefit of that individual or the public, the word is mandatory, not discretionary. The power or function must be exercised by the public officer or court in the interest of the public or the suitor's right. I think the authorities cited in Ex parte Doyle, 62 W. Va. —, 57 S. E. 824, will sustain this view. See Cavender v. City (decided this term) 59 S. E. 732. And I can see no instance, hardly any instance, where that principle would more strongly apply than in a case involving the right of a suitor to adduce evidence in defense of his property right. I will not be so bold, notwithstanding this rule, as to assert that no negligence on the part of the suitor can deprive him of the right to have depositions read, and yet the language of that statute seems very strong. I shall not say, and do not intimate, that the decision in Buster v. Holland, 27 W. Va. 510, is unsound, but that refuses depositions taken after a report of a commissioner was filed and when the case was ready for hearing. The court denied the right to thus nullify the report of the commissioner. That may be all right. We reflect that the commissioner is the handmaid of the court, and a hearing before him is practically a hearing by the court, and that hearing is closed when the commissioner files his report. That is different from the case where the work is still going on before the commissioner and he has not yet completed his report. That case asserts also that as to any matter not adjudged, if the deposition be taken and returned before the final hearing, it may be read. That statute says so. Atwood v. Shenandoah V. R. R., 85 Va. 966, 9 S. E. 748, holds that a master may reopen depositions after they have been closed and he has partly drafted his report. Fulmer Coal Co. v. Railroad Co., 57 W. Va. 470, 50 S. E. 606, was a case of refusal to read depositions taken during term after a continuance had been refused, and the case had been submitted for decision.

Say again that the Youngs were negligent. As when the hearing took place the depositions were before the court, their suppression was a mere penalty for negligence. To give the consent order the force to exclude the depositions would give it the force of estoppel—irrevocable estoppel—as if it were res judicata, when it did not adjudge anything, but was a mere agreement, not on any consideration, and would say that Sheppard had right to so enforce it when it would take away from him no legal right. It is even said that it has the force of a consent decree not to be set aside except by consent. That is the case where the consent decree adjudicates matters in issue in the case in the pleadings—matters in controversy—but this order does not do this. It concerns only procedure in the case.

We do not see any error in overruling exceptions to the depositions of Sheppard. The exception was that after the case had been dormant before the commissioner 10 months they were taken on one day's notice, when counsel had no chance to communicate with his client. There had been a notice published to all parties. It required no other notice. Miller v. Cox, 38 W. Va. 747, 18 S. E. 960. Besides, privilege was tendered counsel for the Youngs to cross-examine the witnesses.

As the case—both sides—has not been pass-

ed upon, either by commissioner or court, and as the court, under the statute direction in such case, sent the case to a commissioner, it is proper that a report be made on the whole case, and there should be a recommittal, and therefore we reverse the decree, without passing on the merits, and remand the case.

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(62 W. Va. 562)

## NEWHOUSE v. KANAWHA & W. V. R. CO.

(Supreme Court of Appeals of West Virginia. Nov. 12, 1907. Rehearing Denied Jan. 7, 1908.)

1. MASTER AND SERVANT — SAFE PLACE TO WORK—DUTY OF MASTER.

A reasonably safe place to work, which it is a nonassignable duty of the master to provide, includes, in the case of railroads, the entire track over which the servant is required to pass in discharge of his duties.'

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 218–223.]

2. SAME—DIRECTING VERDICT.

Where, in an action to recover damages for injury due to negligence, there is evidence which tends in a fairly appreciable degree to prove negligence, it is error to strike out the evidence of the plaintiff and direct a verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1000.]

3. SAME—NEGLIGENCE OF MASTER.

Generally, as between master and servant, negligence will not be imputed from the circumstance alone of injury due to defective machinery or appliances, but some affirmative acts of negligence, either of omission or commission, must be shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 881, 898.]

4. SAME—NEGLIGENCE—QUESTION FOR JURY.

But evidence showing suspension of wire cables across a railroad track so low as to obstruct the passage of a train, and actually obstructing the track but a short time before injury results therefrom, is sufficient, in an action by a servant injured thereby while riding home from his place of work on the construction train of the defendant company, to constitute a prima facie case of negligence, entitling him, until explained by the defendant consistently with the exercise of due care, to have such evidence submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010–1050.]

(Syllabus by the Court.)

Error from Circuit Court, Kanawha County.

Action by Louis Newhouse against the Kanawha & West Virginia Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial granted.

Wertz & Van Fleet, for plaintiff in error. Chilton, MacCorkle & Chilton and T. R. English, for defendant in error.

MILLER, P. The demurrer to the plaintiff's declaration was overruled by the court below, and its action thereon is not challenged here. The plaintiff, a day laborer employed by defendant in the construction of its railroad, in an action on the case seeks recovery of damages for injuries sustained by him on the evening of May 23, 1906, in leaping from a flat car of the construction train on which he was being carried by the defendant from his place of work to his boarding house. Along the line of the railroad was a derrick used in lifting stone, supported by two large wire guy ropes stretched over the track. The derrick had been there for some time, and the construction train had safely passed and repassed under these ropes many times. But on the outward trip on the day of the injury the train was flagged before reaching the derrick; and the conductor, who went forward to learn the cause, on returning announced, in the presence of the plaintiff and others on the flat car, that the guy ropes were too low. But after a delay of only a few moments the train passed on under the ropes without further interruption. The trouble occurred at the derrick in returning in the evening of the same day. The train was moving backward, the engine pushing the flat car, which passed safely under the first rope; but this rope was caught by the cab of the engine, pulling down the derrick and causing the second rope to fall upon and sweep across the top of the flat car, and in order to avoid being dragged off by the rope the plaintiff was obliged to leap off the moving car near the tender, alighting on some rocks on a steep embankment, bruising himself and breaking three ribs, and, as he rolled down the embankment, the heel of his left shoe was caught on the track by the wheels of the engine and his foot mashed, resulting in amputation of part thereof.

The evidence is very incomplete and unsatisfactory, in not showing to whom the derrick belonged, how it was or had been employed, more of the particulars regarding the delay of the train in the afternoon of the day of the accident, how and by whom the ropes were elevated so as to allow the train to pass under them, in whose charge the derrick was, and what provision the defendant had made to keep its track clear at this point. The plaintiff evidently relied on proof of the obstruction alone as making out a case of presumptive negligence, regarding the other matters as defensive in nature. It is not generally true, however, as between master and servant, that negligence is imputed from the circumstance alone of injury due to defective appliances or machinery; but, as a general rule, some affirmative acts of negligence, either of omission or commission, must be shown. Minty v. Railroad Co., 2 Hasb. (Idaho) 471, 21 Pac. 660, 4 L. R. A. 409; Wood, Mast. & Serv. § 382; Railway Co. v. Ledbetter, 34 Kan. 326, 8 Pac. 411; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; 2 Labatt, Mast. & Serv. §§ 833–835.

After the plaintiff had introduced evidence of the nature and cause of, and how he received, his injuries, developing the facts sub-

stantially as stated, the court sustained the defendant's motion to strike out his evidence and direct a verdict in its favor. The only question presented here is, was this action of the court erroneous? It is said by Judge Holt in Robinson v. Railroad Co., 40 W. Va. 585, 21 S. E. 727: "If there is no evidence in any fairly appreciable degree tending to prove defendant's negligence, then the court, on motion, should instruct the jury to find for the defendant, and the court must decide when the case calls for such instruction, for to that extent it is a question of law arising out of the testimony; but if in the opinion of the court the evidence tends in a fairly appreciable degree, not by a mere scintilla, to prove negligence on the part of the defendant, then the question should be submitted to the jury." To the same effect are Carrico v. Railway Co., 35 W. Va. 389, 14 S. E. 12, Yeager v. Bluefield, 40 W. Va. 484, 21 S. E. 752, and Guinn v. Bowers, 44 W. Va. 507, 29 S. E. 1027; a motion to exclude evidence being, according to these and other cases, equivalent to a demurrer thereto, so far at least as the rights of the plaintiff are concerned. Whether the evidence of the plaintiff comes within the rule of these cases depends upon the question whether the suspension of these cables over the track, so low at the time of the accident as to constitute an obstruction, of itself speaks a prima facie case of negligence, tending with the other evidence to support in an appreciable degree the plaintiff's case. It is familiar law that the obligation to provide the servant a reasonably safe place to work is a nonassignable duty, breach of which, though delegated to another, will render the master liable. Such a reasonably safe place to work has been extended, with respect to railroads, to the entire track over which the servant is required to pass in discharge of his duties (Flannegan v. Railway Co., 40 W. Va. 436, 21 S. E. 1028, 52 Am. St. Rep. 896; McCreery's Adm'x v. Railroad Co., 43 W. Va. 112, 27 S. E. 327; Jackson v. Railroad Co., 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337), and we see no reason for excepting railroads under construction.

This position does not violate the general rule, in the case of master and servant, requiring specific evidence which fairly tends to show the employer guilty of negligence. "The rule does not imply that it is only from direct evidence that the master's culpability can be inferred. The burden of proof is satisfied by the production of circumstantial evidence." 2 Labatt, Mast. & Serv. § 835. Does not the suspension of wire cables across a railroad track so low as to obstruct the track and the passage of a train, or leaving them so dangerously insecure as to be liable to become an obstruction and a nuisance, unexplained, actually obstructing the track but a short time before injury results, constitute per se negligence? This court has so held, and we think rightfully, in McCreery's Adm'x v. Railway Co., supra, and substantially, also, in Flannegan v. Railway Co. and Robinson v. Railway Co., supra. The courts of other states so hold. Stoltenberg v. Railroad Co., 165 Pa. 377, 30 Atl. 980; Railway Co. v. Delaney, 22 Tex. Civ. App. 427, 55 S. W. 538; Thomas v. Telegraph Co., 100 Mass. 156. Labatt, Mast. & Serv. § 836, says: "But, while the plaintiff is bound to introduce evidence from which the jury may properly infer that the accident was caused by the defendant's negligence, he is not required to point out the particular act or omission which caused the accident." In a note to section 838 are collected a number of cases illustrating the shifting of the burden of proof. This is not a case like Sanderson v. Lumber Co., 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 88 Am. St. Rep. 841, in which an employé of the defendant not directly connected with the management of a log train, but whose duty it was to ride on it in performance of his duties, was thrown off and injured by the reckless management of the train and engine. Here, as in McCreery's Adm'x v. Railway Co., supra, there was an obstruction over the track, which the servant had the right to assume would be kept unobstructed, subjecting him to a danger not assumed—an obstruction which, until explained by the defendant consistently with nonnegligence, makes a prima facie case of negligence. The plaintiff was entitled to have his evidence go to the jury, and the motion to exclude it and direct a verdict for defendant was improperly sustained.

We therefore reverse the judgment, set aside the verdict, and award the plaintiff a new trial.

(62 W. Va. 576)

## LEWIS v. YATES et al.

(Supreme Court of Appeals of West Virginia. Nov. 19, 1907. Rehearing Denied Jan. 7, 1908.)

1. EJECTMENT—VENDEE IN POSSESSION—DEFENSES.
For the purposes of ejectment law, a vendee in possession under a title bond is the lessee or tenant of his vendor, and may defend under the title of the latter, either as perfect paper title, or as color of title. His possession being that of the vendor, he may defeat recovery by proof of legal title in his landlord, the vendor, by adverse possession.

2. ADVERSE POSSESSION—COLOR OF TITLE.
Whether a title bond or other executory contract of sale of land is color of title discussed, but not decided.

3. SAME.
A deed made by a claimant under a patent, which interlocks with an older one, purporting to convey land lying partly beyond the interlock and within the boundaries of the senior patent, is color of title to the extent of the boundary lines therein designated, but it does not extend the boundary lines of the junior patent beyond their locations as they would be fixed and determined, had such deed never been made, and it remains color of title as to land included in the older grant only to the extent of its boundaries, determined independently of the deed.

4. BOUNDARIES—INTERLOCK.
A tract of land, supposed to lie between older grants, the patent for which, in describing it, calls for lines and corners of the older grants on one side, but makes no reference to those supposedly lying on the other side, must be so located by the jury, in finding a verdict, as not to ignore the location of the older grants, lines, and corners called for in the patent, even though the location of the tract in question, as determined by observance of said monuments, cause an interlock with the older grants on the other side, not called for in the description.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 67.]

5. SAME—NATURAL MONUMENTS.
In locating land from the description set forth in the deed or patent, natural monuments and marked lines must be allowed, ordinarily, to control courses and distances, if there is conflict; but, in such case, the evidence must be sufficient to identify, with reasonable certainty, the monuments in question as the monuments called for in the description.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 3, 12, 18, 23.]

6. SAME—COURSES AND DISTANCES.
When certain lines and corners of a survey are reasonably well identified, or admitted, and others are not, courses and distances must be allowed controlling force in determining the location of the latter, when the description by quantity is in substantial agreement with the area of the tract so located, even though there be slight evidence tending to show marked lines, differing from those determined by the courses and distances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 38–41.]

7. TAXATION—FORFEITURE OF LAND DELINQUENT—OPERATION AND EFFECT.
Title to land, acquired by adverse possession, is forfeited to the state for nonentry on the landbooks for taxation, and nonpayment of taxes thereon for a period of 5 years, in the name of some bona fide claimant thereof, under the colorable title under which title by adverse possession has been acquired; and, if the land lies within the boundaries of a claimant under a grant from the state, under which possession of a part thereof has been held for more than 10 years, and the whole thereof has been taxed and the taxes thereon paid, the forfeited adverse title is transferred to, and vested in, the claimant under the title as to which there has been no default in respect to taxation, by virtue of section 8 of art. 13 of the Constitution of 1899 [Code 1906, p. lxxxiv].

8. SAME—LIMITATIONS AGAINST STATE.
The statute of limitations does not run against the state so as to prevent forfeiture of land titles for nonentry for taxation, under section 6 of Article 13 of the Constitution of 1899 [Code 1906, pp. lxxxiv, lxxxv], or the transfer of forfeited titles under section 8 of said article.

(Syllabus by the Court.)

Error from Circuit Court, Greenbrier County.

Action by Cornelia A. Lewis against W. C. and James A. Yates. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Preston & Wallace, Williams & Dice, and John Osborne, for plaintiff in error. Henry Gilmer, for defendants in error.

POFFENBARGER, J. Cornelia A. Lewis, in her declaration in an action of ejectment against W. C. and James A. Yates in the circuit court of Greenbrier county, seeks recovery of a tract of 470 acres of land known as the "William Donaldson grant," the "William Powell survey," and the "Henning land." The patent was issued on the 4th day of February, 1801, granting the land to Donaldson, who was the assignee of John Deem, who was the assignee of William Powell, and the survey had been made on the 22d day of March, 1798. This land subsequently passed, by conveyance, to one Henning, and then to Stuart, and from Stuart to Sehon, who sold it to Mrs. Lewis. Hence it is frequently referred to in the record as well as in deeds as the Henning tract. The defendants claim 57 acres out of what was known as the Andrew Hamilton tract, which 57 acres, according to the location claimed by them, lies partly within the boundaries of the Powell survey, located according to the claim of the plaintiff. The Hamilton survey was made on the 5th day of May, 1796, and called for 600 acres, and appears to lie for the most part northwest of the Powell survey. It is a large and irregular survey, having many lines and corners. The grant was made February 22, 1816, to Anthony Bowen, assignee of Andrew Hamilton. Bowen conveyed to Samuel Carroll 475 acres of it. Samuel Carroll, by deed dated December 10, 1837, conveyed part of the tract to Clement Carroll. Clement Carroll by deed dated May 17, 1852, conveyed to John Stuart part of it, describing it as a tract of 57 acres. He had previously made a deed dated the 31st of March, 1852, conveying to John Yates, Jr., all of his interest in and title to the farm on which he then resided, describing it as adjoining the "lands of Robt. McClintic, Joseph McClintic, Charles A. Stuart, decst., Garland Brown, and Jacob Hinkle," and as supposed to contain "300

acres more or less after deducting 50 acres which said Carroll had sold Charles A. Stuart, his decst., which 50 acres the said Carroll reserves." John Stuart, to whom the 57 acres was conveyed, seems to have been a son of Charles A. Stuart. Wherefore the deed for the 57 acres, described in the previous deed as 50 acres, was conveyed to him. The defendants claim that Robert Rinehold, years ago, purchased this small tract from John Stuart, taking a title bond therefor but no deed, and that subsequently they purchased it from Rinehold, taking an assignment of the title bond, which they say they have lost. A title bond from Stuart to Rinehold, calling for said tract of land, which was found among the papers of John Stuart, appears in the record. The deed from Clement Carroll to John Stuart describes the 57-acre tract of land as being "on the waters of Byrne's creek, joining said Stuart's Henning place and his Banks lands, and bounded as follows, to wit: Beginning at a white oak on a flat ridge, corner to Smith, said Henning place, N. 79° W. 94 poles to a small dogwood on hillside near Byrne's creek, and leaving N. 26° E. 115 poles over a ridge to a hickory, near a branch or a line of said Banks tract, and with S. 54° E. 112 poles crossing branch twice to a small chestnut oak on side of a point, in laurel, corner to and with said Henning place, S. 40° W. 74 poles crossing small branch to the beginning." A considerable portion of this small tract lies, according to the contention of the plaintiff, outside of the Hamilton survey and inside of the Powell survey, and the defendants and those under whom they claim have been in actual possession thereof for a great many years. Their actual inclosure covered a very considerable portion of the 57 acres. No actual possession or inclosure on the part of the plaintiff, or those under whom she claims, reaches any part of the land claimed by the defendants. It will be observed that the grant of the Powell survey, made to Donaldson, is considerably earlier than that made to Bowen under the Hamilton survey. There is no reference in the Donaldson patent to the Hamilton survey, nor is there any in the Bowen patent to the Powell survey. An older survey than either of these lying east and southeast of the Hamilton survey is the Banks survey, and the Hamilton survey and Bowen grant based upon it call for a corner and two lines of it. The Powell survey seems to have been made without any reference to the Banks survey, since it calls for no line or corner thereof. Another old survey, made in 1791, known as the "Patterson survey," and lying east of the Powell survey, was likewise made without any reference to the Banks survey, for, however located, whether as claimed by the plaintiff or defendants, it laps over onto the Banks survey. The southwest corner of the Patterson survey is the beginning point of the Powell survey, which follows the western line of the Patterson survey N. 6° W. 194 poles to a Spanish oak; thence leaving the same runs S. 84° W. 184 poles to a Spanish oak and chestnut oak; thence N. 80° W. 58 poles to four white oaks by a path, and S. 80° W. 72 poles to two lynns and two sugar trees, corner to the Gratton survey, at a run and with the Gratton survey S. 14° W. 162 poles to two white oaks and a Spanish oak, corner to the Gratton survey, the Barger survey, and the Wolfenberger survey of 464 acres; thence with the Wolfenberger survey S. 65° E. 40 poles to a hickory and white oak sapling; thence S. 50° E. 200 poles to a white oak on the line of the Wolfenberger 464-acre tract, corner to another Wolfenberger survey of 51 acres; thence with the same N. 20° E. 48 poles to a white oak sapling, W. 22 poles to a white oak, N. 20° E. 26 poles to a chestnut and chestnut oak, S. 80° E. 78 poles to a white oak and black oak sapling, corner to the Wolfenberger 51-acre survey and Powell's 400-acre survey; thence with a line of the latter N. 51° E. 120 poles to the place of beginning. The small Wolfenberger survey was made in 1794, and the large one was surveyed for John Frogg in 1785. The Powell 400-acre survey was made in 1798.

There is evident conflict between the lines of the Powell 470-acre survey and the lines of the Hamilton 600-acre survey, but no inconsistency of which the court or jury could take notice, as matter of construction, for neither patent recognizes the other. The defendants claiming under the Bowen patent for the Hamilton survey may be within the lines of the Powell survey, consistently with the lines of the Hamilton survey. As they claim under the title bond from John Stuart for the land described in the deed to him from Clement Carroll, under which Rinehold held possession for a long time, and under which the defendants themselves have been in possession for many years, calling for certain monuments upon the ground, which they say were located by the survey made by Samuel Thompson away back in the 60's, and which survey is inconsistent with the lines of the Powell tract, whether located according to the contention of the plaintiff or the defendants, it may be that this possession is outside of the Bowen grant, as well as within the lines of the Donaldson grant. Presumably, on the three-fold view that the title bond is color of title to the extent of the boundaries described in the deed from Carroll to Stuart, that the land in controversy is within the boundary lines of the Bowen patent, and that it lies wholly beyond the lines of the Donaldson patent, there was a general verdict for the defendants, accompanied by a special finding that the beginning corner and eastern line of the Donaldson patent are located as claimed by the defendants. The principal complaint is that the court erred in refusing to hold this verdict contrary to the law and the evidence, and set it aside. Whether this complaint is well founded in-

volves not only consideration of the evidence, but also the status of the defendants as claimants under the title bond.

In McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562, it is said that an executory contract of sale of land, stipulating for the future conveyance of the legal title, is color of title under the statute of limitations as to hostile claimants. As it was distinctly held and determined in that case that there was no adverse possession shown in it as against any of the parties, the statement is necessarily an obiter dictum. Similar expressions have been made by this court in some other cases, as in Adams v. Alkire, 20 W. Va. 480, Swann v. Thayer, 36 W. Va. 46, 14 S. E. 423, and Bennett v. Pierce, 50 W. Va. 604, 40 S. E. 395. But, as the paper titles relied upon in all those cases were deeds, and not executory contracts, the question whether an executory contract is color of title could not have arisen for decision, and these expressions can be nothing more than dicta. In Adams v. Alkire, Judge Snyder said: "And it is entirely immaterial whether this color or claim of title be under a good or a bad, a legal or an equitable, title. Shanks v. Lancaster, 5 Grat. 110, 50 Am. Dec. 108." I do not think Judge Snyder meant to say that an equitable title is color of title. In his statement he includes both color and claim, two distinct things. This is followed by the terms "legal title" and "equitable title." I think he meant that the terms "legal" and "equitable" should be used distributively, "legal" referring to color, and "equitable" to claim. Shanks v. Lancaster could not have been cited for the proposition that an equitable title may be relied upon as color of title. The syllabus in that case says: "It is immaterial whether possession under a claim of title be under a good or a bad, a legal or an equitable, title." In the opinion, Judge Baldwin said, on this phase of the case: "And he and those claiming under him may do this [go back of the junior patent, and show entries and surveys according to his claim], not only to establish an adversary possession under his junior patent, which confers itself no legal title, but to establish an adversary possession prior to his junior patent, under the entries and surveys upon which the same is founded, it being immaterial whether an adversary possession under the claim of title be under a good or a bad, a legal or equitable, title." It is admitted in McNeeley v. Oil Co. that the proposition is not asserted as matter of decision in any case, unless it be Adkins v. Spurlock, 46 W. Va. 139, 33 S. E. 121. In that case nothing is said as to whether a title bond is or is not color of title. A title bond was involved in it, but the decision seems to have been based upon another and different proposition of law. Holley, the vendor or maker of the title bond, was a tenant in common with John Lucas. Before the title bond was made, he and Lucas had made a verbal partition, after which Holley executed his title bond to Spurlock for the part of the land which had been assigned to him in the verbal partition, and put Spurlock in possession of that part, where he had remained for a period of more than 10 years. Judge Dent, in his opinion, regarded this as an ouster by Holley, not by Spurlock, or Lucas and those claiming under him, from the occupancy of that portion of the land, which made Holley's, not Spurlock's, possession adverse. The proposition of law asserted as controlling the case was stated in the following terms: "Partition, though it be void, and holding land in severalty by co-tenants, is a mutual ouster of each other as to the portion in actual occupancy, and is therefore adverse." Clearly, therefore, it was, in the opinion of the court, not the holding under the title bond that made the possession adverse, but the holding under the partition. As the status of an occupant of land under a title bond or other executory contract is, for the purposes of defense in an action of ejectment, quite as advantageous as that of a lessee, enabling him to defend not on his title bond, but on the title of the vendor, there is no good reason or necessity for calling the title bond color of title. It passes no legal title, does not purport to do so, and is therefore not within the definition of color of title as given by our decisions. Hutch. Land Titles, at § 389, says: "Color of title is that which has the semblance of title, but which in fact is no title, and is anything in writing, however defective or imperfect, purporting to convey title to the land, and which defines the extent of the claim." This definition is the one usually given by the courts and the law writers. An essential requisite of it is that it purports to pass title. As a court of law takes cognizance of nothing but a legal title, it is difficult to see how a colorable, equitable title, such as a title bond or other executory contract, could be treated or regarded in that court as color of title. Nor does there seem to be any necessity or reason for setting up any such fiction; since one in possession under a claim of an equitable title may defeat an action for recovery of possession from him under a title hostile to that under which he claims by showing a better title outstanding in some other person—any person—and if, by the introduction of his title bond, he can show himself to be a claimant of that better title and his possession to be under it, as such claimant, his case becomes stronger and his right of occupancy clearer. If the outstanding title, thus shown, is a good title, a superior title, then the elements of color and adverse possession do not enter into the case. He makes out as against the plaintiff a complete superior title, a perfect paper title, not a title by adverse possession at all. If, on the other hand, he shows a junior patent, or void deed or other paper, purporting to pass a legal title to the person who put him in possession

under the title bond or other executory contract, or as lessee, and that the possession of himself and his vendor or lessor under that colorable title has been of requisite time and character, his defense is based, not upon his executory contract as color of title, but upon the colorable title of his vendor or lessor, his possession being that of the vendor or lessor, as the case may be, and, under his lessor's or vendor's colorable title, not his own, for he has none. Numerous decisions hold that the possession of a vendee under an executory contract is not adverse, and also that his possession is the possession of his vendor. State v. Harman, 57 W. Va. 447, 50 S. E. 828; Core v. Faupel, 24 W. Va. 238; Clarke v. McClure, 10 Grat. 305. At common law, the tenant in possession could always defend under his landlord's title. His failure to do so, however, frequently resulted in hardship and vexation to his landlord. Hence the statute (St. 2 Geo. II, c. 19) was passed, requiring notice of the action to landlords, and giving them the right to make themselves defendants by joining with the tenants in possession, and imposing a penalty upon tenants who refused or neglected to give such notice. Similar statutes have been enacted in most of the states in this country. 7 Enc. Pl. & Pr. 307. Our statute (section 5, c. 90, Code 1899 [Code 1906, § 3340]) says the occupant shall be named in the declaration, and, if a lessee be made defendant without joining his landlord, such landlord may appear and be made a defendant with, or in place of, his lessee. Judge Staples, in Hanks v. Price, 32 Grat. 107, made a careful, able, and exhaustive examination of the authorities for the purpose of determining what the terms "lessee" and "landlord," as used in the statute relating to actions of ejectment, very similar to, if not identical with, ours, mean, and his conclusion is embodied in point 2 of the syllabus in that case, which says: "In general, the law will imply a tenancy whenever there is an ownership of land on the one hand and an occupation on the other." It is enough that the occupant holds under, and in subordination to, the title of another person, for the purposes of ejectment law. This makes them landlord and tenant. Hence it seems quite clear that there never can be any necessity for regarding an executory contract as color of title; the occupant under it being the lessee of the vendor and able to defend under his vendor's title, as perfect title, if it be good, and as colorable title, if it be bad. As this is a matter wholly foreign to the subject-matter of sections 20, 21, and 22 of chapter 90 of the Code of 1899 [Code 1906, §§ 3355, 3356, 3357], these sections seem to have no bearing upon the question. They relate to actions and rights between vendor and vendee in the one instance, and mortgagor and mortgagee in the other. The doctrine propounded here obtains between persons not in privity with one another in any sense, nor holding under the same title, but, on the contrary, under strange and hostile titles. There is some authority as shown in McNeeley v. Oil Company, cited, for the position that a title bond is color of title, but these authorities do not refer their conclusions to any general principle of law, nor show any necessity for such deviation from settled legal principles. Some of them hold that a title bond constitutes color of title if the purchase money has been wholly paid, so that nothing remains to be done except the delivery of a deed. Others hold that it constitutes color of title whether the purchase money be wholly paid or not. It is difficult to see how the payment or nonpayment of the purchase money could make any difference, inasmuch as the holding must proceed upon the theory that the sole object of color of title is to define boundaries, and that it need not purport to pass any legal title.

It is apparent that, in a practical sense, the same result is generally accomplished by allowing the vendee to defend under the colorable title of his vendor that would come from allowing the use of the title bond as color of title. For the purposes of this case, it suffices to say the defense is made under the Carroll-Stuart deed as color, and not under the title bond, and we find it unnecessary to decide whether, in case there were no paper muniment other than the bond, it would be admissible as color of title. A claim of title could undoubtedly be predicated upon it, but that differs widely from color of title. John Stuart was never the owner of any part of the Henning tract, although the deed to him seems to describe it as his land. It was granted to William Donaldson, who conveyed it to Samuel Donaldson, who conveyed it to Nathan Henning, who conveyed it to Charles A. Stuart, the father of John Stuart. Charles A. Stuart devised it to his wife, Elizabeth Stuart, who devised it to Henry Stuart and Thomas Bradford in trust for her son Robinson Stuart's wife and his family. Robinson Stuart and his children made deeds for it to Edmond Sehon, and Thomas H. Dennis, as commissioner of the circuit court of Greenbrier county, conveyed to Sehon the interest of Charles A. Stuart, Jr., a son of Robinson Stuart. Edmond Sehon and his wife, daughter of Robinson Stuart, conveyed the land to Cornelia Lewis. John Stuart purchased the 57 acres, the location of which is in controversy here, from Clement Carroll, believing it to be a part of the Bowen grant and accepting it as such. Hence, as to the Henning tract, the plaintiff is not in privity with John Stuart or the defendants holding under him. The Bowen patent, being later in date than the Donaldson patent, is only color of title as against the latter, and the deed to John Stuart from Clement Carroll is mere color of title as against it. The grave questions presented, then, are whether the Bowen patent and the deed made to Stuart, or either of them, interlocks with the Donaldson patent, and so covers part of the

land granted to Donaldson and now claimed by the plaintiff; whether the possession of the defendants, which has been open, notorious, and continuous for a long period of time, within the boundaries of the Donaldson grant as claimed by the plaintiff, was within or outside of the boundaries of the Bowen patent, and, though outside of the boundaries of that patent, yet within the boundaries of the deed made from Carroll to Stuart; and whether the Donaldson patent covers the land in controversy, it being the contention of the defendants that it does not touch any portion of it.

That the verdict of the jury as to the location of the Donaldson grant of the Henning land is contrary to the law and the evidence seems clear beyond question. All the witnesses say that if located according to the contention of the defendants, it will run over into what is called the "Frogg survey" of 464 acres, known also as the "large Wolfenberger survey," and completely cover the small Wolfenberger tract of 51 acres. The locations of the Wolfenberger tracts seem to be agreed upon by the witnesses. There is no controversy as to their location. Some of their lines, corners, courses, and distances are called for as lines, corners, courses, and distances of the Henning tract. These two tracts, therefore, are monuments called for in the description of the Donaldson grant. Beyond them the Donaldson grant cannot extend without ignoring the monuments called for therein. To locate it beyond them is not only to disregard the evidence, but likewise to disregard the law. Marked lines and reputed boundaries of adjoining tracts, called for in the deed or patent, and the locations of which are not disputed, must be observed by both court and jury. Other lines and corners, as to the locations whereof the evidence is uncertain, must be located from them. Monuments and lines identified or admitted must prevail and govern in finding those not identified. Summerfield v. White, 54 W. Va. 311, 46 S. E. 154; Ruffner v. Hill, 31 W. Va. 428, 17 S. E. 13. The only reply made by counsel for the defendants to this circumstance is that the Donaldson grant, if located according to the claim of the plaintiff, will extend over into the Banks survey, and push the Patterson survey almost wholly over into the Banks survey, and fail to connect as it should with the Gratton survey. The contention of the defendants themselves would locate part of the Patterson survey within the Banks survey. This is no answer to the proposition. Neither the Donaldson patent nor the Patterson survey calls for the Banks survey, or any line of it, as a monument. They wholly ignore that survey. They are hostile grants, covering in part the same land. Hence it is no objection that the one laps upon the other. For no other reason than that otherwise the Donaldson grant would lap on the Banks tract, defendants would shorten the lines and reduce the quantity of the former, a quarter, third, or half, and carry the lines and corners to distances and places to which they cannot go without direct contradiction of the patent and survey. Such results cannot stand on mere conflict with the Banks survey. In locating the Donaldson grant according to the claim of the plaintiff, there is some confusion with the Gratton survey, for which it calls as a monument, and it fails to reach the Jacob Barger survey, for the corner of which it calls as a monument. The conflict between it and the Gratton survey may be due to some error as to the location of the corner and lines of the latter; but it reaches that survey, goes to it, and over onto it. It does not reach the Jacob Barger survey, as it should; but no evidence in the case will solve these difficulties. It is an irreconcilable conflict. The Donaldson grant, as located by the defendant, would not touch either the Gratton survey or the Barger survey. Hence their evidence wholly fails to reconcile it. On the contrary, it would make the situation worse. To give the Gratton and Barger survey calls control, and restrain the Donaldson calls so as to correspond, would still leave a large portion of the land in controversy within the plaintiff's boundary.

It seems clear also that the evidence is insufficient to establish the location of the land in controversy wholly within the Bowen grant of the Hamilton survey. It tends strongly to show that a certain corner of the Jacob Barger survey is a corner of the Hamilton survey. There seems to be no controversy on that point, and this corner seems to be consistent with the long northern and western irregular line of the Hamilton survey, which is described as running with Moody's line to Murphy's corner and to Black's line and with it to a corner of David McCoy and on to Mushbarger's line and with it down to that corner, passing, away back on the line, a cave called for in the description, which the evidence locates and identifies. Neither is there any controversy about the location of another corner at the extreme eastern end of the Hamilton survey, near which this long northern and western zigzag line begins. The beginning point of the patent is almost directly between these corners, and is described therein as two sugar trees, a hickory and lynn, corner to the Banks survey, and running thence with the same N. 60° E. 400 poles to a hickory and white oak on a ridge, another corner of the Banks survey. This is the eastern corner just mentioned herein, and the location of which is practically uncontroverted. The Banks patent seems not to have been given in evidence; but one of the surveyors says that patent describes the corner of the Banks land, which is made the beginning corner of the Hamilton survey, as two lynns and a sugar tree on the northwest side of a branch, and he testifies that, while the timber is not found at the point at which the plaintiff says that

corner is located, he did find a small sugar tree there, standing just north of a branch. A line run from the corner at the eastern end of the tract, the location of which is practically undisputed, back to the place at which the plaintiff locates the beginning corner, on the bearing called for in the survey and patent, reversing the call and allowing for variation, would locate the corner in accordance with the plaintiff's claim. No monument is identified by the evidence of either plaintiff or defendants. The evidence is uncertain, remote, and slight. No witness testified that he had ever seen any tree either at the place claimed by the defendants or the plaintiff as the beginning corner of the Hamilton survey, which he knew to be the corner, or which was the reputed monument. The defendants would locate this corner 70-odd poles southeast of the corner contended for by the plaintiff on, or nearly on, a line of the Banks survey, running northwest and southeast. A tree was found there which was blocked, and the ax mark was very old, but it does not appear to have been marked as a corner tree. It may have been marked merely as a line tree. Besides the mark does not agree in age with the call. Going to the western end of the tract, and running from the corner there which seems to be practically undisputed, the calls of the deed for course and distance would locate the line substantially in accordance with the contention of the plaintiff, except as to the length of the closing line, which would be 70-odd poles long, instead of 130 on the Banks line. From that western corner two calls of the Bowen patent carry the line to the Banks line. One of these is S. 80° E. 210 poles, and the other N. 40° E. 130 poles. The last call is from this point with the Banks line to the place of beginning (the Banks corner), the distance being 130 poles. The defendants' contention would bring these two calls to the Banks line at about 200 poles from the point contended for by the plaintiff as the beginning corner, and about 130 poles from the point contended for by themselves as the beginning corner. To sustain the contention of the defendants, it would be necessary to ignore the corner at the western end of the tract which has been mentioned, or else disregard course and distance, in the absence of identification of any monuments to justify disregard thereof. Identified monuments will control course and distance; but, in the absence of such monuments, course and distance must be observed. The one proposition is the converse of the other. When marks upon the ground are ascertained and identified, they are more certain and reliable than a description on paper; and when they are not ascertained, the paper description of them is the best means of finding them, if there is a beginning point reasonably well established from which to start and follow the courses and distances. "The true principle is that the course and distance called for in the grant must govern in respect of each line, except so far as they may be controlled by calls for natural objects or artificial monuments, proven to have been made or adopted for the survey itself; and, in fixing those of any one line no reference can legitimately be had to the variation from the patent calls that may be found necessary in determining the course and distance of any other line according to natural or other controlling objects found upon the ground." Judge Lee in Clements v. Kyles, 13 Grat. 468, 481. See, also, Smith v. Chapman, 10 Grat. 445. Another weighty circumstance is that the quantity of land in the Bowen grant would be very much greater, if the contention of the defendants should prevail, than that called for in the grant. The grant calls for 600 acres; but it would include about 800, if the disputed lines were located as claimed by the defendants, and a little over 600, if located as claimed by the plaintiff. Though description by quantity is the most uncertain method usually adopted, it is to be considered, and, in this instance, it is in accord with the great preponderance of evidence as to the location of the lines. Under such circumstances it is not without weight. Western M. & Mfg. Co. v. Coal Co., 8 W. Va. 406.

It remains to determine whether or not a good defense has been made, by possession, under the deed from Clement Carroll to John Stuart as color of title. It will be remembered that Carroll, in conveying his land to John Yates, excepted what he called a 50-acre tract, and described it as land sold to "Charles A. Stuart, decst.," and then conveyed that land to John Stuart, as a 57-acre tract. John Stuart was a son of Charles A. Stuart, but he never owned the Henning place. The reference to the Henning place in the deed from Carroll to him may be due to the fact that the sale had been originally made to Charles A. Stuart, the father, who did, at the time of the sale, own the Henning place. However, both the general description and the particular description, by metes and bounds, in that deed, say the land adjoins the Henning place. The beginning point is described as a corner to the Henning place, and the line, after going around, comes back to another corner of the Henning place, and runs thence to the place of beginning. There is inconsistency, however, in this, that the closing line does not correspond in course and length with any northern line of the Henning tract. But if the corners called for could be ascertained and identified as corners of the Henning tract, they would prevail over the calls for course and distance, and the land, according to the description contained in the deed, would lie wholly outside of the Henning tract, provided the Henning tract referred to in the deed is not some other Henning tract then owned by John Stuart. Casto v. Baker, 58 W. Va. 683, 53 S. E. 600; Gwynn v. Schwartz, 32 W. Va. 487, 496, 9 S. E. 880; Adams v.

Alkire, 20 W. Va. 486; Pasley v. English, 5 Grat. 151; Smith v. Davis, 4 Grat. 50; Coles v. Wooding, 2 Pat. & H. 196; Shaw v. Clements, 1 Call, 429; Dogan v. Seekright, 4 Hen. & M. 125. Whether he was the owner of any other Henning tract that might answer this description is not disclosed by the evidence. However, owing to the state of the evidence, another well-settled proposition justified the submission to the jury of the inquiry whether the lines and monuments called for in the deed are not partly within the bounds of the Donaldson grant, known as a "Henning tract," even though it be the Henning tract, referred to in the deed as an adjoining tract. Soon after the date of the deed, May, 1852, Rinehold, as vendee of John Stuart, entered upon the land in question, and he and those holding under the Stuart deed have ever since held the possession thereof. Buildings have been erected, lands cleared and fenced and cultivated, down to and a little beyond the southern line as claimed by the defendants. Not long after Rinehold took possession Samuel Thompson, presumably at the instance of Rinehold and Stuart, made a survey of the land, observing the corners and lines called for by the deed, and marking the trees, which he supposed were called for in the description. John A. Yates says he was present when this survey was made, and the surveyors who testified in this case spoke of the survey as a fact well known to them. That survey, these surveyors say, locates the land in accordance with the present claim and holding of the defendants. The monuments are not well identified, and there is much uncertainty as to their exact location, but there is some evidence tending to show the location of the lines as made by Thompson. Rinehold and Yates, his successors, have held the possession of this land more than 40 years with the knowledge of Robinson Stuart and the later owners of the Henning tract. It is a significant circumstance that close relatives, mother and son, at first, and uncle and nieces and nephews, later, held these conflicting claims of title, and this may account for the lack of contention or dispute of the right of possession and exact location of the 57-acre tract of land. That the defendants and their predecessors in title claimed the land in controversy under the Carroll-Stuart deed was known to the holders of the hostile Donaldson title, and that no objection was raised at any time, until shortly before the institution of this action, are facts concerning which the evidence is clear and practically uncontradicted. There is some testimony tending to show that Yates was regarded by Sehon as a tenant of his as to the Henning tract, but this is contradicted by the positive evidence for the defendants. Wherefore it was a question for the jury. These facts and circumstances bring the case within the principle asserted in Gwynn v. Schwartz, 32 W. Va. 487, 9 S. E. 880, holding as follows: "Disputed boundaries between two adjoining lands may be settled by express oral agreement, executed immediately, and accompanied by possession according thereto. Long acquiescence by one adjoining proprietor in a boundary established by the other is evidence of such agreement so fixing the division line between them." Baker v. Seekright, 1 Hen. & M. 178, often cited with approval in later cases, allows the admission of parol evidence to prove marked trees, not in the course or termination of a line, to be the true line intended. Dogan v. Seekright, 4 Hen. & M. 125, follows this case, reversing a judgment of the court below on account of an instruction to the jury telling them they must find a line corresponding exactly with the description given in the deed, notwithstanding the presence of evidence tending to show a different line which had been marked and recognized by the parties. Norcom v. Leary, 25 N. C. 49, cited with approval by this court in Teass v. St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802, holds that, "in all cases the effect of long and notorious possession, as affording presumptive evidence of right, is very powerful. In questions of boundary, it is at least tantamount to a general reputation." The judge, in delivering the opinion in that case, made the following additional observation: "It shows a claim distinctly asserted by the possessor, and acquiesced in by those most interested to repel it if unfounded, and most likely to ascertain whether it be or be not well founded." Owen v. Bartholomew, 9 Pick. (Mass.) 520, also approved in Teass v. St. Albans, enunciates the same doctrine, holding as follows: "In the case of a grant of land by the commonwealth, in which the land is described by courses and distances, with reference to monuments, evidence of long-continued occupation under it is admissible to prove the boundaries, and though the given distances are exceeded, they may be controlled by the boundaries so proved." Coles v. Wooding, 2 Pat. & H. 189, holds as follows: "Where deeds of partition between coparceners recited that a boundary line between them had been 'run, made, and established,' and the parties had continued in possession up to the line so run and established, from the date of the deeds, for 20 years, less two days—when a writ of right was instituted between parties claiming under them, seeking to set up the boundary described in the deeds, which was different from the line actually run by the parties—it was held, that after such long acquiescence by one party, and quiet possession by the other, possession ought not to be disturbed." In Dogan v. Seekright, 4 Hen. & M. 125, Judge Tucker said: "If lines and corners be proved to have been actually run and agreed on as a boundary between parties holding adjacent lands, those lines and corners are from thenceforth to be regarded

as the limits of the possession of each; and from the period of running such lines, if they continue to be acquiesced in, the acts of limitation may be considered as beginning to run, so as to control the courses and distances mentioned in the deed, by establishing an adversary possession in either party, according to the lines so run." While the cases in which this principle has been applied vary in their circumstances, so that in some instances the agreed line was clearly identified by the evidence, in others the parties held up to the line on both sides, in others only one party held up to the line, and in others the line was not established or identified beyond all question by the evidence, the evidence in this case to which reference has been made seems to make it one proper for the determination of the jury as to whether the Thompson survey, corresponding with the calls of the deed as to course and distance, and slightly supported by evidence of marked trees, defines the lines according to which the defendants have held possession, and cleared and cultivated lands, and whether the plaintiff's predecessors in title have known and acquiesced in the boundary line.

This conclusion, however, brings the defendants face to face with an insuperable difficulty. The greater portion of the land to which they would thus show themselves entitled, if not all of it, lies outside of the Bowen grant. Clement Carroll had caused to be entered upon the landbooks for taxation lands included in the Bowen grant. He owned no land south of that. When he conveyed his lands to John Yates, excepting therefrom the supposed 57 acres, Yates caused himself to be charged with 300 acres, the quantity mentioned in the deed. John Stuart never caused his deed to be recorded, and the land called for in it never was entered on the landbooks for taxation in his name, in Rinehold's name, or in Yates' name, and no taxes have ever been paid on it under that title. John Stuart never owned or claimed any interest in the land under the hostile Donaldson grant or title. He held a colorable, strange, and hostile title, under which the land was never taxed. It therefore became forfeited to the state for a period of five years of nonentry for taxation and nonpayment of taxes (Const. art. 13, § 6; Parkersburg, etc., Co. v. Schultz, 43 W. Va. 470, 27 S. E. 255), and has never been redeemed. By virtue of section 3 of article 13 of the Constitution [Code 1906, p. lxxxiv], this forfeited title has been transferred to the plaintiff, and those under whom she holds. The nonpayment of taxes was in no sense her fault. As she did not claim under that title, it was in no sense her duty to pay them. She had been in possession by her tenant under her own title covering the same land, and paid the taxes on it under her title. Therefore she was in a position to take by transfer the forfeited hostile title. Payment of taxes on the land by her and her predecessors in title under her own title did not prevent the forfeiture of the hostile title under which she was neither bound to pay the taxes, nor possibly had any right to pay them. In view of this situation, the verdict cannot stand, although for the reasons stated it would otherwise be beyond the power of the court to disturb it, unless the statute of limitations saves it. Before the passage of section 20 of chapter 35 of the Code of 1899 [Code 1906, § 1137], saying, "Every statute of limitation, unless otherwise provided, shall apply to the state," there was no adverse possession against the state. In Smith v. Chapman, 10 Grat. 445, Judge Lee said: "But if the party in possession had acquired no such rights at the time of the forfeiture (title by transfer, or title by adverse possession against the forfeited title), from that time his adversary possession and the statute of limitations must cease to run as against the commonwealth, and the commissioner's deed would pass her title thus acquired unaffected by the continued possession of the party holding with whatever claim of title;" and the court held that: "An actual possession of land claiming the same adversely does not prevent the operation of the deed made by the commissioner of delinquent lands, conveying to a purchaser the commonwealth's right to the land." See, also, Staats v. Board, 10 Grat. 400; Levasser v. Washburn, 11 Grat. 572. State v. Harman, 57 W. Va. 447, 448, 469, 50 S. E. 828, holds that the statute of limitation runs against the state as to land, the title whereto is in the state by forfeiture; and such operation of the statute was suggested in Foley v. County Court, 54 W. Va. 16, 46 S. E. 246. As the latter case did not concern such lands, there was in it no application of the doctrine; but, in State v. Harman it was applied, although we decided that the party to whom we gave the benefit of it had title to the land by transfer under section 3 of article 13 of the Constitution. There the benefit of it was allowed to one who was not in default, as to payment of taxes on the land, and whose title was good independently of his adverse possession. Here we have the reverse of that condition. The person whose title has been forfeited remains in actual possession. If the statute is allowed to operate in his favor against the state, the constitutional machinery, designed for the enforcement of the state's right to taxes on all land, and the settlement of land titles, by forfeiture and transfer under sections 6 and 3 of article 13 of the Constitution [Code 1906, pp. lxxxiv, lxxxv], respectively, will cease to perform its functions in cases of this kind. A legislative act cannot have such effect. Whatever its terms may be, it must be subordinated to the organic, paramount law of the state, and made to operate in harmony with it. The Legislature has power to release and dispose of forfeited land titles (State v. Jackson, 56 W. Va. 558, 49 S. E. 465); but it certainly cannot,

directly or indirectly, nullify the forfeiture, and transfer clauses of the Constitution. It cannot prevent forfeitures and transfers, which the Constitution says shall occur, so as to make the land yield to the state her taxes, and as to vest superior title in persons who have put themselves within certain conditions prescribed by said section 3. The statute applied in State v. Jackson, and treated as a legislative grant of forfeited titles, did not conflict with any constitutional provision. It neither prevented forfeiture under section 6, nor transfer under section 3. It seems to me the state does not take for proprietary or speculative purposes, but only for governmental purposes, chiefly for the settlement of land titles. The following, taken from Judge Lee's opinion in Smith v. Chapman, 10 Grat. 445, 464, might at first seem to conflict with the conclusion here stated: "If at the time of the forfeiture, or afterwards, the forfeiture is declared by law to inure to the benefit of the party in possession, a deed subsequently made by the commissioners would, of course, pass nothing to the purchaser. And so if at the time of the forfeiture, the claimants of the title so forfeited had been barred of their right to recover by the long-continued adversary possession of the party holding, under the statute of limitations, the commonwealth would only take the title in the same plight and condition in which the claimants held it, and the commissioner's deed would be inoperative to convey to the purchaser any other or better right to recover. But if the party in possession had acquired no such rights at the time of the forfeiture, from that time his adversary possession and the statute of limitations must cease to run as against the commonwealth, and the commissioner's deed would pass her title thus acquired unaffected by the continued possession of the party holding with whatever claim of title." But it does not, for the reason that it assumes that the title, acquired by adverse possession has not been forfeited. We have here exactly the reverse of the supposed cases stated by him. The title acquired by adverse possession is itself forfeited, and the better paper title not forfeited. Title by adverse possession is forfeitable for nonentry for taxation. Parkersburg, etc., Co. v. Schultz, 43 W. Va. 470, 27 S. E. 255. If the forfeited and transferred title could have been won back from the plaintiff and her predecessors in title by continued possession of the defendants after the forfeiture and transfer, it was repeatedly reforfeited and retransferred, so that it is an utter impossibility that they could now have any title. This conclusion is predicated, however, upon the case as it now stands. In another trial, a different state of the evidence may appear, justifying the location of this land outside of the plaintiff's boundaries, or within the Hamilton survey.

The objections to the action of the court in admitting the testimony of witnesses to the effect that John Stuart had delivered to Rinehold the title bond, admitting the payment of all the purchase money, and the assignment of the title bond by Rinehold to the father of the defendant, W. C. Yates, were principally upon the ground that John Stuart should have been called to testify himself to the execution and delivery of the title bond, he being still alive, and, in the other instance, on the ground that the assignment should have been in writing and produced in evidence. Neither of these objections is tenable. It was competent to prove by any third person the act and declaration of John Stuart, as well as by himself. The admission of the testimony as to the assignment of the title bond was justified by evidence to the effect that it had been lost after the assignment, and could not be produced. These objections are no doubt based upon the theory that the title bond itself is color of title with which the defendants were bound to connect themselves by means of written muniments of title. What has been said on this subject suffices to sustain the admission of the evidence as showing that the defendants were rightly in the occupation of the land as equitable claimants under the deed from Carroll to Stuart.

For the reasons stated, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

NOTE BY BRANNON, J. I still adhere to the opinion in McNeeley v. South Penn Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562, that an executory written contract giving boundary is in and of itself, as color of title, just as good as a deed purporting to convey legal title. It is not the paper that counts under the statute. It is the possession with intent to claim that does the work under the statute. Title is not the question. What difference is it when a man is in actual possession claiming the land, whether he claims it under a deed purporting to pass legal title, or under an executory contract? Neither the deed nor the contract is used to show title, but simply to mark the boundary of the possession and claim. It is the possession and claim that accomplish the defeat of the adverse claim, and the paper, whether a deed or contract, is used only to show claim and prescribe boundary and limit the extent of the claim and possession. Why is not a contract color for these purposes? It seems very technical to say that it is not. To hold it such does not antagonize any of our own decisions. Take the case where there is no legal title shown in the party making a title bond or executory contract, where he has no title; would you say that the party holding under the title bond for the period fixed by the statute could not defend his possession? In such case he could not fall back on the title of his vendor, and yet no length of time would give him title under the statute, under the theory that it is not color. In addition to

the cases cited on this subject by me in McNeeley v. Oil Co., cited above, I now cite Mullan v. Carper, 37 W. Va. 215, 16 S. E. 527, holding that, "any written instrument, however defective or imperfect, and no matter for what cause invalid, purporting to sell, transfer, or convey title to land, which shows the nature and extent of the party's claim, constitutes 'color of title,' within the meaning of the law of adverse possession." See many cases cited in 1 Encyclopedic Digest, 206, 207. In Creekmur v. Creekmur, 75 Va. 438, the opinion says: "It is impossible to say with any degree of accuracy what is color of title. Upon this subject there is hopeless confusion, as well as irreconcilable diversity of opinion. Color of title has sometimes been held to be that which in appearance is title without being in reality so. Again, it has been held that it matters not how defective the title may be, whether the occupant makes color under a written or a parol contract, or even under no contract at all. Tyler on Eject. 863, 864; McCall v. Neely, 3 Watts, 69, 72. Without attempting now to describe 'color of title,' it may be perhaps sufficient to say its effect is to fix the character of the occupant's possession, and to define its extent and limits. As a general rule, the possession of one who has a colorable title is coextensive with the boundaries of his deed, or other instrument under which he claims, in the absence of any actual possession by the true owner; whereas the possession of one entering and holding under a mere claim of title is necessarily confined to the land in actual occupation." Sharp v. Shenandoah Co., 100 Va. 27, 40 S. E. 103, says that any instrument conferring appearance or a semblance of title, legal or equitable, is color of title. In Chesterman v. Bolling, 102 Va. 471, 46 S. E. 470, the court treated an executory contract as color of title. Why shall we now cast shadow over so many cases holding what ought to be the law? I grant, of course, that where one having legal title sells by executory contract land to another, the vendee can defend his possession by attributing it to his vendor, saying that his possession is that of a tenant under his grantor or lessor; but where there is no such grantor shown, where the occupant shows an executory contract only, I hold that he can use it, without reference to any one holding the legal title for him, on the strength merely of his written contract purporting to bargain and sell.

In addition, I would say that one who has an executory contract selling land to him, not providing for a future deed, if it be under seal, has legal title upon the theory that his sealed contract, showing bargain and sale for valuable consideration, is a deed of bargain and sale, operative under the statute of uses passing legal title. Code 1899, c. 71, § 14 [Code 1906, § 3033]. A deed of bargain and sale is "a real contract whereby a person bargains and sells his land to another for a pecuniary consideration, in consequence of which a use arises to the bargainee, and the statute of uses immediately transfers the legal estate and actual possession to the cestui que use, without any entry or other act on his part; a kind of a real contract, whereby the bargainer, for some pecuniary consideration, bargains and sells, that is, contracts to convey the land to the bargainee, and then the statute of uses completes the purchase." 5 Cyc. 616. Many authorities say this. Nobody would dispute that a regular deed of bargain and sale, so long used in Virginia before the short form of deed given in the Code was adopted, and perfectly valid yet, would be color of title.

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(63 W. Va. 260)

## SANDUSKY v. WEST FORK OIL & NATURAL GAS CO.

(Supreme Court of Appeals of West Virginia. Dec. 17, 1907.)

1. ASSUMPSIT—PLEADING—DECLARATION.

In an action of assumpsit to recover for money agreed to be paid by the terms of an oil lease as commutation for failure to bore a well, there must either be a special count or a common count in indebitatus assumpsit suitable to the case specifying the ground of action. No recovery can be had therefor on the counts in the declaration in this case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Assumpsit, Action of, §§ 81–91.]

2. PARTIES—NONJOINDER OF PLAINTIFFS.

Upon a contract to pay a sum of money to two persons, they must both unite as plaintiffs in an action for its breach, if living. Where one sues alone, the nonjoinder of the other is fatal, and the plaintiff cannot recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 19–23.]

(Syllabus by the Court.)

Error to Circuit Court, Harrison County.

Action by James B. Sandusky against the West Fork Oil & Natural Gas Company. Judgment for plaintiff, and defendant brings error. Reversed.

George M. Hoffheimer and R. G. Altizer, for plaintiff in error. Davis & Davis, for defendant in error.

BRANNON, J. This is an action of assumpsit in the circuit court of Harrison county by James B. Sandusky against West Fork Oil & Natural Gas company, resulting in verdict and judgment for the plaintiff, and the oil company has brought the case to this court.

J. B. Sandusky and Nannie E. Sandusky made to the oil company a lease for three years of a tract of 400 acres of land for the production of oil and gas. The lease contains this clause: "Second party covenants and agrees to * * * and, further, to complete one well on said land within six months through all known oil sands, if considered necessary by all parties mentioned, from the date hereof or in case of failure so to do, to pay thereafter an annual rental of one dollar per acre directly to the first party, until such well shall be commenced, or this

lease surrendered for cancellation." The action is for the recovery of this $1 per acre rental or commutation money under said clause. The declaration contains no special count on the lease, but contains only common counts for goods, wares, and merchandise sold and delivered, for goods and chattels bargained and sold, for horses sold and delivered, for work done and materials for the same provided, for meat, drink, washing, and lodging and other necessaries provided, for money lent, for money paid by the plaintiff for the use of the defendant, for money received by the defendant for the use of the plaintiff, and for money found due on an account stated. The plaintiff gave in evidence the said lease to sustain his action. He had no right to recover upon any of the common counts used by him. The defendant never took possession of or occupied the land or bored any well on it. The declaration contains no count for use and occupation, if that would be sufficient. The case required a count specifying that recovery was asked for this rental under this lease. As Judge Poffenbarger wrote for the court in Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 S. E. 258, the object of a declaration is to let the defendant know what will be proven against him. Now, how did any of those counts tell the company what would be proven against it? In the case just cited, which was for the recovery of rent under a coal lease, it was held that there must be a count for use and occupation or a special count on the contract. I think that case settles the insufficiency of the declaration in this case. 1 Chitty's Pleadings, 342, says; "It is not sufficient to state merely that the defendant was indebted to the plaintiff in a certain sum and promised payment. It must be shown what was the cause or subject-matter or nature of the debt, as that it was for work done or for goods sold, etc." Surely under the common counts a consideration must be stated for the promise to rest upon; but none of these counts tell of the use and occupation of the land under the lease, or proceed for the $1 per acre commutation money in place of boring a well. That consideration for the implied promise is not stated or hinted. There is filed with the declaration a bill of particulars specifying, with the requisite definiteness, the character of the demand, that is, that it was for the $1 per acre per annum, but what purpose does a bill of particulars answer when there is no count in the declaration appropriate to the bill of particulars? We know that our decisions say that a bill of particulars in an action of assumpsit is no part of the declaration, but a mere satellite with it or of it, designed to further specify or particularize what is in the declaration, but it cannot specify what is not in the declaration. The bill alone would not admit the evidence. Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366. Counsel would make that bill of particulars in this case perform the function of a count in the declaration. It cannot do so. "A bill of particulars does not set forth the cause of action or ground of defense. These constitute the function of the original pleading." 3 Ency. Pl. & Prac. 519. Further authority to show that recovery on this declaration cannot be had on the evidence is to be found in 4 Robinson's New Practice, 504, 505; Heyerman v. Kanter, 36 Mich. 316, the latter case seeming pointed authority in this case. In Beach v. Dorwin, 12 Vt. 139, was a special count on a contract for the sale of land and the common count for money had and received. The court said: "It is evident that the plaintiff cannot recover for use and occupation on either count in the declaration. To entitle him to recover there must be a count for use and occupation." Personally I doubt whether a count for use and occupation would suit this case, as I think there should be a count for this money demand like that specified in the bill of particulars. We must not jump to the conclusion that anything and everything can be recovered under the ordinary common counts usually found in declarations. They are short statements, but they must suit the case. 1 Chitty on Pleadings, 345, says that the indebitatus count may be brought to recover for the use and occupation or enjoyment of a fishery, or a water course, or pew, and for tolls, and for incorporeal hereditament. Now, if we inspect the precedents approved by long usage and the law of pleading, we find that the common counts for the use of a fishery, a pew, a way, a seat to view a procession, for tennis courts, and other things, specify these things thus giving the particular consideration from which the law raises a promise. A count for goods sold and delivered will not support evidence of goods, sold, but undelivered, or goods bargained and sold. 4 Rob. New Prac. 523. Recovery cannot be had for work, labor, and material under a count for goods sold and delivered. There is a specific count for use and occupation of land. Goshorn v. Steward, 15 W. Va. 657. To support the count for money had and received it must be shown that the defendant received money actually for the plaintiff's use. Isom v. Johns, 2 Munf. (Va.) 272; Bank v. Jackson's Adm'r, 9 Leigh (Va.) 221. The count for money paid must be supported by evidence of actual payment. Butterworth v. Ellis's Adm'r, 6 Leigh (Va.) 106. A count for money lent must have an actual loan. 2 Ency. Pl. & Prac. 1015. Of course the count on account stated will not do; for an account stated is a settlement between parties of prior money transactions with the consent that the balance is right, and the parties have so agreed. 4 Rob. New Prac. 569; 1 Am. & Eng. Ency. L. (2d Ed.) 437; 1 Cyc. 369, 396. The mere rendering of an account is not sufficient to make an account stated. Robertson v. Wright, 17 Grat. (Va.) 534. The common counts commonly used suit only cases to which they apply. If the case is different,

that is, if the consideration is a different thing from those mentioned in the usual common money counts, there must be specification, according to the fact, though it be in short and simple form, and then a bill of particulars can be more definite. No count of this declaration suits the bill of particulars, or the evidence adduced by the plaintiff.

The lease was made by James B. Sandusky and Nannie E. Sandusky. The promise of payment was to them, if to anybody, by the face of the lease. The action is in the name of James B. Sandusky alone, not in the names of James B. and Nannie E. Sandusky. The declaration stated a contract with one of them. The proof shows a contract with both, a promise to both. Here is a fatal variance between allegation and proof. It is well-settled law that "when the contract is made with several, whether under seal or by parol, if their legal interest were joint, they must all, if living, join in an action in form ex contractu for the breach of it, though the covenant or contract was in terms joint and several. The reason assigned is that when the interest is joint, if several were permitted to bring actions for one and the same cause, the court would be in doubt for which of them to give judgment." 2 Tucker's Comm. 207. That is old law cited by Judge Dent in Assurance Co. v. Fristoe, 53 W. Va. 361, 44 S. E. 253, holding where a promise is to two persons to pay a single amount, one of them cannot maintain an action for his share or the whole, but they must sue jointly. This is treated as conceded law in the case of Sadler v. Taylor, 49 W. Va. 104, 38 S. E. 583, as written by Judge Poffenbarger. It is an infallible rule that an action on a contract must be in the name or names of the person or persons in whom is the legal title. "Where a promise is made to two or more persons jointly, all the obligees must unite as plaintiffs in an action for the breach thereof, as the cause of action in such cases is joint only. This rule is not affected by the fact that some of such obligees have no real beneficial interest in the recovery. And it applies even though some of them never executed or assented to the contract, and in fact expressly disclaimed it." 15 Ency. Pl. & Prac. 528–530. Why? Because the legal right by the terms of the contract is in one as much as the other of joint contractors. It is the dry legal title that controls here. 2 Tucker, 205. It makes no difference that Nannie E. Sandusky was the wife of James B. Sandusky. The contract does not say so, though that would not change the case. She had contingent dower at least. The contract gives her an interest on its face. For its purpose she is the equal of James B. Sandusky. The legal title to the money under the lease vests in her by force of the letter of the contract jointly with her husband. As Judge Brooks said in Carthae v. Brown, 8 Leigh, 98: "It may happen also that where there is but one duty to be performed to one of two individuals, yet both may be interested in the performance of it; in such case the contract is joint and both may sue. * * * Indeed, where a party covenants with two to pay money to one only, the law presumes an interest in the other, although he is to receive nothing because he is joined in the contract, and there can be no other assignable motive for it, and there the action must be joint, as in Anderson v. Martindale. The interest presumed in such a case must be a joint interest, as two could not have a several interest in the performance of but a single duty to but one of them." In Peerce v. Athey, 4 W. Va. 22, 27, the test is, does the contract itself on its face make the right joint? In a lease by several owners of a house there was a covenant to repair. And it was thought that as the rent was payable to each one his portion, each might sue for nonrepair; but this covenant was held joint, and it was held that a separate action could not be maintained by each lessee. Calvert v. Bradley, 16 How. (U. S.) 580, 14 L. Ed. 1066. This is a fatal variance in this case. The defense objected to the introduction of that lease because of such variance, and moved the court for a new trial, specifying such variance as one of the grounds. The objection did not require a plea in abatement. "On the other hand, if the objection do not appear on the face of the pleadings, the defendant may take advantage of the omission of one who ought to have been a coplaintiff, either by a plea in abatement, or, except in the case of a coexecutor or coadministrator, as a variance at the trial, upon the plea of non est factum, if the action be upon a specialty, or if it be upon any other contract, upon the general issue of nil debet or non assumpsit. 1 Chit. Pl. 14, 53; 1 Wms. Saund. 154, n. (1); Id. 291 f. g.; 5 Rob. Pr. 63; Prunty v. Mitchell, 76 Va. 169." 4 Minor's Inst. 757. "In all cases of contracts, if it appear upon the face of the pleadings that there are other obligees, covenantees, or parties to the contract, who ought to be but are not joined in the action, it is fatal on demurrer, or on motion in arrest of judgment, or on error; though the objection may not appear on the face of the pleadings, the defendant may avail himself of it either by plea in abatement, or as a ground of nonsuit in the trial upon the plea of the general issue." 2 Tucker, Comm. 207. If the omission of a plaintiff be disclosed only by the evidence, as in this case, the plaintiff will be nonsuited. Prunty v. Mitchell and Cobbs, 76 Va. 169. "Allegata and probata must correspond. Where there is no count in a declaration on the cause of action shown by the evidence, it is a variance, and there can be no recovery." Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366. The case stands as if the lease had been excluded, in which case a verdict for the defendant would have resulted.

The declaration cannot be amended by the introduction of Nannie E. Sandusky as a plaintiff, for the declaration would then vary from the writ. It would be another suit. Amendment may be made of mere allegations, but not of parties plaintiff in an action at law, on a joint contract. However, there was no request to amend. There are other questions involved in the case; but as they concern the merits, in view of the reason of our decision, we consider it neither necessary nor proper to pass on them.

Because of such fatal variance, we reverse the judgment, and dismiss the action.

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(63 W. Va. 249)

## ROBERTSON CONSOL. LAND CO. v. PAULL et al.

(Supreme Court of Appeals of West Virginia. Dec. 17, 1907.)

1. PARTITION—WHEN MAINTAINABLE—PROPERTY SUBJECT.

R. C. L. Co., being the owner of one undivided third interest in and to "all the coal, gases, salt water, oil, and minerals of every kind and description in, upon, and under a certain tract of land supposed to contain 329 acres," together with rights of way and mining rights, filed its bill for partition of said interests against P., trustee for himself, and C., the owners of the other two-thirds undivided interests of the said coal, gases, etc., in said tract of land, with rights of way and mining rights, etc., none of said parties having any interest in the surface or soil of said property. *Held*, plaintiff's interest is not such an estate as can be the subject for a suit in partition.

2. SAME—NOTICE—PRESUMPTIONS.

Where a decree for partition is entered on the 23d day of a month in a cause where the defendants have not appeared, and the report of the commissioners appointed to make partition shows that they went upon the premises and viewed, surveyed, and partitioned the same on the 25th day of the same month, and the report is silent as to any notice of the partition being given to the defendants, it will be presumed that such notice was not given.

3. SAME—SALE.

Such undivided interests can only be partitioned by a sale thereof and a division of the proceeds among the parties entitled thereto.

(Syllabus by the Court.)

Appeal from Circuit Court, Logan County.

Bill by the Robertson Consolidated Land Company against J. F. Paull and others. Decree for plaintiff, and defendants appeal. Reversed and remanded.

Simms & Enslow, for appellants. Lilly & Shrewsbury and Campbell, Heffley & Davis, for appellee.

McWHORTER, J. The Robertson Consolidated Land Company, a corporation, J. F. Paull, trustee for himself, and R. P. Chew, were each the owner of an undivided one-third interest in and to all the coal, gases, salt water, oil, and minerals of every kind and description in, upon, and under a certain tract or parcel of land lying in Logan county on the branch where James Lawson formerly resided, supposed to contain 329 acres. The Robertson Consolidated Land Company filed its bill in the circuit court of Logan county against J. F. Paull, in his own right and as trustee, and R. P. Chew, praying for a partition in kind of said property, and that the plaintiff's undivided one-third interest be laid off and assigned to it in kind adjoining other lands owned by it, if the same was susceptible of partition in kind, and, if not so divisible, that it be sold and the proceeds divided among the parties thereto. Process was duly served upon the defendants, but they made no appearance. On the 23d of October, 1906, the cause was brought on to be heard upon the process duly served, the bill taken for confessed at the rules as to all the defendants who, still failing to answer, plead, or demur, or otherwise appear in defense, the confession entered at rules was confirmed, and the court proceeded to decree a partition of the said interests and appointed John B. Hudson, a civil engineer, J. F. Alridge, and Harry Thompson, commissioners to make partition of the real estate described in the bill, and that they should make such partition and report to the same term of the court, accompanying their report with a description of the proper metes and bounds of the respective parcels allotted to the parties entitled to share in the partition, with all the evidence which might be taken before them pertaining to the matter of said partition, and plat and deeds used, read, and made in connection therewith, and that if the said commissioners should determine that the said property was not susceptible of partition they should so report to the court, setting forth the facts upon which they based their conclusion. On the same day, October 23, 1906, the commissioners were qualified by taking the oath to impartially make said partition, and on the 27th of October, 1906, made their report together with a plat and description of the several parcels allotted to the persons entitled thereto, which was filed on the 29th day of October, 1906, and a decree was then entered confirming the same and describing the several parcels so to be held by the parties in severalty respectively by metes and bounds. The defendants, J. F. Paull, J. F. Paull, trustee, and R. P. Chew, gave notice to the plaintiff, the Robertson Consolidated Land Company, that on January 29, 1907, they would move the said circuit court of Logan county, in accordance with section 5, c. 134, of the Code, to reverse and set aside the decrees in the cause entered upon the bill taken for confessed without appearance on the part of the defendants of either of them for the reasons set forth in the notice. The motion on the notice was heard by consent on the 5th day of February, 1907, and the court overruled the motion, and refused to set aside the said decrees. From which decrees of October 23 and 29, 1906, and February 5, 1907, the defendants appealed, and say that the court erred in decreeing a partition in kind of the property, as it was not of such a nature as was sus-

ceptible of division; that it was error to decree partition without the commissioners having given notice to all parties of the time of going upon said property that they might have appeared to protect their interests.

It appears from the bill and title papers filed therewith that none of the parties to this suit have any interest in the surface or soil of said property, but had only title to the coal, gases, salt water, oil, and minerals of every description in, upon, and under said tract of land, "together with the necessary rights of way over and across said land for mining and transporting said coal, gases, salt water, and minerals, with the right to take and use such timber trees as may be necessary for mining purposes found on said lands." In Smith v. Cooley, 65 Cal. 46, 2 Pac. 880, it is held: "A grant of an undivided interest in a piece of mining ground expressly conditioned that no rights are conveyed, except a mining right upon the premises, vests in the vendee only the right of taking from the land any minerals or ores contained in it to the extent of the interest granted. He does not by virtue of the conveyance become a corparcener, joint tenant, or tenant in common with the vendor in the land itself. His interest is not an estate which can be the subject of an action for partition." And in Hall v. Vernon, 47 W. Va. 295, 34 S. E. 764, 81 Am. St. Rep. 791, it is held: "Partition of oil and gas, owned by co-owners separate from the surface, cannot be decreed, except by sale and division of the proceeds. A judicial partition thereof by assignment of the oil and gas under sections of the surface is void." In Kemble v. Kemble, 44 N. J. Eq. 454, 11 Atl. 733, it was held that a partition of lands containing minerals cannot be ordered if the location, extent, and value of said deposits cannot be ascertained. And in Franklinite Co. v. Condit, 19 N. J. Eq. 395, it is held: "A grantee of the right to dig ores, from one tenant in common, cannot call for a partition of the premises." See, also, Grubb v. Bayard, 2 Wall. Jr. (U. S.) 81, Fed. Cas. No. 5,849. Cecil v. Clark, 47 W. Va. 402, 35 S. E. 11, was a case in which it is held: "Extraction of coal by one tenant in common without consent of another is waste, for which he must account to that other." It was contended by counsel for co-tenants, who were extracting the coal, that they had not occupied more land in mining than their share; that all the coal taken by them came from the land occupied and improved by them, and as that land could and should be assigned to them in the partition they consequently ought to keep the proceeds of the coal without accounting for it to the Chapman heirs and Torbett, who should be compelled to take their share in undeveloped land with its coal which they might mine if they chose. In discussing this proposition, at page 409 of 47 W. Va., page 13 of 35 S. E., it is said: "This does seem to be a strong proposition, but second thought presents a counter consideration overthrowing its force. If the trustees keep all the money, they keep money actually realized from coal from a given area of land—a certainty. The Chapman heirs and Torbett have to look to a like quantity of land for a like quantity of coal, producing an equal amount of money—an uncertainty. Under this theory you call on equity to compel the Chapmans and Torbett to relinquish this money for what may not be realized. In the land undeveloped, which they would get, the coal may be less rich in quantity and quality. There is an element of hazard. In Hall v. Vernon (decided this term) 34 S. E. 764, this court held that ownership in fee of natural gas and oil, separate from the surface of the land, is impartible, because gas and oil are fugacious, and no partition of them can be made, affording a reasonable guaranty of equality. While coal land, or only the coal in land, is more certain, and is partible, still there is an appreciable element of uncertainty touching it, great enough to forbid a court of equity from depriving a party of his right in what is in the land for what may never be there."

The object of the bill in case at bar is for the partition of all the interests of the parties in said land, composed of coal, gases, oil, salt water, etc. As has been seen, this court has held that oil and gas interests cannot be partitioned. Dangerfield v. Caldwell, 151 Fed. 554, 81 C. C. A. 400, was a case which went up from the Southern District of West Virginia to the Circuit Court of Appeals, where it was held: "A tract of land known to have oil or gas or both under its surface is not property susceptible of partition in kind." Even if the coal and other solid minerals could be partitioned, all the interests of the parties cannot be partitioned in kind. Hence the decrees of partition are erroneous.

It is further alleged that it was error to accept and confirm the report of the commissioners, because no notice was given to the parties in interest of the time the commissioners took action under the decree. It is contended by appellee that there is nothing in the record on the question of notice; that it does not appear by any statement on the record that the notice was given, nor any proof in the record "from beginning to end that such notice was not given. And we contend that this court must presume, in the absence of proof to the contrary, that such notice was given." In Wamsley v. Coal & Lumber Co., 56 W. Va. 296, 49 S. E. 141, it is held: "Although the statute does not, in terms, require notice to be given by commissioners in partition to the parties, yet the necessity of such notice must be implied, and an exception to the report for failure to give such notice will be sustained and the report set aside." The decree confirming the report of the commissioners partitioning the property was made in the absence of any appearance on the part of the defendants. They

made this one of the grounds of their motion to set aside the decrees and grant a rehearing, which was equivalent to an exception to the report of the commissioners. The action of the commissioners in carrying out the decree of the court shows upon its face what they did in the premises, and nothing further will be presumed to have been done by them. It appears from the report that the commissioners were sworn on the 23d day of October, 1906, the same day on which the decree was entered appointing them, and their report shows that they went upon the premises and viewed, surveyed, and partitioned the same on the 25th day of October, the second day after the date of the decree, but it is in no way intimated that the parties had any notice of the time of their meeting to carry out the mandates of the decree. The appellee in its bill prays for a sale of the property and a division of the proceeds in case the same cannot be partitioned in kind, and the appellants in their petition for appeal pray for the reversal of said decrees and that the case be remanded to the circuit court of Logan county, "with directions to make a sale of the property and divide the proceeds among the parties entitled thereto."

For the reasons herein given the said decrees are reversed, set aside, and annulled, and the cause remanded to the circuit court of Logan county for further proceedings there to be had therein according to the principles laid down herein, and further according to the rules governing courts of equity.

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(63 W. Va. 275)

## YOUNGER v. MEADOWS et al.

(Supreme Court of Appeals of West Virginia. Dec. 17, 1907.)

1. TAXATION—ASSESSMENT—VERIFIED RETURN—CONCLUSIVENESS.

Furnishing by the assessor to the owner of blanks on which to return a list of his property for taxation, and his reception from the owner of such return properly verified, as required by chapter 29, § 1–100, Code 1899 [Code 1906, §§ 821–1 to 821–105], such verified return being in aid of the assessor, and not conclusive on him, are not a condition precedent to a valid assessment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 549.]

2. SAME — DEFAULT IN PAYMENT — LEVY AND SALE.

A sheriff, in a levy and sale for taxes, is a ministerial officer, his action therein being subject to no supervision or order of a court, and, as in levy and sale under execution, is constituted in law the agent of the owner of the property without his consent; and the law imposes upon such officer the duty to act fairly in making such levy and sale.

3. SAME—SALE—GROSSLY INADEQUATE PRICE.

It is the duty of the sheriff in distraining for taxes to make no unreasonable distress or levy therefor, and to sell the property, where susceptible of division, in separate parcels, and not en masse, so as to cause the least sacrifice thereof possible; and a sale thereof otherwise at a grossly inadequate price, is irregular, and violative of his official duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1354.]

4. SAME—RELIEF IN EQUITY.

Gross inadequacy of price alone will not, as a general rule, avoid such a sale; yet when combined with such irregularity in making the sale, or even slight circumstances indicating unfairness or fraud, it will furnish sufficient ground for equitable interposition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1381.]

(Syllabus by the Court.)

Appeal from Circuit Court, Raleigh County.

Bill by W. T. Younger against Isadore Meadows and others. Decree for plaintiff, and defendants appeal. Affirmed.

McGinnis & Hatcher, for appellants. M. G. McClung and Ashton File, for appellee.

MILLER, P. W. T. Younger and Crockett Mankin had been stockholders, but not directors, of the Raleigh Oil & Gas Company, a corporation. This company had acquired, among others, an oil and gas lease from Mankin of the farm on which he resided in Raleigh county, and in 1903 began drilling a well thereon, having assembled there all necessary tools and oil well supplies, including a large amount of iron casing. During progress of this work, in August, 1903, the company borrowed from Younger, who resided at Salem, Va., $1,500, and in November of that year $600, securing him in each case by deed of trust on all its said property, with John F. Davis trustee. In December following the company also became indebted in the sum of $708 to Mankin, who shortly thereafter instituted a chancery suit to cancel as fraudulent the trust deeds of Younger, and to charge the property therein conveyed with payment of his debt. On hearing of that cause, July 29, 1904, these deeds were adjudged valid liens, and the property decreed to be sold. August 27, 1904, the property was sold by the trustee, purchased by Younger at $2,368.80, and the sale later confirmed by the court; the net proceeds, $2,220.36, as directed by the decree, being paid over by the trustee to Younger, and credited on his said debts. After his purchase Younger allowed the property to remain at the well, and shortly afterward began negotiations with Mankin and others for sale of the property, or a reorganization of the company for further prosecution of work on the well so begun and nearly completed. For 1905 the assessor of Raleigh county, without calling on Younger or receiving from him a verified return thereof, assessed this property to him for taxation at $8,000, the taxes for all purposes amounting to $136, and, with interest and costs to the time of the sale of the property therefor hereafter referred to, amounting to $141.88. Younger had no notice of such assessment or sale of his property. Negotiations between him and Mankin and others for sale thereof had continued, and were pending down to the day of sale for taxes of the property, which took place on Mankin's farm, where situated, on May 16, 1906, the same being sold by the sheriff

en masse, without effort to sell in parcels, the defendant Isadore Meadows becoming the purchaser for, as he claims, himself and the defendant Davis, at $145, but who immediately afterward, as he states, without consulting Davis, admitted Mankin to partnership therein on equal terms upon payment by the latter of one-third of the purchase price; but the sheriff accepted in payment only $141.88, the amount of taxes and costs, in place of the amount bid for the property, although it is claimed by the defendants this was with the understanding that if the owner of the property, whom the sheriff professed he did not know where to find, should appear and claim the balance, the purchasers were to pay it. A day or two after the sale by the sheriff, Mankin wrote Younger's attorney at Salem, Va., who had been conducting the negotiations with him for sale of the property—in reply to a letter from said attorney of May 3, 1906, received while notice of sale was posted on his premises, but not answered until after the sale—saying "the matter is all off with you people, as Mr. Younger has nothing here. The entire outfit was sold for taxes, and is now in the hands of other people. The rig was entirely destroyed by fire last winter, and one fire and a sheriff's sale puts any man out of business in this country." This letter brought Younger the first notice of the assessment and sale, and that part of his property had been destroyed by fire, confirmed by letter to his attorney of May 17th from Messrs. Laing & File, attorneys at Beckley, W. Va., with whom Younger's attorney at Salem had also been corresponding in reference to sale of the property, who represented therein that knowledge of the sale for taxes had just come to them from the purchasers, who had that day proposed to sell the property to them. Immediately after receiving this information, Younger, through Messrs. Laing & File, tendered the defendants the amount of the taxes paid by them, which was refused; and this suit was brought to set aside and cancel the tax sale, and recover the property sold, resulting in a decree April 11, 1907, in favor of the plaintiff, to reverse which the defendants have appealed to this court.

That part of the decree which must be considered here is: "Upon consideration whereof, the court is of opinion that the plaintiff has failed to sustain the allegations of fraud charged in his bill, but that the assessment of the property sold was irregular, and that the property sold was in excess of what was required by law, and irregular and illegal," entitling the plaintiff "to the relief prayed for in his said bill"—upon which finding it was "adjudged, ordered, and decreed that the preliminary injunction heretofore awarded herein in vacation on the 24th day of May, 1906, be, and the same is hereby, continued and perpetuated * * *; that the levy and sale of the property in the bill and proceedings in this cause mentioned by the sheriff * * * to said Isadore Meadows and John F. Davis, and * * * by said Isadore Meadows and John F. Davis of one-third interest in said property * * * to Crockett Mankin, be, and the same are * * * hereby, set aside, annulled, and held for naught." The decree also provided for refunding to the defendants the taxes paid, and that the special receiver appointed should turn over the property to the plaintiff. As the facts recited and the decree indicate, the bill of the plaintiff bases his claim to relief against said tax sale and purchase upon the following grounds: Alleged illegality of the assessment for failure of the assessor to furnish him, by mail or otherwise, an assessment blank, or to call upon him for a verified return of his property thereon, as required by law; alleged excessive levy upon, and sale en masse, of said property in satisfaction of said taxes, at a grossly inadequate price; and alleged conspiracy and fraudulent conduct of the defendants at said sale, by which competition in bidding was prevented, said Meadows, by words and conduct, giving out the impression that he was bidding for the owner, and said Mankin at, or before the sale, falsely pretending to have a judgment against the property, by reason of which the purchasers procured the property at a grossly inadequate price.

The plaintiff has cross-assigned as error the finding of the court that he failed to sustain by proof his allegations of fraud; but it is claimed by defendants that such a finding of fact by the circuit court is usually conclusive, and we are cited to Weaver v. Akin, 48 W. Va. 456, 37 S. E. 600, and the numerous decisions of this court there referred to, which do hold that such finding will not be disturbed, unless contrary to the plain preponderance of the evidence; and therefore, if the decree here cannot be supported upon other ground, we must reverse it unless we find such preponderating evidence of fraud to overthrow the finding of the court below.

But we will first consider the alleged illegality of the assessment; for, if the assessment was illegal, the decree would stand on that ground alone. It is claimed that strict compliance with the several provisions of sections 13, 69, 70, 72, 73, 74, c. 29, Code 1899 [Code 1906, §§ 821–13, 821–73, 821–74, 821–76, 821–77, 821–78], as amended in 1905, making it the duty of the assessor to furnish the taxpayer blanks to list his property, the mailing thereof to him at his nearest post office being by section 13 sufficient, and to previously procure from the taxpayer such list verified as required by law—unless, after he has performed these duties, the taxpayer neglects or refuses to make such verified return—is a condition precedent to a valid assessment of his property. Section 74 provides that "if any person fail to furnish a proper list, or if the list furnished be, in the judgment of the assessor, incomplete or erroneous in any re-

spect, the assessor shall proceed to list the property and assess its value, or to supply the omission and correct the errors, upon the best information he can obtain, and for the purpose may call upon any officer of the state, county or district for such proper information as it may be in his power to give, and may require any person having possession, charge or control of any personal property in the county to permit him to examine the same, in order that a fair valuation thereof may be made." Section 13 also provides that "the failure of any taxpayer to receive such blank shall in no case excuse him from making a list of his property when called on, or exempt him from taxation." The effect of sections 63 and 64 [sections 821–67, 821–68] is to require the owners, whether resident or nonresident, to list for taxation their property located in this state. These and other provisions of chapter 29 clearly indicate that the lists to be returned by the taxpayers are in aid of a proper assessment by the assessor, not for the protection of the taxpayer, who is given his remedy against an improper assessment by application to the county court. True, section 78 imposes upon him a forfeiture, and denies him all remedy for correction of any assessment by the assessor, if when called upon he refuses to furnish a proper list of his property or make the oath required thereto, or refuses to answer or answers untruly any question lawfully asked by the assessor; and the same section says that "the return of the assessor showing that any person is the owner of any amount of property liable to taxation shall be prima facie evidence that such taxpayer was called upon by the assessor to list his property." It cannot be said that, under these provisions of the law, the list of the taxpayer is a prerequisite to a valid assessment. In support of the argument that strict compliance with the statute by the assessor is necessary to a valid assessment, we are cited to Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94, and Winnisimmet Co. v. Assessors, 60 Mass. 477. The first case related to assessment of land under a statute providing in what manner it should be assessed, whether in the name of the owner, to unknown owner, or occupant, and prescribing the conditions applicable in each case. Strict compliance by the assessor with the provisions of that statute was rightly held mandatory and prerequisite to a valid assessment as against each class of persons affected thereby. But that case is not applicable here. The provisions of the law there were for the protection of the taxpayer, not merely to aid the assessor. In the latter case the statute of Massachusetts provided that "the assessors may, in all cases, require any person bringing in such list to make oath that the same is true"; and "the assessors shall receive, as the true valuation of the property of each individual, the list, if any, brought in by him, unless he shall, on being thereto required by the assessors, refuse to make oath that the same is true." Whether the alleged omission to give notice of the assessment would excuse the taxpayer for not bringing in his list, and entitle him to the abatement of taxes provided for, was not decided, for reasons stated by the court. Nearly all the states have statutes similar to ours on the subject of assessment; and, by an almost unbroken line of decisions, it is held that the return required of the taxpayer is not a condition precedent to a valid assessment when the return is not made conclusive upon the assessing officer. 27 Am. & Eng. Enc. 670, and note 8, where the cases are collated. In French v. Edwards, 13 Wall. (U. S.) 506, 20 L. Ed. 702, it is held that statutory regulations intended for guidance of officers are directory, unless accompanied by words importing that the acts shall not be done in any other manner or time, but that, when intended for protection of the citizen and disregard of them would injure his property, they are mandatory. See note to the case 7 Rose's Notes, 744, where state and federal decisions affirming it are collated. We conclude, therefore, that our statutes impose no such condition precedent to a valid assessment, and that the assessment of the plaintiff's property was not void.

The validity of the assessment being established, counsel for appellants affirm that, fraud eliminated, all other grounds for relief are either not proven, or do not constitute good cause for setting aside the sale. We cannot accede to this view. While the court below, as we have concluded, wrongly founded its decree in part on the alleged illegality of the assessment, yet it was based also, as we think rightly, on the alleged irregularity and illegality of the levy, sale, and purchase of the property. With respect to the sheriff, he in a levy and sale, for taxes as well as under an execution, being a mere ministerial officer whose acts are not subject to confirmation, as in case of officers or commissioners acting under decree or order of the court having supervision over them, is constituted in law the agent of the parties, without their consent; and the law imposes upon him the duty to act fairly. Slater v. Maxwell, 6 Wall. (U. S.) 268, 18 L. Ed. 796; McLeod v. Pearce, 9 N. C. 110, 11 Am. Dec. 742; Carter v. Harris, 4 Rand. (Va.) 202; De Grauw v. Mechan, 48 N. J. Eq. 219, 21 Atl. 193; Underwood v. McVeigh, 23 Grat. (Va.) 409. Says Judge Carr in Carter v. Harris: "Sheriffs are confidential and highly responsible officers of the law. They are the trustees and agents of both plaintiff and defendant—not selected by them, but imposed on them by the law—and therefore, for the honor of the law, and the purity of the administration of justice, it is vitally essential that their conduct should be watched over with a vigilant and jealous eye."

It is argued that there is no evidence of unreasonable distress; but the very tax ticket the sheriff held, and on which he indors-

ed his levy, showed that the property the taxes on which he was seeking to collect was assessed at a valuation of $8,000; and there is competent testimony that at the time of the sale and after a part had been destroyed by fire the property was worth in the neighborhood of $5,000. A number of the separate items of property, according to the evidence, each exceeded in value the total amount of the taxes. The casing covered by the levy was alone estimated to be worth $2,700 at market price. These facts preclude the idea that the price at which this property was sold en masse justified a levy upon and sale of the whole for the mere pittance of the taxes. The sheriff made no effort to sell in parcels, as it was his duty under the law to do, for the protection of the owner. There may have been persons present for all we know who might have been willing to purchase a very small portion for sufficient to cover the taxes, but they were given no opportunity to do so. The fact that the property was sold en masse is relied on to avoid the sale; but it is claimed no proof was offered to show that it was not necessary to so sell in order to obtain the taxes. A sufficient answer to this is the one already made —that it was the duty of the officer to sell in parcels, and it was not incumbent upon the plaintiff to show that it was not necessary to so sell en masse. In making sale of real estate Code 1899, c. 31, § 8 [Code 1906, § 866], provides that "the sale shall be of each tract * * * or of such separate quantities or parts of such tract * * * as shall be sufficient to satisfy the whole of the taxes." This law would inhibit the sheriff from selling separate tracts en masse. Code 1899, §§ 19, 20, c. 41 [Code 1906, §§ 1315, 1316], provide that "the officer shall in no case make an unreasonable distress or levy," and that, with reference to sale, "the officer shall sell to the highest bidder for cash * * * the said goods and chattels, or so much thereof as may be necessary." These sections imply, indeed, they in effect command, that goods and chattels so distrained shall be separately sold. But, independently of statute, general law would exact fairness in the conduct of an officer in such cases. Mechem on Pub. Offices & Officers, §§ 755, 773; Handy v. Clippert, 50 Mich. 355, 15 N. W. 507; Murfree on Sheriffs, § 527. In Handy v. Clippert, Judge Cooley says: "It cannot be tolerated that such a seizure shall go unrebuked. The officer is or should be a minister of justice, not of oppression; and he should execute every writ put into his hands in such a manner as to do as little mischief to the debtor as possible." The sheriff did not call upon the owner for payment of his taxes, excusing himself on the ground of want of knowledge of where he lived. Mankin, on whose farm the property was, knew, for he had recently been in correspondence with plaintiff. The natural thing for the sheriff to have done was to make inquiry of Mankin at the time of his levy. Besides, Younger had only recently been engaged in litigation with Mankin in the court of which the sheriff was an officer, in which litigation Younger had become purchaser of the property.

In Stead v. Course, 4 Cranch, 412, 2 L. Ed. 660, Chief Justice Marshall says, in reference to a sale for taxes, that "its validity depends on the authority of the collector to sell, and on the fairness of the transaction. * * * He must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire if he has so acted." In Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 646, it is held that "an execution sale en masse, when the property is susceptible of division and a smaller portion would if offered have satisfied the debt, is irregular, and the sale will be set aside in equity." And following Phelps v. Conover, 25 Ill. 312, the court further says: "The debtor also has the right to demand that the sale shall be conducted according to law, and in such a manner as shall not needlessly sacrifice his property." In a note to Patterson v. Carneal's Heirs, 3 A. K. Marsh. (Ky.) 619, 13 Am. Dec. 212, it is said: "In the case of an execution sale, the sheriff has a plain ministerial duty to perform by selling the debtor's property for the debt, interest, and costs; and, if he exceeds the authority given by the fi. fa., it is a usurpation of power, for the time being, at least, that the debtor is powerless to control. The action of the sheriff does not require the approval or confirmation of the court, and therefore the wisdom of the rule declaring such unauthorized acts on the part of officers, or even ministerial agents, null and void." In Lurton v. Rodgers, 139 Ill. 554, 29 N. E. 866, 32 Am. St. Rep. 214, it is affirmed, under a statute practically the same as ours, that, "when property susceptible of division is sold under execution en masse for an inadequate price without first being offered in separate parcels, the sale will be set aside." In that case the sale en masse was of two lots valued at $2,000 for $60, without having first been offered separately. The sale was set aside; and the principle applied there is applicable as well in sales of personal property as real estate. It is true that gross inadequacy of price alone will not, as a general rule, avoid a sale, particularly a judicial sale; yet, when combined with irregularity in making the sale, or even slight circumstances indicating unfairness or fraud, it will furnish sufficient ground for equitable interposition. Smith v. Huntoon and Underwood v. McVeigh, supra. The sacrifice of the plaintiff's property here was, we think, the inevitable result of the violation of the duty of the officer in making the sale in the manner complained of. He should have advertised, and sold, the property by separate items.

With respect to the conduct of the purchasers, we need not necessarily convict them

of positive fraud; but their conduct at the sale, taken in connection with the excessive levy and the manner and conduct of the sale by the officer, constituted such unfairness therein, and worked such prejudice to the rights of the owner of the property, as warranted the court in setting aside the sale. In Underwood v. McVeigh, supra, it is held that, where the fairness of the transaction and the good faith of the purchaser are impeached, the conduct of the officer and inadequacy of price are entitled to great weight. The purchasers here had notice of the manner of the levy upon and offer of the property by the sheriff, and of the irregularity therein. The defendant Meadows was the county clerk of Raleigh county, and accompanied the sheriff to the place of sale. It is claimed he represented to the sheriff and other persons present that he was bidding in the property for the owner. The evidence does not clearly show that he made such representation in exact terms, nor what his exact expressions were. His own words on the witness stand were as follows: "Q. Did or did you not on the day of the sale make the statement to any party present at the sale that it was no use anybody bidding that you had come to bid the taxes, or words to that effect? A. I did not make that statement that I remember of certain. Q. Or words to that effect? A. No, sir; except what I intimated to Crock. Q. That was the idea you intended to convey, was it not? A. Well, I didn't care what he took it for. Q. From the conduct of Crock Mankin at the sale you were led to believe, Mr. Meadows, that Crock believed you had come there for the purpose of representing W. T. Younger, the owner of the property? A. I suppose he did from the fact that he quit bidding when I bid the taxes." This and other testimony of Meadows convince us that he purposely gave out the impression that he was bidding in the property for the owner, that he knew Mankin at least had that impression, but he allowed the sale to proceed for the purpose (as he says) of buying the property as cheaply as he could. Moreover, after the property was knocked down to him and the price exceeded by a few dollars the exact amount of the taxes, he represented to the sheriff that he had only intended to bid the amount of the taxes; and the sheriff accepted from him in payment just the amount of the taxes, and did not require him to pay the amount he bid. This is explained, it is true, by the representation of the sheriff that he did not know who was entitled to the surplus, and that he arranged with the purchasers to pay the balance if later called for. Mankin, who became one of the beneficiaries of this purchase, knew who was entitled to the surplus. He was then in correspondence with Younger. The sheriff could then have ascertained to whom the surplus belonged by inquiry of him.

We cannot say positively from the evidence that Mankin had any prior arrangement with Meadows for the purchase. The circumstance of his becoming interested immediately after the sale on equal terms, as explained by Meadows, is that he wanted to avoid trouble with Mankin, that Mankin represented he had a judgment against the property or that Younger owed him quite a sum of money, and that, no matter who the purchaser might be, he would not be allowed to take the property off of his farm until he got his money. But Meadows seems to have known of this claim before the sale. Mankin quit bidding, for some reason, when Meadows bid the amount of the taxes. Meadows must have known the sale of the property for taxes would free it from any claim of Mankin, by judgment or otherwise. There were several persons present at the sale, but Meadows and Mankin did most if not all of the bidding. These facts, though not convincing, arouse suspicion of some prior arrangement between Meadows and Mankin.

The result of the whole matter was that the plaintiff's property was sold and sacrificed, without his knowledge and contrary to the forms of law, and the defendants became the beneficiaries thereof.

Under the circumstances proven, all notion of fair dealing is precluded, and the authorities above cited fully justify the decree of the circuit court. We are therefore of opinion to affirm it.

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(107 Va. 515)

## NORFOLK & W. RY. CO. v. BONDURANT'S ADM'R.

(Supreme Court of Appeals of Virginia. Nov. 21, 1907. Rehearing Denied Jan. 16, 1908.)

1. MASTER AND SERVANT—EXISTENCE OF RELATION.

Whether a student locomotive fireman is an employé of the railroad depends upon the circumstances of the particular case.

2. SAME—OBTAINING POSITION BY FRAUD—LIABILITY OF MASTER FOR INJURIES.

Where a minor by knowingly misrepresenting his age is accepted by a railroad as a student fireman, though the rules of the company prohibit the accepting of minors for train service, he is a trespasser, or at most a bare licensee, and not a servant, and the railroad is not liable for his death in a collision, since it would be liable only for injuries willfully or wantonly inflicted upon him.

3. TRIAL—INSTRUCTIONS—CONFORMITY TO EVIDENCE.

Requested instructions, not based on the evidence, should not be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596–612.]

4. RAILROADS—CARE AS TO LICENSEES.

A railroad does not owe to a licensee the duty of employing competent servants to run its trains.

5. WRIT OF ERROR—PETITION—SPECIFICATION OF ERRORS—SUFFICIENCY.

Where the petition for a writ of error clearly points out the points relied on for reversal, and the instructions asked are covered by the bills of exceptions, it is sufficient, although it is not specifically stated in the petition that the ruling of the court upon any particular point is assigned as error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1961.]

Error to Circuit Court, Amherst County.

Action for death, by the administrator of C. N. Bondurant against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The following instructions were given for plaintiff:

"(1) The court instructs the jury that if they believe from the evidence that the defendant, through its duly authorized agents, issued and delivered to the plaintiff's intestate, C. N. Bondurant, the written instrument or permit which had been introduced in evidence, marked 'Exhibit A,' with the testimony of J. J. Whitlow, and if they further believe from the evidence that at the time of his injury and death he was upon one of the defendant's freight engines for the purpose and on the division set forth therein, then it was the duty of the defendant, and of its agents and servants in charge of and operating trains of cars, upon which he was not at the time of his injury, to exercise ordinary care in the operation thereof, so as not to unnecessarily endanger him, and their failure to perform that duty would be negligence.

"(2) The court instructs the jury that if they believe from the evidence that the permit mentioned in instruction No. 1 was obtained by the plaintiff's intestate by falsely representing himself to be over the age of 21 years, then, while the said intestate was riding upon the defendant's engine, by virtue thereof, the defendant owed him the exercise only of such ordinary care as it would have owed him had he in fact been over the age of 21 years; but it did owe him such ordinary care as it would have owed him if an adult, notwithstanding such misrepresentation.

"(3) The court instructs the jury that if they believe from the evidence that the plaintiff was killed by the negligence of the defendant, its agents and servants, as set forth in the declaration, they must find for the plaintiff, notwithstanding the waiver by the plaintiff's intestate as contained in the permit, mentioned in instruction No. 1."

The following instructions were requested by defendant and refused by the court:

"(1) The court instructs the jury that under the permit issued by the defendant to C. N. Bondurant, and upon which he was riding at the time of the accident complained of, said Bondurant was not a servant of the defendant, but only a licensee, to whom was not due the care and caution owing by a master to a servant.

"(2) The court instructs the jury that a railway company does not owe to a licensee the duty of employing competent servants to manage its trains, or to run them in a particular manner, or at a particular rate of speed.

"(3) The court instructs the jury that if they believe from the evidence that the plaintiff's intestate, in order to enter the service of the defendant company, falsely represented that he was over 21 years of age, when he knew, or had good reason to know, that such statement was not true, and that the rules of the defendant forbade the employment of minors in its operating department, they must find a verdict for the defendant.

"(4) The court instructs the jury that if they believe from the evidence that C. N. Bondurant made application for the service as fireman with the defendant on May 3, 1906, and stated in said application that he was over 21 years of age; that said statement was false, and that Bondurant knew, or had good reason to know, that the same was not true; that the defendant's rules forbade the employment in its train service of minors; that, acting upon the statement as to his age, and with no knowledge of its falsity, the defendant issued to said Bondurant the permit set forth in the declaration; and that while upon one of defendant's engines pursuant to said permit he received injuries which resulted in his death—then the jury must find a verdict for the defendant."

F. S. Kirkpatrick, for plaintiff in error.
Lee & Howard, for defendant in error.

KEITH, P. C. N. Bondurant, the plaintiff's intestate, was killed in May, 1906, by a rear-end collision upon the Norfolk & Western Railroad, under circumstances which, it is conceded, would, as against a passenger or an employé of the railroad company, have constituted actionable negligence.

The young man who was killed desired to become a fireman on the Norfolk & Western Railroad, and to learn the duties of that position filed an application on May 3, 1906, in which, in reply to one of the printed questions, he stated that he was born on the 27th day of April, 1884, and was, therefore, on the date of the application in his twenty-second year. One of the rules of the company provides that "minors must not be employed without the written consent of parents or guardians on prescribed form, which must be filed with personal records, and must not under any circumstances be employed in the train service."

The evidence tends to show that, while young Bondurant may not have known of the precise terms of this rule he did know, and his attention was specifically directed to, the fact that the rules of the company forbade the employment of infants.

Upon his written application a permit was granted to him, which is set forth in the declaration in the following words:

"Permit the bearer, C. N. Bondurant, upon presentation of this order duly signed by him and witnessed, to ride on freight engines of the company for the purpose of learning the duties of a fireman, for duty as a fireman in the service of the company hereafter.

"It is understood and agreed that Mr. C. N. Bondurant uses this permit at his own risk and expense, without compensation; that

he assumes all hazard and risk of personal injury and damages, whether arising from negligence of the Norfolk & Western Railway Company or its employés or otherwise; and that the Norfolk & Western Railway Company shall not be held liable for any injury so sustained or for any damages resulting therefrom.

"This permit is not good on passenger engines, and expires June 3, 1906.

"L. P. Ligon, Division Master Mechanic.

"I, C. N. Bondurant, the applicant above mentioned, do hereby accept and agree to the terms and stipulations of the above permit, and I do certify that I am more than twenty-one years of age.

"Witness my signature this 3d day of May, 1906. C. N. Bondurant.

"Witness: C. M. Mays."

It was under these circumstances that C. N. Bondurant was upon the engine at the time he received the fatal injury for which his administrator brings this suit.

At the instance of the defendant in error, four instructions were given to the jury, to which the plaintiff in error excepted; and four instructions were asked for by the plaintiff in error, to the refusal of which on the part of the court an exception was also noted.

The controlling question is: What was the duty and degree of care owed by the railway company to defendant in error's intestate under the circumstances of this case?

The theory upon which the case was tried, the verdict rendered, and the judgment entered was that there was a contractual relation between the deceased and the railway company, by which he became an employé to whom the defendant owed the duty of ordinary care; in other words, that the relation existing between Bondurant and the company was that of master and servant, with all the mutual duties and responsibilities which that relation implies. The contention on behalf of the plaintiff in error is that young Bondurant was a trespasser, to whom the company owed no duty, except not to injure him wantonly, recklessly, or willfully.

A student fireman may, or may not, be an employé. Whether he is or not in a particular case depends upon circumstances.

In Weisser v. Southern Pacific Ry. Co., 148 Cal. 426, 83 Pac. 439, cited by defendant in error, it was held that a student brakeman, on freight trains of defendant at his own request and by permission of defendant, for the purpose of gaining experience to render him competent to act as a regular brakeman, and who was entirely subject to defendant's orders, and was required to perform such ordinary duties of brakeman as were allotted to him, was a fellow servant of the other brakemen, although he was receiving no pecuniary compensation.

So, in Barstow v. Old Colony R. Co., 143 Mass. 535, 10 N. E. 255, it was held that if a person undertake voluntarily to perform service for a corporation, and the agent of such corporation assents to his performing such service, he stands in the relation of a servant of the corporation while so engaged, which is the proposition in this case for which we presume it was cited by the defendant in error, and as to the correctness of which there can be no doubt.

In Hewett v. Woman's Hospital Aid Association, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496, it was held that a pupil nurse, employed in a hospital maintained by a charitable corporation, under a contract whereby she is to receive professional training and be paid a small remuneration, is a servant of the corporation, and not a recipient of its bounty. It appears in that case that the plaintiff was 19 years of age, and that the hospital authorities put her in charge of a case of diphtheria without disclosing to her the nature of the malady. She contracted the disease, and brought suit for the wrong done her. The question discussed in the case was whether or not a charitable corporation which is engaged in the maintenance of a hospital, and which holds its property for that general purpose, is liable for injuries resulting from a negligent failure to warn its servants concerning the nature of their employment; and the hospital was held to be liable.

In Millsap's Adm'r v. Louisville, etc., Ry. Co., 69 Miss. 423, 13 South. 696, it was held that one who by permission of a railway company acts as fireman of its locomotive is a servant of the company, though he acts without compensation merely to learn the business. He was also held to be a fellow servant of the train dispatcher, whose negligence caused the injury, and therefore a recovery was denied.

But in none of these cases was there misrepresentation as to age or a rule prohibiting the employment of infants.

In the case of Youll v. Sioux City & Pac. Ry. Co., reported in 66 Iowa, 346, 23 N. W. 736, the Supreme Court of Iowa held that the mere fact that a brakeman injured was a minor will not entitle him to recover for such injury, if he was physically able to perform the duties he was employed to do, and, in the absence of evidence to the contrary, it will be presumed that he was of ordinary intelligence. There the contention seems to have been that the infant was entitled to recover under circumstances which would have precluded a recovery had he been an adult; but the court, being of opinion, in the absence of evidence to the contrary, that he was a person of ordinary intelligence, held that the railroad company was not negligent in employing him as a brakeman, there being no evidence to show that he was inexperienced in the duties of that position, that he was to be treated for the purposes of that case as an adult, and that he could not recover.

As we have said, in all of these cases there is an absence of two circumstances upon which plaintiff in error rests its case: First,

that the railroad company prohibited the employment of an infant; and, second, that the deceased, by misrepresenting his age, obtained permission to ride upon the engine where he was injured.

Defendant in error also relies on Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 Pac. 869. In that case the state of Washington prohibited by law the employment of infants under 14 years of age; and the infant represented himself as over 14 years of age, when in point of fact he was only 12. The court held broadly that infants are not liable for torts connected with or growing out of contracts, and the doctrine of estoppel in pais does not apply to them. In support of the opinion Sims v. Everhardt, 102 U. S. 300, 26 L. Ed. 87, is cited, where the court said: "The question is whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel in pais is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity."

In the Kirkham Case the railroad company had violated a positive law by employing an infant within the prohibited age, and it differs in its facts from the case before us.

Cases of negligence have become so numerous that it is impossible to discuss all that bear upon the subject, and therefore it becomes necessary to select those which are most pertinent.

In the case of Fitzmaurice v. N. Y., N. H. & H. R. Co., 192 Mass. 159, 78 N. E. 418, 6 L. R. A. (N. S.) 1146, the facts were as follows: The plaintiff, while riding upon a train of the defendant, was injured by a collision, and no question was made that she would have been entitled to a verdict in her favor if she had been a passenger. She was a minor, and was riding upon a three-months season ticket which was good only for students under 18 years of age. She had obtained this ticket by presenting to the defendant's ticket agent a certificate, purporting to be signed by her father, that she was under 18 years of age and was a pupil in the Hollander Art School, Boston, and agreeing that she would not use the ticket otherwise than in going to and from school, and also presenting a certificate, purporting to be signed by "J. F. Miner, Principal, Hollander Art School, Boylston Street, Boston, Mass.," that she was a pupil in his school and as he fully believed intended to remain so for the next three months. She was at this time over 18 years of age, as she testified, lived in Marlboro, and was employed in Hollander's dry goods store in Boston. The regular price for a season ticket was $32. The reduced rate for students under 18 years of age, at which the plaintiff procured it, was $16. She had been riding upon this ticket nearly every day, except Sunday, for over a month, and the coupons had been received by the conductor. Upon the face of the ticket were the words: "Good only for a person under 18 years of age." The jury having found the amount of the plaintiff's damages, if she was entitled to recover, the judge ordered a verdict for the defendant. Upon this state of facts, the Supreme Court of Massachusetts held:

"The defendant had the right to establish a reduced rate for students under a fixed age. * * * The plaintiff knew that she did not come within the class to which this offer of a reduced rate was made, and obtained her ticket by presenting certificates of facts which she knew to be false. She thus obtained by false representations a ticket to which she knew that she was not entitled. Whatever rights she had to be regarded as a passenger on the defendant's train she had acquired solely by the fraud which she had practiced upon the defendant. She had no right to profit by her fraud. She had no right to rely upon the consent of the railway company to her entering its train as a passenger, when she had obtained that consent merely by gross misrepresentations. Accordingly she was not lawfully upon the defendant's train. She was in no better position than that of a mere trespasser. This principle has been affirmed in other jurisdictions. Thus it has been held that a person traveling over a railroad on a free pass or a mileage ticket which had been issued to another name and was not transferable was barred by his fraudulent conduct from recovering for a personal injury, unless it was due to negligence so gross as to show a willful injury. Toledo, W. & W. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Way v. Chicago, R. I. & P. R. Co., 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431. If the plaintiff had fraudulently evaded the payment of any fare, she certainly would not have become a passenger, and the defendant's utmost duty to her while she was upon its train would have been to abstain from doing her any willful or reckless injury. Condran v. Chicago, M. & St. P. R. Co., 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749, 32 U. S. App. 182; Toledo, W. & W. R. Co. v. Brooks, 81 Ill. 245; Chicago, B. & Q. R. Co. v. Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17. But such a case cannot be distinguished in principle from the case at bar, in which the plaintiff obtained her ticket at a reduced price by successfully practicing a fraud. The only relation which existed between the plaintiff and defendant was induced by her fraud; and, as was said by the court in Way v. Chicago, R. I. & P. R. Co., ubi supra, she cannot be allowed to set up that relation against the defendant as a basis of recovery. See, also, to the same effect, Godfrey v. Ohio & M. R. Co., 116 Ind. 30, 18 N. E. 61; McVeety v. St. Paul, M. & M. R. Co., 45 Minn.

268, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728; McNeill v. Durham & C. R. Co., 132 N. C. 510, 44 S. E. 34, 67 L. R. A. 227, 95 Am. St. Rep. 641.

"Nor is the plaintiff helped by the fact that the defendant's conductors had accepted the coupons of her ticket. This simply showed that she had succeeded in carrying her scheme to completion. There had been a similar acceptance by the conductor in Way v. Chicago, R. I. & P. R. Co. and Toledo, W. & W. R. Co. v. Beggs, ubi supra. If the defendant's conductors did not know the real facts, their acceptance of her coupons could have no effect. If they knew the facts, and acquiesced in the plaintiff's wrongful purpose, this conduct could give her no additional rights. McVeety v. St. Paul, M. & M. R. Co. and Condran v. Chicago, M. & St. P. R. Co., ubi supra."

This case is annotated in 6 L. R. A. (N. S.) 1146, and a number of cases not cited in the opinion are mentioned in the note; and it seems to us to be not only good law, but good morals, as well. It so completely covers the case under consideration, and is so well supported by the reasoning of the court and the authorities cited, that we are content to rest upon it.

Defendant in error relies also upon the argument that there was no relation between the misrepresentation of Bondurant as to his age and the accident by which he was injured.

It is true that his being an infant in no way contributed to the accident. It is equally true that in Fitzmaurice v. Railroad, supra, the fact that plaintiff was over 18 years of age in no wise contributed to the accident. Doubtless the accident would have taken place, whether Bondurant had been upon the engine or not; but, if he had not been upon the engine, he would not have been injured by the collision. The controlling question in this case, however, is: In what relation did the intestate of the defendant in error stand to the railroad company at the time of the injury, and what duty did the railroad company owe to him? It is as true of him as it was of Miss Fitzmaurice that the only relation which existed between him and the railroad company was induced by fraud. But for his fraud and misrepresentation, he could never have been upon the engine. He was, therefore, a trespasser, or at most a bare licensee, to whom the railroad company stood in no contractual relation and owed no other duty than not to injure him recklessly, wantonly, or willfully.

The law is settled that it is one of the primary nonassignable duties of a corporation, with a large number of employés performing difficult and dangerous duties, to prescribe and promulgate rules for their government. In the performance of its duty the Norfolk & Western Railway Company adopted a rule prohibiting the employment of infants under 21 years of age without the consent of parents or guardian. It is a reasonable and salutary rule, from whatever point of view it may be considered. It shields and safeguards the infant from the consequences of his inexperience and temerity, and it promotes the safety of the public by securing mature and efficient employés for the discharge of the dangerous and difficult duties pertaining to a common carrier of passengers and freight. It would be a hard measure of justice to hold a company responsible on the one hand for failure to prescribe rules, and on the other to refuse to protect it from the consequences of the violation of reasonable and proper rules adopted and promulgated in the discharge of the duty imposed by law.

There is neither averment nor proof that the injury was inflicted recklessly, wantonly, or willfully. We are therefore of opinion that it was error to give the instructions asked for by defendant in error, and to refuse to give those asked for by plaintiff in error.

The point is made by defendant in error that there is no proper assignment of errors in the petition in this case. As we have seen, instructions were asked for on the part of the plaintiff and defendant, all of which are covered by plaintiff in error's bills of exceptions, and, while it is not specifically stated in the petition that the ruling of the court upon this point or upon that is assigned as error, the points upon which reliance is had to secure a reversal are clearly stated, and can leave no doubt as to the questions presented for our consideration.

Upon the whole case, we are of opinion that the judgment of the circuit court should be reversed, and a new trial awarded.

Reversed.

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(107 Va. 412)

## CHESAPEAKE & O. RY. CO. v. FORTUNE

(Supreme Court of Appeals of Virginia. Nov. 21, 1907. Rehearing Denied Jan. 16, 1908.)

1. CARRIERS—INJURIES—PERSONS ACCOMPANYING PASSENGERS—DUTY OF CARRIER.

Where plaintiff went to defendant's station to accompany his wife and children, who intended to become passengers on defendant's train, and plaintiff was injured by the premature starting of the train while he was endeavoring to place his wife's baggage aboard, plaintiff was on defendant's premises by its implied invitation, and defendant was therefore bound to exercise ordinary care for his safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1242.]

2. SAME—EVIDENCE.

Plaintiff, having been injured while on a carrier's premises to assist his wife and children to board a train, being entitled to assume that the carrier would stop a reasonable length of time to enable passengers and baggage to be put aboard, it was not error to permit him to testify that when he attempted to put the baggage aboard, as the train was standing, he believed it would remain so until his wife could get in the car and until he could get the baggage on.

3. WITNESSES—CHARACTER EVIDENCE—ADMISSIBILITY.

Where defendant's cross-examination of plaintiff was such as to question his truthfulness

indirectly, evidence to support his reputation for truth and veracity was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1167.]

4. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.

Where plaintiff, a man of good health and character, in the prime of life, suffered the loss of a leg by defendant's negligence, a verdict allowing him $5,500 was not excessive, under the rule that a verdict will not be disturbed unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by a mistaken view of the merits of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372–395.]

5. TRIAL—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Refusal of proper instructions is harmless, where the charge given fully covered the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651–659.]

Error to Circuit Court, Alleghany County.

Action by R. L. Fortune against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

R. L. Parrish, for plaintiff in error. Jno. T. Delaney and George A. Revercomb, for defendant in error.

KEITH, P. R. L. Fortune brought suit in the circuit court of Alleghany county to recover damages for the loss of his leg, occasioned, as he alleges, by the negligent conduct of the Chesapeake & Ohio Railway Company. There was a verdict and judgment in his favor for $5,500, to which the railroad company obtained a writ of error.

The first assignment of error is that the court overruled the demurrer to the declaration.

There were five counts in the declaration, which state the plaintiff's case in a manner somewhat varying as to details; but the cause of action is set forth substantially as follows: That Fortune accompanied his wife and two small children, aged, respectively, two and four years, to "Mallow," a station on the Chesapeake & Ohio Railway, his wife and children intending to take train No. 14; that the station is what is known as a flag station, at which there is no depot, ticket office, baggage office, platform, portable step, or any other means or appliance to facilitate ingress and egress to and from the trains that stop at that station; that the train stopped at a point where the public road crosses the railroad track, so that a passenger could step from the road upon the steps leading to the platform of the coach appropriated to colored people, or upon that appropriated to white passengers, which was the last coach in the train; that after his wife and two children had been assisted to the platform of the coach for colored people they passed across the platform to the rear coach, in which they were to be accommodated, and defendant in error, who had in his charge a valise or telescope belonging to his wife, and while the train was still at rest, undertook to put the valise or telescope upon the platform, so that his wife could take it with her; but while so engaged, and in a position perfectly open and obvious to the train crew, the train was put in motion, he was carried along with it, and received the injury for which he sues.

The theory of defendant in error (plaintiff in the court below) is that, having accompanied his wife and children, who intended to become passengers on the Chesapeake & Ohio Railway, to the station, he was there by invitation, and that it was the duty of the railroad company to use reasonable and ordinary care not to do him an injury.

The theory of plaintiff in error is that Fortune was at most a mere licensee, to whom the railroad company owed no duty, except that it should not injure him willfully or recklessly.

We are of opinion that the position of plaintiff in error cannot be maintained. We think it plain that one who accompanies his wife and small children to a station where they expect to take a train and become passengers is there by the implied invitation of the railroad company; that it is the duty of a person upon the premises of a railroad company for such a purpose to exercise reasonable precaution for his own safety, and proceed with reasonable diligence to discharge the duty in which he is engaged; and that, while upon the premises under such conditions, it is the duty of the railroad company to exercise ordinary care for his safety and protection. This proposition seems to us too plain to need either argument to enforce it or authority to maintain it.

Without discussing the numerous cases cited, we shall content ourselves with an extract from 5 Am. & Eng. Enc. of Law (2d Ed.) 518: "Persons going upon a carrier's premises, or entering a carrier's vehicle, to assist a passenger, to greet an arriving passenger, or to take leave of a departing passenger, cannot be deemed passengers themselves. Nor are they trespassers, properly speaking. They should be considered rather in the light of licensees, to whom the carrier owes certain duties."

And in Fetter on Carriers of Passengers, § 237, it is said: "One who escorts a passenger to a station or to a seat in a train is not a mere trespasser, to whom the company owes no duty except to abstain from willful injuries; nor, on the other hand, is he a passenger towards whom the company is bound to the exercise of the highest degree of care and skill; but he is on the company's premises on its implied invitation, and it is bound to exercise ordinary care for his safety."

The second error assigned is to the action of the trial court in permitting the attorney for defendant in error to ask the following question: "When you attempted to put the baggage on the train was standing still. Did you believe the train would remain standing still until your wife could get in the car where she had to go, and until

you could get the baggage on? A. That is what I expected."

The objection taken to this ruling is that Fortune showed by his own testimony that he had never been to Mallow Station but once before, that he was unfamiliar with the surroundings, and he did not know what time trains usually stopped at Mallow, and had no right to presume that they would stop any given length of time. All of which is, perhaps, true; but it still remains that it was the duty of the company to stop a reasonable length of time to enable passengers and baggage to be put upon the train, and Fortune had a right to suppose that the railroad company would discharge that duty.

The third assignment of error is to the action of the court in admitting character evidence as to R. L. Fortune's general reputation for truth and veracity, when his reputation for truth and veracity had not been assailed, and the proof of such reputation by persons who were not sufficiently acquainted therewith.

The examination of Fortune was such as to bring the case within the influence of George v. Pilcher, 28 Grat. 299, 26 Am. Rep. 350, where this court said: "Whenever the character of a witness for truth is attacked, either by direct evidence of want of truth, or by cross-examination, or by proof of contradictory statements in regard to material facts, or by disproving by other witnesses material facts stated by him, or, in general, whenever his character for truth is impeached in any way known to the law, the party calling him may sustain him by evidence of his general reputation for truth."

The fourth assignment of error is that the verdict is excessive and that it is contrary to the law and the evidence.

Fortune was a man of good character, good health, in the prime of life, and he suffered the loss of a leg. This court has said in numerous cases that, there being no exact standard by which it is possible to ascertain in money the value of the various elements of damage proper for the consideration of a jury in such a case, this court would not disturb the finding of a jury, unless the damages were so excessive as to furnish evidence of partiality or prejudice, or some corrupt motive, on the part of the jury.

We shall refer only to one case. In Farish & Co. v. Reigle, 11 Grat. 697, 62 Am. Dec. 666, there was a verdict and judgment for the plaintiff for $9,000. In that case the plaintiff was injured by the overturning of a stagecoach. His head was severely cut, and one of his legs was broken above the ankle, and at the time of the trial, which occurred about one year after the accident, his leg was not entirely healed and was shortened, the ankle joint was swollen and stiff, and he was obliged to use crutches. The attending physician expressed the opinion that he would be a cripple for life. The court held that the verdict in such a case could not be disturbed, unless the damages allowed were so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.

The fifth assignment of error is to the giving of instructions asked for by the plaintiff, and the refusal to give instructions Nos. 2 and 3, asked for by the defendant.

Without going into a particular discussion of the instructions, we are of opinion that there is no error in the instructions given; that they fully covered the case, and were sufficient to enable the jury correctly to apply the evidence; and that, even though defendant's instructions were in themselves free from objection (about which we express no opinion), the refusal to give them was, under such circumstances, harmless error.

With respect to the evidence, we find that it was ample to suport the averments of the declaration; and upon the whole case we are of opinion that there was no error to the prejudice of the plaintiff in error, and the judgment is affirmed.

Affirmed.

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(107 Va. 895)

## WOODSON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 16, 1908.)

1. RAPE—ASSAULT WITH INTENT TO RAPE—ELEMENTS.

A charge of assault with intent to rape can only be established by proof of force or attempted force, coupled with an attempt to have sexual intercourse with prosecutrix against her will and notwithstanding her resistance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 15–19.]

2. SAME—EVIDENCE.

On a trial for assault with intent to rape, prosecutrix testified that before dark, when returning home, she met accused, who stood in the path with a shotgun and, disguised by having his face blackened, seized her and said, "Hold on, I want some;" that she ran to a neighbor, and told him; and that the neighbor went to look for accused and could not find him. *Held* to justify a conviction for aggravated assault, but not for assault with intent to rape.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 78–82.]

3. CRIMINAL LAW — PROOF OF GUILT — EVIDENCE.

The guilt of accused cannot be inferred because the facts are consistent with his guilt, but they must be inconsistent with innocence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1261.]

Whittle, J., dissenting.

Error to Circuit Court, Buckingham County.

John W. Woodson was convicted of assault with intent to rape, and he brings error. Reversed, and new trial awarded.

Moon & Moss, for plaintiff in error. The Attorney General and Sands Gayle, for the State.

HARRISON, J. The indictment in this case charges the accused with an attempt

to commit rape upon a certain female. In such cases force is an essential element of the crime. To sustain the charge of an attempt to commit rape, there must be evidence of force, or of an intention on the part of the offender to use force, in the perpetration of the heinous offense, if it should become necessary to overcome the will of his victim. The crime of assault with intent to rape can only be established by proof of force or attempted force, coupled with an attempt to gratify the lustful desire, against the consent of the female, notwithstanding resistance on her part. Hairston v. Com., 97 Va. 754, 32 S. E. 797; Cunningham v. Com., 88 Va. 37, 13 S. E. 309; Christian v. Commonwealth, 23 Grat. 954; Jones v. State, 90 Ala. 628, 8 South. 383, 24 Am. St. Rep. 850; Dorsey v. State, 108 Ga. 477, 34 S. E. 135; State v. Massey, 86 N. C. 658, 41 Am. Rep. 478; Green v. State, 67 Miss. 356, 7 South. 326.

In the case at bar the testimony of the prosecutrix is the only evidence showing the facts and circumstances attending the occurrence. She says that before dark on the 9th of January, 1907, she went to the spring, about one-fourth of a mile from her home, to get a bucket of water; that when returning the accused was standing in the path, with a double-barrel shotgun and his face blackened, though she could see the natural color of his neck and hands; that he followed her along the path, and when she had gotten about half way home he came up to her and seized her arm and said, "Hold on, I want some;" that she screamed, and ran to a neighbor's house, who lived about 200 yards from her home, and told him of the occurrence; and that this neighbor went down there with his gun but could find no one.

This evidence shows that the conduct of the accused was shockingly indecent and insulting, and, if believed by the jury, subjected him to a conviction for an aggravated assault; but the court is of opinion that it falls short of showing a felonious intent. However reprehensible his conduct, we are constrained to say that the testimony fails to show any attempt on the part of the defendant to employ any force whatever in the accomplishment of his purpose, whatever that may have been. There was no attempt to use force; no threat; only solicitation. The absence of all violence, and of evidence of any intention to use force, if necessary, to overcome the will of the prosecutrix, the time, and the place, invest the charge with improbability. The evidence is consistent with a desire on the part of the offender to have sexual intercourse with the prosecutrix; but there is no evidence of an intention to use force, if necessary, to gratify his desire—only persuasion.

"The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." Hairston's Case, supra.

This conclusion makes it unnecessary to consider other assignments of error.

We are of opinion that the circuit court erred in refusing to grant the plaintiff in error a new trial, for which error its judgment must be reversed, the verdict of the jury set aside, and a new trial awarded.

Reversed.

WHITTLE, J. (dissenting). I cannot concur in the opinion of the court in this case that the evidence for the commonwealth is insufficient to establish the corpus delicti, the attempted rape charged in the indictment.

The testimony of Mrs. Dunkum (a young married woman) bearing upon the essential fact of the attempted commission of the crime, which in many of its features is corroborated by other testimony, is certified as follows: "On January 9, 1907, she went to the spring about one-fourth of a mile from her home to get a bucket of water. She dipped out the water and started home. The accused * * * was standing in the path and asked her, 'Who lives up there?' She replied, 'Elijah Dunkum.' The accused had a double-barrel shotgun and his face blackened; but she could see the natural color of his face and hands. She started on home with the water, and the accused followed her along the path. When she had gotten about half way home, he said something which she did not hear sufficiently to know what it was. The accused then came up to her, and seized her left arm, and said, 'Hold on,'" accompanying that action and language with the declaration of his lustful desire. Whereupon she screamed and ran to the house of a neighbor, who lived about 200 yards distant from her home, and in an agitated and excited manner told him what had occurred. The neighbor, armed with a gun, repaired to the scene of the crime; but the accused had disappeared.

These facts, together with the reasonable inferences which the jury were justified in drawing from them, in my opinion, maintain the following propositions: That the accused (a young negro man), armed with a double-barrel shotgun, disguised himself to prevent identification, and beset the path, along which Mrs. Dunkum was returning from the spring to her home, for the purpose of intercepting her and of having carnal knowledge of her person against her will; that he pursued her along the pathway with that design; that he made known his lecherous desire, commanded her to stop in order that he might accomplish his purpose, and attempted to enforce the demand by laying hold of her person; and that he was deterred by her screams alone from the consummation of the offense.

It must be observed that the language of the accused did not import an indecent proposal, but conveyed a distinct demand, accompanied by a coercive act conducing to its

fulfillment, and that the resistance and outcries of his intended victim frightened him off and prevented its consummation. If the foregoing are warrantable deductions from the facts proved, it can hardly be said that they fall short of proving the corpus delicti.

In this class of cases, the authorities are agreed that each case must be governed by the attendant circumstances, "among which (as was said in Christian's Case, 28 Grat. 954) the character and condition of the parties may have an important bearing. Acts of the accused, which would be ample to show and produce conviction on the mind that it was the wicked attempt and purpose to commit this infamous crime, if done in reference to a female of good and virtuous character, would be wholly insufficient to establish guilt if they were acts done to a female of dissolute character or easy virtue." The facts of that case were that the accused and the prosecutrix, both of whom were negroes, had attended an exhibition together in the night; that she was a base woman, the mother of two bastard children; that there was no attempt on his part to ravish her, the court characterizing his conduct toward the woman as "rough wooing" merely, and emphasizing the circumstance that there was no outcry on her part.

So, also, in the latest pronouncement of this court on the subject (Hairston's Case, 97 Va. 754, 32 S. E. 797), though the conviction was not sustained, the reasoning of Judge Riely conclusively shows that all the elements of the offense are present in the case in judgment. The learned judge remarks: "To sustain the charge of an attempt to commit rape there must be evidence of force, or of an intention on the part of the offender to use force, in the perpetration of the heinous offense, if it should become necessary to overcome the will of his victim." At page 757 of 97 Va., page 797 of 32 S. E., in summing up the circumstances of that case, it is said: "There was no attempt to use force; no threat; only solicitation. The absence of all violence, and of evidence of any intention to use force, if necessary to overcome the will of the prosecutrix, the time and the place, and all the surrounding circumstances, invest the charge with very great improbability."

The converse of the preceding enumeration of circumstances plainly appears from this record.

In conclusion, I desire to remark that, in estimating the significance of those circumstances, we must not close our eyes to the existence of a "Black Peril," which rests like a pall over the land, and constitutes an ever-present menace to the safety of the white women of the South. Confronted by this horrible condition, which is known to all men and deplored by the right-thinking element of both races, we cannot, I submit, upon the cogent evidence before us, afford to set aside the verdict of the jury and establish a precedent, the dual tendency of which, in my judgment, will be to increase crime and to encourage resort to mob violence.

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(107 Va. 695)

## NEWPORT NEWS LIGHT & WATER CO. v. PENINSULA PURE WATER CO.

(No. 1.)

(Supreme Court of Appeals of Virginia. Jan. 16, 1908.)

WATERS — WATER COMPANIES — REGULATION —CORPORATION COMMISSION—JURISDICTION.

Acts 1902–04, p. 974, c. 609, subc. 2, § 19 [Code 1904, § 1294b, cl. 19], authorizing any person aggrieved by anything done by any public service corporation doing business in the state to complain before the State Corporation Commission, sitting as a court of record, etc., when considered in connection with Acts 1902–04, p. 141, c. 147, § 16 [Code 1904, § 1313a, cl. 16], and Const. art. 12, § 156, pars. "a," "b," "c" [Code 1904, pp. ccli–ccliii], providing that in all matters pertaining to public control, the commission shall have the powers of a court of record, with authority to require all corporations doing business in the state to perform any public duty, etc., gives to the commission authority over corporations in the discharge of their public duties, and does not confer jurisdiction to determine cases against such corporations in which the matter in controversy relates primarily to injuries to private property rights, and only affects the public incidentally, and the commission has no jurisdiction of a controversy between public service corporations engaged in supplying water to towns, resulting from one of them occupying with a system of water mains the same streets occupied by the other.

Appeal from State Corporation Commission.

Suit by the Newport News Light & Water Company against the Peninsula Pure Water Company, brought before the State Corporation Commission. From a decree denying relief, complainant appeals. Affirmed.

R. G. Bickford and Batchelor & Phillips, for appellant. S. G. Cumming, for appellee.

BUCHANAN, J. The only question involved in this case is whether or not the State Corporation Commission has jurisdiction to enjoin and restrain the appellee from doing the acts complained of by the appellant in its petition for an injunction.

Both appellant and appellee are public service corporations, engaged in the business of supplying water to the towns of Hampton and Phœbus, among other places. The alleged wrongful acts sought to be enjoined are:

(1) That appellee, without authority, and in violation of the statute law of the state relating to corporations, is proceeding to occupy with a system of water mains and pipes the same streets already occupied by the appellant in the said towns.

(2) That the appellee has laid and is proceeding to lay its pipes at a less distance from the outside of the pipes of the appellant, when paralleling and crossing the same, than is permitted by section 2, subc. 9, of the act concerning public service corporations approved January 18, 1904, Acts 1902–04, pp. 968, 1004, c. 609 [Code 1904, § 1294i, cl. 2].

(3) That the appellee has violated section 8, subc. 2, of the same act (Acts 1902–04, p. 970, c. 609 [Code 1904, § 1294b, cl. 8]), which requires that one public service corporation, before crossing with its works the works of another such corporation, shall give notice of its purpose accompanied by plans and specifications, by failing to give such notice.

(4) That the appellee has violated section 17, subc. 2, of the same act, which requires that public service corporations shall conform to the "Act concerning corporations," which went into effect May 21, 1903, in this: that it has failed to proceed under section 6, subc. 3, of the last-named act (Laws 1902–04, p. 457, c. 270 [Code 1904, § 1105c, cl. 6]) to have its charter amended so as to acquire the right of eminent domain; and that, having no such power, it has no right to cross the pipe line of the appellant without its consent.

(5) That by virtue of those alleged wrongful acts, the improper and careless manner in which the appellee is doing the work complained of, and the insolvency of that company, the appellant will suffer irreparable injury unless the appellee is restrained from doing the acts complained of.

The Corporation Commission declined to grant the injunction, being of opinion that it had no jurisdiction to grant the relief prayed for upon the case made.

Section 19, subc. 2, of the act concerning public corporations (Code 1904, § 1294b, cl. 19), is relied on by appellant as giving the commission jurisdiction. That clause is as follows: "Any person or corporation aggrieved by anything done or omitted in violation of the provisions of this act, by any public service corporation chartered or doing business in this state, shall have the right to make complaint of the grievance and seek relief against such public service corporation before the State Corporation Commission, sitting as a court of record. If the grievance complained of be established, the State Corporation Commission, sitting as a court of record, shall have jurisdiction, by injunction, to restrain such public service corporation from continuing the same, and to enjoin obedience to the requirements of this act, and the said commission, sitting as a court of record, shall also have jurisdiction, by mandamus, to compel any public service corporation to observe and perform any public duty imposed upon public service corporations by the laws of this commonwealth, subject as to any matter arising under this section to the right of appeal to the Supreme Court of Appeals by either party as of right in the mode prescribed by law, but nothing in this section shall be construed to confer any power upon the State Corporation Commission which is forbidden to the courts by section twelve of chapter four of this Act."

The provision quoted is broad enough, standing alone, to give the commission jurisdiction to grant relief for any violation of any of the provisions of the "Act concerning public service corporations" by any such corporation chartered or doing business in the state; but when read, as it must be, in connection with the constitutional and statutory provisions defining the powers and duties of the Corporation Commission (Const. art. 12, § 156, pars. "a," "b," "c" [Code 1904, pp. cclicclliii]; Act of Assembly approved April 15, 1903 [Acts 1902–04, p. 141, c. 147, § 16; Code 1904, § 1313a, cl. 16]), we do not think that the commission erred in holding that it did not have jurisdiction to grant the relief prayed for in this case.

The constitutional provision defining the powers and duties of the commission, and the act of April 15, 1903, enacted to put into effective operation the provisions of the Constitution, were intended, as we understand them, to give power and authority to the commission over corporations chartered or doing business in this state in the performance and discharge of their public duties, and were not intended to confer upon the commission jurisdiction to hear and determine cases against such corporations in which the matters in controversy relate primarily to injuries to private property rights and only affect the public incidentally.

By section 156c of the Constitution, it is provided that "in all matters pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record, * * *" and by section 16 of the act of April 15, 1903, it is provided that "the commission shall have power and authority to require, by its rules, regulations and requirements, all corporations chartered under the laws of this state and all foreign corporations doing business in this state, to perform and discharge any public duty or requirement imposed upon such corporations by the Constitution or by law, and * * * the commission may enforce against any such corporation, by its judgments and processes, any fine or penalty imposed by law for the failure of any such corporation to perform any public duty required of it, or to comply with any requirement of law or any lawful regulation of the commission in reference to the same."

The acts of the appellee sought to be enjoined affect primarily the property rights of the appellant, and only incidentally affect the public. If the construction contended for by the appellant be placed upon section 19, subc. 2, of the act concerning public corporations, viz., that the Corporation Commission has jurisdiction to grant an injunction for any and every violation of any of the provisions of that act, then it will have jurisdiction over a great number and variety of controversies in which the public has no interest, or, if any, only incidentally, such as every failure of such corporations to make compensation to any person damaged by its use of the streets or alleys of any city or town (as provided by section 1, subc. 2, of

the act), or, where its works pass through the land of another, for failing to provide suitable wagon ways across the same (as provided by section 2 of the same chapter) or where a telephone or telegraph company is stringing its wires across the property or premises of any person without first having obtained his consent (as provided by section 1, subc. 8, of the act), or where it fails to make compensation to any person damaged in his property along the line of a public road or street before using or occupying the same with its works (as required by section 5 of the same chapter).

A construction which would clothe the Corporation Commission (a body created, as it manifestly was, to procure from public service corporations better service for the public, and to that end having the powers and authority of a court of record), with jurisdiction over such a class of cases—over matters in which the public has no interest, or is only interested incidentally—ought not to be given, unless it be clear that the Legislature so intended. Such an intention not being clearly manifest, when all the constitutional and statutory provisions on the subject are considered, we are of opinion that the Corporation Commission had no jurisdiction of the case made, and that its order must be affirmed.

Affirmed.

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(107 Va. 700)

## NEWPORT NEWS LIGHT & WATER CO. v. PENINSULA PURE WATER CO. (No. 2.)

(Supreme Court of Appeals of Virginia. Jan. 16, 1908.)

Appeal from State Corporation Commission.

Suit by the Newport News Light & Water Company against the Peninsula Pure Water Company, brought before the State Corporation Commission. From a decree denying relief, complainant appeals. Affirmed.

R. G. Bickford and Batchelor & Phillips, for appellant. S. G. Cumming, for appellee.

BUCHANAN, J. This case was argued with the case of Newport News Light & Water Co. v. Peninsula Pure Water Co. (No. 1) 59 S. E. 1099. As the question involved in both cases is the same, the order appealed from in this case is affirmed, for the reasons stated in the opinion of the court in the other cause and this day filed.

Affirmed.

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(107 Va. 901)

## WHITE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 16, 1907.)

1. INDICTMENT AND INFORMATION—LANGUAGE OF STATUTE.

On a prosecution for unlawfully selling liquor in the county of Mathews, contrary to Acts 1901–02, p. 765, c. 653, an indictment charging the offense in the terms of the statute was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 289–294.]

2. INTOXICATING LIQUORS—INDICTMENT—SUFFICIENCY.

On a prosecution under Acts 1901–02, p. 765, c. 653, being an act to suppress the unlawful sale of liquor in Mathews county, the indictment was not insufficient because it did not state the place within the county at which the sale was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 227.]

3. CRIMINAL LAW — TRIAL—EVIDENCE—ELECTION.

Where the indictment charged defendant with unlawfully selling liquor within the two years last past in Mathews county, contrary to Acts 1901–02, p. 765, c. 653, it was not error to refuse to compel the state to elect on what day within the two years the offense was committed.

4. INTOXICATING LIQUORS — PROSECUTIONS—EVIDENCE.

Acts 1901–02, p. 765, c. 653, being an act to suppress the unlawful sale of liquor in Mathews county, provides that the fact that any person has a license as a retail liquor dealer from the United States and no such license from the state shall be evidence of selling by retail without a state license, and that the fact that a person has such a United States license may be proved by the evidence of the internal revenue collector for the district or any of his deputies who know the fact, or by any person who has seen the license. *Held* that, on a prosecution under the statute, it was not error to permit the state to prove the issuance of a United States license to defendant by introducing a certificate of the collector of internal revenue showing that a license had been granted to defendant, which certificate was authenticated by a certificate of the United States district judge and a certificate by the clerk of the court.

5. SAME—INSTRUCTIONS.

Where, on a prosecution charging defendant with having sold liquor at retail contrary to the statute within the two years last past, the only showing made by the commonwealth was evidence that defendant had had a United States license covering only the last eight months of the two years, an instruction that, if defendant held a license from the United States within two years last past, it would be evidence of selling liquor by retail, but that the jury must believe that defendant had sold it within the two years last past, was erroneous.

6. SAME.

The probative value of the evidence of the issuance of a United States license is to be determined in connection with all the other evidence in the case.

7. SAME.

The question as to the probative value of the evidence of the issuance of a United States license is a question primarily for the jury.

Error to Circuit Court, Mathews County.

J. T. White was convicted under Acts 1901–02, p. 765, c. 653, of unlawfully selling liquor in Mathews county, and he brings error. Reversed, and remanded for a new trial.

J. N. Stubbs, for plaintiff in error. The Attorney General, for the Commonwealth.

KEITH, P. White was indicted under "An act to suppress tippling houses, the illegal and unlawful sale or traffic in ardent spir-

its, in the county of Mathews, and to provide a penalty therefor." Acts of Assembly 1901–02, p. 765, c. 653.

The indictment is in the following words: "The jurors of the commonwealth of Virginia, in and for the body of the county of Mathews, and now attending said court at its March term, 1907, upon their oath present that J. T. White, in said county and within the two years last past, did unlawfully and without a state license so to do, sell spirituous or malt liquors, whisky, brandy, wine, ale, beer, or some mixture thereof, alcoholic bitters, bitters containing alcohol, or some mixtures, preparations or liquors which will produce intoxication, against the peace and dignity of the commonwealth. * * *"

A demurrer to this indictment was overruled, a plea of not guilty entered, upon which the jury rendered a verdict of guilty, and assessed a fine of $250, and to the judgment upon that verdict a writ of error was awarded by this court.

The first error assigned is to the judgment of the court upon the demurrer.

The indictment follows the statute, and this is sufficient.

In Commonwealth v. Young, 15 Grat. 664, it is said: "It is generally proper and safest to describe the offense in the very terms used by the statute for the purpose. But it is sufficient to use in the indictment such terms of description as that, if true, the accused must of necessity be guilty of the offense described in the statute."

The specific objection taken to this indictment is that it does not state the place at which the sale was made, and Arrington's Case, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242, is relied upon; but that is of a class of cases such as Head's Case, 11 Grat. 819, Boyle's Case, 14 Grat. 674, and Young's Case, supra, in which the place was of the essence of the offense. In Head's Case, for instance, the indictment was for the selling of ardent spirits by retail, without a license, to be drunk where sold. The court held that it was not sufficient to state that the sale was in the county, but the place in the county where the sale was made must be set out, in order that the defendant might make a satisfactory defense. The prosecution took place under section 18, c. 38, of the Code of 1849, which provides that, "if any person shall, without paying such tax and obtaining such certificate as is prescribed by the fourteenth section, sell, by retail, wine, ardent spirits, or a mixture thereof, to be drank in or at the store, or other place of sale, he shall, unless he be licensed to keep an ordinary at such store or place, forfeit thirty dollars." The court, in its opinion, says: "The grand jury intended to present an offense against the latter clause of this statute. This offense is local in its nature. Place is of its essence, and yet no place is alleged but the whole county. A sale of ardent spirits by an unlicensed dealer, not to be drunk at the place of sale, would fall within the first clause of the section above cited. The identity of the place at which the spirits were to be drunk with the place at which they were sold enters into and forms part of the offense under the latter clause of the statute. If this be so, the defendant should be apprised of the place alleged, so that he may be prepared with proof, if any he have, to show that the place of sale and that of drinking are not the same."

Boyle's Case, supra, has no particular bearing upon this point, and Young's Case appears to be an authority in favor of the judgment here.

The demurrer was properly overruled.

The indictment charges the offense to have been committed within "two years last past," and the accused asked that the commonwealth be required to elect on what day within the two years the offense was committed for which it would prosecute. The refusal of the court to do this is assigned as error.

In support of this assignment, the case of Hatcher & Shaw v. Com., 106 Va. 827, 55 S. E. 677, is relied upon. It was there held that where upon the trial of an indictment containing a single count, charging the defendant with the illegal sale of liquor to certain designated parties "at divers times within the last 12 months," evidence has been received tending to show a number of distinct sales covering a period of several months, the commonwealth may be required, before the prisoner opens his defense, to elect on which of the sales it will proceed—a very different case from the one under consideration.

This assignment of error is without merit.

During the progress of the trial, the commonwealth introduced the following paper:

"I, M. K. Lowry, collector of internal revenue for the Second district of Virginia, do hereby certify that record 10, in this office, discloses the fact that the following persons paid special tax as retail liquor dealers and retail malt liquor dealers in the county of Mathews, state of Virginia, on the dates and for the periods hereinafter set forth, and that special tax stamps were issued them as per the numbers given, viz., * * * and J. T. White, New Point, Va., as R. M. L. D. for the period of 11 months ending June 30th, 1907, stamp No. 13,472.

"Witness my hand and seal of office this the 6th day of March, 1907.

"[Seal.] M. K. Lowry, Collector.

"United States of America, Eastern District of Virginia:

"I, Edmund Waddill, Jr., United States district judge within and for the Eastern district of Virginia, do hereby certify that M. K. Lowry, whose name is attached to a certain certificate purporting to be a record of special taxpayers in Mathews county, in

the Second collection district of Virginia, hereto attached, certified as a copy from record No. 10 in his office, is and was at the time of signing such certificate collector of internal revenue of the United States for the Second district of Virginia, which said district comprises, among other counties, the county of Mathews; that his said signature thereto is, I believe, his genuine signature, and his acts as such collector are entitled to full faith and credit.

"This certificate is made pursuant to section 906 of the Revised Statutes of the United States. Edmund Waddill, Jr.,

"United States District Judge."

The clerk of the court then certifies under the statute that the Honorable Edmund Waddill, Jr., was the duly qualified district judge of the United States for the Eastern district of Virginia.

By section 5 of the act before cited for the suppression of the sale of ardent spirits in the county of Mathews it is provided "that the fact that any person, firm, or corporation, or joint-stock company have a license as a retail liquor dealer from the United States of America, and no such license from the state of Virginia as such dealer, shall be evidence of selling by retail at said place without a state license so to do, and the fact that a person has such United States license may be proved by the evidence of the internal revenue collector for said district, or any of their deputies who know the fact, or by any person who has seen said license."

The contention is that the fact that the United States license had been procured was not in this case proved in the manner provided for by this statute, which is true. It was proved, however, in a lawful manner, and we presume that the Legislature, by stating the manner in which it might be proved, did not intend to exclude any lawful proof of the fact, but rather that its purpose was to provide additional modes of proof. The mode adopted in this case was the most certain and convenient, and could not have prejudiced the accused.

The only evidence introduced upon the trial by the commonwealth was this paper, above referred to. The only evidence introduced by the defendant was his own testimony—that he was 75 years of age, was a native of Accomac county, and had resided in Mathews county for 53 years; that he had not sold any intoxicating liquors within the past two years from March 18, 1907; that he had sold sweet cider; that he was the father of 19 children; and that his youngest child was 5 years of age.

When the testimony was all in, the court gave to the jury the following instruction: "The court instructs the jury that when spirituous or malt liquors, or any mixtures, preparations, or liquors which will produce intoxication, are parted with, and any pay, compensation, or consideration is left, given, or conveyed to the person, or to another at the place, or if any understanding or agreement therefor is tacitly or expressly agreed on, whether done directly or indirectly, or whether it be nominally for another's benefit or consideration, it shall be deemed a sale within the intent of the law; but the court further instructs the jury, if they believe from the evidence that J. T. White, the accused, held a license as a retail malt liquor dealer from the United States government within two years last past from the 18th of March, 1907, the possession of such license shall be evidence of selling malt liquor by retail, but before the jury shall convict the accused they must believe beyond all reasonable doubt from the evidence in this prosecution that he sold malt liquor within two years last past from the 18th day of March, 1907."

The giving of this instruction is one of the errors assigned.

The offense here charged is that the plaintiff in error sold intoxicating liquors within two years last past from the 18th day of March, 1907, in the county of Mathews. It was no offense to have in his possession a United States government license. The office of the government license was to prove the unlawful sale of ardent spirits. Now this license only came into operation on the 31st day of July, 1906; whereas, the "two years last past" from the date of the indictment would go back to the 18th of March, 1905. There was a period, then, from March, 1905, to the 31st day of July, 1906, within which the offense might have been committed, and under the instruction the jury might have found the accused guilty; and, if such had been the case, it would have been without a shadow of testimony, for there was no independent evidence of the offense. The only evidence is the effect which, by virtue of the statute, is attributed to a license from the government of the United States, and that could not have been prima facie evidence, except during the eleven months from the 31st of July, 1906, to the 30th of June, 1907. It covered, therefore, only something less than eight months of the two years preceding the 18th of March, 1907.

In giving this instruction we are of opinion that the circuit court erred.

In Young's Case, supra, it is said: "If the indictment may be true, and still the accused may not be guilty of the offense described in the statute, the indictment is insufficient." And the same is true of an instruction.

The court tells the jury here that the possession of a retail liquor license within two years last past from March 18, 1907, shall be evidence of selling malt liquors by retail, and yet all that is stated in that instruction may be true, and doubtless was true, without there being a scintilla of evidence against the accused, to be deduced from the license or otherwise, between the 18th day of March, 1905, which is the beginning of the "two years last past" from the 18th of March, 1907, as

set out in the instruction, and the time when the license went into effect, which was eleven months prior to the 30th of June, 1907, to wit, on the 31st of July, 1906.

The statute prescribes that the possession of a United States license shall be evidence of selling by retail at the place named in the license; but the probative value of such evidence is to be determined in connection with all the other evidence in the case, and is a question primarily for the determination of the jury, with respect to which we for the present express no opinion.

For these reasons, the case must be reversed, and remanded for a new trial.

Reversed.

(107 Va. 881)

## RICHARDS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 16, 1908.)

1. JURY—SELECTION OF PANEL.

Const. art. 1, § 8 [Va. Code 1904, p. ccix], guarantees an accused the right of trial by jury of the county where he is to be tried. Code 1887, § 4024 [Va. Code 1904, p. 2121], provides that in any criminal case, if qualified jurors, not exempt from serving, cannot be conveniently found in the county in which the trial is to be, the court may cause so many of such jurors as may be necessary to be summoned from any other county. *Held*, that merely because there had been two previous protracted trials in which the juries had failed to agree, and because in selecting the jury for the first trial 27 persons had to be summoned in order to get a panel of 16 qualified jurors, and in obtaining a jury for the second trial 48 persons were summoned, only 41 of whom had to be examined in order to get a panel of 16 jurors, did not authorize the court to summon a foreign jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 12.]

2. CRIMINAL LAW—EVIDENCE—OPINION EVIDENCE.

On a prosecution for murder there was evidence that prior to the killing accused had had a bottle containing oiled shot, that a bottle containing such shot was found near the scene of the shooting, and that between the point from which it was claimed the shot was fired and the point where deceased was when struck, there were powder-burnt leaves. *Held*, that testimony of a witness that he had examined the leaves and found on them a black oily substance which would not mix with water, and that he was of the opinion that it was oil, was not objectionable, though it involved an opinion of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1048–1050.]

3. SAME.

Where a person has a special opportunity for observation, he may testify as to his opinions as conclusions of fact, though he is not an expert, if the subject-matter to which the testimony relates cannot be reproduced or described to the jury as it appeared to the witness at the time, and the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1053.]

4. SAME—FACTS FORMING BASIS OF OPINION.

The facts and circumstances on which such a witness bases his opinion or conclusion should be stated as far as is practicable, that the jury may have a basis to test its value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1057.]

5. SAME—NATURE OF OBJECTS.

It was proper to permit witnesses to testify that the mustache worn by a certain man, whom the evidence tended to prove was accused, was in their opinion a false mustache.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1048–1050.]

6. SAME—IDENTITY.

Where, on a prosecution for murder, there was evidence that deceased was shot with oiled shot, and that a bottle containing such shot was found near the scene of the crime, it was proper to permit witnesses to give their opinion as to the identity of the bottle found with the bottle they stated they had seen in the possession of accused prior to the killing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1043.]

7. SAME—EVIDENCE—RES GESTÆ.

On a prosecution for the murder of one who was shot while riding in a buggy, testimony of a witness that deceased stated to him after the shooting that a person other than accused had ridden with deceased at his invitation, and then left deceased before he reached the point where he was shot, was not admissible as res gestæ, though the statement was made a couple of hours after the shooting and the witness was the physician who had been called to attend deceased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 811, 819, 820.]

8. HOMICIDE—DYING DECLARATIONS.

The statements of deceased were not admissible as a dying declaration, as they did not relate to the cause of death, nor to any circumstance of the transaction which resulted in death, and did not tend to identify accused as the guilty party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 448–450.]

9. WITNESSES—CROSS-EXAMINATION.

A witness for the commonwealth testified to the measurement of certain tracks, and on the next trial he was again put on the stand by the commonwealth, but asked no questions as to the tracks. Defendant on cross-examination sought to have the witness testify as to the tracks, but an objection that such procedure would make the witness defendant's own was sustained. Afterwards, while defendant was introducing his evidence, on his motion, the witness was placed on the stand by the court as its witness, and defendant's counsel permitted to cross-examine him as to the tracks. *Held*, that the action of the court resulted in no prejudice to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 949, 950.]

10. CRIMINAL LAW — EVIDENCE — RESULTS OF EXPERIMENTS.

Where, on the issue of the identity of the criminal, there is evidence as to footprints, a witness should not be permitted to testify that he had made tracks with different shoes, and found that in every instance the tracks were shorter than the shoes, unless it appears that they were made under the same or substantially similar conditions existing at the time of the experiment as at the time of the making of the tracks in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 854.]

11. WITNESSES — IMPEACHMENT — CONTRADICTORY STATEMENTS ON FORMER TRIAL.

Where a witness testifies differently than at a former trial as to any matter material and

relevant to the issues, proof of such contradictory statements is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1252–1256.]

12. SAME.

The judge's notes taken at a former trial of a case are not admissible in evidence for the purpose of contradicting a witness.

13. CRIMINAL LAW—TRIAL—INSTRUCTIONS.

There is no error in the refusal of requested instructions fully covered by those given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

Error from Circuit Court, Floyd County.

John W. Richards was convicted of murder, and he brings error. Reversed, and remanded for a new trial.

Scott & Buchanan, V. M. Sowder, and B. H. Custer, for plaintiff in error. The Attorney General, for the Commonwealth.

BUCHANAN, J. The first error assigned by the prisoner is to the action of the circuit court in ordering the venire for his trial to be summoned from a county other than that in which the offense was alleged to have been committed and the accused was tried.

The bill of exceptions taken to this action of the court shows that the order was made upon the motion of the commonwealth, over the prisoner's objection, without any evidence except "the record" in the cause.

The authority for summoning a jury from another county or corporation is found in section 4024 of the Code of 1887 [Va. Code 1904, p. 2121], and is as follows: "In any criminal case in any court, if qualified jurors not exempt from serving cannot be conveniently found in the county or corporation in which the trial is to be, the court may cause so many of such jurors as may be necessary to be summoned from any other county or corporation by the sheriff or sergeant thereof, or by its own officer."

The contention of the accused is that under the Constitution and laws of the commonwealth he had the right to be tried by a jury of the county where the crime he was charged with was alleged to have been committed, where he was indicted and tried, and in which he himself and the principal witnesses for and against him resided; that he could not be tried by a jury from another county or corporation unless qualified jurors could not be conveniently found in his own county; and that "the record" upon which the court based its opinion that qualified jurors could not be conveniently found in his county wholly fails to show that fact.

As before stated, the commonwealth, to sustain its motion to have a jury summoned from another county, introduced no evidence, and relied solely, as did the court in sustaining the motion, upon what appeared "from the record in the cause." "The record" shows that the accused was indicted for murder at the October term, 1905, of the court, his trial commenced on the 17th, and on the 30th of the month the jury were discharged because they were unable to agree upon a verdict, and the cause continued.

In selecting the panel of 16 persons from which the jury at that trial was taken, 8 were found free from exception among the 16 persons summoned for the trial of another person accused of a felony and the other causes to be tried at that term of the court. The court then directed 12 other persons to be summoned from a list furnished by it. Of those 11 were summoned, 8 of whom were sworn, examined, and found free from exception, and the panel completed.

By consent the cause was continued at the next February term of the court. At that term the court ordered that the names of 36 persons be drawn from the jury box. Of these the sheriff was directed to summon 32 for the next (April) term of the court. Thirty-one of these were summoned, and of them 6 were found free from exceptions. To complete the panel 17 persons were summoned from a list of 22 furnished by the court. Of these 10 appeared, all of whom were found free from exception, and the panel of 16 secured. At that trial, which continued from the 17th to the 28th day of April, the jury, being unable to agree, were discharged, and the cause continued. At the next (July) term of the court the order complained of, directing a jury to be summoned from Patrick county for the October term of the court, was entered. These are all the facts which "the record" disclosed as to the necessity of summoning a jury from another county.

The question of the propriety of summoning a foreign jury, under the provisions of section 4024 of the Code of 1887 [Va. Code 1904, p. 2121], although in substance enacted more than 50 years ago, has seldom been raised in this court. The rule, however, which should govern us in passing upon the question, is well settled, and is stated by Judge Moncure in Chahoon's Case, 21 Grat. 822, 833, as follows: "In the exercise of the power conferred by this law, the court of trial must, of necessity, have a great deal of discretion, and the appellate court, in revising the judgment, ought not to reverse it for error in this respect, unless it be plain that such discretion has been improperly used." See, also, Page's Case, 27 Grat. 954.

Upon the former trials there was comparatively little difficulty in finding qualified jurors. Upon the first trial one-half of those summoned, whose names had been drawn from the jury box for the trial of another person charged with a felony, were found free from exception. The remaining 8 required to complete the panel of 16 were obtained from 11 persons summoned from the list furnished by the court. Upon the second trial only about one-fifth of the 31 summoned, whose names were drawn from the jury box, were found to be qualified jurors; but the remaining 10 required to complete the panel

of 16 were obtained from the 17 persons summoned from the list of names furnished by the court. It would seem from the order of the court that these 10 jurors were all that appeared or that were examined from the 17 summoned. The order states that "10 of the persons summoned from said venire facias from the said list furnished by the court appearing in court, to wit," and after giving their names the order continues, "who were sworn and examined by the court, found free from all legal exception, and qualified to serve as jurors." In none of the cases which have come to this court, in which this question was involved, was a jury summoned from another county upon so little evidence of the necessity or propriety of such action.

In Wormeley's Case, 10 Grat. 658, there were affidavits that at a former trial between 300 and 400 persons had been summoned for the trial of the accused, and another who was jointly indicted with him, in order to get a panel for his trial, and that at the term at which the order was made to summon a jury from the cities of Richmond and Petersburg only 1 qualified juror was obtained from a venire of 24. In addition, it appeared from the testimony of both the commonwealth and the accused, who was asking for a change of venue, that it would be very difficult, if not impossible, to get qualified jurors in the county where the court was sitting.

In Chahoon's Case, supra, there had been a mistrial at the March term of the court. At the June term of the court all of the venire summoned to try the prisoner were present except one, but, none of them being found to be qualified jurors, the prisoner moved the court to have other persons summoned as jurors from the city (Richmond); but the court overruled his motion, being satisfied, as the order states, "by evidence adduced and heard that qualified jurors could not be conveniently found in the city," and ordered jurors to be summoned from two other cities. In that case the sergeant of the city and one of his deputies testified, giving the reasons upon which they based their judgment that it would be inconvenient, and they believed impossible, to get a jury from the city.

In Sands' Case, reported in 21 Grat. 871, the accused had been found guilty and the judgment reversed by this court (20 Grat. 800), and after it had been remanded there had been a mistrial. On that (second) trial, after there had been an abortive effort to get a jury from the city of Richmond, where the case was tried, a jury was summoned from another city. On the third trial 18 of the 19 persons who had been summoned under the writ of venire facias appeared, and, none of them being qualified jurors, because of opinions formed and expressed as to the case, the court ordered a jury to be summoned from other cities. In considering the propriety of making such order, the court, by consent, read the testimony heard upon this point at the second trial, part of which was that of the sergeant of the city of Richmond and his deputy that it would be very inconvenient, if not impossible, to get a jury in the city of Richmond.

The facts upon which the court based its judgment in those cases, respectively, in ordering juries from other jurisdictions, are not mentioned for the purpose of indicating that we think it was necessary to show as much as appeared in those cases, or that the facts upon which the court based its action should be established in the same manner, but to show that, in order for the trial court to exercise the discretion vested in it under section 4024 of the Code, it should appear in some manner that such a course is reasonably necessary in order to obtain qualified jurors. The facts upon which the court based its order in this case do not show that it would have been inconvenient, within any reasonable meaning of that word, to have obtained qualified jurors from Floyd county, whose population was more than 15,000, for the trial of the accused.

Manifestly it was not intended by the provisions of section 4024 of the Code that an accused person should be deprived of the right of "a trial by a jury of his vicinage" (that is, of the county or corporation where he is to be tried) secured to him by the Constitution (section 8, art. 1 [Va. Code 1904, p. ccix]) and the laws of the state (Code 1887, §§ 4018, 4019, and 4024 [Va. Code 1904, pp. 2114, 2115, and 2121]), merely because there had been two previous protracted trials in which the juries had failed to agree, and because in selecting the jury for the first trial 27 persons had to be summoned in order to get a panel of 16 qualified jurors, and in obtaining a jury for the second trial 48 persons were summoned, only 41 of whom, it seems, had to be examined in order to get a panel of 16 jurors free from exceptions. If these facts alone are sufficient to authorize a trial court to summon a foreign jury, the right intended to be secured by the Constitution and laws of the state would be of little value to the accused, and there would be comparatively few cases in which there was much public interest, or about which there was much excitement, where the court would not find it necessary to summon, or at least feel justified in summoning, a jury from another county or corporation.

We are of opinion, therefore, that the facts disclosed by "the record," upon which alone the court based its action, were plainly insufficient to justify the order complained of, and for that error its judgment must be reversed.

The next error assigned is to the action of the court in admitting improper evidence and in refusing to properly instruct the jury in reference thereto.

No witness testified that he was present when the deceased was shot. The evidence relied on to establish the commonwealth's charge is entirely circumstantial. Among oth-

er things, the commonwealth sought to prove that some 18 months prior to the killing the accused had in his possession and was using as a part of his hunting outfit a bottle containing oiled or greased shot; that the same bottle, containing oiled or greased shot, was found the morning after the killing near the scene of the shooting; and that between "the blind," the point from which it is claimed the shot was fired, and the point where the deceased was when struck, there were powder-burnt leaves, and on the leaves some black, oily, or greasy substance with which water would not mix. Tice, one of the witnesses whose testimony was objected to, stated, among other things, that he "examined the leaves on the bushes between the fence corner and the buggy, in a line with the buggy and the pine bush from which a limb that was shot was hanging, and in a line with the shot; that he found on the leaves a black, oily, greasy something, that indicated or looked like oil or some other kind of grease, that glazed the leaves, and the water on them was in beads or puddles and would not mix; that at the time he examined the leaves and at this time he was of opinion that it was oil or grease." At this point the accused objected, and moved the court to exclude the witness' opinion as evidence; but the court permitted the witness to proceed, who then added that "he could not tell whether it was oil, butter, or some other kind of grease, but at the time he believed it was oil or some other kind of grease, and to the best of his knowledge and belief it was oil or some other kind of grease. He did not know if a man's belief was as strong as his knowledge."

The objection made to this evidence is that it was merely the witness' opinion and belief.

It is well settled that the opinions of witnesses are generally inadmissible; that they must testify to facts only, and not as to opinions or conclusions based upon facts. But there are exceptions to the rule as well settled as the rule itself. Va., etc., Chem. Co. v. Knight, 106 Va. 674, 676, 56 S. E. 725, and authorities cited; Tyler v. Sites, 90 Va. 539, 542, 19 S. E. 174; 1 Elliott on Ev. § 672.

Where a person has a special opportunity for observation, he may testify to his opinions as conclusions of fact, although he is not an expert, if the subject-matter to which the testimony relates cannot be reproduced or described to the jury as it appeared to the witness at the time, and the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending and understanding; but the facts and circumstances upon which he bases his opinion or conclusion should be stated as far as is practicable, in order that the jury or other tribunal may have some basis upon which to test the value of his opinion. See Jordan v. Com., 25 Grat. 943, 945, 946; 1 Elliott on Ev. §§ 675, 676, 678; 17 Cyc. pp. 81–87. In the text-books cited, numerous instances are given where the opinion of witnesses may be received. Among them are identity and the appearance of things animate and inanimate.

In the last-named work it is said, in discussing this question (page 86): "A witness may, after enumerating such as he can of the constituent facts, state the effect on his mind of the numerous phenomena which constitute the impression of appearance, whether of animate or inanimate objects; it being affirmatively shown that the witness had adequate opportunity for observation, that the constituent facts cannot be fully placed before the jury, and that the ultimate fact is relative to the issue."

Tested by this rule, which seems to us the correct one, the evidence of Tice was admissible.

Upon the same grounds the evidence of Conner and Poff, that the mustache worn by the man who had been seen by them, and who the evidence tended to prove was the accused, appeared to them, or was in their opinion, a false mustache, was admissible.

And for like reasons the evidence of Noah Wilson and Lee Poff as to the identity of the bottle found near the place of shooting with the bottle they stated they had seen in the possession of the accused some 18 months prior to the killing was also admissible.

The instructions, J and K, offered by the accused and rejected by the court, mentioned in the same assignment of error, asked the court to tell the jury to disregard the evidence of these witnesses as to the shot bottle, because they did not attempt to identify it, but only expressed their opinion or belief as to its identity. These instructions were based upon the same erroneous view as was the objection to the evidence when offered, and for the same reason that the court overruled the objection to the evidence it properly refused to give the instructions.

Dr. Thomas, a witness for the commonwealth, who was called to visit the deceased professionally after he was shot, testified that he reached him about two hours afterwards; that the deceased "was in a state of shock. He realized he was seriously hurt. I think he was conscious of impending death. I think he knew what he was talking about." The witness was then asked: "Did he state anything to you about a man getting in the buggy and riding with him? If so, what did he state?" To which witness replied: "He spoke of that. I asked him about the man getting in the buggy with him near Copper Hill, and he said a man got in the buggy with him near Copper Hill. I asked him if the man asked to ride with him, or 'did you ask the man to ride?' and he said, 'I asked the man to ride.' I asked him who it was, and he said the man lived over about Ferrum, and tried to call his name, and seemed to be unable to call it. He was so weak he could not. He said the man got out of the buggy before and beyond where he was shot.

That was before Dr. Huff came. He did not say whether the man had a gun or not."

This question and answer were objected to, but the court overruled the objection. This action of the court is assigned as error.

The evidence was not admissible, either upon the ground that it was part of the res gestæ or as a dying declaration. It is not claimed that the man who got in the buggy with deceased was the accused. On the contrary, that man had been called by the commonwealth as a witness and stated substantially the same as to his getting in and out of the buggy.

In order for a statement to be a part of the res gestæ, it must, as was said in Haynes' Case, 28 Grat. 942, 946, be "so connected with the very transaction or fact under investigation as to constitute a part of it." Joyce's Case, 78 Va. 287, 290; Barley v. Byrd, 95 Va. 316, 322, 28 S. E. 329; 1 Elliott on Ev. § 154.

The fact that some one, other than the accused, at the request of the deceased, rode with him in his buggy, and then left him before reaching the point where he was shot, is in no way connected with the transaction or fact under investigation—certainly not so connected with it as to constitute a part of it.

The statements of the deceased were not admissible as dying declarations, because they did not relate to the cause of the death, nor to any circumstance of the transaction which resulted in death. They do not tend to identify the accused as the guilty party, nor do they establish the circumstances of the res gestæ, or show any transaction from which death resulted. Swisher v. Com., 26 Grat. 964, 21 Am. Dec. 330; O'Boyle's Case, 100 Va. 785, 795, 40 S. E. 121.

"Declarations," says Elliott on Ev. § 336, "of distinct or separate, prior or subsequent, occurrences, * * * are not competent evidence. These and other such declarations are not competent because they relate to distinct and separate transactions." See, also, sections 332, 333; 21 Cyc. 973–975.

Assignments of error based upon bills of exceptions numbered 5, 12, and 16 may be considered together.

On the first trial the commonwealth put on the stand a witness named Conner, who testified, among other things, to the measurement of certain tracks leading from the "blind" from which the deceased was shot. On the last trial this witness was again put upon the stand by the commonwealth; but it asked no questions as to the said tracks or the measurements made by him. The defendant, upon his cross-examination, sought to have the witness testify as to the tracks and his measurements. This was objected to by the commonwealth, upon the ground that in asking about these matters he was making the witness his own. This objection was sustained by the court; but in sustaining the objection the court stated that the defendant could recall the witness when the commonwealth was through with its evidence and examine him as to the tracks. Afterwards, whilst the defendant was introducing his evidence, upon his motion the witness was placed upon the stand by the court as its witness, and the prisoner's counsel was permitted to cross-examine him as to the tracks and measurements. The action of the court in refusing to permit the accused to cross-examine the witness as the witness of the commonwealth is assigned as error.

In the course pursued by the court no prejudice resulted to the accused.

To rebut the evidence of this witness as to the tracks, which was regarded as favorable to the accused, because it tended to show that the tracks measured by the witness were shorter than the shoes which the accused wore or could wear, the commonwealth introduced a witness named Jack, who testified that during the second trial of the accused he had gone to the scene of the shooting and made tracks with his own and the shoes of another, and found that the tracks were shorter in every instance than the shoes.

The objection made to this evidence is that it did not appear that the experiments made by the witness were made under the same conditions as those which existed on the day of the murder.

It is not clear from the evidence that the conditions were the same, or substantially similar, and unless they were it seems to be well settled that such experiments are not admissible. 1 Elliott on Ev. § 1249; Richmond P. & P. Co. v. Racks, 101 Va. 487, 44 S. E. 709; Wise Ter. Co. v. McCormick, 104 Va. 400, 51 S. E. 731. As the case will have to be reversed upon other grounds, it is unnecessary to pass upon this question; but it is proper to say that if, upon another trial, evidence of such experiments be offered, it should not be admitted, unless it satisfactorily appears that they were made under the same or substantially similar conditions to those surrounding the shooting of the deceased.

The refusal of the court to permit its notes taken at a former trial of the case to be used for the purpose of contradicting a witness introduced by the commonwealth is assigned as error.

If the witness had testified differently at the former trial as to any matter which was material and relevant to the issues presented by the trial, proof of such contradictory statement was clearly admissible. But it is generally agreed in this country that the judge's notes are not admissible evidence for that purpose, because the notes, however full they might be, were not taken in the discharge of any official duty, but for the judge's own private convenience. See 3 Wigmore on Ev. § 1666, and cases cited in note 1.

The action of the court in refusing to give instructions marked A, B, C, D, E, F, G, H, I, J, and K, asked for by the accused and in giv-

ing instruction No. 3, asked for by the commonwealth, is assigned as error.

The court gave five instructions offered by the commonwealth, ten offered by the accused, and three in lieu of instructions offered by the accused, making in all eighteen instructions. Without discussing in detail any of the instructions given or rejected, it is sufficient to say that in our opinion the court did not err in refusing to give the instructions rejected by it, as the instructions given fully and fairly submitted the case to the jury, and when that has been done there is no necessity or propriety in giving other instructions asked for by either party, even if they be correct statements of law as applied to the case, as they cannot subserve any good purpose, and may by their very number and the different manner in which the same proposition is stated confuse the jury. McCue's Case, 103 Va. 870, 49 S. E. 623; Southern Ry. Co. v. Stockdon, 106 Va. 693, 56 S. E. 718.

The errors assigned to the action of the court, based upon bills of exception numbered 13, 15, 17, and 18, need not be specially considered, as the rulings of the court upon the questions raised in each seem to us to have been clearly right.

The refusal of the court to set aside the verdict, because contrary to the law and the evidence, and grant the accused a new trial, is assigned as error. As the verdict will have to be set aside and a new trial granted for errors hereinbefore indicated, it will be unnecessary and might be improper to consider this assignment of error, as the evidence may not be the same upon the next trial.

We are of opinion, therefore, to reverse the judgment of the circuit court, set aside the verdict, and remand the cause for a new trial.

Reversed.

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(146 N. C. 378)

## PENLAND v. BARNARD et al.

(Supreme Court of North Carolina. Dec. 14. 1907.)

1. ACKNOWLEDGMENT — SUFFICIENCY — STATUTES.

Acts 1883, p. 187, c. 129, allowed probate of deeds to be taken by a clerk of a superior court in another state and certified under the official seal of such court. By Acts 1885, p. 62, c. 11, the words "superior court" were stricken out, and "court of record" substituted. The act as originally enacted and as amended and as inserted in Code, § 1262, and Revisal 1905, § 1022, further provided that a deed so proved and certified, with a certificate of its having been registered in the proper county, shall be a sufficient registration of the same, and such proof and registration shall be adjudged good and valid in law. *Held*, that the legislation was constitutional, and a deed in which the acknowledgment of the grantor and his wife and her privy examination were taken before a clerk of the county court of Cleveland, Tenn., and which bore affixed thereto the seal of his office, was admissible in evidence in an action of trespass to show title in the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, § 84.]

2. APPEAL AND ERROR—HARMLESS ERROR.

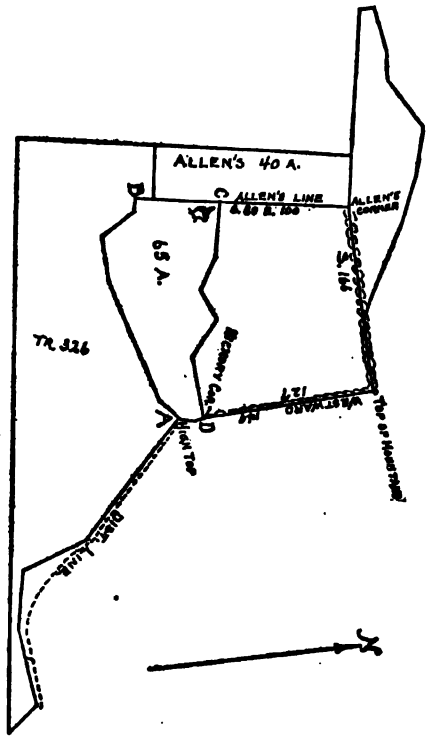
Error to warrant reversal must be prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4029.]

Appeal from Superior Court, Cherokee County; O. H. Allen, Judge.

Action by W. C. Penland against J. E. Barnard and others. Judgment for plaintiff, and defendants appeal. Affirmed.

The following is the map referred to in the opinion:




The "black line," referred to in the opinion, is the irregular line, C, D. The "red line," also referred to in the opinion, is the irregular line, D, A, B, C.

Dillard & Bell, for appellants. Axley & Axley, Ben Posey, and E. B. Norvell, for appellee.

WALKER, J. This is an action in the nature of trespass quare clausum for cutting timber. The solution of the controversy depends upon the true location of the tract of land containing 100 acres, which was excepted in the deed of Wilkerson to Eaves, dated August 3, 1869, for the land which had theretofore been conveyed to S. P. Wilson, and the location of the tract of 100 acres depends, in its turn, upon whether its southern boundary line is at A. B., as indicated on the map and as contended by the defendant, or at C. D., as contended by the plaintiff. There was evidence upon which the jury were well warranted in deciding as they did, that the line was at C. D.; the timber having been cut below that

line and on plaintiff's land, if the verdict was correct in fact and in law.

The defendants objected to the introduction of the deed from Wilkerson to Eaves, upon the ground of a defective probate. The acknowledgment of Wilkerson and his wife and her privy examination were taken before Samuel Hunt, clerk of the county court of Cleveland, Tenn., and the seal of that court which appears to be the seal of his office is affixed thereto. This probate would be insufficient to authorize the registration of the deed, and the objection would have been good, but for the several acts of the Legislature relating to such probates and validating the same. Acts 1883, p. 187, c. 129; Acts 1885, p. 62, c. 11; Code, § 1262; Revisal 1905, § 1022. The original act of 1883 allowed probates to be taken by a notary, or a clerk of a superior court, in another state and certified under the official seal of such notary or superior court. By the act of 1885 the words "superior court" are stricken out, and the words "court of record" substituted, so that it will read as amended: "A clerk of a court of record." The act as originally enacted and amended, and as inserted in the Code and in the Revisal, further provided that a deed so proved and certified, "with the certificate of its having been registered" in the proper county, shall be a sufficient registration of the same, "and such proof and registration shall be adjudged good and valid in law." That such legislation is constitutional where it does not affect vested rights cannot now be questioned. The able and learned opinion of the present Chief Justice in Barrett v. Barrett, 120 N. C. 127, 26 S. E. 691, 36 L. R. A. 226, which is well sustained by authority, fully demonstrates the power of the Legislature to enact it, and clearly defines the limitations upon that power. See, also, Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272, 9 L. R. A. (N. S.) 1145. We do not understand how the defendant is in a position, with respect to the title conveyed by the Wilkerson deed, to challenge the validity of the act. The deed was properly admitted in evidence. This seems to have been the main contention of the defendant. We have examined very carefully the other exceptions of the defendant, and have found them to be without merit. The rulings as to evidence, even if not correct in themselves, did the defendants no harm. There must not only be error in order to reverse a judgment in this court, but prejudicial error. We do not mean to imply that any of those rulings were not correct. We think they were right. Besides, the finding of the jury has rendered some of them immaterial.

The charge of the court was substantially responsive to the defendant's prayers for instruction, and covered the material points of the case. The defendants, in our opinion, have no just or legal ground to complain of the proceedings below. The pivotal question was the location of the true dividing line between the land of the parties, and that was largely a question of fact. Under a correct charge from the court, the jury have found that it is the "black" line, and not the "red" line, and, this being so, the plaintiffs have established the trespass.

No error.

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(129 Ga. 796)

## SEABOARD AIR LINE RY. v. RANDOLPH.

(Supreme Court of Georgia. Dec. 19, 1907. On Rehearing Jan. 15, 1908.)

NEW TRIAL — EXCESSIVE VERDICT — REMITTITUR.

Where, in a suit by a widow for the homicide of her husband, a verdict was found in favor of the plaintiff for $9,127.20, and the presiding judge, on the hearing of a motion for a new trial, expressed his disapproval of such verdict as being far too large a sum, and stated that he would not approve a verdict in favor of the plaintiff for exceeding $6,500, whereupon the plaintiff's attorney wrote off all in excess of that amount, and the judge then passed an order reciting that "it appearing" that the plaintiff had voluntarily reduced the verdict and judgment in her favor, and had written off all in excess of $6,500, the motion was overruled, under previous decisions of this court, this was error which necessitated a reversal.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by Mrs. H. B. Randolph against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Reversed.

See 55 S. E. 47.

Mrs. H. B. Randolph brought suit against the Seaboard Air Line Railway to recover damages for the homicide of her husband. On the first trial a nonsuit was granted. Randolph v. Brunswick & Birmingham R. Co., 120 Ga. 969, 48 S. E. 396. The suit was rebrought, and resulted in a verdict in favor of the plaintiff for $9,127.20. A motion for a new trial was made. During the argument the presiding judge "expressed his disapproval of the verdict in said case, as being for a greater sum than ought to be approved by him under the evidence; * * * that he would not approve a verdict in said case in favor of the said defendant in error exceeding in amount the sum of $6,500." After this statement counsel for the plaintiff wrote off from the verdict all in excess of the sum thus indicated by the judge as satisfactory to him. An order was then passed reciting that, "it appearing to the court in the above-stated case that the plaintiff, Mrs. H. B. Randolph, has voluntarily written off and reduced the verdict and judgment in her favor, so as that of the said verdict and judgment thus amended and so reduced and written off by her voluntarily be and remain the sum of sixty-five hundred dollars ($6,500)," the motion for a new trial was overruled. The defendant excepted. There were assignments of error on the refusal of a new trial. One of the special assignments of error complained that the court erred in overruling and denying the

motion and amended motion for a new trial upon the grounds therein contained, "after and notwithstanding said plaintiff had written off the excess and reduced said verdict and judgment complained of in said case to the sum of $6,500."

Crovatt & Whitfield, for plaintiff in error. Burton Smith and D. W. Krauss, for defendant in error.

LUMPKIN, J. (after stating the facts as above). The case before us is controlled by former decisions of this court. In Savannah, Florida & Western Ry. v. Harper, 70 Ga. 120, the following ruling was made: "Where general damages have been recovered for a personal tort, if they are so excessive as to lead the court to suspect bias or prejudice, he may grant a new trial; but the judge has no power to say that the verdict in such a case should not exceed a specified sum, and to require the plaintiff to write off a portion of the damages, and thereupon refuse a new trial. Aliter, in actions on contracts or for torts to property, the value of which may be ascertained, and in relation to which fixed rules for measuring damages are recognized." Mr. Justice Hall, in a learned and elaborate opinion, discussed the power of the judge in such cases, the limitation therein, and the reasons therefor, in the light of the common law and the statutes of this state. The only difference between the action of the presiding judge there and in the present case is that in the former case he stated in his order that a new trial would be granted unless a certain amount should be written off from the verdict by the plaintiff, which was done, and the defendant excepted. Here the bill of exceptions shows that the judge stated orally that he would not approve a verdict in favor of the plaintiff in excess of a certain amount, whereupon counsel for the plaintiff wrote off all in excess of that amount, and the motion for a new trial was overruled, to which the defendant excepted. The order on its face shows that the overruling of the motion for a new trial was affected or influenced by this "voluntary" (?) writing off of a part of the verdict. The case cited was for a physical injury. In Savannah, Florida & Western Ry. v. Godkin, 104 Ga. 655, 30 S. E. 378, 69 Am. St. Rep. 187, the general rule was again stated. But cases of tortious homicide are passingly referred to as exceptions, and the cases of Carlisle v. Callahan, 78 Ga. 320, 2 S. E. 751, and Central Railroad v. Crosby, 74 Ga. 737, 58 Am. Rep. 463, were cited. It was held that the mere voluntary writing off of a part of the verdict by the plaintiff was not in itself a ground for reversal, where it did not appear that this was done on the suggestion of the presiding judge, or that his refusal of a new trial was influenced by the reduction of the verdict, and where this court could not say that the verdict as originally rendered by the jury was so excessive as to lead the court to suspect bias or prejudice on the part of the jury. See, also, Brunswick Light, etc., Co. v. Gale, 91 Ga. 813, 18 S. E. 11; Central of Ga. Ry. Co. v. Harden, 113 Ga. 453, 38 S. E. 949; Thompson v. Warren, 118 Ga. 644, 45 S. E. 912; McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71.

In Central of Georgia Ry. Co. v. Perkerson, 112 Ga. 923, 38 S. E. 365, 53 L. R. A. 210, suit was brought by a widow for the homicide of her husband. Proof was made as to his earnings, and the mortality and annuity tables were introduced in evidence. The jury returned a verdict in favor of the plaintiff for $10,333.33. The defendant moved for a new trial. The motion was overruled, except as to the ground complaining that the verdict was excessive, upon which ground the judge ordered that a new trial be granted unless the plaintiff should write off from the verdict a designated amount. The plaintiff complied with the requirement, and a new trial was thereupon refused. The defendant excepted. This court held that "the trial judge has no power to order that, as a condition to the refusal of a new trial, a portion of the verdict shall be written off as excessive, except where, from the application of the law to the evidence, the excess can be accurately ascertained." In the opinion Mr. Justice Fish reviewed various cases, including the Carlisle Case, 78 Ga. 320, 2 S. E. 751, and the Central Railroad Case, 74 Ga. 737, 58 Am. Rep. 463. The decision in the case of Savannah, Florida & Western Ry. v. Harper, 70 Ga. 119, was approved, and certain later decisions, which were not in harmony with it, were disapproved.

If the question were an original one, something might be said in favor of the practice adopted in some other states, where, if the presiding judge approves the finding so far as the question of liability is concerned, and thinks that the plaintiff is entitled to recover against the defendant, but that the amount found is too large to be approved by him, he may allow a certain amount to be written off, and, if the excess be voluntarily relinquished, the amount of the verdict would be no longer be cause for a new trial. Bleckley, C. J., in Augusta Ry. Co. v. Glover, 92 Ga. 132 (15), 149, 18 S. E. 406, 415, said: "Why should there be a new trial solely for the purpose of reducing the damages, when the plaintiff had voluntarily relinquished all that could be treated as excess?" But it did not appear there that the presiding judge by suggestion or order caused the reduction of the verdict, or made it a condition for the refusal of a new trial. The rule appears to be too well settled now in this state to discuss it as an open question. Under the authorities referred to above, and other decisions cited in them, a reversal must result. It was argued that the point was not sufficiently made by the bill of exceptions. But it was quite as

clearly made as in other cases cited above, and was sufficiently raised.

Judgment reversed. All the Justices concur, except ATKINSON, J., disqualified.

On Rehearing.

A motion for a rehearing was made in this case. After careful consideration it is overruled. It was urged that the assignments of error in cases cited in the original opinion more clearly raised the points considered than those in the case at bar. In some of the cases cited the specifications of error were more elaborate, and perhaps more definite; but in other cases we do not think that the assignments of error which were passed on by this court made the point under consideration any more clearly than it was made in this case, and this was the meaning of the statement in the opinion that "it was quite as clearly made as in other cases cited above." Thus, in the case of Savannah, Florida & Western Railway v. Harper, 70 Ga. 120, the presiding judge ordered that the motion for a new trial should be granted unless within five days the plaintiffs should write off from the verdict a certain amount, and, in the event they should do so, a new trial should be refused. The amount was written off. The assignments of error were that the judge erred in denying the motion for a new trial, "that the said judge erred in not granting a new trial without terms or conditions, and that the said judge erred in not granting unconditionally the new trial prayed for upon each and all the grounds of said motion for new trial and amendments thereto." This does not appear to make the point that the judge ought to have granted a new trial, and ought not to have refused it upon compliance with a condition that the plaintiff write off a part of his recovery, any more clearly, in our opinion, than in the present case the plaintiff in error complains that the judge orally disapproved the verdict as it stood, stated that he would not approve a verdict except for a certain amount, allowed the plaintiff's counsel to reduce it to that amount, and then refused a new trial. At any rate, we think that the bill of exceptions and the assignments of error therein are sufficient to raise the question for adjudication by this court.

It was suggested that no objection was shown to have been made, nor was any exception taken, to the court's allowing plaintiff's counsel to reduce the verdict by writing off a part of it, but only to the overruling of the motion for a new trial. Had the plaintiff in error assigned error because the presiding judge allowed the plaintiff to abandon a part of her recovery, she would no doubt have promptly replied that she had a right to cancel her recovery in whole or in part, and not to insist on collecting it all, or, indeed, any of it, if she saw fit not to do so. The trouble was, not merely that she wrote off a part of her recovery, but that the court announced his dissatisfaction with the verdict which the jury had found as being excessive, and then, when the plaintiff had reduced it to an amount stipulated by him, refused the new trial. It was not simply the reduction of the amount which was the substantive cause of the complaint, but the refusal of a new trial upon the reduction of the verdict to an amount fixed by the presiding judge as satisfactory to him, instead of by a jury. The overruling of the motion, under the circumstances and on the basis set out in the bill of exceptions, was the real error assigned. We think the point is controlled in principle by the decisions cited in the opinion heretofore filed, and that it is not open for discussion as an original proposition. In cases where, from the application of the law to the evidence, an excess in the verdict can be accurately ascertained, and the verdict corrected by plaintiff's writing it off, a different rule might apply; but in cases like that under consideration, where the jury found a verdict for a specified amount on account of the homicide of the plaintiff's husband, and there was no exact method by which, from an application of the law to the evidence, if the amount was excessive, the excess could be accurately ascertained, under the former decisions of this court, which are binding, the presiding judge could not lawfully fix an amount which in his discretion would be a proper verdict, and, upon the plaintiff's reducing the recovery to that amount, refuse a new trial.

Counsel for defendant in error included in his motion a request that, if a new hearing should not be allowed, the new trial should be limited to assessing the amount of damages. Under the facts of the case, we do not think it would be proper to give such a direction to the court below, and the request is denied.

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(3 Ga. App. 352)

## WISEBERG v. NOVELTY HAT MFG. CO.

(No. 547.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

1. WRIT OF ERROR—DISMISSAL.

The motion to dismiss the bill of exceptions is denied on all the grounds stated. Civ. Code 1895, §§ 5565, 5569; Continental Insurance Co. v. Wickham, 110 Ga. 131, 35 S. E. 287; Scott v. Whipple, 116 Ga. 211, 42 S. E. 519; Anderson v. Newton, 123 Ga. 518, 51 S. E. 508; Strickland v. Thornton (Ga. App.) 58 S. E. 540; Gleason v. Traynham, 111 Ga. 887, 36 S. E. 969; Taylor v. McLaughlin, 120 Ga. 705, 48 S. E. 203.

2. SET-OFF AND COUNTERCLAIM — OVERPAYMENTS.

Recoupment and set-off lie for overpayments, and the motion to strike such plea was properly overruled. Civ. Code 1895, § 3758; Petit v. Teel, 57 Ga. 145; Bracken v. Dillon, 64 Ga. 244, 37 Am. Rep. 70.

3. WRIT OF ERROR — REVIEW — CONFLICTING EVIDENCE.

The Supreme Court having held in this case that the contract sued upon was ambiguous and that parol evidence was admissible to explain such ambiguity, and there being a conflict in the

evidence as to all the material issues, the finding of the court below without the intervention of a jury on questions of fact will not be disturbed. Novelty Hat Manufacturing Company v. Wiseberg, 126 Ga. 800, 55 S. E. 923.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by B. H. Wiseberg against the Novelty Hat Manufacturing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Wiseberg brought suit against the Novelty Hat Manufacturing Company upon a contract which provided that the said Wiseberg "agrees to work in the employ of the Novelty Hat Manufacturing Company, both in the house and on the road as traveling salesman, for which he is to receive $100 per month provided his sales average $25,000 per annum; and it is also agreed that Wiseberg is to receive a commission of 5 per cent. on all sales over and above that amount." The contract was to continue one year from November 1, 1903, each party reserving the right to terminate the contract April 30, 1904; and the contract was terminated April 30, 1904, and Wiseberg brought this suit to recover the remainder of his salary computed at the rate of $100 per month. The defendant admitted the execution of the contract, but insisted that the plaintiff was not entitled to $100 per month unless his sales averaged the amount of $25,000 per annum, and that they did not average that much. The defendant filed a plea of set-off, alleging that the plaintiff had been overpaid, and asked for a judgment against the plaintiff for the balance. The case was submitted to the judge without the intervention of a jury.

On the first trial of the case the court struck the defendant's answer, and construed the contract to be unambiguous, and interpreted it as imposing upon the defendant the obligation of paying the plaintiff $100 per month for his services, and entered judgment in his favor for the full amount of his claim. The defendant took the case to the Supreme Court, and that court held that the lower court erred in ruling that the contract was unambiguous, and held that the contract was ambiguous, and that parol evidence was admissible to explain the ambiguity; the ambiguity being as to whether the contract imposed upon the Novelty Hat Company the unqualified obligation to pay the plaintiff $100 per month for his salary in case the contract should be terminated before the end of the year, or whether the obligation was to pay the plaintiff this amount of salary per month on average sales during the year that would make a total average for the year of $25,000—in other words, whether this average was to be calculated on the basis of the entire year's business, or on average sales amounting to so much per week or per month. Novelty Hat Manufacturing Company v. Wiseberg, 126 Ga. 800, 55 S. E. 923.

On the second trial the case was again submitted to the judge without the intervention of a jury. The plaintiff moved to strike the defendant's plea of set-off and recoupment, claiming that the sums paid to him by the defendant were voluntary payments and could not be recovered back. The court refused to strike this plea, and the plaintiff excepted. After hearing the evidence the court rendered judgment in favor of the Novelty Hat Manufacturing Company and against Wiseberg for $92.23, based upon the plea of set-off and recoupment. This judgment is assigned as error, because there was no evidence to support it and because it was contrary to law. On the material issues in the case the evidence is conflicting.

When the case was called in this court a motion was made to dismiss the writ of error on the following grounds: (1) That the bill of exceptions was filed before it was certified and before it was approved. (2) That the brief of evidence was filed before it was either approved or ordered filed. (3) That there is no sufficient assignment of error on the final judgment. The bill of exceptions is dated May 22, 1907. It was filed in the court below on the same day. The judge's certificate is dated May 23d. The bill of exceptions was served May 24th. The brief of evidence was filed in the court below on May 22d, and approved and ordered filed May 23d. The clerk of the court below certified to this court the original bill of exceptions on the 7th day of June, 1907.

Hirsch & Haas, for plaintiff in error. Jno. L. Hopkins & Sons, for defendant in error.

HILL, C. J. Judgment affirmed.

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(3 Ga. App. 374)

## SHEFFIELD et al. v. INTERNATIONAL HARVESTING MACH. CO. OF AMERICA. (No. 568.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

1. BILLS AND NOTES—RENEWAL NOTE—CONSIDERATION.

A note given in renewal and extension of a past-due note contains a stipulation releasing and relinquishing any and all claims arising out of the purchase of a machine for which the first note was given. *Held:* (1) The renewal and extension of the time of payment constitutes a sufficient consideration for such waiver. (2) A plea setting up total failure of consideration in defense to a suit on the renewal note was properly stricken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 350–354.]

2. SAME—EVIDENCE.

The verdict was demanded by the evidence.

(Syllabus by the Court.)

Error from City Court of Miller County; C. C. Bush, Judge.

Action by the International Harvesting Machine Company of America against B. A.

Sheffield and others. Judgment for plaintiff, and defendants bring error. Affirmed.

W. I. Geer, for plaintiffs in error. Bush & Stapleton, for defendant in error.

HILL, C. J. The International Harvesting Machine Company of America sued Sheffield as principal and Kelley as indorser on a promissory note which contained the following provision: "In consideration of the renewal and extension of my notes, Nos. 82,972 and 82,973, year 1903–04, I hereby acknowledge full satisfaction of and unconditionally release and relinquish any and all claims arising out of purchase of the machine for which the note or notes of which this is a renewal, was given." The defendants filed a joint plea of the general issue, and further pleaded a total failure of consideration as to the mowing machine for which the original note was given, but admitted an indebtedness of $15 for a hayrake. On motion of plaintiff's counsel the court struck the plea of total failure of consideration on the ground that the note sued on was given in renewal of a previous note, and in consideration of the extension and renewal of said note the maker thereof had made an express waiver of all claims arising out of the purchase of the machine for which the first note was given. To this judgment striking his plea the defendant excepted pendente lite. The note sued on was introduced in evidence, and the defendant testified that it was made in renewal of the notes which he had given for a Deering mowing machine and hayrake. Under this evidence the jury returned a verdict for the plaintiff for the full amount, and the defendant filed a motion for a new trial, based on the general grounds and on the ground that the court struck his plea of total failure of consideration.

The one question for our decision is whether the court erred in striking the plea of total failure of consideration. This plea is in the following language: "For further plea this defendant says that the consideration of the note sued on was the purchase price of a mowing machine and hayrake, and that the said mowing machine was shipped to this defendant Sheffield, but that no blade was sent with the mowing machine, and for this reason the consideration of said note has totally failed as to said mowing machine, for that the defendant purchased the said blade as a part of the mowing machine." It will be seen, from the recitals contained in the renewal note sued on, that the machine in question was purchased and the original note given therefor over a year previous, and that the defect complained of was patent, and one that the purchaser could readily see upon looking at the machine. Nevertheless, he seems to have given his original note therefor without making any complaint of the defect, and over a year thereafter, still without complaint, he gave his renewal note, the subject-matter of this suit, in which renewal note he expressly waived all claims arising out of the purchase of the machine for which the original note was given. Many authorities hold that a renewal or extension of a promissory note at the solicitation of the maker, with full knowledge of a failure of the consideration for which the original note was given, constitutes a waiver of any defense on that score; but it cannot be doubted that where, in a renewal note, there is an express waiver of any breach of warranty or failure of consideration, such as is contained in the present note, and the extension is given in consideration of such waiver, the defendant could not set up such defense to a suit on the renewal note. A renewal or an extension of time of payment constitutes a sufficient consideration for a waiver on the part of the vendee of any breach of warranty or of any failure of consideration of the article purchased and for which he gave his promissory note in the first instance. While we are inclined to the opinion that a mere extension of time of payment does not itself estop the maker of the note from setting up as a defense a total failure of consideration, yet, where the evidence discloses the fact of his knowledge of such failure of consideration at the time that he gave the renewal note, and in the renewal note he expressly waives any failure of consideration or any claim arising on account of failure of consideration, we think he would unquestionably be bound. Fairbanks v. Baskett, 98 Mo. App. 53, 71 S. W. 1113; Deering & Co. v. Walter, 2 Neb. (Unof.) 361, 96 N. W. 517.

The learned counsel for the plaintiff in error states in his brief that his client was induced to give his note for the mowing machine notwithstanding the fact that there was no blade, on the promise of the harvesting machine company that they would send the blade, but the plea fails to set up any such explanation of his conduct. It is not alleged in said plea that the note sued upon was obtained by any unfair means, or that the harvesting machine company failed to comply with their promise to send the blade, which was an essential part of the machine; but the note contains expressly and in the clearest language and upon a sufficient consideration (to wit, an extension of time for the payment of the indebtedness) a release and relinquishment of all claims for damages arising out of the purchase of the machine. We are therefore clearly of the opinion that the court did not commit an error in striking the plea. After the plea was stricken, of course, any evidence offered by the defendant in support thereof was properly excluded.

The verdict was demanded by the evidence, and the judgment of the court below, refusing a new trial, is affirmed.

Judgment affirmed.

(3 Ga. App. 377)

## SHORT v. CHEROKEE MFG. CO. (No. 580.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

The alleged defect in the machinery and the unsafe condition of the floor, which concurrently caused the plaintiff's injury, according to his own evidence were known to him, or by the exercise of ordinary care could have been known to him. Being, therefore, the ordinary risks of his employment and assumed by him, the judgment of nonsuit was properly granted. Civ. Code 1895, § 2612; Banks v. Schofield's Sons Co., 126 Ga. 671; 55 S. E. 939; Crown Cotton Mills v. McNally, 123 Ga. 35, 51 S. E. 13.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574–600.]

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Action by Frank Short against the Cherokee Manufacturing Company. Judgment for defendant. Plaintiff brings error. Affirmed.

H. J. Langston and R. J. & J. McCamy, for plaintiff in error. Shumate & Maddox, for defendant in error.

HILL, C. J. Judgment affirmed.

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(3 Ga. App. 410)

## SOUTHERN RY. CO. et al. v. MILLER. (No. 772.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

1. NEGLIGENCE—PLEADING.

As to all questions raised in the record, except those arising from the overruling of the motion for a new trial, the cases of Southern Railway Co. v. Miller, 1 Ga. App. 616, 57 S. E. 1090, and Southern Ry. Co. v. Rowe, 2 Ga. App. —, 59 S. E. 462, are controlling.

2. WRIT OF ERROR—REVIEW — RULINGS ON EVIDENCE.

To be sufficiently specific to raise any question for determination on review, grounds of a motion for a new trial complaining of the admission of testimony should contain such recitals as will show with definiteness, independently of other portions of the record, the nature of the errors complained of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1744–1756.]

3. NEW TRIAL—GROUNDS OF MOTION.

Where a request to charge contains several distinct propositions, a ground of a motion for a new trial complaining that the court refused the request in its entirety will be held not to be well taken if any of the propositions be unsound.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 257.]

4. CONTINUANCE—ABSENCE OF COUNSEL—INSTRUCTIONS.

No error appears in the instructions excepted to, nor in the refusal to continue the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, § 17.]

5. WRIT OF ERROR — REVIEW — VERDICT—APPROVAL OF TRIAL COURT.

It is the duty of the trial judge to be reasonably satisfied that a verdict is just and true before he approves it; but if, after deliberately weighing the matter, his mind and conscience does approve it, any slight dissatisfaction or doubt through which he may have passed, and to which he may have given expression in discussing the matter preliminary to a decision, will not operate to relieve the verdict of that element of finality to which, when approved, it is entitled as a finding of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 3948–3950.]

(Syllabus by the Court.)

Error from City Court of Hall County; J. C. Boone, Judge.

Action by W. M. Miller against the Southern Railway Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

See 57 S. E. 1090.

Jno. J. Strickland and Ed. Quillian, for plaintiffs in error. Arnold & Arnold, Howard Thompson, and F. M. Johnson, for defendant in error.

POWELL, J. 1. The same questions made by the demurrer and by the special plea were decided adversely to the plaintiff in error in the cases of Southern Ry. Co. v. Rowe, 2 Ga. App. —, 59 S. E. 462, and So. Ry. Co. v. Miller, 1 Ga. App. 616, 57 S. E. 1090.

2. In the motion for a new trial error is assigned upon the admission of certain testimony. The grounds are not sufficiently full and specific to indicate definitely the nature of the error complained of, and therefore present no question for determination by this court.

3. One of the grounds of the motion complains: "The court erred in refusing to give in charge to the jury the following written request, handed the presiding judge as required by law." This is followed by a request to charge 14 distinct propositions, some of which, at least, were not proper to be charged. We are not prepared to hold, as was insisted by counsel for defendant in error, that the form in which the request was submitted had the effect of making these requested charges an entirety, so that an error in one paragraph would so vitiate all the others as to excuse the judge from charging such of them as were legal and pertinent; yet it is plain that the exception now taken is an entirety. In other words, counsel could have assigned error upon each of his requested charges by a separate assignment, and thus have brought under review the refusal of each request as a segregate proposition. This he did not do, but has elected to stand or fall by the whole. The rule as to exceptions of this character is too well established by the Supreme Court to deserve further discussion here.

4. Complaint is also made of certain instructions given. Upon comparing them with the evidence and the charge as a whole, we find no error in any of them. The question whether the court should have continued the case for the absence of local counsel, when the general and leading counsel for the defendant was present, was a matter addressed largely to the discretion of the trial judge,

and in this case we are unwilling to say that he abused it.

5. It is contended that the verdict is contrary to the evidence and that it is excessive. It is further said in this connection that it is not approved by the trial judge. The verdict is not contrary to the evidence, and, while it is large, it is not so large as to justify us in declaring it as a matter of law excessive. As to the approval of the trial judge, we find that he by an unqualified order overruled the motion for a new trial containing the general grounds, thereby formally expressing his approval of the verdict. The following assignment of error is, however, verified by the bill of exceptions: "The court erred in holding, in passing on said motion for new trial, that while he was not exactly satisfied with the amount of the verdict rendered in this case, yet what amount the court would have given is not the controlling question, but the amount was a question for the jury under the charge of the court, and, the jury having determined the amount, a new trial would not be granted because of the amount of the verdict alone." If the judge was so dissatisfied with the amount of the verdict that the persuasive influence of the jury's finding—the deliberate opinion of 12 impartial men, who also heard the evidence—did not convince him that the amount was reasonably correct, it was his duty to set it aside. In the nature of things no man's mind can fix with exactness upon the amount of damages to be allowed for personal injuries. The verdict of the jury itself is probably in most cases a compromise of the estimates of the individual jurors. No juror ought to agree to a verdict which is either so small or so large as to strike his mind and conscience as being unjust or unreasonable. In passing upon a verdict, the trial judge, on motion for a new trial, exercises a like discretion. It is not required that he be "exactly satisfied," provided he is reasonably satisfied with the finding. It is not improper that the verdict of the jury should exercise a persuasive influence upon him. The record as a whole indicates that the trial judge, before finally determining how he should exercise that discretion, which it is his positive duty to exercise, had doubts which he expressed, and which he duly weighed, but that despite his original lack of entire satisfaction he was so persuaded by the unanimous finding of the jury that he became reasonably satisfied with the verdict and approved it. Doubt and uncertainty are not necessarily inconsistent with the complete decision of a question. The judgment can fully choose and act, despite doubt. We will not construe the record as indicating that the trial judge deliberately disregarded his sworn duty by approving a verdict which his mind and conscience told him was unjust and unreasonable in amount. As against a motion for a new trial, it takes 13 men to make a verdict. Until it has received the approval of all 13, it does not become a final finding of fact. But when all 13 (though one or all, in deliberating the question, may have felt some shade of doubt) do finally assent to the same thing, the unanimous agreement of minds—the approved verdict—is final and conclusive upon all others who may thereafter have occasion to review it as to every issue of fact legitimately involved.

Judgment affirmed.

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(3 Ga. App. 414)

## ALBANY & N. RY. CO. v. WHEELER.
(No. 800.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

RAILROADS—FIRES SET BY LOCOMOTIVES—CARE REQUIRED.

A railroad company is bound to use only ordinary care and diligence to prevent the communication of sparks from its locomotives. An instruction which is fairly susceptible to the criticism that it tended to mislead the jury into believing that the railway company was required to have its locomotive equipped with a spark arrester "of the latest approved pattern in general use" is erroneous. In the case at bar the state of the pleadings and the charge taken as a whole do not, as they did in the case of Alabama Midland Ry. Co. v. Guilford, 119 Ga. 526, 46 S. E. 655, render the error harmless. See Atlanta & Birmingham Air Line Railway v. McManus, 1 Ga. App. 303 (5a), 307, 58 S. E. 258, and cases therein cited.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1657, 1671.]

(Syllabus by the Court.)

Error from City Court of Cordele; E. F. Strozier, Judge.

Action by H. C. Wheeler against the Albany & Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Lane, Maynard & Hooper and Will McKenzie, for plaintiff in error. Crum & Jones, for defendant in error.

POWELL, J. Judgment reversed.

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(3 Ga. App. 413)

## MORRIS et al. v. GEORGE, Ordinary.
(No. 788.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

PRINCIPAL AND SURETY—ACTION ON BOND—VENUE.

The principals in an administrator's bond, on which a nonresident fidelity insurance company is surety, may be joined with the surety in a suit brought in any county wherein jurisdiction over the surety may be obtained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 413.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by J. R. George, ordinary, for use, etc., against C. R. and L. M. Morris. Judgment for plaintiff. Defendants bring error. Affirmed.

W. H. Terrell, for plaintiffs in error. Ben J. Conyers, for defendant in error.

POWELL, J. The administrator's bond sued on in this case was executed by Messrs. Morris as principal and the National Surety Company of New York as surety. The administrators reside in De Kalb county, and the surety company in New York; but it has an office and an agency in Fulton county, though not in De Kalb county, where the decedent resided at the time of his death. The suit was located in Fulton county.

The point is made that the courts of Fulton county were without jurisdiction; that venue was confined to De Kalb county. Taken together, the decisions in the cases of Reeves v. Southern Ry. Co., 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, Equity Life Ass'n v. Gammon, 119 Ga. 271, 46 S. E. 100, and Southern Ry. Co. v. Grizzle, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191, seem to necessitate the conclusion that, where residents and nonresidents are joint obligors, the suit against them may be brought in any county in the state in which jurisdiction can be obtained over the nonresident defendant. See, also, Saffold v. Scottish American Co., 98 Ga. 785, 787, 27 S. E. 208. In this case the nonresident defendant is a fidelity insurance company, and venue of suits against such companies may be laid according to section 2145 of the Civil Code of 1895, and section 2144 is merely cumulative. See, also, sections 2068, 2057. The city court of Atlanta properly took jurisdiction.

There is no merit in the other exceptions appearing in the record.

Judgment affirmed.

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(3 Ga. App. 356)

## MONK v. GAY. (No. 359.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

1. POSSESSORY WARRANT—GROUNDS.

There was no error in sustaining the certiorari from the judgment of the justice of the peace awarding the possession of certain rollers to the affiant. The evidence fully showed that the possession of the mechanic was the possession of the plaintiff in the possessory warrant, and that the defendant had wrongfully and fraudulently obtained his possession of the rollers in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Possessory Warrant, § 2.]

2. JUSTICES OF THE PEACE — CERTIORARI — JUDGMENT.

The judgment for costs against the petitioner in certiorari made a final disposition of the case, and to make such final disposition was properly within the discretion of the judge of the superior court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 828.]

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by M. L. Gay against J. F. Monk. Judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Wilkes, for plaintiff in error. W. C. McCall, for defendant in error.

RUSSELL, J. The defendant in error sued out a possessory warrant against the plaintiff in error for nine rollers made of black gum. The justice of the peace, upon the trial, awarded the possession of the black-gum rollers to the plaintiff. The defendant (now plaintiff in error) carried the case by certiorari to the superior court of Colquitt county, where the certiorari was overruled, and exception is taken to the judgment overruling the certiorari.

It appears from the evidence that Gay sawed out certain pieces of black gum and hauled them to a mechanic named Drake, who was to make them into rollers for Gay for $1.25. Some time afterwards Monk, being in need of such rollers, went to Drake and purchased these rollers from him without the knowledge, consent, or authority of Gay. When Gay called upon Drake for his rollers, Drake told him that he had let Monk have them. Gay thereupon went to Monk's mill and recognized the rollers in question as being the same rollers which he had seen at Drake's shop after they had been manufactured out of his black gum. We think the justice properly awarded the possession of the rollers in question to the defendant in error, and that the judgment overruling the certiorari is the only judgment that could properly have been rendered. The uncontradicted evidence of Gay, supported by corroborative circumstances from the testimony of Monk himself, showed that the rollers in question were made from the identical black gum carried by Gay to Drake's shop. If the black gum had never been manufactured into rollers, Gay could have recovered possession on his own prior possession; and we think that the case is not altered by reason of the fact that the pieces of black gum had been transformed into rollers with iron pins in each end, because the evidence is uncontradicted that the possession of Drake was the possession of Gay. Drake had no interest in the rollers. Gay was to pay him $1.25 for the work in turning the black gum and putting in the pins, and he would have been entitled to retain the rollers until Gray paid him for the work, or he could, by foreclosure of his lien, have brought the rollers to sale in order to collect the amount due him for his labor in making the rollers. But, unless he thus proceeded, so long as the rollers were in his possession he was merely an agent of Gay for their safe-keeping and their delivery to Gay upon his demand. His sale to Monk, upon the authority of one Jacobs, who had no authority whatsoever to act for Gay so far as the record discloses, was tortious and fraudulent. Monk, having full knowledge of all the facts, was a party to the fraud in purchasing the rollers from Drake. The case is controlled by the decisions in Meredith v. Knott, 34 Ga. 222, Hillyer, v. Brogden, 67 Ga. 24, Mitchell v. Railway, 111 Ga. 770, 36 S. E. 971, 51 L. R. A. 623, and Sheriff v. Thompson, 116 Ga. 436, 42 S. E. 738. That the fact

that Gay had not paid Drake his $1.25 for making the rollers did not alter the case is clearly shown by the decision in Raymond v. Strickland, 124 Ga. 504, 52 S. E. 619, 3 L. R. A. (N. S.) 69.

The superior court did not err in rendering judgment for the costs and making a final disposition of the case. Under the provisions of Civ. Code 1895, § 4807, a judge of the superior court, in passing upon a certiorari from a decision of the justice of the peace in a possessory warrant case, may make a final disposition of the case. Bush v. Rawlins, 80 Ga. 583, 5 S. E. 761.

Judgment affirmed.

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(3 Ga. App. 357)

JAMES v. AVERY & McMILLAN. (No. 514.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

ELECTION OF REMEDIES—EFFECT.

One who, in the sale of personal property, has reserved title thereto, may by trover recover the same, even against the purchaser at a judicial sale; but where personal property to which title has been reserved is sold under an order of a court, and the vendor, who has reserved the title, elects to claim a lien upon the fund, he is estopped thereafter from asserting his title as against the property, and is confined to the proceeds of its sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Election of Remedies, § 17.]

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action by Avery & McMillan against T. J. James. Judgment for plaintiffs, and defendant brings error. Reversed.

C. A. Howell purchased certain machinery from Avery & McMillan and gave four notes for the purchase money. In these notes Avery & McMillan reserved the title to the property in question until the purchase price should be fully paid; and the notes, with the reservation of title, were recorded in Johnson county in 1900 and in Emanuel county on June 9, 1901. On June 1st C. A. Howell was adjudged a bankrupt, and on June 7th a sale of the property of the bankrupt, including the machinery he purchased from Avery & McMillan (which had previously been ordered by the United States District Court), was confirmed by the referee in bankruptcy. On July 23, 1901, Avery & McMillan intervened in the proceeding in bankruptcy, proved their notes, and claimed a first lien on the proceeds of the sale of the machinery, which had been sold by D. R. Clayton, receiver. T. J. James bought the property in question at the receiver's sale for $600. The unpaid purchase-money notes, with reservation of title, payable to Avery & McMillan, amounted to $221, besides interest. Some time after the claim of Avery & McMillan was filed with the referee in bankruptcy, Mr. George W. Owens, as attorney for Avery & McMillan, withdrew their claim, by taking the papers, with the consent of the referee, from the files, but no order of withdrawal was entered. Avery & McMillan thereafter brought an action in trover in the city court of Swainsboro against James, the purchaser of the machinery, to recover one No. 1 Frick Eclipse sawmill, 35 feet of carriage, and certain other machinery described in the petition. At the conclusion of the evidence the judge of the city court directed a verdict in favor of the plaintiffs for $310.66; the plaintiffs asking a money verdict. Thereupon the defendant filed a petition for certiorari. The certiorari was overruled, and exception is taken to that judgment.

In the petition for certiorari it is insisted: First, that the sale made in pursuance of the order of the United States District Court was legal and valid, and passed the title to the plaintiff in error free from all liens and incumbrances, and free from any claim on the part of defendants in error; second, that Avery & McMillan, having relinquished all right and title to the property by proving their claim in the bankruptcy court and claiming a first lien on the fund arising from the sale (as the order of sale empowered them to do), with full knowledge of all the facts, ratified the sale; third, because the claim of Avery & McMillan is still pending in the United States District Court, they having entered said court of their own motion, and their claim never having been formally or legally withdrawn; fourth, that Avery & McMillan, under the order of sale, had a superior lien on the fund in the bankruptcy court arising from said sale to any and all other claimants, and, petitioner in certiorari having no right to said fund, Avery & McMillan would be compelled to exhaust the fund arising from said sale and credit the same on their claim before proceeding against him; fifth, that there are sufficient funds in the hands of the receiver to pay off and fully discharge the claim of Avery & McMillan. As alleged in the petition for certiorari, these were the objections made by James, as defendant in the action in trover in the city court of Swainsboro, to the direction of a verdict by the court; James contending especially that the question of ratification was one of fact and should be submitted to the jury. Exception is also taken to the ruling of the court on certain interrogatories.

Saffold & Larsen and Jas. K. Hines, for plaintiff in error. Williams & Bradley and Frank Reagan, for defendants in error.

RUSSELL, J. (after stating the facts as above). After a careful consideration of the record we are of the opinion that the controlling questions in this case are, first, whether the defendants in error had the option to pursue either of two remedies in the collection of their debt; second, whether they exercised their option; and, third, if, having exercised their option, they are estopped from now selecting the other of the two remedies.

It cannot be questioned that the reserva-

tion of title in the note given by Howell to Avery & McMillan would have amply protected all of their rights, had they declined to prove their claim in bankruptcy, and that by an action in trover they could have recovered the property they had sold to Howell, even after the sale by the receiver of the United States court. The bankruptcy of the vendee would not affect the title of a plaintiff in trover to the property if the title was reserved and the evidence of the reservation of title (such as the purchase-money note) was properly recorded. Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; In re Muhlhauser Co., 10 Am. Bankr. Rep. 240, 121 Fed. 669, 57 C. C. A. 423; Taylor v. McLaughlin, 120 Ga. 703, 48 S. E. 203. And the purchaser would have had all the notice required by law of a vendor's title. Anderson v. Leverette, 116 Ga. 732 (2), 734, 735, 42 S. E. 1026.

The defendants in error, however, with knowledge of the lis pendens, intervened in the United States District Court and elected to claim a first lien on the fund, instead of standing on their title to the property which had been sold. The record is conclusive that in the filing of this intervention Mr. Owens represented the defendants in error, and they are bound by his act. If there were doubt upon this subject, it appears clear to us that his act was ratified by the defendants in error. In the interrogatories of the defendants in error they state that they did not know that Mr. Owens had intervened in their behalf in the United States District Court; but they do not deny that Mr. Owens was their attorney. If he was their attorney, as is unquestioned, he had the right to proceed to collect their money by either route he preferred —to make their election for them. The answers to the interrogatories propounded to the defendants in error are that the defendants in error were ignorant of what Mr. Owens had done; but they did not disavow his employment.

Then, did the defendants in error ratify the act of Mr. Owens? In our view of the case it is immaterial whether they ratified it or not, unless it appeared that Mr. Owens was not authorized to act. Granting that he was not authorized, the defendants in error would be presumed to know the condition of their claim and the proceedings being taken to enforce its collection. By not expressly disavowing the steps taken by Mr. Owens towards its collection and not denying that Mr. Owens was their attorney, the defendants in error were bound by his act, and there was no issue of fact as to Avery & McMillan's intervening in the United States court. Consequently, as to this point, the judge of the city court erred in directing a verdict for the plaintiffs (though he might have been authorized to direct a verdict for the defendants), and the judge of the superior court erred in not setting aside the verdict directed.

Avery & McMillan were plaintiffs in the city court, and when the defendant, James, introduced the record showing that the then plaintiffs had intervened in the United States District Court, the presumption certainly arose that Avery & McMillan had elected to proceed against the fund arising from the sale by the receiver instead of by asserting their title to the property. As there was no evidence that Mr. Owens was acting without any authority from Avery & McMillan, and the evidence showed him to be an attorney at law, it would be presumed that he was acting under employment and by authority. In this state of the case the burden was shifted from the defendant to the plaintiffs, and it became incumbent upon them to show that the act of Mr. Owens was not their act, or that for some other reason their action in intervening in the United States Court did not amount to an estoppel. Either would have rebutted the inference which the jury might have drawn from the facts so far in evidence. The defendants in error did not attempt to disavow the act of Mr. Owens or his authority. They relied upon the proposition that the defendants took nothing by their intervention (which confessedly would amount to an estoppel), and relied upon the fact that their intervention was withdrawn before the commencement of the action in trover which is the subject of adjudication in the state courts.

The question finally resolves itself, then, into the inquiry whether the physical withdrawal of the papers from the custody of the referee, with the personal assent of that officer, but without any written official action upon his part, can effect the dismissal of the intervention of Avery & McMillan, or, even if such be the effect, whether such dismissal can defeat or destroy the estoppel resultant from the previous action of the defendants in error in setting up a claim to the fund. We think that the claim could not have been withdrawn by a mere manual taking. The intervention being a matter of record, in our opinion an order allowing the withdrawal should have been duly entered by the referee to be effectual in accomplishing a withdrawal of the intervention. But this point is completely unimportant, for the reason that the prior action of the plaintiffs in the trover suit, in proving their claim and claiming a first lien on the fund arising from the sale by the receiver, in our judgment, would clearly estop them from thereafter asserting their title, even though the intervention had been more formally withdrawn by an appropriate order, unless the plaintiffs had shown that Mr. Owens was not employed as an attorney to act in their behalf, and that because he was not their attorney they had disavowed his act in filing the intervention. If he was not authorized to file the intervention, it devolved upon the plaintiffs in the action in trover to show that fact. In proceedings in court, where an attorney at law purports to represent a party, proof of the fact that he did represent him

is sufficient evidence of employment and of authority on the part of such attorney to act according to his own judgment in the election of remedies, in the absence of evidence to the contrary.

Judgment reversed.

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(3 Ga. App. 321)

## JENKINS v. SEABOARD AIR LINE RY.
(No. 615.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

ACTIONS — TORT OR CONTRACT — ELECTION — AMENDMENT.

Where a contractual relation, such as that of shipper and carrier, exists between the parties, so that the carrier rightfully obtains possession of the property, and a conversion is not alleged, a suit brought to recover damages arising from delay in delivery or failure to deliver is not necessarily an action ex delicto. In such a case the plaintiff has an option to waive the tort and maintain assumpsit. Bates v. Bigby, 123 Ga. 729, 51 S. E. 717. The present case is distinguished from Cragg v. Arendale, 113 Ga. 181, 3 S. E. 399, and Southern Ry. Co. v. Born Steel Range Co., 122 Ga. 658, 50 S. E. 488, both of which deal with cases in which a conversion was alleged. If a petition is ambiguous, this may furnish ground for demurrer; but the plaintiff may amend so as to show clearly whether he is suing for a tort or for a breach of contract. King v. Southern Ry. Co., 128 Ga. 288, 57 S. E. 507; Central Ry. Co. v. Pickett, 87 Ga. 734, 13 S. E. 750.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 177, 178, 196–203; vol. 89, Pleading, §§ 676–683.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by C. R. Jenkins against the Seaboard Air Line Railway. On appeal from a justice court, the action was dismissed, and plaintiff brings error. Reversed.

D. H. Clark, for plaintiff in error. Thos. F. Walsh, Jr., and J. Randolph Anderson, for defendant in error.

RUSSELL, J. The plaintiff in error instituted an action in the justice's court to recover $72.50 as damages on account of loss sustained through failure of the defendant to transport a shipment of beans. The case was appealed to the superior court of Chatham county, where the action was dismissed upon the ground that the justice's court was without jurisdiction of the subject-matter. The bill of exceptions assigns error upon the refusal of the court to allow two amendments to the summons and also upon the judgment dismissing the suit.

The controlling question in the case is whether the action as originally brought was one ex delicto or ex contractu. It is well settled that one may waive his action for the tort and sue on the contract. It is likewise beyond dispute that a justice's court has no jurisdiction of actions ex delicto, except for injury to personal property less than $100. If the action, as originally brought, sounds in contract, the amendment should have been allowed. If the suit should be construed as one in tort, the court correctly disallowed the amendments, because an action ex delicto cannot be transformed by amendment into one ex contractu. These principles are axiomatic. The original summons is in the following words: "You are hereby summoned personally or by attorney to be and appear at a justice court of said county and state, to be held at No. 420 Bryan St. West, being the place of holding the justice's court for the First district, G. M., in the city of Savannah, county and state aforesaid, on the 1st day of August, 1905, at 10 o'clock a. m. of said day, to answer to complaint entered against you by C. R. Jenkins to recover the sum of seventy-two and $^{50}/_{100}$ dollars, the value of 29 crates of beans, property of plaintiff, delivered on the 11th day of May, 1905, to defendant, at its station, Meinhardt, Ga., for shipment to Chapin Bros., Boston, Mass., and by defendant accepted, but not delivered to consignee, to the loss and damage of said plaintiff the sum of seventy-two and $^{50}/_{100}$ dollars, and ——— cents, besides interest, a copy of which is hereto annexed; and in case of your refusal or neglect the court will proceed as to justice shall appertain. Given under my hand and seal of office at Savannah, county and state aforesaid, this the 15th day of July, A. D. 1905. [Signed] Richard Wickham, J. P., Justice of the Peace, C. C. Ga." "1905. May 11. To 29 crates of round beans, delivered to and accepted by defendant, and lost by failure to deliver in time, at $2.50 a crate, $72.50."

Counsel for plaintiff in error insists that the lower court improperly distinguished between a case where the defendant wrongfully came into possession and refuses to account, and a case where the defendant's possession has been obtained by consent and agreement and he fails to account. And the ruling in the case of Macon & Birmingham R. Co. v. Walton, 127 Ga. 294, 56 S. E. 419, is relied upon to sustain the contention that the justice's court had jurisdiction, and therefore upon appeal the superior court had jurisdiction. In the Walton Case, supra, it was held that "a petition alleging that the defendant company 'did * * * undertake to transport from Lizella, Bibb county, Georgia, to Atlanta, within a reasonable time, a certain car load of watermelons, * * * that said defendant failed to transport said car of melons within a reasonable time, and said melons, having been delayed three days or more, were * * * damaged on account of said delay to the amount of $50.00,' states a cause of action arising ex contractu." It will be observed that there is a very slight difference between the wording of the summons in the present case and in the Walton Case. In the Walton Case the summons specifically alleged that the damages to the melons arose on account of the delay. In the present case the failure to deliver to the consignee in time is alleged to be the reason of

the loss and damage. According to the allegations of the Walton Case, the watermelons were delivered, but in a damaged condition, due to the delay in the shipment. In the present case, the allegation, considering, as we must, the account attached to the summons in connection therewith and as a part of it, is practically the same.

If it be admitted that it is ambiguous whether the action in the present case is one predicated upon a breach of contract, or whether damages are sought for a tort, still, even in that event, the plaintiff had the right at his option to treat it as an action on the contract. The defendant, though it had the right to demur, could not defeat the right of plaintiff to make this election by means of a proper amendment responsive to the demurrer. In Central Railroad Co. v. Pickett, 87 Ga. 784, 13 S. E. 750, it was held that "where a declaration against a common carrier is susceptible of being construed equally as an action upon contract or an action of tort based upon an alleged violation of a public duty by the carrier, and the same is not demurred to, the plaintiff at the trial may, at his option, elect to treat it as either species of action." In that case Justice Lumpkin, delivering the opinion, declared that the declaration was ambiguous and susceptible of being construed either as an action upon a breach of contract or for a violation of a public duty. Thereupon the court held that "the defendant was entitled to be distinctly informed of the nature of the complaint against it, in order that it might have a fair opportunity to make its defense; but it neglected taking the proper step to secure this important right by failing to demur to the declaration. Had it done so, the court below would either have dismissed the cause for duplicity, or required the plaintiffs to so shape their allegation as to leave no doubt of the manner in which they sought to hold defendant liable." In the more recent case of King v. Southern Railway Co., 128 Ga. 288, 57 S. E. 507, the Supreme Court, after stating that it is frequently difficult to determine whether an action is ex contractu or ex delicto, reaffirms the right of the plaintiff to treat his right of action, which is ambiguous, at his own option as arising from contract or as sounding in tort as he may prefer, holding that, "if a petition is ambiguous as to whether the suit is for a tort or based on contract, this may furnish ground for demurrer, duly filed. The plaintiff, however, may amend so as to clearly show whether he is suing for a tort or for a breach of contract." These rulings are not in conflict with what is held in Central Ry. Co. v. Chicago Portrait Co., 122 Ga. 11 (1), 49 S. E. 727, because in that case the right of the plaintiff to elect is recognized. See, also, Seals v. Augusta Southern R. Co., 102 Ga. 818 (2), 29 S. E. 116.

Counsel for defendant in error relies especially upon the rulings in Southern R. Co. v. Born Steel Range Co., 122 Ga. 658, 50 S. E. 488, and Cragg v. Arendale, 113 Ga. 182, 38 S. E. 399. Both of these cases, however, are instances where conversion of the property was plainly alleged, and, as held by this court in Atlantic Coast Line R. R. Co. v. Goodwin, 1 Ga. App. 351, 57 S. E. 1070, such conversion is a tort. In the case of Southern Ry. Co. v. Born Steel Range Co., 122 Ga. 658 (2), 50 S. E. 488, it was held that "where the pleadings do not show that the property has been converted into money, and the suit is to recover the value of the property, the action is ex delicto, and not ex contractu." But, as well said on page 659 of 122 Ga., on page 489 of 50 S. E., by Justice Evans, delivering the opinion of the court: "The gravamen of the plaintiff's complaint is that there had been a conversion of the property. It is alleged that the carrier not only failed to deliver the goods to the consignee, but also refused to reship them to the plaintiff on its demand." The Born Case, being, according to the allegations of the summons, clearly an action to recover the value of the property converted by the carrier, was controlled by the ruling in Cragg v. Arendale, 113 Ga. 182 (4), 38 S. E. 399, because it was not alleged that there had been a sale of the property converted, and for that reason the aggrieved party could not sue in assumpsit for money had and received to the plaintiff's use, but was restricted to an action ex delicto, of which the justice's court had no jurisdiction.

In the present case the summons does not allege a conversion; but, construing the summons and the account together, it is plainly alleged that the defendant has damaged the plaintiff by the loss in value in the beans because of delay in delivery, the idea of a conversion is really negatived, and the case is controlled, in our judgment, by the decision in Bates v. Bigby, 123 Ga. 729, 51 S. E. 717, in which Chief Justice Fish, delivering the opinion, says: "All the authorities agree that, where personal property is tortiously taken and converted into money, the owner may waive the tort and sue the wrongdoer in assumpsit. They differ, however, as to the right of the owner to sue in assumpsit where the wrongdoer has not sold or otherwise disposed of the property, but retains it for his own use. This court has held that where one wrongfully takes the personalty of another and converts it to his own use in some manner other than by a sale, and receipts of money therefor, the owner is restricted to his right of action ex delicto. He cannot waive the tort and sue ex contractu. Cragg v. Arendale, 113 Ga. 181, 38 S. E. 399, and citations. Where, however, a contractual relation exists between the parties, such as that of bailor and bailee, so that the latter rightfully obtains possession of the property, a tort arising out of a breach of the bailee's duty imposed by his relation may be waived by the bailor and assumpsit main-

tained; the reason being that the relation of the parties, out of which the duty violated grew, had its inception in contract. 4 Cyc. 331, 332; Zell v. Dunkel, 156 Pa. 353, 27 Atl. 38; Tindall v. McCarthy, 44 S. C. 487, 22 S. E. 734."

In the present case, according to the allegations of the summons (at least sufficiently for the purposes of a justice's court), the defendant was rightfully in possession of the beans, had not converted them to his own use, but, having been intrusted with them for the purpose of delivery, had damaged the plaintiff by delay in delivery. So far from delivery being denied, it is rather to be inferred from the statement of the account. We are therefore clear in the opinion that the learned trial judge erred in dismissing plaintiff's action.

2. Having held that the action is one ex contractu, it necessarily follows that the amendments offered by the plaintiff which amplified the statement of his cause of action should have been allowed. A petition showing a plaintiff and a defendant, and setting out sufficient facts to indicate and specify some particular transaction as a cause of action, is enough to amend by. If the original summons of the plaintiff was not of itself sufficient to meet the requirements as to pleadings in a justice's court, the amendments offered and refused set out an express written contract to carry and deliver the goods in question. The receipt evidenced a contract of bailment. A bailment is a delivery of goods upon a contract, express or implied, to carry out the object and dispose of the property in conformity with the purposes of the trust. Civ. Code 1895, § 2894.

The second amendment offered still more clearly negatived the idea that the action was for a conversion; the amendment offered being as follows: "That said defendant, at the time of the reception of said beans, did not transport and deliver the same within a reasonable time to their place of destination, but so delayed in their transportation that plaintiff was injured and damaged the difference between the price he should have received, if delivered within a reasonable time, and the price he did receive when actually delivered, to wit, the sum of $72.50." It was not, as contended by counsel for plaintiff in error, an attempt to set up by amendment a new cause of action. As held by the Supreme Court in Columbus v. Anglin, 120 Ga. 793, 48 S. E. 318, the test by which it may be determined whether an amendment sets up a new cause of action is whether or not the facts alleged in the amendment show substantially a different wrong in the same transaction alleged in the original suit. As we think it can be clearly inferred that the original suit only claimed damages in the deterioration in value of the beans caused by delay, and as the proposed amendment only set forth the same alleged wrong more definitely, the amendment met the test proposed by the Anglin Case, and should have been allowed.

Judgment reversed.

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(3 Ga. App. 344)

## HARDEN et al. v. GEORGIA R. CO.

(No. 312.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

RAILROADS—INJURY TO PERSON ON TRACK—PLEADING—ACTS OF NEGLIGENCE.

There was no error in sustaining a general demurrer to the petition.

(a) The presumption of negligence arising by operation of law (Civ. Code 1895, § 2321) is a rule of evidence, and has no application to a plaintiff's petition. A plaintiff must allege sufficient specific acts of negligence as to the injured party to withstand demurrer, and can recover only on the specific acts alleged.

(b) Negligence is the failure to perform a duty of diligence toward one entitled thereto. There is no duty of diligence that its trains shall not be behind time, or shall not run at a certain speed, due by a railroad company as to one who is on its track not at a crossing, until the presence of such person is discovered or can be ascertained by the exercise of ordinary care and diligence in keeping a proper lookout.

(c) A ruling upon the question of negligence can be invoked by general demurrer.

(d) In the present petition there is no allegation of a failure of diligence relative to the deceased in any respect with regard to which diligence was due to him. The acts of the defendant alleged are not, as to the deceased, negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1267–1284, 1331; vol. 39, Pleading, § 402.]

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Action by John Harden and others, next friends, against the Georgia Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

R. H. Lewis and L. C. Culver, for plaintiff in error. Jos. B. & Bryan Cumming, for defendants in error.

RUSSELL, J. The plaintiffs, as next friends for two minor children of Matt Harden, brought suit against the Georgia Railroad Company for damages arising from the homicide of the father of the children. It was alleged that "Matt Harden was killed by an engine of the train of cars running over the tracks of the Georgia Railroad Company, in the county of Hancock, on the 26th day of September, 1904, about 300 yards from the crossing of the track of said railroad at Dixie. Said train was behind time, and running at an illegal and reckless rate of speed, conducted by the agents and employés of said company. The value of the life of said Harden to said minor children was $1,999, in which sum they were damaged by the negligence aforesaid, and for which sum petitioner prays judgment." The defendants demurred specially on the ground that the

petition failed to specify the train that killed the deceased, and that the rate of speed at which the train was running was not stated, so as to enable the defendant to properly make answer thereto. The demurrer was met by an amendment setting forth that the deceased was killed by an east-bound freight train, about 12 o'clock midnight of the 26th and 27th of September; said train running from Macon to Camak at not less than 30 miles an hour. Upon the allowance of this amendment the defendant demurred generally, and the court sustained the demurred and dismissed the petition. The plaintiffs except to this judgment.

Counsel for the plaintiffs in error contend in their brief that the judgment sustaining the demurrer was error because "the petition as amended is in the language of the statute." We presume that the statute to which reference is made is the act of 1856, as amended and codified in Civ. Code 1895, § 2321; for counsel for the plaintiffs in error, in their brief, say: "This suit is based on Civ. Code 1895, §§ 2321, 2322, construed with section 3830"—and we are cited to the cases of Vickers v. A. & W. P. R. Co., 64 Ga. 306–309, Hankerson v. S. W. R. R., 59 Ga. 593, and Ga. R. Co. v. Neely, 56 Ga. 543 (2). We fail to see that any of these authorities are in point on the question raised by the demurrer, to wit, the sufficiency of the petition to set forth a cause of action. Had no demurrer been filed, and if the evidence, instead of the pleading, were being tested, it would undoubtedly be true, as held in the Neely Case, supra: "In advance of all testimony on the point of diligence, our law presumes that the corporation was altogether in fault. * * * The killing established and value [of the life] proved, the company opens its defense with a complete case against it for full damages. To change that case into one for no damages at all, * * * the evidence must make out one of three propositions: That the plaintiff consented to the injury, or that he caused it by his own negligence, or that the agents of the company exercised all ordinary care and reasonable diligence." To the same effect are the rulings in the Vickers and Hankerson Cases. In the Hankerson Case a nonsuit was held to be erroneous, because the law presumed negligence from some of the facts proved, and there was scope for legitimate reasoning by the jury whether that presumption was rebutted by other facts in the plaintiff's evidence.

In all of the cases, however, which we have examined, the rule relied upon by the plaintiffs in error did not become applicable until evidence had been adduced. It does not apply to the pleadings. For, however anomalous it may appear that a plaintiff is required to allege acts of negligence, which he need not prove unless he desires, the rule rests upon the reason that the plaintiff, having shown his injury, may rely upon the presumption of negligence until it is rebutted by proof, and the defendant railroad, being thus notified of what acts of negligence it is called to meet, finds some protection in the fact that the plaintiff can only recover on the specific acts of negligence alleged as the cause of the casualty. The provision of section 2321 of the Civil Code of 1895, that in injuries by a railroad a presumption of negligence arises, is nothing more nor less than a rule of evidence. As such it is applicable to the evidence when a case has reached that stage; but it does not, under the rulings in Augusta Ry. Co. v. Weekly, 124 Ga. 384, 52 S. E. 444, Central R. Co. v. Tucker, 79 Ga. 128, 4 S. E. 5, Central R. Co. v. Avant, 80 Ga. 195, 5 S. E. 78, and Central R. Co. v. Nash, 81 Ga. 580, 7 S. E. 808, dispense with the necessary pleading of proper facts to show liability. South. Ga. Ry. Co. v. Ryals, 123 Ga. 330, 51 S. E. 428. If the plaintiffs could have proven that Harden was killed by the train of the defendant, after having alleged some specific act of negligence with reference to which the company owed the duty of diligence to Harden, the presumption would have arisen (in the nature of evidence in behalf of the plaintiffs) that the defendant was negligent in the respect alleged; and the plaintiffs, under the ruling in the Neely Case, could have made out their case. The defendant, however, under the ruling in Jarrett v. A. & W. P. R. Co., 83 Ga. 350 (2), 9 S. E. 681, had the right to invoke the ruling of the court upon the question of negligence by a general demurrer; and we see no error in the judgment of the court in the premises.

The only facts alleged as negligence are that the train was behind time and was running at an illegal and reckless speed. The only negligence inferable from the statement that the deceased was within 400 yards of a railroad crossing is that perhaps the defendant failed to observe the statutory requirement with reference to checking speed and tolling the bell. But under the ruling in A. & C. Air-Line Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145, the defendant owed the deceased no duty to observe this statutory requirement, because he was a trespasser. It is settled that there can be no negligence unless there is some duty of diligence. Relatively to the deceased, negligence must consist in the omission of some diligence due for his safety; and as there was no duty as to him, at the point where the casualty occurred, that the defendant's train should not be behind or that it should not run at the rate of speed alleged, under the uniform rulings of the Supreme Court there was no negligence alleged as to the deceased, and the plaintiffs could not recover for his homicide.

Even though the deceased was a trespasser in a certain sense, the plaintiffs might recover if it had been alleged that the place was such as to require the railroad company and its servants to anticipate the presence of

pedestrians at that place (either a crossing or a pathway used with the assent of the railroad), because at such a place it becomes the duty of the company and its servants to exercise ordinary and reasonable care and diligence in the matter of ascertaining the presence of such pedestrians, and likewise in avoiding injury to them after their presence is discovered. Macon & Birmingham Ry. Co. v. Parker, 127 Ga. 471, 56 S. E. 616; Ashworth v. So. Ry. Co., 116 Ga. 638, 43 S. E. 36, 59 L. R. A. 592; Crawford v. So. Ry. Co., 106 Ga. 873, 33 S. E. 826. If the agents of the defendant in charge of the train had been aware of the presence of the deceased, and thereafter had failed to use all ordinary care and diligence for his safety, the defendant would be liable for that absence of diligence even to a trespasser. But, in view of the fact that the petition in this case entirely failed to show that the defendant had neglected or omitted any duty which it owed to the deceased, the timely demurrer of the defendant was properly sustained.

Judgment affirmed.

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(3 Ga. App. 407)

BRYSON v. SOUTHERN RY. CO. (No. 765.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

1. RAILROADS — ACCIDENT AT CROSSING—DEFENSES.

When those in charge of a railway train neglect to comply with the statutory precautions in approaching a highway, and a person on the crossing is struck and injured, the only defenses open to the company are that the injury was done by the consent of the person injured, or that by the observance of ordinary care he could have avoided the injury, or, in mitigation of damages, that his negligence contributed to it. "When such injury occurs, the onus is upon the company to prove such default on the part of the injured person."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1117–1123.]

2. SAME.

A railway side track which crosses a public highway is included within the purview of the crossing statute.

3. SAME—CONTRIBUTORY NEGLIGENCE.

In this state it is not per se negligent for one not aware of the approach of the train to attempt to cross the track without stopping, looking, or listening.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1305–1310, 1379.]

(Syllabus by the Court.)

Error from City Court of Dalton; J. A. Longley, Judge.

Action by W. H. Bryson against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

G. G. Glenn and W. E. Mann, for plaintiff in error. Maddox, McCamy & Shumate, for defendant in error.

POWELL, J. Bryson, an old man, was struck and injured by a train of the Southern Railway Company upon a public crossing near its station in the village of Varnells, in Whitfield county. He brought suit for damages; the specific acts of negligence alleged being that the train ran over the crossing at a high rate of speed, and that it violated the crossing statute by not blowing the whistle, ringing the bell, or checking the speed of the train. The plaintiff testified that he was on the east side of the track, desiring to cross to the west. A water tank stood just below the crossing. On the main line, which was nearest him as he approached, were two trains headed north. One had just taken water and had gone forward, clearing the crossing, and the other was coming on up toward the tank as if to take water. He crossed the main line just behind the first train and just ahead of the second. His attention was directed toward this second train, and he stepped off the main line track and onto a parallel side track six or eight feet further west, without looking up the side track to the north. A train happened to be coming south on the side track at a rapid rate of speed. This south-bound train struck him. He did not hear it blow the whistle or ring the bell. He did not see it till it struck him, but admitted that, if he had turned his head north as he was about to step upon the side track, he could have seen it. His excuse for not hearing the approach of the south-bound train was the noise the two other trains were making; and his excuse for not looking up the side track was that he was watching the approach of the north-bound train on the main track. He showed the extent of his injuries. At the conclusion of the plaintiff's testimony the court awarded a nonsuit, and the plaintiff excepted.

1. Clearly the grant of a nonsuit was error. When the plaintiff proved that he was injured by the train, the law at once presumed that the railway company was negligent in every respect alleged, that it was running its train at a high and excessive rate of speed, that it gave no warning by ringing the bell and blowing the whistle, and that it did not check for the crossing. Harden v. Georgia R. Co. (this day decided) 59 S. E. 1122. When a train approaches a public crossing without complying with the statute, and strikes or injures a passer thereon, the only defenses open to the railway company are that the injury was done by the consent of the person injured, or that by the observance of ordinary care he could have avoided the injury, or, in mitigation of the damages, that his negligence contributed to it. Atlanta & West Point R. Co. v. Newton, 85 Ga. 517, 11 S. E. 776; Central Ry. Co. v. Hall, 109 Ga. 367, 370, 34 S. E. 605; Bowen v. Gainesville R. Co., 95 Ga. 688, 22 S. E. 695. "When such injury occurs, the onus is upon the company to prove such fault on the part of the injured person." Civ. Code 1895, § 2225.

2. The crossing statute does not except side tracks from its application, and we see no reason for excepting them by judicial con-

struction. The brief for defendant in error states that this train was stopped between the blow post and the crossing, and had started up again, and argues that for this reason the statute is not applicable. We do not find this statement of fact to be supported by the record, nor do we find the conclusion of law to be in harmony with the decision of the Supreme Court in the case of East Tenn. R. Co. v. Markens, 88 Ga. 60(4), 63, 13 S. E. 855, 14 L. R. A. 281. But, even without reference to the crossing statute, there was enough evidence to take the case to the jury on the question of the defendant's negligence. Ga. R. Co. v. Cromer, 106 Ga. 296, 31 S. E. 759; Bullard v. Southern Ry. Co., 116 Ga. 644, 648, 43 S. E. 39; Shaw v. Ga. R. R., 127 Ga. 8, 55 S. E. 960.

8. The rule that it is negligent per se for one who is about to cross a railway track to fail to stop, look, and listen is not recognized in this state. Whether, under all the circumstances, the plaintiff was guilty of such conduct as to defeat or diminish his recovery, is a question for the jury. Western & Atlantic R. Co. v. Ferguson, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802; Bullard v. Southern Ry. Co., 116 Ga. 644, 43 S. E. 39; Williams v. Southern Ry. Co., 126 Ga. 710, 55 S. E. 948; Thomas v. Gainesville Electric Ry. Co., 124 Ga. 748, 52 S. E. 801. This is not a case where the plaintiff, seeing and knowing the danger, in manifest imprudence, attempted to cross ahead of the train, as in the cases of Atlantic Ry. Co. v. Owens, 119 Ga. 833, 47 S. E. 213, Thomas v. Central Ry. Co., 121 Ga. 38, 48 S. E. 683, and Harris v. Southern Ry. Co., 129 Ga. ——, 58 S. E. 873. See Charleston & W. Car. R. Co. v. Camp, 3 Ga. App. ——, 59 S. E. 710.

Judgment reversed.

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(3 Ga. App. 372)

## LIQUID CARBONIC ACID MFG. CO. v. PAULK & JULIAN. (No. 565.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

1. SALES — ACTION FOR PRICE — DEFENSES — FAILURE OF CONSIDERATION.

The purchaser of a soda fount, who buys it by description and number, and who accepts in lieu thereof another soda fount of a different number, and with full opportunity for inspection, and with knowledge that the soda fount received by him is not the same as the one originally purchased, pays thereon 12 of a series of promissory notes without notice to the vendor of any defects, and thereafter sells to another all his interest in the soda fount, is estopped from pleading partial failure of consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 460–462.]

2. SAME—WAIVER OF DEFECTS.

Such course of conduct is a waiver of defects, latent and patent; and the evidence on the subject, coming from the defendants' own witnesses and being uncontradicted, demands a finding in behalf of the plaintiff for the unpaid remainder of the purchase price.

3. CERTIORARI—GRANT OF NEW TRIAL.

The discretion appertaining to a judge of the superior court as to the first grant of a new trial on petition therefor by certiorari, where issues of fact are involved, does not exist where the question presented by the certiorari is one purely of law. To order a first new trial, where the issue depends solely upon the weight of the evidence, is discretionary. To set aside a finding, when no different result can be reached, is erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 180–182.]

(Syllabus by the Court.)

Error from Superior Court, Ben Hill County; U. V. Whipple, Judge.

Action by the Liquid Carbonic Acid Manufacturing Company against Paulk & Julian. Judgment for defendants, and plaintiff brings error. Reversed.

E. W. Ryman, for plaintiff in error. McDonald & Quincey, for defendants in error.

RUSSELL, J. The plaintiff in error brought an action against the defendants in error in the city court of Fitzgerald on certain promissory notes aggregating $430, besides interest. By amendment the plaintiff set up a contract entered into between itself and the defendants in error for the purchase of certain soda water apparatus. The defendants pleaded partial failure of consideration and a set-off for certain freight paid by them on the apparatus for which the plaintiff was liable. Demurrers were filed to the petition and to the defendants' amended answer. At the conclusion of the evidence the court directed a verdict in favor of the plaintiff for the amount of principal due upon the notes, less the freight charges claimed by the defendants, with interest. The defendants carried the case by certiorari to the superior court, and the certiorari was sustained and a new trial ordered.

We think that the verdict was demanded by the evidence and that the judge of the superior court erred in sustaining the certiorari. The errors assigned in the petition for certiorari are 11 in number. The defendants aver that the city court committed error as follows: (a) In refusing to allow the defendants to assume the burden and get the concluding argument, after they had admitted a prima facie case for the plaintiffs. (b) In admitting in evidence over plaintiff's objection the written contract attached to this petition and marked "Exhibit J." (c) In refusing to allow the witness J. B. D. Paulk to testify to the kind of apparatus actually bought, and also the kind actually shipped, and to the difference in the prices of the two. (d) In refusing to allow witness J. L. Pitman to testify, in answer to defendants' counsel's question, what the price of a fount of the size shipped of good material, cork-lined, first-class, would be worth, and that the difference between the fountain actually shipped and the fountain described would be from $450 to $500. (e) In refusing to allow the amendment attached to this petition and marked "Exhibit I." (f) In refusing to allow R. A. Majors, a witness for the

defendants, to testify as to the difference in price of an apparatus that was cork-lined and of first-class material, trimmings, etc., and the one actually shipped by the plaintiff to the defendants. (g) In refusing to allow the witness R. A. Majors to testify, in answer to counsel's question, that the difference in price between a cork-lined, first-class apparatus and the one actually shipped would be from $300 to $500. (h) In directing a verdict for the plaintiffs and against the defendants. (i) The verdict is contrary to evidence. (j) The verdict is contrary to law. (k) The verdict and judgment are contrary to law and evidence.

Inasmuch as the judge directed the verdict, we fail to see wherein the defendants were hurt by failing to be awarded the concluding argument. As a matter of fact, so far as appears from the record, there was neither occasion nor opportunity for argument by counsel for either party. All of the other assignments of error are likewise immaterial to the controlling fact in the case and their discussion seriatim would be useless. It is absolutely clear, from the pleadings and the evidence, that the defendants waived the substitution of a different apparatus from the one they first purchased. If there was a difference in the two soda founts, the one they first contracted to buy being No. 420, and the one they accepted being No. 2,442, by accepting soda fount No. 2,442, instead of No. 420, the express warranty which was created by the description of soda fount No. 420 was perhaps substituted or exchanged for an implied warranty that No. 2,442 would be merchantable and reasonably suited for the purposes intended. But, even in this view of the case, there is no dispute that the defendants, with full opportunity of discovering any defects, used the fount for many months without any complaint, and without complaint, so far as the testimony discloses, paid $370 on the purchase money. The defendants are therefore estopped from setting up their plea of failure of consideration.

The judge allowed the sum of $44.71, which the defendants claimed as freight paid by them by direction of the plaintiff, and no attorney's fees were allowed. A verdict in favor of the plaintiff for these items was absolutely demanded by the evidence. We find, however, upon a calculation of the interest, that the judgment for interest is too large by $12.26. It may be that the judge of the superior court sustained the certiorari upon this ground. But inasmuch as the plaintiff is by every rule of law entitled to recover the principal, and the error in calculating the interest in the judgment is easily capable of correction, the judgment of the judge of the superior court in sustaining the certiorari and ordering a new trial is reversed, if the plaintiff in error will reduce the interest from $80.75 to $68.49; and upon the failure of the plaintiff in error to make such reduction within 20 days from the filing of the remittitur in the court below, it is ordered that the judgment granting a new trial be affirmed. The headnotes sufficiently deal with the material issues involved, and further discussion of the record can serve no useful purpose.

Judgment reversed.

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(3 Ga. App. 387)

BYCK et al. v. H. J. WEILER CO. (No. 640.)

(Court of Appeals of Georgia. Jan. 15 1908.)

1. CONTRACTS — WORK AND LABOR — ACTION FOR CONTRACT PRICE.

The defendant sent to the plaintiff a lambskin coat to be remodeled and repaired. No time was agreed upon for completing the work. When the garment was returned the defendant complained that it did not fit. Within a reasonable time the plaintiff offered to remedy the defects in the fit, which offer the defendant refused. *Held*, the plaintiff had a cause of action for the entire contract price of the repairs.

2. WRIT OF ERROR—HARMLESS ERROR.

Where, in such a case, there is a plea of total failure of consideration, and a judgment is asked by way of set-off for the full value of the coat, on the ground that the work done on it has made it absolutely worthless, and there is evidence to authorize such a finding, but no evidence whatever from which the jury could infer a mere depreciation in the value of the coat, a new trial will not be granted on account of an instruction to the effect that the burden is on the defendant to show that the coat had been made absolutely worthless.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the H. J. Weiler Company against W. S. Byck and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Mrs. Byck, the defendant, sent to the plaintiff in Cincinnati a lambskin coat to be relined and remodeled, with the following instructions: "I am sending you a lamb coat by express prepaid. Please examine same, and give me an estimate. I want the coat relined and remodeled, and the sable made into an extra piece." The plaintiff replied: "Your Persian lamb coat received; also letter. To remodel your coat and reline and full sleeves with high storm collar and revers of Persian lamb, to match coat, will cost $75.00. * * * To make from your collar and revers a four in hand, cost $7.00. We enclose you measure blank. Please have same filled in by some good tailor or dressmaker; also, let us know what kind of lining you like." The defendant had the measure blank filled in by a tailor in Atlanta, and sent it to the plaintiffs, with the following letter: "Inclosed are the measurements, which have been taken by a good tailor. Hope they are correct. Please remodel the coat as per letter, viz.: Coat to be same length, relining with old blue brocade, high storm collar, revers, and full sleeves." When the coat was returned to the defendant she objected that it did not

fit, that it was too large in the waist and hips, and that it had been materially shortened. The plaintiff promptly offered to remedy the defects in the fit by making the coat smaller in the respects indicated; but, so far as appears from the record, no offer was made to remedy the alleged shortening of the coat. The defendant refused the offer, and the plaintiff instituted suit for the full contract price of the repairs. The defendant relied on the defense that the coat had been made absolutely worthless by the work done on it, and asked as a set-off for judgment against the plaintiff for the full value thereof. The jury returned a verdict for the plaintiff for the full amount sued for, the defendant made a motion for a new trial, the motion was overruled, and she excepted.

At the trial it was admitted by the witnesses for the plaintiff that the measure blank called for a coat 40 inches in the hips, and that the coat was made 43 inches, or three inches larger than the instructions stipulated. The reason given for departing from the instructions in this particular was that it appeared that the defendant had a bust measurement of 38 inches, and the cutter and the fitter were of the opinion that the hip measurement was erroneous, because in all their experience they had never known a woman with bust so large and hips so small. Weiler, the president of the plaintiff company, testified that he had been in the fur business for 36 years, and "no woman having a 38-inch bust could have a 40-inch hip." The cutter said: "I have been in the employment of this company and its predecessor about 9 years. * * * I would judge that it would hardly be possible for a person to have a 38-inch bust measurement and only a 40-inch hip measurement. The usual proportion of a woman having a 38-inch bust is a 43-inch hip." There was also an issue as to whether the coat had been shortened. The defendant and her witnesses testified positively that the coat had been made at least two inches shorter. Some of the plaintiff's witnesses, on the other hand, testified that the coat had not been shortened at all, while others said that the fur was very much worn at the bottom, and that it was necessary to cut this fur off in order to make a workmanlike job, and that the coat had been shortened from one-half to three-quarters of an inch on this account.

Arthur Heyman and Lamar C. Rucker, for plaintiffs in error. Ben J. Conyers and I. S. Hopkins, for defendant in error.

RUSSELL, J. The only errors assigned in the motion for a new trial are based on the charge of the court to the jury. The following portion of the charge is assailed as constituting error: "If you believe that the plaintiff remodeled this coat, but that it did not fit according to the terms of the contract, but that it could have been made to fit by a slight alteration by the plaintiff, which would not have in any way impaired the value or appearance of the coat, and that the defendants declined to allow the plaintiff to make that alteration, they having offered to do so, and if you believe, further, that the coat was made shorter, but that it was substantially the same length, and that wherein it was made shorter it was necessary, in order to make a workmanlike job, to make it from one-half to three-quarters of an inch shorter, on account of the fact that the fur was worn off of the coat at the bottom, the court charges you that, if you find with the plaintiff on both these points, the plaintiff would be entitled to recover." The defendant insists that this charge was error, because, in the first place, under the law a breach of the contract occurred when the plaintiff returned the coat not fitting to the defendant, and that the plaintiff could not avoid this breach by afterwards offering to remedy said defect, and, in the second place, because by the contract the plaintiff was under an absolute duty to remodel the coat so that it would be the same length, and that it was a breach of the contract to make it from one-half to three-quarters of an inch shorter, even though it was necessary to do so in order to get rid of the worn-out fur.

The first objection is predicated on the theory that this was an entire contract of bailment, and that full performance by the plaintiff was a condition precedent to a suit on the contract, under Civ. Code 1895, § 2920, which is as follows: "As a general rule, the contract of bailment is an entire contract, and a full performance is a condition precedent to an action upon it." We are cited to the case of Sinclair v. Bowles, 32 Rev. Rep. (Eng.) 589, 9 Barn. & Cress. 92, 4 Man. & Ry. 1, 7 L. J. K. B. 178. In that case the defendant delivered to the plaintiff three chandeliers under an agreement that they were to be put in a perfect state of repair for £10. The jury found that the plaintiff had not substantially performed his part of the agreement according to the intent of the parties. The chandeliers had been cleaned, and some icicles and drops supplied; one of the arms, which was perfect when taken away, had been broken, and several of the spangles and icicles damaged; and, in one of the chandeliers, the scroll, which had been sent damaged, was brought back in the same condition. The court held that the plaintiff could not recover. The defendant in the case at bar relies also on the case of Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534, where the defendant furnished the plaintiff with part of the materials for the manufacture of some shears, to be made according to a sample at an agreed price. The defendant accepted some of the shears before he found that they were not made according to the sample. They were useless, and the defendant refused to accept the remainder of the shears. The court held that the plaintiff could not recover for the work and material

furnished in manufacturing the shears, and allowed a counterclaim in behalf of the defendant for the plaintiff's breach of the contract. Both of these cases are distinguishable from the case at bar. In neither of them does it appear that the plaintiff offered, within the time stipulated by the contract for performing the work, to remedy the defects of which complaint was made. In the case now under consideration the plaintiff promptly offered to remedy the defects in the fit of the coat, so as to make it conform to the wishes of the defendant.

It does not appear from the contract that full performance was due by a day fixed and certain, nor that the plaintiff guaranteed to make the coat fit when first tried on. A tailor ordinarily does not guarantee a fit on one trial, and the customer should give him an opportunity to remedy the defects complained of, where such offer is made promptly and prior to the date at which final performance is due. Especially is this true where, as in the present case, the measurements were not taken by the tailor himself, but by a person selected by the customer. Of course, if the tailor has agreed to have the garment completed by a certain date and time is of the essence of the contract, he must as a general rule have the work completed on the day named; and an offer made subsequently to such date to remedy the defects would be too late. But such was not the agreement here. Nor do we think this result should be changed because the tailor departed from the measurements contained in the blank submitted at his request. He asked for these measurements as a guide to his judgment in remodeling the coat. He had a legal right under the contract to depart temporarily from the measurements contained in the blank, if in his opinion they were erroneous, to remodel the coat accordingly, and submit it to the defendant. Of course, by doing so, he assumed the risk of having to pay the express charges on the coat to Atlanta and back to Cincinnati, and of having to alter the coat to conform to the wishes of the defendant without additional pay. He chose the latter course, and the only thing which saved him the express charges and the expense of doing the work over again was the defendant's refusal to allow him to complete the work. As already stated, his offer to make the alterations would have to be made within the time prescribed by the contract for performance. Admitting, then, that this was an entire contract as contended by the defendant, that full performance or its equivalent was a condition precedent to an action by the plaintiff, and that full performance has not taken place, in that the coat was too large in the hips and waist, still the performance of a condition precedent will be excused when its performance has been prevented by the opposite party or has been waived by him. 9 Cyc. 688, 701; Williams v. Bank of United States, 2 Pet. 96 (4), 7 L. Ed. 360. See, also, Haralson v. Speer, 1 Ga. App. 573 (3), 58 S. E. 142. When, therefore, the coat was submitted to the defendant and it did not fit, this was not a breach of the contract as claimed by defendant's counsel. The offer to make alterations in the coat was not an attempt to avoid the effects of a breach, but an offer to go on and complete performance, and the refusal to allow further performance excused the plaintiff.

It is contended, however, that this charge was error for the further reason that it did not submit to the consideration of the jury the theory that the defendant's refusal to redeliver the coat to the plaintiff so that the defects could be remedied was due to the fact that the plaintiff did not offer to remedy the alleged defect in the length of the coat. Counsel say that under the contract the plaintiff was under an absolute duty to so remodel the coat as that it should be left the same length, and that it would not be a compliance with the contract to shorten it even one-half or three-quarters of an inch, even though this was necessary in order to get rid of the worn-out fur and in order to make a workmanlike job. If there was any error in this portion of the charge, it was cured by the context and by the charge as a whole. The judge charged the jury several times that the coat was not to be shortened, and that, if it was materially or substantially shortened, this would be a breach of the contract by the plaintiff. The jury had the coat, the old lining, and a tape measure out with them during their deliberations, and were authorized under the evidence to find, and probably did find, as shown by their verdict, that the coat had not been substantially shortened, if shortened at all. Under the contract the tailor was to remodel and repair the coat, and it would seem that skillful workmanship required that the worn-out fur be cut off. If the plaintiff in error did not so consider, she should have returned the coat and have allowed Weiler to complete the contract.

2. It is further insisted that the court erred in charging the jury as to the burden of proof. The defendant in her answer alleged that the coat had been totally ruined by the work done on it, and that it was absolutely worthless, and she asked for judgment against the plaintiff for the full value of the coat. After stating the issue made by the pleadings, the judge said: "The effect of this plea is to put the burden upon the plaintiff of establishing that it has done its work on this garment according to contract, and the burden is on the defendant to show to your satisfaction that the work done on this garment by the plaintiff has made it worthless and that it is of no value. The burden of proof means the greater weight of testimony, and, while it may not be sufficient to remove every reasonable doubt from the minds of the jury, it is sufficient to incline

your minds to one side of the case rather than to the other." Under her plea this was a correct statement of the burden which the defendant had assumed. It is claimed, however, that this charge took from the consideration of the jury any depreciation in the value of the coat, less than total, which was caused by the work done on it. Inasmuch as the pleadings were that the value of the coat had been destroyed completely, and inasmuch as the evidence introduced by the defendant was introduced for the purpose of showing that the value of the coat had been completely destroyed, and inasmuch as there was nothing in the pleadings or in the evidence upon which the jury could base an estimate of any depreciation in value less than total destruction of value, the court was correct in the charge given. In Grier v. Enterprise Stone Co., 126 Ga. 17, 54 S. E. 806, it is said: "While 'a plea of total failure of consideration includes partial failure of consideration,' there must be evidence introduced showing the extent to which the consideration has failed, before a verdict can be rendered giving the defendant the benefit of a partial failure. * * * When in a given case the only plea is a plea of total failure of consideration, and the evidence for the plaintiff authorizes a finding for the full amount claimed, and the evidence for the defendant authorizes a finding that the consideration has entirely failed, as well as that the article sold was of some value, but there is no evidence as to value other than full value, a new trial will not be granted on account of an instruction to the effect that the jury should find a verdict for the defendant in the event that the article was totally worthless, nor because of an instruction that, if they should find the goods were reasonably suited for the purpose intended, they should find for the plaintiff." To the same effect, see Otis Bros. v. Holmes, 109 Ga. 775, 35 S. E. 119; Hinkle v. Burt, 94 Ga. 506, 19 S. E. 828; Hornsby v. Butts, 85 Ga. 694, 11 S. E. 846.

The verdict was amply authorized by the evidence, and there is no reversible error in any of the grounds of the motion for a new trial.

Judgment affirmed.

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(3 Ga. App. 413)

## ELBERTON GROCERY CO. v. FIRST NAT. BANK OF WACO, TEX. (No. 777.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

GARNISHMENT—PROPERTY SUBJECT—CLAIM OF THIRD PERSON.

This case is controlled by the decision in the case of Fourth National Bank v. Mayor, 89 Ga. 108(3), 14 S. E. 891. The title to the property, the proceeds of which were the subject-matter of the garnishment, passed to the claimant prior to the service of the garnishment, and no phase of the law of innocent purchaser is involved. See, also, Askew v. So. Ry. Co., 1 Ga. App. 77, 58 S. E. 242, and citations.

(Syllabus by the Court.)

Error from Superior Court, Elbert County; H. M. Holden, Judge.

Action by Elberton Grocery Company against the First National Bank of Waco, Tex. Judgment for defendant, and plaintiff brings error. Affirmed.

Z. B. Rogers, for plaintiff in error. W. Duncan Tutt, for defendant in error.

POWELL, J. Judgment affirmed.

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(3 Ga. App. 394)

## WAXELBAUM CO. v. ATLANTIC COAST LINE R. CO. (No. 666.)

(Court of Appeals of Georgia. Jan. 15, 1908.)

CONTINUANCE—ABSENCE OF COUNSEL.

A motion for continuance upon the ground that the sole or leading counsel for the party is actually engaged in the Supreme Court or the Court of Appeals should be granted, and a refusal thereof is ground for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, § 55.]

(Syllabus by the Court.)

Error from City Court of Albany; D. F. Crosland, Judge.

Action by the Waxelbaum Company against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

The Waxelbaum Company brought a suit for the recovery of damages against the Atlantic Coast Line Railroad Company. The case proceeded to trial before a jury, and a large amount of testimony was adduced in behalf of both parties. The testimony in behalf of the plaintiff tended to establish the liability of the defendant for the nondelivery of a certain box of goods marked ⓂⓅ, and testimony in behalf of the defendant tended to show the delivery of the boxes in question to the consignee. On behalf of the defendant, however, there was positive testimony that at the time the box of goods in question was shipped, and when they were received at Albany, the defendant had no railroad, nor depot, nor agency at Albany. Mr. Winegate, a witness in behalf of the defendant, testified that he was with the Plant System in 1901 as cashier at Albany, that there was no Coast Line at that time at Albany, and that the Coast Line at that time did not run into Albany. After the introduction of this evidence the plaintiff's counsel asked that the case be withdrawn from the jury and for a continuance in order to investigate the question. The defendant objected, and moved the court to direct a verdict for the defendant. Counsel for the plaintiff thereupon argued that the court had the authority to withdraw the case, and made the statement that the plaintiff was helpless to overcome the evidence of the defendant upon the point that the Atlantic Coast Line was not doing business at Albany in 1901, not having anticipated such evidence. The court then overruled

the motion to direct a verdict for the defendant, and, after cautioning the jury not to discuss the case, adjourned the hearing of the case until the 8th of June. On the 8th of June, 1907, the case was duly called, and Mr. George S. Jones, the counsel who had conducted the case on the previous two days of trial, was absent. Nor was there any other appearance for the plaintiff. On June 7, 1907, as appears from the bill of exceptions, Mr. Jones sent a letter and a telegram to the presiding judge, in which he stated that he was engaged in the Supreme Court, and would necessarily be compelled to argue a case in that court on the next day (the 8th), which was the date to which the present case had been passed. The telegram said: "Engaged in Supreme Court to-day and Saturday. Please check Waxelbaum case." The letter fully detailed the facts in regard to certain cases in the Supreme Court in which Mr. Jones' presence was necessary, because he had tried them in the court below without assistance, and asked the court to continue the case until some day of the succeeding week. If this was impossible, a mistrial was asked for. The court declined to continue the case and awarded a nonsuit, upon the ground that the plaintiff had sued the Atlantic Coast Line, and the wrong, if any was committed, was done either by the Savannah, Florida & Western Railroad or the Brunswick & Western Railroad, and because there was no evidence to show that the Atlantic Coast Line was in any way responsible for their torts. The Waxelbaum Company excepts to the judgment granting a nonsuit.

Hardeman & Jones, for plaintiff in error. Pope & Bennet, for defendant in error.

RUSSELL, J. (after stating the facts as above). Applications for continuances are addressed to the sound legal discretion of the trial judge, and that discretion will not be interfered with unless it is abused. The defendant objected strongly to the temporary continuance from May 24th to June 8th, which was granted by the court for the purpose of enabling the plaintiff to see if it could find evidence sufficient to overcome that adduced by the defendant; but it did not preserve its exceptions by excepting, and consequently this ruling of the court is not before us for review. While we are not required to rule that the court abused its discretion in passing the case at that time, certain it is that if the court had then proceeded with the case it would not have been an abuse of discretion. However that may be, the court, having taken recess and temporarily continued the case, properly or improperly, until Saturday, June 8th, should at that time have granted a further continuance in view of the showing made.

Mr. Jones, as appears from the record, alone conducted the case in behalf of the plaintiff during the trial, lasting two days before the recess was taken. Upon the day set for the resumption of the trial he was actually engaged in the argument of cases before the Supreme Court. He could not be at both places, and his place in the trial in the city court of Albany could not be supplied by any one else, who would necessarily be unfamiliar with what had already transpired on the trial. If the trial had never begun, his client would have been entitled to his presence, and his absence would have been good ground for continuance. His presence was more important when the case was to be resumed and had been partially tried than if the trial had not been begun. It rests in the knowledge of every practitioner that counsel brought into a case partly tried, and who had heard nothing of what had transpired, especially if the case has been practically completed so far as evidence is concerned, labors under a great disadvantage. Where the sole counsel in a case is in attendance and actually engaged in the Supreme Court or the Court of Appeals, his absence from a superior court, or a city court, or any other inferior court, is a good ground of continuance; and when it is made to appear, as in this case, that the absence of such counsel is due to his engagements in the Supreme Court or the Court of Appeals, and that thereby a conflict of duties has arisen, the appellate courts having precedence, the duty there must prevail, and the cause of such counsel in the lower court, in which such showing appears, should be continued.

Holding, as we do, that this case should have been continued, it necessarily follows that a mistrial should not have been denied, and it becomes immaterial for us to discuss whether the court erred, under the evidence then before him, in granting a nonsuit. Counsel for the plaintiff had the right to be heard upon that, as upon any other judgment asked at the hands of the court, and more especially where the case had been passed for the express purpose of allowing his client to supplement, if he could, his evidence upon a point which he had not anticipated.

Judgment reversed.

# MEMORANDUM DECISIONS.

BEAM v. ADDERHOLDT. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Beam against one Adderholdt. Self, Whitener & Mauser, for plaintiff.

PER CURIAM. Affirmed.

BRISCOE v. JORDAN. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Briscoe against one Jordan. Mr. Bond, for plaintiff.

PER CURIAM. Dismissed, under rule 17 (53 S. E. vii).

BROWN v. RAILWAY. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Brown against the railway. Mr. Winston, for plaintiff. Day, Bell & Allen, for defendant.

PER CURIAM. Affirmed.

BURGE v. TELEGRAPH CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Burge against the telegraph company.

PER CURIAM. Settled.

CAPPS v. SEABOARD AIR LINE RY. (Supreme Court of North Carolina. Spring Term, 1907.) Action by W. E. Capps against the Seaboard Air Line Railway. T. T. Hicks and M. J. Hawkins, for plaintiff. Day, Bell & Allen, for defendant.

PER CURIAM. Affirmed.

CARTER v. TELEGRAPH CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Carter against the telegraph company. H. A. London & Son, for plaintiff. Busbee & Son and W. A. Montgomery, for defendant.

PER CURIAM. Petition of defendant to rehear dismissed. See 54 S. E. 274.

C. H. DUGGAN & CO. v. ATLANTIC COAST LINE R. R. (Supreme Court of North Carolina. Spring Term, 1907.) Action by C. H. Duggan & Co. against the Atlantic Coast Line Railroad. W. D. McIver and R. A. Nunn, for plaintiff. Simmons, Ward & Allen, for defendant.

PER CURIAM. Affirmed.

CHEDESTER v. MOORE. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Chedester against one Moore.

PER CURIAM. Dismissed, under rule 17 (53 S. E. vii).

DANIELS v. HOMER. (Supreme Court of North Carolina. Dec. 11, 1907.) Appeal from Superior Court, Dare County; W. R. Allen, Judge. Action by E. R. Daniels against John Q. Homer. Judgment for defendant. Plaintiff appeals. Affirmed. B. G. Crisp and Aydlett & Ehringhaus, for appellant. W. M. Bond and Ward & Grimes, for appellee.

PER CURIAM. This appeal presents substantially the same questions considered by this court in the case of Daniels v. Homer, 139 N. C. 230, 51 S. E. 992, 3 L. R. A. (N. S.) 997, and is governed by that case. The judgment is affirmed.

WALKER and CONNOR, JJ., dissent.

DAVIS v. RAILROAD CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Davis against the railroad company. Aydlett & Ehringhaus and Meekins & Leigh, for plaintiff. Pruden & Pruden and Shepherd & Shepherd, for defendant.

PER CURIAM. Affirmed.

DOBSON v. RAILWAY. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Dobson against the railway. W. L. Rees, for plaintiff. Manly & Hendren, for defendant.

PER CURIAM. Affirmed.

DORSEY v. BRIDGES. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Dorsey against one Bridges. McBrayer & McBrayer and B. A. Justice, for plaintiff. S. Gallert, for defendant.

PER CURIAM. Affirmed.

DUFFY v. LIFE INS. CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Duffy against the life insurance company. W. D. McIver and O. H. Guion, for plaintiff. Hinsdale & Son and W. W. Clark, for defendant.

PER CURIAM. Affirmed.

DUNN v. MARKS. (Supreme Court of North Carolina. Spring Term, 1907.) Action by Charles F. Dunn against A. Marks. Mr. Dunn, for plaintiff. Y. T. Ormond, for defendant.

PER CURIAM. Affirmed.

EBORN v. LUMBER CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Eborn against the lumber company.

PER CURIAM. Dismissed, for failure to print.

DUNN v. NATIONAL BANK OF GOLDSBORO. (Supreme Court of North Carolina. Spring Term, 1907.) Action by Charles Dunn against the National Bank of Goldsboro. Mr. Dunn, for plaintiff. S. W. Isler, for defendant.

PER CURIAM. Affirmed.

ELLIS v. MITCHELL. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Ellis against one Mitchell. R. H. Battle and W. J. Peele, for plaintiff. S. G. Ryan and J. N. Holding, for defendant.

PER CURIAM. Affirmed.

FAIN v. GADDIS. (Supreme Court of North Carolina. Spring Term, 1907.) Action by L. J. Fain against A. J. Gaddis. Busbee

& Busbee, Axley & Axley, and Ben Posey, for plaintiff. Dillard & Bell, for defendant.

PER CURIAM. No error.

FORREST v. SMITH. (Supreme Court of North Carolina. Spring Term, 1907.) Action by Barrum Forrest against I. H. Smith. R. W. Williamson and P. M. Pearsall, for plaintiff. D. L. Ward, for defendant.

PER CURIAM. Affirmed.

GAST v. CROUCH. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Gast against one Crouch. E. B. Cline, for plaintiff. Hufham & Williams, for defendant.

PER CURIAM. Affirmed.

GAY v. RAILROAD & LUMBER CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Gay against the railroad and lumber company. Aycock & Murrell and Wooten & Wooten, for plaintiff. Galloway & Albritton and L. I. Moore, for defendant.

PER CURIAM. Affirmed.

GOODEN v. LUMBER CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Gooden against the lumber company. W. M. Bond, for plaintiff. Pruden & Pruden and Shepherd & Shepherd, for defendant.

PER CURIAM. Affirmed.

GUNTER v. TOBACCO CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Gunter against the tobacco company. Boone, Giles & Boone, for plaintiff. Winston & Bryant, for defendant.

PER CURIAM. Affirmed.

HALL v. RAILROAD. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Hall against the railroad. McIntyre & Lawrence, for plaintiff. McLean & McCormick, for defendant.

PER CURIAM. Affirmed.

HARPER v. LOCKE. (Supreme Court of North Carolina. Spring Term, 1907.) Action by G. W. Harper against T. N. Locke. Jones & Whisnant, for plaintiff. Lawrence Wakefield and Mark Squires, for defendant.

PER CURIAM. Affirmed.

HARRELL v. WEBB. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Harrell against one Webb.

PER CURIAM. Dismissed, under rule 17 (53 S. E. vii).

HARRISON v. STICKNEY. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Harrison against one Stickney. Connor & Connor and F. A. Woodard, for plaintiff. Pou & Finch and Murray Allen, for defendant.

PER CURIAM. The court being evenly divided, judgment below affirmed.

CONNOR, J., not sitting.

HARTY v. HARTY. (Supreme Court of North Carolina. Spring Term, 1907.) Action by P. C. Harty against James Harty. Pharr & Bell, for plaintiff. Burwell & Cansler and R. J. Hutchison, for defendant.

PER CURIAM. Affirmed.

HATEM v. ELLIS. (Supreme Court of North Carolina. Spring Term, 1907.) Action by Nahoum Hatem against A. Ellis. W. W. Clark, for plaintiff. H. C. Whitehurst and R. A. Nunn, for defendant.

PER CURIAM. Affirmed.

HEARTT v. POOL. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Heartt against one Pool.

PER CURIAM. Dismissed, for failure to print the record.

HOBGOOD v. MATCH CO. TRUST CO. v. BATTLE. SAME v. BENBOW. (Supreme Court of North Carolina. Fall Term, 1906.) Actions by one Hobgood against the match company, by the trust company against one Battle, and by the same plaintiff against one Benbow.

PER CURIAM. Dismissed, under rule 17 (53 S. E. vii).

HOWELL v. BARFIELD. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Howell against one Barfield. Wishart & Shaw and D. J. Lewis, for plaintiff. McLean & McCormick and McIntyre & Lawrence, for defendant.

PER CURIAM. Affirmed.

JACKSON v. NEUSE RIVER MILLS. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Jackson against the Neuse River Mills. J. N. Holding and S. G. Ryan, for plaintiff. R. H. Battle, for defendant.

PER CURIAM. Affirmed.

JENNINGS v. WHITE (two cases). (Supreme Court of North Carolina. Fall Term, 1906.) Actions by one Jennings against one White. Aydlett & Ehringhaus, for plaintiff. W. M. Bond and C. E. Thompson, for defendant.

PER CURIAM. Affirmed.

JONES v. REYNOLDS TOBACCO CO. (Supreme Court of North Carolina. Spring Term, 1907.) Action by J. P. Jones against the Reynolds Tobacco Company. Lindsay Patterson and J. S. Grogan, for plaintiff. Watson, Buxton & Watson and Manly & Hendren, for defendant.

PER CURIAM. Affirmed.

JONES v. TELEGRAPH CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Jones against the telegraph company. W. A. Stewart, for plaintiff. R. C. Strong and Shepherd & Shepherd, for defendant.

PER CURIAM. Affirmed.

KERNODLE v. WESTERN UNION TELEGRAPH CO. (Supreme Court of North Carolina. Spring Term, 1907.) Action by C. R. Kernodle against the Western Union Telgraph Company. King & Kimball and F. H. Busbee & Son, for defendant.

PER CURIAM. Affirmed.

LEDBETTER v. DELINTING CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Ledbetter against the Delinting Company. J. D. Shaw and Morrison & Whitlock, for plaintiff. Busbee & Busbee, for defendant.

PER CURIAM. Affirmed.

LYMAN v. LYMAN. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Lyman against one Lyman.

PER CURIAM. Dismissed, for failure to print record.

McCORMICK v. BURKE. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one McCormick against one Burke.

PER CURIAM. Dismissed, under rule 17 (53 S. E. vii).

McKINNIE v. McCONNAUGHEY. (Supreme Court of North Carolina. Spring Term, 1907.) Action by F. B. McKinnie against R. L. McConnaughey. Adams, Jerome, Armfield & Maness and L. T. Hartsett, for plaintiff. Montgomery & Crowell, for defendant.

PER CURIAM. Affirmed.

McKINNON v. RAILROAD. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one McKinnon against the railroad.

PER CURIAM. Dismissed, under rule 17 (53 S. E. vii).

MARTIN v. COOPER. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Martin against one Cooper. W. B. & H. R. Ferguson and W. T. Crawford, for plaintiff.

PER CURIAM. Affirmed.

MEREDITH v. RAILWAY. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Meredith against the railway. W. D. McIver, for plaintiff. Simmons & Ward, for defendant.

PER CURIAM. Affirmed.

MILLER v. MILLER. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Miller against one Miller.

PER CURIAM. Dismissed, for failure to prosecute.

MILLER v. RAILWAY. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Miller against the railway. R. L. Wright and P. S. Carlton, for plaintiff. T. C. Linn, for defendant.

PER CURIAM. Affirmed.

MILLING CO. v. COLTRANE. (Supreme Court of North Carolina. Fall Term, 1906.) Action by the milling company against one Coltrane.

PER CURIAM. Compromised and dismissed, by consent.

MORGAN v. HARRINGTON. (Supreme Court of North Carolina. Spring Term, 1907.) Action by J. F. Morgan against O. W. Harrington. G. M. Lindsey and Shepherd & Shepherd, for plaintiff. Skinner & Whedbee, for defendant.

PER CURIAM. Affirmed.

ORMOND MINING CO. v. BESSEMER CITY COTTON MILLS. (Supreme Court of North Carolina. Spring Term, 1907.) Action by the Ormond Mining Company against the Bessemer City Cotton Mills. Winston & Bryant, O. F. Mason, and Burwell & Cansler, for plaintiff. Tillett & Guthrie, for defendant.

PER CURIAM. Affirmed.

OSBORNE v. NORTH CAROLINA R. CO. (Supreme Court of North Carolina. Spring Term, 1907.) Action by W. T. Osborne against the North Carolina Railroad Company. John W. Hinsdale and J. A. Barringer, for plaintiff. King & Kimball, for defendant.

PER CURIAM. Affirmed.

QUEEN v. COOPER. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Queen against one Cooper.

PER CURIAM. Dismissed, under rule 17 (53 S. E. vii).

ROBERSON v. RAILWAY. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Roberson against the railway. J. A. Barringer, for plaintiff. King & Kimball, for defendant.

PER CURIAM. Affirmed.

ROWELL v. LITTLE. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Rowell against one Little. A. M. Stack, for plaintiff. Adams, Jerome & Armfield, J. C. Sikes, and Robinson & Caudle, for defendant.

PER CURIAM. Affirmed.

SHUMAKE v. WILKESBORO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Shumake against one Wilkesboro. Finley & Hendren and F. D. Hackett, for defendant.

PER CURIAM. Affirmed.

SMITH v. MARSH. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Smith against one Marsh. T. H. Sutton, for plaintiff. Robinson & Shaw and N. A. Sinclair, for defendant.

PER CURIAM. Affirmed.

STATE v. ADAMS. (Supreme Court of North Carolina. Fall Term, 1906.) Action by the state against one Adams. The Attorney General, for the State. Walser & Walser and E. E. Raper, for defendant.

PER CURIAM. Affirmed.

STATE v. ALSOBROOKS. (Supreme Court of North Carolina. Fall Term, 1906.) Action by the state against one Alsobrooks. Walter Clark, Jr., for the State. A. M. Stack, for defendant.

PER CURIAM. Affirmed.

STATE v. CLAYTOR. (Supreme Court of North Carolina. Spring Term, 1907.) Action by the state against Henry Claytor. The Attorney General, for the State.

PER CURIAM. Affirmed.

STATE v. GARNER. (Supreme Court of North Carolina. Fall Term, 1906.) Action by

the state against one Garner. The Attorney General, for the State. E. E. Raper, for defendant.

PER CURIAM. Affirmed.

STATE v. HESTER. (Supreme Court of North Carolina. Spring Term, 1907.) Action by the state against W. H. Hester. The Attorney General and Hayden Clement, for the State. D. F. Morrow, for defendant.

PER CURIAM. Affirmed.

STATE v. HOUGH. (Supreme Court of North Carolina. Fall Term, 1906.) Proceeding by the state against one Hough. The Attorney General and Walter Clark, Jr., for the State. H. H. McLendon, for defendant.

PER CURIAM. Affirmed.

STATE v. JOHNSON. (Supreme Court of North Carolina. Fall Term, 1906.) Action by the state against one Johnson. The Attorney General, for the State. J. L. Fleming and F. G. James, for defendant.

PER CURIAM. Dismissed, for failure to perfect appeal.

STATE v. LITTLE. (Supreme Court of North Carolina. Fall Term, 1906.) Action by the state against one Little. The Attorney General and Walter Clark, Jr., for the State. H. H. McLendon, for appellee.

PER CURIAM. Affirmed.

STATE v. MARTIN. (Supreme Court of North Carolina. Spring Term, 1907.) Action by the state against H. T. Martin. The Attorney General, for the State. O. O. McMichael, for defendant.

PER CURIAM. No error.

STATE v. MOYE. (Supreme Court of North Carolina. Spring Term, 1907.) Action by the state against J. V. Moye. The Attorney General, for the State. Mr. Skinner, for defendant.

PER CURIAM. Affirmed.

STATE v. RIVES. (Supreme Court of North Carolina. Fall Term, 1906.) Proceeding by the state against one Rives. The Attorney General, for the State. Skinner & Whedbee, for defendant.

PER CURIAM. Dismissed, for failure to perfect appeal.

STATE v. SCOTT. (Supreme Court of North Carolina. Fall Term, 1906.) Proceeding by the state against one Scott. Walter Clark, Jr., for the State. Williams & Lemmond, for defendant.

PER CURIAM. Affirmed.

STATE v. WILLIAMS. (Supreme Court of North Carolina. Fall Term, 1906.) Proceedings by the state against one Williams.

PER CURIAM. Dismissed, under rule 17 (53 S. E. vii).

THOMAS v. TELEGRAPH CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Thomas against the telegraph company. D. L. Ward, for plaintiff. W. W. Clark and F. H. Busbee & Son, for defendant.

PER CURIAM. Affirmed.

TURNER v. LAWS. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Turner against one Laws. Frank Nash, for plaintiff. J. W. Graham and S. M. Gattis, for defendants.

PER CURIAM. Affirmed.

TYSINGER v. FURNITURE CO. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Tysinger against the furniture company. Brooks & Thompson and Taylor & Scales, for defendant.

PER CURIAM. Affirmed.

WALL v. SMITH. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Wall against one Smith.

PER CURIAM. Dismissed, for failure to prosecute.

WILKESBORO & JEFFERSON TURNPIKE CO. v. ABSHER. (Supreme Court of North Carolina. Spring Term, 1907.) Action by the Wilkesboro & Jefferson Turnpike Company against E. M. Absher. Finley & Hendren, for plaintiff. Cranor & Cranor, for defendant.

PER CURIAM. Affirmed.

WINSTON CIGARETTE MACHINE CO. v. WELLS-WHITEHEAD TOBACCO CO. (Supreme Court of North Carolina. Spring Term, 1907.) Action by the Winston Cigarette Machine Company against the Wells-Whitehead Tobacco Company. Manly & Hendren and Watson, Buxton & Watson, for plaintiff. F. A. Woodard, Connor & Connor, and Lindsay Patterson, for defendant.

PER CURIAM. Affirmed.

WORSLEY v. KEECH. (Supreme Court of North Carolina. Fall Term, 1906.) Action by one Worsley against one Keech.

PER CURIAM. Dismissed, under rule 17 (53 S. E. vii).

VON LEHE v. ATLANTIC COAST LINE R. CO. (Supreme Court of South Carolina. Sept. 11, 1907.) Appeal from Common Pleas Circuit Court of Colleton County; Purdy, Judge. Action by A. Von Lehe against the Atlantic Coast Line Railroad Company. From an order affirming a judgment of a magistrate, defendant appeals. Affirmed. W. Huger Fitzsimons, for appellant. J. S. Griffin, for respondent.

WOODS, J. This action was brought for $5.30, the value of one cheese, with freight paid thereon, shipped by Leman Bros. from New York, and consigned to the plaintiff at Walterboro, S. C., and the statutory penalty of $50. According to the plaintiff's evidence, all the rest of the goods with which the cheese was shipped were safely delivered by the defendant, Atlantic Coast Line Railroad Company, and under the case of Bradley v. Railway Co., 57 S. E. 1101, this gave rise to the presumption that the cheese was lost on the defendant's railroad. The defendant's freight agent at Charleston testified, however, the cheese was short when the lot of goods came to the defendant railroad from the Clyde Line Steamship Company. From this testimony the magistrate found that the cheese never came into the possession of the defendant from the connecting carrier; but he nevertheless held the defendant liable for the value of the cheese, freight, and penalty, and gave judgment accordingly. In appealing to the circuit court defendant alleged error in holding it liable for goods not lost on its own line, when it had made proof of its inability to trace the loss after due diligence. But the appeal to this court from the decision of the circuit court is on the sole ground that the penalty act of February, 1903 (24 St. at Large, p. 81), is unconstitutional. As that statute has been recently considered and held to be constitutional in Charles v. Railroad Company, 58 S. E. 927, the appeal must fail. The judgment of this court is that the judgment of the circuit court be affirmed.

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VON LEHE v. ATLANTIC COAST LINE R. CO. (Supreme Court of South Carolina. Sept. 11, 1907.) Appeal from Common Pleas Circuit Court of Colleton County; Purdy, Judge. Action by A. Von Lehe against the Atlantic Coast Line Railroad Company. From an order affirming judgment of a magistrate, defendant appeals. Affirmed. W. Huger Fitzsimons, for appellant. J. S. Griffin, for respondent.

WOODS, J. The plaintiff recovered judgment in a magistrate's court for the value of two sacks of grist and two sacks of flour shipped from Nashville, Tenn., to plaintiff at Walterboro, S. C., and the statutory penalty of $50. The judgment was affirmed by the circuit court, and the defendant appeals solely on the ground that the penalty statute of 1903 (24 St. at Large, p. 81) is unconstitutional. The question has been settled by the case of Charles v. Railroad Co. (recently filed) 58 S. E. 927. The judgment of this court is that the judgment of the circuit court be affirmed.

END OF CASES IN VOL. 59.